Litigating BP's Contribution Claims in Publicly Subsidized Courts: Should Contracting Parties Pay Their Own Way?

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I. INTRODUCTION

In this Article, we focus on an important problem with mass-accident cases, a problem highlighted by the *Deepwater Horizon* litigation: overuse of courts to enforce contribution claims. These claims seek to allocate liability among the business and governmental entities that contractually participated in the risky venture.[1] Joint and several liability with provision for contribution, for example, enables plaintiffs asserting primary claims to recover all proven damages from a single "deep-pocket" defendant, regardless of that defendant's own share of legal responsibility for the harm, and then authorizes the defendant to sue other joint venturers to recoup payments in excess of its proportionate share of liability.[2] The key point for our purposes is that contribution claims are entirely creatures of the joint venturers' own making. Through a contract that establishes the terms of their joint venture relationship ("predispute contract"), the parties can exercise complete control over whether to subject themselves to contribution claims, and, if so, whether to resolve the claims by publicly funded courts or by a privately funded alternative, such as arbitration.

1. In pursuing this inquiry, we broadly define "contribution claims" to include all causes of action—whether created by common law, statute, or contract—seeking to shift or allocate incurred or expected damages and related litigation costs among joint venturers. We are not concerned with the technical classification of these actions as claims for contribution, indemnity, setoff, or otherwise.

2. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § C18 (2000) (allowing a party to seek reallocation for joint and several liability damages). For historical and doctrinal overview of rules of joint and several liability and related provisions for contribution, see Frank J. Vandall, *A Critique of the* Restatement (Third), Apportionment *as it Affects Joint and Several Liability*, 49 EMORY L.J. 565, 565–71 (2000) (discussing the history of joint and several liability); for economic analysis of various allocation rules, see A. Mitchell Polinsky & Steven Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 STAN. L. REV. 447, 448–50 (1981) (providing an economic analysis of three different contribution rules). We will not explore the variations and details in the rules governing adjudication of contribution claims because parsing and analyzing their differences would complicate, but not change, the substance of our argument.

Because the parties prosecuting and defending against contribution claims can consume judicial resources largely free of charge, it is likely they will choose to litigate in court to a greater extent than is socially desirable. The specific, socially detrimental result of such distorted litigation incentives is delayed resolution of cases that merit greater priority in gaining access to public judicial resources. Generally, these are cases in which the claimants lacked predispute contractual means to control risk and provide for nonjudicial alternatives, and hence the principal social benefits of deterrence and compensation depend on court-enforced civil liability.

We argue that courts can effectively correct the contracting parties' incentives by charging them for the cost of using the judicial process. Requiring contracting parties to pay their way in court would free up judicial resources to increase the average level of benefits from adjudication. Such a user fee, as we show, can be extended to almost all commercial-contract cases.

A. Contribution Claims in the Deepwater Horizon *Litigation*

The problem of overuse of courts was brought into sharp relief by the sheer scale of the *Deepwater Horizon* disaster and the number of potentially responsible parties. The devastation wreaked by the *Deepwater Horizon* disaster in the Gulf of Mexico and along the Gulf Coast underscores the risk of mass catastrophic harm that shadows virtually all large-scale production.[3] The *Deepwater Horizon* project also highlights that large-scale production is inevitably a "joint venture" comprised of an intricate combination of private and public entities that are organized and operated through a network of contracts and other agreements.[4]

Two critical features of the *Deepwater Horizon* disaster, the extensive injuries sustained by victims of the disaster and the comprehensive contractual relationship among the joint venturers, will characterize the complex civil litigation that invariably follows

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3. For an analysis of the causes and effects of the *Deepwater Horizon* disaster, see BP, DEEPWATER HORIZON ACCIDENT INVESTIGATION REPORT 28 (2010), *available at* http://www.bp.com/.liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report.pdf.

4. *See, e.g.*, *id.* at 11 (noting that a "complex and interlinked series of mechanical failures, human judgments, engineering design, operational implementation and team interfaces" permitted the accident to occur and that "[m]ultiple companies, work teams and circumstances were involved over time"); David M. Uhlmann, *After the Spill is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1420–21 (2011) (discussing the various private and government entities involved with the *Deepwater Horizon* venture).

mass accidents.[5] Mass-accident litigation may span decades and consume hundreds of millions of dollars in legal resources.[6] In addition, the litigation will consume massive amounts of judicial resources as courts resolve not only plaintiffs' primary personal-injury and property-damage claims against the named defendants, but also secondary claims for contribution. For example, exactly one year after the *Deepwater Horizon* disaster, many of the principal joint venturers in the project filed a slew of accusatory contribution claims against each other. These claims seek to shift all or at least part of the liability for the blowout from the movant to one or more of the other parties.[7]

B. Costs and Benefits of Contribution Claims

Resolving these contribution claims may take more publicly subsidized judicial time and effort than the underlying primary claims. Generally, the court must determine not only whether the party sued for contribution is liable for the accident but also the proportionate degree to which its conduct causally enhanced the risk and harm at issue. For example, in its third-party complaint against Halliburton Energy Services, BP seeks to recover any damages that it may have to pay plaintiffs in the underlying action. BP argues that both Halliburton's negligent cement work on the well and its fraudulent concealment of problems with the well's performance

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5. Most of the civil claims arising from the *Deepwater Horizon* mass accident have been consolidated by the Multidistrict Litigation Panel pursuant to 28 U.S.C. § 1407 (2006). *See In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, 731 F. Supp. 2d 1352, 1356 (J.P.M.L. 2010) (consolidating and transferring seventy-seven related actions to the Eastern District of Louisiana).

6. The litigation arising out of the 1989 Exxon Valdez accident is illustrative. *See, e.g.*, William A. Lovett, *Exxon Valdez, Punitive Damages, and Tort Reform*, 38 TORT TRIAL & INS. PRAC. L.J. 1071, 1087 (2003) (observing that reported and estimated expenses of plaintiffs and defendants in the 1994 trial exceeded $200 million); *see also* William Yardley, *22 Years Later, the Exxon Valdez Case is Back in Court*, N.Y. TIMES, Mar. 4, 2011, at A14 (illustrating the *Exxon Valdez* litigation continuing in 2011). The *Exxon Valdez* case, however, comes nowhere near matching the time and expense of the more than forty years of asbestos litigation in this country. For an accounting of the asbestos litigation cost, see STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION (2005).

7. *See, e.g.*, BP's Cross Complaint and Third-Party Complaint Against Halliburton at 2, *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, No. 10-02179 (E.D. La. Apr. 20, 2011), 2011 U.S. Dist. Ct. Pleadings LEXIS 351 (illustrating the nature of the contribution claims). The array of cross, counter, and third-party claims is extensive and complicated. *See, e.g.*, BP Parties' Countercomplaint, Cross Complaint and Third-Party Complaint Against Transocean and Claim in Limitation at 2, *In re Oil Spill*, 2011 U.S. Dist. Ct. Pleadings LEXIS 351. In addition, the BP subsidiary BP Exploration & Production filed similar contribution claims against Transocean, Cameron, and Halliburton. BPXP's Cross Claim and Third-Party Complaint Against Transocean at 1, *In re Oil Spill*, 2011 U.S. Dist. Ct. Pleadings LEXIS 349.

caused or contributed to the *Deepwater Horizon* accident.[8] Moreover, contribution claims greatly multiply the judicial resources absorbed by a mass-accident case by requiring courts to adjudicate questions mooted by settlement in the underlying litigation.[9] They also confront courts with additional questions not at issue in the underlying litigation, such as substantive (and related choice of law) issues concerning the extent to which an insolvent joint venturer's share of damages should be reallocated to solvent parties.[10]

These costs must be assessed in light of potential social benefits from court enforcement of contribution claims. Judicial enforcement of contribution claims can usefully promote deterrence objectives by allocating liability to the parties best situated to take optimal precautions against harm.[11] Along with its benefits of administrative efficiency, application of collective liability rules such as joint and several liability may distort the parties' incentives to invest in reducing accident risk to the socially appropriate level. If a party expects to ultimately bear disproportionate liability, it may well be overdeterred, spending too much on safety precautions and being too cautious about entering into risky but socially desirable joint ventures. At the same time, a party anticipating relief from bearing its share of the expected liability will be underdeterred, spending too little on precautions and, perhaps, entering into hazardous ventures that, from society's point of view, it should avoid.[12] In this way,

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8. BP's Cross Complaint and Third-Party Complaint against Halliburton at 34–40, *In re Oil Spill*, 2011 U.S. Dist. Ct. Pleadings LEXIS 351.

9. *See* Eric D. Suben, *The Effect of Settlement on Nonsettling Joint Tortfeasors in Maritime Law*, 17 TUL. MAR. L.J. 301, 302 (1993) (relating that some courts in maritime actions would allow contribution claims in separate actions after trial where the settling defendant's degree of fault was determined).

10. *See, e.g.*, Edward S. Johnson & Cindy T. Matherne, *Statutory and Contractual Indemnification and Forum Selection, Including the Oil Patch*, 24 TUL. MAR. L.J. 85, 88–98 (1999) (discussing choice-of-law provisions in service contracts related to the oil industry in the Gulf of Mexico). On apportionment of insolvent defendant's share, see RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § C21 (2000) (providing rules for reallocation of damages among solvent parties); William M. Landes, *Insolvency and Joint Torts: A Comment*, 19 J. LEGAL STUD. 679, 679–80 (1990) (evaluating the efficiency of negligence and strict liability in cases of joint tort defendant insolvency).

11. *See* David Rosenberg, *Joint and Several Liability for Toxic Torts*, 15 J. HAZARDOUS MATERIALS 219, 225 (1987). *See generally* Polinsky & Shavell, *supra* note 2. In this Article, we use the term "deterrence" to encompass all applications of civil liability that create incentives for individuals and institutions to obey the law, including incentives to take reasonable precautions against accident and to comply with rules governing enforcement of contracts.

12. Of course, participants in a joint venture may shun a party that is expected to bear less than its proportionate share of anticipated liability. One purpose of contribution agreements is to facilitate joint undertakings among parties who might otherwise be excluded from or reluctant to join the venture.

enforcing contribution claims (including contractual allocations of liability) encourages the formation of socially desirable joint ventures, discourages undesirable ones, and promotes optimal care by the participants in those that are formed.

However, there is an unnecessary social cost associated with *public courts* resolving contribution claims brought by defendants against other joint venturers. The basic problem lies in the public subsidy for the use of courts. Although litigation in the court system obviously is not free to the parties, the public still bears a substantial amount of the costs of adjudication.[13] Foremost among these costs is the time that public officers devote to adjudication—time that the parties do not pay for and that the officials could have spent on other cases if the parties had opted for a private alternative. Yet if they resort to private alternatives, such as arbitration, or nonlitigation options, like liquidated damages or adjustment of basic contract price and performance terms, the parties must pay for the contract negotiations, and if contribution or other disputes arise, for arbitrators to resolve them.[14] This divergence—free provision of public decisionmakers but not of their private counterparts—distorts the incentives of joint venturers, leading them to make socially excessive use of the courts to resolve contribution claims.[15]

Our claim is that eliminating the public subsidy for adjudicating contribution claims would optimize the scale and scope of contracting parties' predispute behavior. Charging contracting parties a user fee equal to the public costs of adjudication would largely align the private and social incentives to use publicly funded courts instead of privately funded alternatives.

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13. Litigants remit only a pittance of the court and other social costs generated by the adjudication of their cases. The current filing fee for federal district courts is set by statute at $350 for civil claims (other than filing a petition for a writ of habeas corpus, which is $5). 28 U.S.C. § 1914(a) (2006).

14. For an example of the fees charged for arbitration, see *AAA Pre-filing Facts*, AM. ARB. ASS'N, http://www.adr.org/sp.asp?id=29297 (last visited Sept. 3, 2011) (listing of fees for arbitration). Unless otherwise specified, references to contracting parties' choice between courts and arbitration include nonlitigation alternatives, such as liquidated damages and price adjustments.

15. *See* Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 435–36 (2010) (arguing that the public subsidy for adjudication often leads parties to choose court instead of arbitration); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 250 (1979) (arguing that adjudication may have a competitive advantage over arbitration because courts are publicly funded).

C. User-Fee Proposal

We propose that courts charge contracting parties a fee to cover the expenditure of judicial resources incurred by society to adjudicate their contribution claims. Taking account of the public good of judicial precedent making, the proposed user fee would be subject to an offset for costs attributable to the adjudication of substantial legal questions. Because the basic aim of the user fee is to correct the incentives of contracting parties in making predispute contracts, our proposal can readily apply to all commercial-contract cases. Dampening incentives to overuse judicial resources would free courts to enforce civil liability in the balance of cases and thereby increase the resulting average level of deterrence and compensation benefits.

To illustrate, assume that there are two hundred claims pending on a court's docket—one hundred commercial-contract cases and one hundred other cases—the potential deterrence benefits of which require court-enforced civil liability. Assume further the court can adjudicate ten cases a year and randomly selects cases for adjudication. Finally, assume that the parties in all of the commercial-contract cases would prefer adjudication if it was publicly subsidized but would prefer arbitration if courts charged a user fee. Under these conditions, with all two hundred claims vying for access in a publicly subsidized system, each case has a five percent chance of being adjudicated within the year. In contrast, if the user fee drives the one hundred commercial-contract cases into arbitration (or some other nonjudicial alternative), then the chance of the one hundred other types of cases being adjudicated within the year jumps to ten percent. Thus, the social benefit produced by the user fee results both from minimizing the total cost of resolving disputes in commercial-contract cases and from reducing the average delay cost and consequent loss of deterrent effect in other types of cases.

To focus the analysis, we consider only commercial-contracting parties and the claims that arise from their joint undertaking. The proposal is not applicable to claims that involve noncommercial contracts or noncontracting parties.[16] Nor does it apply to claims arising under regulatory regimes in which courts or administrative authorities override or dictate the terms of commercial contracts.[17] We

16. *See, e.g.*, Am. Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 899 (Cal. 1978) (involving a contribution claim against multiple noncontracting tortfeasors).

17. For discussion of the complementary roles of contract (markets) and regulation (e.g., torts) in the socially appropriate management of risk, see CHARLES FRIED & DAVID ROSENBERG, MAKING TORT LAW: WHAT SHOULD BE DONE AND WHO SHOULD DO IT 98–100 (2003); EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 291–329 (1978).

also put aside the independent deterrence argument for charging a user fee in contribution or other contract cases to compel internalization by tortfeasors of the total social cost of accidents.[18] Beyond eliminating the public subsidy, the proposal does not significantly affect application of common law, statutory provisions, or administrative rules that determine the legal enforceability of contracts and the process for resolving contract disputes in and out of court.[19]

D. Related Literature

Economic and policy-oriented legal commentators have addressed the subject of publically subsidized courts as well as the possibility of charging a user fee to correct the divergence between private and social incentives to litigate.[20] Our Article adds to this literature in both of these areas. First, it examines in greater detail the social costs of publicly subsidizing the judicial resolution of contribution claims and commercial-contract cases. The costs of publicly subsidized adjudication, we contend, result from the delayed

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18. *See* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 588 (1997) (arguing that tortfeasors should pay for the total social cost of accidents, including the expense born by plaintiffs and courts to determine liability).

19. Thus, for example, our proposal assumes the background rules regarding the enforceability of indemnity agreements between joint tortfeasors. *See, e.g.*, Louisiana Oilfield Anti-Indemnity Act, LA. REV. STAT. ANN. § 9:2780 (2005) (stating that such indemnity agreements are void when pertaining to oil, gas, water, or drilling for certain minerals); Texas Oilfield Anti-Indemnity Act, TEX. CIV. PRAC. & REM. CODE §§ 127.001–127.007 (West 1999) (similarly stating such agreements void as a matter of public policy). Both commentators and courts have suggested that state anti-indemnity statutes have led to confusion, increased litigation, and wasted expense of creating contractual circumventions of these statutes. *See, e.g.*, Julia M. Adams & Karen K. Milhollin, *Indemnity on the Outer Continental Shelf—A Practical Primer*, 27 TUL. MAR. L.J. 43, 43 (2002); Larissa Sanchez, *Charting the Chaotic Offshore Waters: The Validity of Contractual Indemnity Provisions Pertaining to Injuries Sustained Offshore*, 31 TUL. MAR. L.J. 177, 177, 189 (2006).

20. For an analysis of the current state of publicly financed adjudication and an argument that parties should generally pay court usage costs, see Brendan S. Maher, *The Civil Judicial Subsidy*, 85 IND. L.J. 1527, 1527 (2010). On the wider problem of aligning private and social incentives in the face of litigation costs (of which scarce judicial resources are only one component) and justification for social intervention where there is excessive private incentive to use the legal system, see Shavell, *supra* note 18, at 575. On possible levies for the use of court systems, see RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 195–204 (1985) (suggesting a user fee to address court overcrowding); Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 CATH. U. L. REV. 267, 272, 274 (1985) (suggesting a user fee for litigants and questioning whether there should be exceptions for the indigent or civil rights claims); Steven Shavell, *On the Design of the Appeals Process: The Optimal Use of Discretionary Review Versus Direct Appeal*, 39 J. LEGAL STUD. 63, 77–81, 95 (2010) (suggesting a user fee for certain appeals).

resolution of other claims, with resulting harm to the deterrent and other goals of the substantive law in those cases. Eliminating the subsidy for commercial-contract cases would increase the average chance of the other civil cases being adjudicated, and thus the average level of deterrence and other benefits from adjudication.

Second, the Article takes up the problem of designing a fee structure that addresses both the aim of correcting the private dispute-resolution incentives we have noted and the aim of producing the public good of legal precedents. We acknowledge the tension between these goals: one generally favors compelling parties to internalize the costs of the public judicial resources they consume while the other generally favors subsidizing them to pursue the creation of judicial precedents that benefit others. Our analysis seeks to identify an appropriate trade-off between these objectives.

E. Organization of the Article

In Part II, we examine the incentives created by the public subsidy for adjudication in relation to the predispute choice of contracting parties to resolve potential contribution disputes in court rather than by arbitration or some other privately funded alternative. Our argument is not that the nonjudicial means are superior; it is simply that the presence of a subsidy for public adjudication motivates the contracting parties to overuse courts. In Part III, we assess the social costs of such overuse. Our analysis not only takes into account the unnecessary consumption of scarce and valuable judicial resources; it also explains the adverse effects of resulting court congestion and delay on the level of deterrence and other benefits produced by adjudicating cases that do not arise from commercial contracts. We emphasize the negative consequences of delay on the time value of litigation, particularly for plaintiffs with high discount rates. This translates into inappropriately low recoveries and correspondingly lower levels of deterrence. In Part IV, we sketch the design of a user fee for judicial resolution of contribution claims, coupled with a calibrated offset for cases that generate legal precedents of value to others. In Part V, we extend the analysis to consider the application of the proposed user fee generally to commercial-contract cases. Part VI concludes with further comments on the scope and mechanics of our proposal.

II. CONTRIBUTION CASES AND THE OVERUSE OF COURTS

A. The General Theory of Litigation Incentives

To introduce our subject, we begin with a brief discussion of the theoretical explanation of parties' motives to bring their dispute to court.[21] The theory focuses on the divergence between the private and social incentives to pursue litigation; that is, the difference between lawsuits that generate net social gains versus those that profit a given party while yielding overall social losses. The "externalized" costs generated by each party include those incurred by the opposing party in response,[22] as well as the resources expended by the public court system. Because a party can shift the costs of its litigation decisions onto others, cases that do not belong in court may wind up there. By that same token, because the parties do not capture the full social benefit of their decisions, particularly the deterrent effect on others, cases may stay out of court that should not.

A simple example illustrates the problem. Suppose that the amount in controversy in a given case is $10,000 and that going to court costs each party $9,000. Assuming that the parties fail to settle beforehand, that the plaintiff will file suit, and that the defendant will defend, all parties will have jointly spent more than the matter is worth to them. Add to this the public costs of adjudicating the matter, and the litigation seems even more wasteful. Assume, for example, that it costs the public another $9,000 to adjudicate the case. At the end of the case, $27,000 will have been spent in a battle over $10,000. The total costs exceed either party's possible gain from the litigation, yet from an ex ante perspective both parties believe that the litigation is worthwhile because most of the cost is borne by someone else.[23]

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21. Here we draw upon the analysis developed in Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 333 (1982), and subsequently extended and refined in Shavell, *supra* note 18, at 575, and Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 307 (1994). A summary of this work, with references, can be found at A. Mitchell Polinsky and Steven Shavell, *Economic Analysis of Law*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS (2d ed. 2008). For recognition of the diverging private and public interests to use the civil liability system in the context of mass tort litigation, see David Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849, 900 (1984) (pointing out that the deterrence benefit of litigation is a "public good" that plaintiff attorneys lack a profit motive to produce).

22. In general, each party bears roughly half of the joint litigation expenditures. *See* TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2002 UPDATE—TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM 17 (2003).

23. We emphasize the assumption that the parties have failed to settle the matter out of court. It is well known that private litigation costs exert strong pressure on parties to settle and

Of course, this picture is incomplete because it ignores the possible social benefits of the litigation. The social cost of litigation may indeed be outweighed by the social benefit, in particular, the deterrence effect of sanctions on third parties to the lawsuit. In the above example, a lawsuit would be socially desirable despite its cost if the award led other prospective defendants to refrain from engaging in legally sanctionable conduct. If, say, the $27,000 expenditure in this case prevented each of ten prospective injurers from causing $10,000 of harm in the future, the litigation would be well worth it from a social point of view. However, because outsiders to the litigation reap the deterrence benefits, the parties to the present case have no incentive to consider it. So, depending on the balance of private payoff and cost, the present parties will pursue litigation that yields no net deterrence benefit or forgo litigation that would produce significant social value.[24]

B. Contribution Cases

Applying the general theory to contribution cases suggests that the private incentive to go to court is generally excessive. Contribution claims produce no significant deterrence benefit; that is, these lawsuits are not needed to create incentives for the contracting parties or for third parties embarking on other joint ventures to take precautions against harming each other and to otherwise obey the law. Consequently, to the extent that the public subsidy for adjudication motivates the parties to litigate in court rather than in arbitration, the resulting suit imposes a net social cost.

Contracting parties internalize the expense that a decision to sue generates for the opposing party. Consistent with their overall interest in minimizing the total private costs of their venture, the parties will agree upon predispute terms that efficiently reduce their

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create a high entry barrier that keeps the vast majority of disputes out of court. Nonetheless, many thousands of cases fail to settle and wind up in court each year. Moreover, the prospect of bearing litigation cost will alter the substance of settlements as well as the motivation to settle.

24. Theorists have observed that this analysis applies straightforwardly to the use of alternatives to litigation. Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL. STUD. 1, 1 (1995). Consider, for example, the possibility of submitting a dispute to arbitration instead of going to court. In some cases, arbitration may be socially preferable to court adjudication in terms of overall costs and benefits; in other cases, the reverse may be true. This is a complex question that we need not go into here. For our purposes, the critical point is that once a dispute has materialized, the parties have no general incentive to make the socially preferable choice. They may use arbitration when, all things considered, it would be better that they go to court, or they may seek court adjudication when it would be socially preferable that they have the matter arbitrated. Because the major costs and benefits of the decision are external to each party, neither party is motivated to select the process that optimizes them.

joint costs of litigation to enforce the contract. For example, if resolving an alleged contract breach in court would cost the parties three hundred dollars and resolving the dispute in arbitration would cost the parties one hundred dollars, then the parties will specify the latter mode of deciding the matter. Choosing adjudication instead would increase the venture's costs and lower its payoffs for the parties.

The same reasoning demonstrates that there is no externalized social benefit of deterrence at stake in contribution cases. In other words, in contrast to noncontract cases, contracting parties' and society's deterrence incentives coincide completely: both the parties and society are best off by minimizing the total costs of the venture through the creation and enforcement of optimal contract terms. Any excess cost from disproportionate allocation of expected or incurred damages among the parties raises the cost of the venture, reducing the total payoff for distribution among the parties and total welfare for distribution among members of society.

However, although the parties will avoid externalizing to each other the cost of litigating contribution claims, the public subsidy for adjudication still distorts the incentives of contracting parties. Absent from the predispute negotiations is a representative of the public interest in preventing the overuse of courts. The contracting parties thus lack incentive to adopt predispute terms that would constrain their use of courts beyond the point of avoiding inefficient litigation cost for themselves. Thus, if adjudication costs the parties $100 and arbitration costs the parties $300, a predispute contract would specify the use of courts.[25] The parties would be unmoved by the fact that the value of the judicial resources consumed, say $500, exceeds their private savings from avoiding arbitration and inefficient litigation procedures.

The main point is that in contribution cases, private and social deterrence objectives align. Adjudication of contribution claims therefore plays no role in motivating potential joint venturers to allocate potential damages among themselves so that all participants have proper incentives to take reasonable precautions against imposing socially inappropriate risks of harm to each other. As noted, the contracting parties' motive to minimize the venture's total private costs will suffice. Consequently, social-deterrence benefits will not justify the expenditure of judicial resources to adjudicate contribution

25. The parties will of course seek to reduce litigation expenses they bear, such as by setting limits on the scope of discovery or designating a convenient venue. *See* Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 595 (2007) (suggesting that public dispute resolution rules can be waived by contract).

claims that the contracting parties would not otherwise bring to court but for the public subsidy.

Having completed the discussion of how publicly subsidized adjudication skews contracting parties' incentives to overuse courts for resolution of contribution claims, we next explore the adverse consequences of resulting court congestion and delay. In particular, we consider the costs of delay in devaluing the interests of parties and in diluting the deterrence potential of the backed-up cases.

III. THE DELAY COSTS OF PUBLICLY SUBSIDIZED ADJUDICATION

Subsidizing the consumption of judicial and related legal resources to enforce contribution claims is socially problematic. These resources are socially valuable and likely to remain in short supply.[26] Distributing them for free inflates demand that will clog dockets, lengthen the queue of claims seeking judicial attention, and increase the time it takes to have the court resolve a claim.

Generally, courts attend to civil claims on a first-come-first-served basis.[27] The "first case" is not selected because its resolution promises above-average social payoffs in terms of deterrence. In effect, the expected social benefit from adjudicating the first case is equivalent to selecting a case for resolution at random. And, while producing average expected benefit, adjudication of the first case necessarily delays and thereby diminishes the average social value of the cases waiting in line.

Freeways offer an apt, well-known way of thinking about the problem. The first car to enter the freeway travels at optimal speed and ease, while the next car to enter will likely move somewhat more slowly as the driver confronts the physical and safety limits created by the first car. As more cars enter the freeway, increased congestion disrupts drivers' schedules, frays their nerves, wastes their time in traffic jams, risks more accidents, and produces more air pollution. The prospect of encountering such congestion will lead some drivers to refrain from using the freeway even if they would make more socially beneficial use of it than others would. Like freeway congestion, courts with congested dockets exact social costs at two interrelated levels: (1) they impose a direct cost to litigants by decreasing the time value of litigation; and (2) they impose an indirect cost to litigants by

26. *See* POSNER, *supra* note 20, at 59–76 (describing the caseload explosion in federal courts and possible ways to address it).

27. *Cf.* Orthmann v. Apple River Campground, Inc., 765 F.2d 119, 121 (8th Cir. 1985) (applying the "first to file" rule when two courts have concurrent jurisdiction).

undermining the deterrence effect and other social benefits of civil liability.

A. Direct Delay Costs

The costs of delayed adjudication are many and varied. Often these costs arise because delay tends to diminish the availability and quality of relevant evidence. Physical conditions change, memories fade, witnesses move away, and documents may be lost or destroyed.[28] Courts can employ modern discovery rules to avoid such costs without resort to much, if any, judicial intervention. However, preserving evidence for possible use in some later, delayed adjudication will itself burden the parties with greater litigation expense.[29]

The following sections consider two basic effects of delay costs that have received little attention in the relevant literature. The first concerns diminution of the time value of litigation, particularly relating to economic losses that cannot be replaced by recovery of damages and prejudgment interest. The second relates to the effect of delay costs on incentives to invest in litigation.

1. Loss of Litigation Time Value

Delay imposes a direct cost on litigants through the lost time value of litigation. Resolution of a dispute is often time sensitive. Plaintiffs naturally have a preference for recovering damages sooner rather than later. The availability of prejudgment interest can mitigate some of the delay costs borne by plaintiffs,[30] but the typically low rates of such interest ensure that a substantial residuary of delay-related loss will likely remain. But, even adequate interest rates would not solve the problem in many cases. For example, a plaintiff suffering from serious harm to person or property may have a pressing need for financial liquidity or, because of advanced age, poor health, and other causes of economic stress, a plaintiff may discount the utility of the delayed recovery.[31] Such cases of "forced-creditor

28. Geoffrey P. Miller, Comment, *Some Thoughts on the Equilibrium Hypothesis*, 69 B.U. L. REV. 561, 565 (1989).

29. *See* WILLIAM M. HART & RODERICK D. BLANCHARD, LITIGATION AND TRIAL PRACTICE 251 (6th ed. 2007) (noting the costs that must be weighed in deciding to preserve evidence through discovery).

30. Prejudgment interest seeks to compensate the plaintiff fully by multiplying an award by the interest rate the plaintiff could have had. Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 TEX. L. REV. 293, 302 (1997).

31. *See* John C. Keir & Robin C. Keir, *Opportunity Cost: A Measure of Prejudgment Interest*, 39 BUS. LAW. 129, 147, 149 (1983) (arguing that the court should account for the fact that a

plaintiffs" probably represent a large percentage and possibly the majority of noncommercial-contract civil actions pending on court dockets across the country. On the other hand, defendants tend to prefer deferring the payment of damages.[32] And, in any event, liability insurance renders the defendants (if not the insurers) indifferent as to when damages are paid. However, defendants may have a strong countervailing desire for expeditious resolution of the case to remove the burden of litigation on key personnel, operations, finances, and market reputation.[33]

The parties can always reduce delay costs by settling their dispute. Indeed, all else equal, by lowering the parties' expected trial payoffs, delay costs will exert added pressure on parties to avoid litigation cost and risk by settling.[34] And settlement is usually effected without the need for judicial intervention. The extent to which delay costs motivate settlement will depend, however, on how much settlement reduces those costs by hastening the plaintiff's receipt of monetary recovery and the defendant's ability to restore the pre-lawsuit status quo.

But, even if settling the dispute out of court reduces delay costs, the expectation of such costs will nevertheless adversely affect the parties' respective payoffs from settlement. Put simply, the *prospect* of delay will distort the terms of settlement measured against a baseline in which the parties faced no significant delay. The parties will apply a delay-cost discount to their respective payoffs from trial and each will factor the discounted value into the formulation of their respective reservation points. If, as is often the case, forced-creditor

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plaintiff missed the opportunity to invest at a favorable interest rate); R.F. Lanzillotti & A.K. Esquibel, *Measuring Damages in Commercial Litigation: Present Value of Lost Opportunities*, 5 J. ACCT. AUDITING & FIN. 125, 139–41 (1990). Litigants will "sell" their claims in settlement for less than their expected judgment value for the same reason those with an immediate need for money pawn their property. *See, e.g.*, Iuliana Cenar, *The Legal and Accounting Dimension of Pawn*, 2009 ECON. & APPLIED INFORMATICS 199, 205 (2009) (citing money-in-hand value as the primary benefit of pawnshop loans).

32. Knoll, *supra* note 30, at 297 (suggesting that defendants can effectively borrow money without paying interest by delaying litigation). Prejudgment interest thus tends to mitigate the defendant's preference for delay. However, it may operate in the opposite direction. By raising the stakes for both parties, prejudgment interest may increase delay costs. *See* Richard A. Posner, *Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 421 (1973) (arguing that prejudgment interest raises the stakes of the litigation and thereby creates the opposite effect of delay costs). In addition, prejudgment interest tends to dilute the plaintiff's preference for speedy resolution of the case.

33. *See* THE BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 1 (1990); Keir & Keir, *supra* note 31, at 147.

34. *See* George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 534 (1989) (discussing the interrelationship between court congestion and settlement incentives).

plaintiffs are put at a greater disadvantage than defendants by delay, this asymmetry will translate directly into inappropriately low settlement recoveries with a predictable dilution of deterrent incentives for defendants.

To illustrate, suppose the plaintiff's damages are $100,000 and each party perceives a 50% chance of prevailing at trial. For simplicity's sake, assume that the parties have equal litigation costs and assume that settlement, if it occurs, is struck at the midpoint of the bargaining range.[35] Then if there were no significant anticipated delays, the parties would settle the case for the expected value of the judgment, $50,000. However, the outcome changes if we consider anticipated delay costs. Suppose that, due to lack of liquidity, pressing medical costs, and other financial strains, the anticipated delay of court resolution leads the plaintiff (notwithstanding receipt of prejudgment interest) to discount the value of a judicial damage award by 60%. Assume further that anticipated delay costs add (notwithstanding payment of prejudgment interest) 10% to the value of a judicial award for the defendant. In this scenario, the effect of introducing delay shifts the plaintiff's and defendant's effective expected damage award at trial to $20,000 and $55,000, respectively. Maintaining our assumption that they settle at the midpoint, the settlement amount drops from $50,000 to $37,500.[36] In this example, the delay costs effectively tax away 25% of the amount that the defendant pays in settlement. To the extent that such lowered settlements can be foreseen at the time of primary behavior, it will translate into fewer defendant precautions against accident.

2. Loss of Litigation Investment Incentive

So far, we have held constant the parties' incentives to invest in litigating their respective sides of the case. At this point, we take account of the effect that delay costs, which lower a party's expected payoff, have on these incentives. It appears that delay costs will have a differential impact on the parties' respective investment incentives, depressing plaintiffs' incentives while exerting mixed effects on defendants' incentives.[37]

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35. These assumptions are made for clarity of exposition and do not affect the underlying point.

36. Our arithmetic here is ($20,000 + $55,000) / 2 = $37,500.

37. Delay costs have long been recognized as posing a potentially complete barrier to suit by plaintiffs. *See* Miller, *supra* note 28, at 561 (arguing that delay costs will eliminate the economic incentive to file suit for litigants at the margin). To our knowledge, no prior consideration has been given to the general asymmetric effects on the parties' respective investment incentives. *Cf.*

For plaintiffs, because delay costs lower the expected recovery from trial, their incentive to invest in pursuit of that gain is correspondingly reduced. All else equal, the greater a party's stake in a case, the more the party will be prepared to spend to protect that stake. Cutting a plaintiff's effective gain from litigation through a "delay tax" predictably weakens the plaintiff's motive to invest in winning the case, which lowers the plaintiff's probability of success at trial. With the odds of winning at trial thus eroded, the plaintiff's settlement position will also further decline. To put the point most explicitly, even if delay had no effect on investment in the case, delay costs would exert downward pressure on the plaintiff's settlement position. When we then factor in the plaintiff's depressed incentive to invest in the case due to delay, we find that the downward pressure is augmented.

In our example, the plaintiff had a fifty percent chance of winning a $100,000 judgment at trial. Assume that it requires an investment of $20,000 to generate that probability of success and that with a smaller investment of $10,000 the plaintiff would have a thirty percent chance of prevailing at trial. In the absence of delay, the plaintiff would rationally make the larger investment in order to secure the greater chance of winning at trial.[38] Yet if, as above, we suppose that delayed adjudication effectively cuts the value of the judgment for a liquidity-constrained plaintiff by sixty percent, then the plaintiff's investment decision changes. It is no longer worthwhile to make the larger investment.[39] The plaintiff will make the lower investment and the expected judgment will fall to $30,000. Discounting that figure by sixty percent yields a $12,000 value. Maintaining our earlier assumption about the effect of anticipated delay on the defendant's discount rate, and still assuming that the parties make the same litigation investment, we observe that defendant's effective expected liability is therefore $33,000. The midpoint of the parties' expected damage recovery and liability, respectively, is $22,500. This represents a fifty-five-percent fall from

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Rosenberg, *supra* note 21 (comparing investment incentive effects of continuing or changing a set of basic rules such as those governing proof, causation, and aggregation of claims that structure the civil liability system).

38. With no delay costs in the picture, a $20,000 investment will yield an expected judgment of $50,000, while a $10,000 investment would yield only an expected judgment of $30,000. The larger investment yields a greater expected payoff of $10,000.

39. A $20,000 investment would yield an expected judgment of $50,000, which discounted by 60% is only $20,000. In contrast, a $10,000 investment would yield an expected judgment of $30,000, which discounted by 60% is $12,000. Only the lower investment yields an expected profit.

the originally stipulated expected damage award for $50,000.[40] Once again, to the extent that these dynamics are predictable at the time of primary care decisions, the weakening of defendant deterrence is plain.

Turning to the defendant, we find that delay costs may have varying effects on investment incentives. The results depend on whether, and how, the litigation investment affects the magnitude of delay cost. For example, investing in litigation may lengthen the time it takes for the court to adjudicate the case due to an increase in the scope of discovery, the number of witnesses called to testify, or the volume of motions filed. If so, the above analysis relating to the plaintiff's investment incentives applies to the defendant's investment incentives. The burden of delay costs will reduce the marginal net payoff from the additional unit of litigation investment and, all else equal, the defendant will find it more cost effective to invest less in the litigation.[41]

On the other hand, if changing the level of investment in litigation would not significantly affect the amount of incurred delay costs, then the defendant would rationally stay with its otherwise optimal investment strategy. Indeed, it may often be the case that defendants' litigation investments will have offsetting effects, both prolonging and shortening the duration of adjudication. Moreover, shortening the time it takes for the court to resolve the dispute may only reduce or eliminate future delay costs. In contrast to prejudgment interest for plaintiffs, hastening resolution of a case will not redress defendants' previously incurred delay costs. Not even full vindication of defendants' position at trial can adequately and fully compensate for practically irreplaceable losses such as diversion of key personnel from business to litigation tasks, forgone business opportunities, product withdrawals from the market, and bankruptcy.[42] However, the defendant will likely treat such accrued losses as sunk costs and

40. Similar logic explains why in lower-stakes cases, where damages are well below $100,000, delay costs may cause a claim's settlement value to disappear entirely.

41. Strategic interaction with the plaintiff may create some complexities. If the plaintiff decides to invest less in the litigation, the defendant may do the same, or the defendant may—depending on a host of variables—decide to increase its investment in order to overwhelm the plaintiff. We cannot rule out either possibility a priori, and both responses are observed in practice. By the same token, if the defendant drops its investment in the litigation, it is possible this will induce the plaintiff to raise its investment in order to exploit the defendant's weakness.

42. *See* Keir & Keir, *supra* note 31, at 147 (discussing how businesses calculate the opportunity cost of litigation).

proceed with its investment strategy as if they had not been incurred.[43]

These different possibilities make it difficult to categorically predict the overall effects of delay on litigation investment. Delay lowers the effective stakes of the litigation, which should lead both parties (and particularly the plaintiff) to lower their investments. This may not be universally true, however, and the strategic dynamics of litigation are such that if one party lowers its investment, then the other may raise its own investment in response.[44] Nevertheless, we can safely offer the following generalizations: First, for reasons we have discussed, anticipated delay will frequently lower plaintiff recoveries with the result of diluting defendant deterrence. In other cases it may be that defendants are put at greater disadvantage with the result of creating excessive deterrence incentives. Second, even in types of litigation where neither party is put at a systematic disadvantage, anticipated delay introduces greater *variability* into party investments, and this variability leads to greater unpredictability in the civil justice system, which itself is harmful to the aim of establishing optimal deterrence.

B. Indirect Delay Costs

The forgoing analysis explains why and how delay decreases the deterrence benefit that society derives from the civil liability system. As noted above, when the parties discount the value of adjudication due to delay costs, settlement and judgment outcomes are distorted, potentially resulting in adverse deterrence effects. Parties anticipating settling for a delay-cost-discounted payoff may be led to invest too much or too little in precautions. For example, if the defendant forecasts that delay costs will create a greater disadvantage for the plaintiff than for itself, the defendant will anticipate paying less than the claim is worth and be underdeterred. And, if a defendant anticipates that it will be at a greater disadvantage than the plaintiff due to delay costs, the defendant will internalize the exposure to an excessive level of liability and damages and hence be overdeterred. If the adverse effect of delay costs on settlement is randomly distributed, then there might be negligible distortion of incentives. However, often before they engage in risky activity, potential defendants will be in a

43. Defendants will sink the delay costs they incur automatically upon being sued; for plaintiffs, in contrast, delay costs are entirely a future burden at the time they choose to commence litigation.

44. *See supra* note 43 (explaining this phenomenon).

position to predict which party will bear the greater burden of delay costs and, therefore, will apply the greater discount to the payoff from adjudication. For similar reasons, delay costs that result in defendants paying too little in judgments and settlements jeopardize the compensation function of judicially enforced liability. Conversely, delay costs that result in defendants paying too much in judgments and settlements waste legal resources merely to effect a noncompensatory wealth transfer, and also create moral hazard problems.

To the extent that they alter the parties' investment incentives, delay costs will distort trial and settlement outcomes, undermining deterrence and compensation objectives. As illustrated by the above example, delay costs can result in pricing both claims and defenses out of the system. When such results are systematic, civil liability can have significant underdeterrent or overdeterrent consequences. This is not to suggest that marginal effects are likely to be negligible. On the contrary, harm or loss should be internalized fully because in reality investments in precautions are continuous. Threatening liability less or more than harm can distort incentives especially when the risk taking involved arises from business or governmental activity that exposes a large population to injury.

In sum, the public subsidy for adjudication results in delay costs that can produce socially undesirable distortions in the deterrence (and if relevant, the compensation) output of the system. The magnitude of this problem is uncertain. As we note in the next Part, the total public subsidy for adjudication is difficult to measure. The direct, easily calculable financial outlays such as for the operation of courthouses and for the salaries of judges and other judicial personnel represent a small fraction of the total costs of litigation. Moreover, there is a dearth of empirical studies of the deterrence function of civil liability. This is not at all surprising. Answering this question entails enormously complicated and costly assessments of both the actual deterrence effects from subsidizing the existing mix of cases in the waiting line and the counterfactual deterrence effects from adjudicating the mix of cases that would queue up in the subsidy's absence.

However, along with other commentators, we proceed on the assumption that the public subsidy of adjudication and the resulting social costs are substantial. And we also join their appraisal that the one solution that seems most relevantly appropriate is entirely impractical. That solution would have courts screen cases for their relative deterrence value. Courts rarely do so, and the explanation is patently clear. As we just noted, the courts would encounter an

insurmountable barrier of complexity and cost against developing reliable information to assess the social cost from delay-induced deterrence distortions.

This is not to suggest that the subsidy operates unchecked. Access to courts is strictly controlled. The constraint is not imposed by substantive regulation of the deterrence value of incoming cases because courts largely operate as a substantively neutral clearinghouse. Rather, the main check on access to courts is litigation cost. The high cost (and risk) of litigation essentially dictates the composition of the case queue. Only cases promising sufficiently high net payoffs in damages and other outcomes of value to the parties are likely to survive the delay costs. The results of this winnowing process correlate somewhat with the objective of minimizing total social costs by tending to exclude cases involving claims of less serious injury (or less meritorious nature, or both) and hence lower financial stakes. Yet, the correlation is tenuous. In operating on the basis of the parties' (and lawyers') myopic interest in maximizing their private payoff from litigation without regard to the social need for deterrence, this market process can do no better than blindly and crudely screen for socially worthwhile cases for adjudication.

On the stated assumption of substantial social cost from subsidized adjudication and in light of the impractical and ineffective means currently available for promoting a more socially desirable allocation of judicial resources, we proceed in Part IV to advance our proposed user fee.

IV. USER-FEE DESIGN AND SOCIAL CONSEQUENCES

We begin this Part by briefly outlining the proposed design for a user fee. Its aim is to compel contracting parties to internalize the social cost of resolving their contribution disputes in court, aligning the private and social motives for adjudication of such cases. Our analysis suggests that eliminating the public subsidy for adjudication would curtail excessive consumption of judicial resources, thereby reducing overall delay costs and increasing average deterrence effects of civil liability.

After outlining the proposal, we go on to discuss the principal questions regarding its implementation. For the most part, operational concerns prove either insubstantial or readily solvable by simple design modifications. We conclude that charging the parties at minimum for the substantial, easily calculable overhead costs of

establishing and operating courts promises sufficient social benefit to warrant employing the proposed user fee.[45]

We take up this social cost inquiry in the balance of this Part, focusing on potential loss of deterrence and precedent-making value for applying the user fee to curtail litigation of contribution cases in court. The general conclusion is that the proposal is unlikely to have an adverse effect on the goal of deterrence. Indeed, it may well improve the deterrence results of contribution-case adjudication. The proposal's waiver provision, which preserves the ability of courts to adjudicate substantial questions of law, meets concerns about loss of precedent-making benefits.

A. Design, Implementation, and Social Benefit

To address the problem of delay costs, we propose that courts charge a user fee to the parties in contribution cases for the social cost of adjudication. Internalizing this cost corrects parties' incentives on the margin when they choose between courts and arbitration for resolving contribution disputes. This also corrects parties' incentives when they choose between going to court and forgoing their claim.

The user fee we advance also includes a special feature lacking in prior proposals to address the problem of potential loss of precedent-making value from the adjudication of contribution cases. The problem arises from the divergence between the social and private payoff from the judicial development of precedent. Because the parties in contribution cases do not fully internalize the resulting social benefits, they will lack sufficient incentive to invest in litigating cases beyond the point of their expected private payoff simply to provide a court with an opportunity to make precedent. To address this misalignment in private and social motives for litigation investment, our proposal authorizes courts to reduce the user fee by the amount attributable to the cost of adjudicating substantial legal questions. In short, our proposal creates a contingent, public subsidy for adjudication of contribution cases exhibiting sufficient promise of

45. We emphasize that the principal social benefits of charging a user fee do not derive from the new revenue stream or from saving some amount of judicial resources per se. The benefits derive from removing a subsidy that induces parties to overuse courts, freeing up judicial resources to lower delay costs and increase average deterrence. The benefits of the user fee are greatly magnified as judicial budgets face sharp cutbacks. *See, e.g.*, Adam Skaggs & Maria da Silva, *Courting Disaster: Justice Can't Be a Budget Bargaining Chip*, SACRAMENTO BEE, July 14, 2011, http://www.sacbee.com/2011/07/13/3768390/courting-disaster-justice-cant.html#storylink=misearch (outlining judicial budget reductions in California and other states for 2010 and 2011).

precedential value to warrant the social investment of judicial resources.

Our proposal is straightforward and, for the most part, its implementation poses no design difficulties. To account for the incurred social costs, the fee would be assessed and taxed at the close of the contribution case. Whether the fee should be taxed against the party who initiates, responds to, or loses the contribution claim also seems of little regulatory consequence. As with most other aspects of allocating liability among the joint venturers, the parties can resolve this question by predispute contract, designating who will ultimately bear the burden of judicially imposed costs as well as the general litigation expenses. Levying the user fee against the initiating party is the best default rule; it is simple and certain, making it both easy for courts to administer and easy for the parties to work from in formulating the terms of predispute contracts.[46]

One major design problem, however, does not appear amenable to a precise solution. This problem concerns the practicality of courts setting the optimal user fee. To completely remove the public subsidy for adjudication of contribution cases, the fee should effectively tax the parties for the total social cost of adjudication. That cost has two components. First, there is the judicial overhead: the fixed and marginal costs incurred in establishing and funding the operation of courts to adjudicate contribution cases. This expenditure of judicial resources is both substantial and reasonably calculable. We surmise that courts could readily compute and levy the tax without practical difficulty in any given case.

The second component involves the social cost resulting from delayed adjudication. Calculating this element of social cost poses daunting practical problems. Determining this cost will require courts (or legislatures) to estimate the delay-induced distortions in the average deterrence payoff from civil liability, a task entailing complex investigation across all or at least broad categories of cases, development of currently unavailable evidence, and a comparative assessment of the actual and counterfactual deterrence effects on a system operating with and without the public subsidy for adjudication. If, as previously noted, information costs would prevent courts from selecting cases for adjudication according to their relative deterrence

46. It is possible for a predispute contract to impose the user fee on the losing party, which might entail substantial additional expenditure of judicial resources to apportion the costs. For example, there might be added cost for determining whether, and the extent to which, a party has "lost" in a case that settles or even in a case that goes to judgment. In these situations, the court would tack on the added cost to the fee for adjudicating the principal matters presented by the contribution dispute.

payoffs, then it is likely those same information costs would prevent courts from computing the delay-related loss of deterrence payoff to include in the user fee.

Perhaps the best practical alternative is to charge the parties for the direct fixed and marginal costs of resolving their contribution dispute in court.[47] Because contribution cases consume substantial amounts of judicial resources, they are likely to play a significantly relevant role in creating court congestion and the resulting delay costs. If the user fee eliminates a large fraction of the cases from court, delay will likely be reduced along with the average distortion of deterrence outcomes. On this assumption, we believe that it is worthwhile to investigate the costs of employing a proposed user fee that only charges parties for judicial overhead as a means of reducing the social cost from delayed adjudication.

B. Lost Social Benefit from Adjudicating Fewer Contribution Cases

The proposed user fee should operate to discourage some fraction of contribution cases from being litigated in court. Assuming that this would lessen delay costs and thereby increase the average level of effective deterrence from the adjudication of all other civil cases, the next question to address is whether reducing the adjudication of contribution cases will adversely affect the functioning of the judicial system and produce offsetting social costs. In particular, we examine how discouraging the adjudication of contribution claims may diminish the social benefit of deterrence and precedent making.[48]

1. Deterrence

Measured against the baseline of the current rate and volume of contribution-case adjudication, imposing a user fee will diminish the incentive to invest in litigating such cases in court. Eliminating

47. It may be practical to estimate statistically the average deterrence loss from delay, and for courts to charge that amount across-the-board in all, or large categories of, contribution cases. The initial estimate would likely only roughly approximate the average loss, but this estimate could be refined over time based on follow-up studies. The utility of charging the average loss from delay will depend on the variability among contribution cases in relation to the relative input to the delay-cost problem, and the extent to which indiscriminate pricing would lead to gaming by the parties and the risk of moral hazard.

48. We focus on the principal benefits of deterrence and precedent making because other salutary consequences of adjudication, such as avoiding violent or festering disputes, have little or no relevance to the joint-venture contribution cases considered here. Courts are also regarded as expositors if not founts of social-welfare-enhancing values. Application of the user fee is unlikely to diminish this benefit, the production of which roughly coincides with that of precedent making, and hence should be preserved largely intact by the waiver provision.

the public subsidy for this adjudication will conserve judicial resources by pricing some fraction of cases out of court altogether, reducing the parties' expenditures on litigating another fraction of the cases, and motivating the parties in some other fraction to substitute liquidated for allocated damages or adopt some other nonlitigation solution. The question is whether the baseline level of adjudication is excessive or suboptimal relative to the socially desirable level—the level of adjudication that minimizes total social costs.

The forgoing analysis shows that the current level of contribution-case adjudication is excessive and that eliminating the subsidy would better align the parties' incentives with the socially optimal incentive for the utilization of courts to resolve these claims. Applying the proposed user fee to contribution claims between contracting parties would not subvert deterrence objectives because no plausible case can be made that the level of their adjudication is inadequate rather than excessive. The basic reason is that the parties' incentives to maximize profit align with the social objective to minimize total accident costs through optimal investment both in precautions and in litigation. Misallocation of damages among the joint venturers increases the risk of accident and therefore increases the expected costs of the project. Subjecting one party to disproportionate liability may induce excessive investment in precautions, while also absolving another party of a share of the liability, leading that party to take inadequate precautions. But contracting parties have a compelling motivation to eliminate their disproportionate exposure to damages and to contractually realign the allocation of their respective liability-related burdens. Predispute contracts allocating damages serve to minimize the parties' total costs and, by doing so, promote the social objective of minimizing total accident costs. Similarly, the parties would avoid incurring the unnecessary costs associated with litigating contribution cases. Unlike parties to "stranger" cases for whom the inability to negotiate predispute contracts means that access to court is often the only legal enforcement option, the parties to contribution cases can formulate predispute contract terms for allocating damages based on a virtually continuous array of dispute resolution options. Joint-venture disputants are unlikely to experience a precipitous fall from overpriced judicial allocation and deterrence into an abyss of no allocation and deterrence.

Consider a joint-venture version of the above example in which the $20,000 damages represent the amount of disproportionate liability that party X expects to bear in the event of an accident. Assume that this threat of excessive liability leads X to invest $19,000

in order to eliminate the accident risk. At the same time, party Y spends nothing, despite having the capacity to take reasonable precautions. But also assume that if X can shift its excess expected liability to Y, then each party will be motivated to spend $8,000, or a total of $16,000, to eliminate the risk of accident. Now suppose that the parties anticipate the possibility of a dispute arising over Y's share of excess liability. Assume that the parties' predispute contract allows contribution claims to address allocation disputes. Finally, assume that the social cost of adjudicating the contribution case in court is $2,000 versus $1,000 for the parties to arbitrate the claim. In the absence of a user fee, the parties would elect to litigate the contribution case in court because it would be cheaper than paying $1,000 more for arbitration. However, applying the user fee would align the parties' incentives with society's deterrence interest in optimal allocation of expected damages. The parties would choose arbitration over adjudication, thereby minimizing total accident costs, private and social from $18,000 ($16,000 plus $2,000) to $17,000 ($16,000 plus $1,000).[49]

2. Precedent Making

A good case can be made for retaining the subsidy for contribution cases that present substantial questions of law and thereby provide the opportunity for courts to make precedent. In other words, applying the proposed user fee might discourage the parties from using the courts to litigate some cases that could provide the basis for socially beneficial rulings affirming, clarifying, or changing existing law to guide the behavior of joint venturers in the future. In contrast to deterrence, the social interest in precedent making through litigating contribution cases in court would likely diverge substantially from the interest of present joint venturers—namely, society would prefer a substantially higher investment in precedent making than the parties would. From the parties' standpoint, the private investment would probably garner only a relatively small fractional share of the benefit, while the bulk of it would go to other parties organizing future joint ventures (including competitors).

Although many cases priced out of court will go to arbitration, arbitral resolution of contribution cases is unlikely to provide a full replacement for court-made precedent. Even if arbitrators were as

49. Note that if arbitrating a contribution case entailed high joint investments by the parties—due either to factual complexity or to potential litigation abuse—at some point the parties would find it profit-maximizing, and hence it would be socially desirable, to substitute liquidated damages for proportional allocation.

qualified as judges to make precedent, it is doubtful that the parties would be willing pay the price for comparable services. And that price would be quite steep, far higher than the cost of simply deciding the legal questions for the sole benefit of the present parties. To begin with, arbitrators would labor longer and more intensively to decide legal questions for the benefit of parties other than those financing the proceedings; indeed they do this for the benefit of an entire industry. In addition, to enhance the quality and coherence of the rulings, arbitration would have to develop an appellate or functionally equivalent review process, and the parties would have to pay its overhead. In addition, there is also a supply-side problem. In the absence of proprietary control over the work product, arbitration-made precedent becomes a public good.[50] As such, competitive free riding among arbitrators will inhibit their investing optimally to make high-grade precedent.[51]

Our proposal is designed to preserve the flow into court of contribution cases with precedent-making value, while at the same time reducing the excess demand for adjudication of contribution cases generally. Thus, we advance a user fee that both taxes the parties for court costs to discourage marginal overconsumption of judicial resources and authorizes trial courts in the first instance to waive the costs attributable to adjudication of substantial legal questions. Therefore, at the end of an adjudication, the court would assess taxable adjudication costs and would also consider whether the resulting legal precedent justifies waiving some of these costs.[52]

Overall, waivers probably will be infrequent because contribution cases are unlikely to provide precedent-making

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50. For evidence that arbitrators rely on arbitral precedent in making decisions, see generally Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129, 129 (2007) (reviewing the value and precedential role of tribunal cases, awards, and orders in investment treaty arbitration); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 362–69 (2007) (analyzing the motivation and potential obligation of arbitrators to rely on past awards in international commercial arbitration, sports arbitration, and international investment arbitration); W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1907–11 (2010) (discussing the robust system of arbitral precedent in international investment arbitration and labor arbitration).

51. *See* Landes & Posner, *supra* note 15, at 248 (explaining that due to the public-good character of precedent, a free market in judicial services would not lead to the production of precedent as a by-product of the efforts of competing judges).

52. Normally the parties would move for waiver, but the court should also have authority to reduce the user-fee charge on its own motion in the event that the parties fail to appreciate the precedential value of the case. The court might announce at the outset or early on in the litigation that it viewed the case as having precedential value and that it would entertain an application for waiver of the user fee at the close of proceedings.

opportunities. Most contribution litigation involves largely factual disputes over whether and how much contribution payment is due. Resolving these factual disputes has little (if any) precedential value. Indeed, these are factual disputes that would be well-suited for arbitration.

In any event, to avoid further burdening the process, the standard for waiver should be familiar to courts. Although it is beyond the scope of the paper to develop this aspect of the proposal in detail, we briefly note two available formulations. One possible formulation is suggested by Rule 11 of the Federal Rules of Civil Procedure. Under Rule 11, a legal argument that fails to pass a minimum substantive threshold of "nonfrivolous" is barred from court, and the attorney who presents it may be subject to sanction.[53] If the standard from Rule 11 is used in our proposal, the waiver would apply broadly to all "claims, defenses, and other legal contentions" that advance "a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."[54] While this standard may impose only a small burden on courts, assuming frivolous contentions are easily identified, waiving the user fee for all claims that pass such a minimal test will eviscerate the benefits created by a user fee. Moreover, the "nonfrivolous" standard may actually prompt the parties to game the system because some minimally sufficient claims or defenses may be cheap for parties to assert yet expensive for a court to resolve on the merits and also to differentiate from nonwaivable, pedestrian legal questions for purposes of assessing costs covered by the user fee.

The standard for federal interlocutory appellate review provides a better test than Rule 11.[55] As applied to our proposal, the user fee would be waived for adjudication of "a controlling question of law as to which there is substantial ground for difference of opinion."[56] This test seems more useful because there is a relatively high correlation between outcome-determinative legal questions that provoke substantial differences of opinion and legal questions that present opportunities to make valuable legal precedent. Applying this test is also unlikely to create a significant burden on courts; by the time the waiver decision is made, the presiding judge will have already become immersed in the issues. Finally, because establishing that the question is outcome determinative and that there are

53. FED. R. CIV. P. 11(c).

54. FED. R. CIV. P. 11(b)(2).

55. 28 U.S.C. § 1292(b) (2006) (specifying the standard governing the authority of federal district courts to certify an otherwise nonappealable order for interlocutory appellate review by a court of appeals).

56. *Id.*

substantial grounds for disagreement requires a greater litigation investment than simply asserting a nonfrivolous claim, the interlocutory appeal test is less susceptible to gaming by the parties.[57]

Our waiver proposal will neither impose new or substantial information burdens on courts nor distort judicial incentives. Judges routinely acquire the information necessary for applying the waiver in the process of ruling on various outcome-determinative motions by the parties (often prompted by the court) relating to dismissal, summary judgment, preliminary injunction, scope and intensity of discovery, class action certification, and judgment as a matter of law during and after trial. Nor is there reason to expect significant judicial abuse of the power to waive the user fee. Judges are unlikely to refrain from applying it to avoid the burden of resolving a substantial legal issue. Few judges would forgo such an opportunity to boost their professional reputation and influence. And in any event, it could be either unavailing, as the question may well come back to the judge on remand from the appellate court, or counterproductive, as any room on the docket will be quickly filled by a claim waiting in the queue. Empowering the presiding judge with discretion to tax litigants for court costs might also be viewed as problematic due to concerns that the judge could penalize a party for advancing unpopular arguments, which would thereby chill incentives to vigorously litigate the case. However, there is little evidence of judicial abuse of such discretionary power.[58] And if the certification standard from interlocutory appeals is

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57. Given that parties are already unlikely to game a waiver provision defined by the §1292 certification standard, it may be desirable to have a less-restrictive condition than the "controlling question of law." For example, courts could draw upon the well-established requirements for applying the rule of collateral estoppel to preclude relitigation of an issue decided in an earlier case. It should be noted that some of the requirements for applying collateral estoppel reduce the risk of using this doctrine to preclude relitigation of prior adjudications that may have been the product of collusion between the parties, or that may have been the product of significant asymmetry in the respective incentives of the adverse parties to invest in the litigation. Regarding the former risk, the proponent of collateral estoppel is required to show that the issue was not only actually and fully litigated in the prior adjudication, but also that its determination was logically and realistically relevant to the court's ruling (e.g., that the ruling on the particular issue was necessary to the outcome and not merely dictum). *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties."). Furthermore, because collateral estoppel is frequently applied in contribution cases to preclude relitigation of common questions of law and fact, adopting its requirements to delimit the scope of the user-fee waiver provision will not impose any new burden on the court or the parties.

58. *See* Gerald Stern, *Judicial Error that is Subject to Discipline in New York*, 32 HOFSTRA L. REV. 1547, 1547 (2004) (pointing out that judicial conduct commissions dismiss the great majority of the complaints they receive).

adopted for user-fee waivers, the substantial question of law requirement would make waivers less vulnerable to abuse because the decision could be readily reviewable by an appellate court.

V. APPLYING THE USER FEE TO COMMERCIAL CONTRACTS GENERALLY

In this Part we consider the appropriateness of applying our user-fee proposal to all commercial contracts. For the reasons previously advanced in support of applying our proposal to contribution claims, we conclude that the user fee should be applied to commercial-contract cases generally. We do, however, discuss a possible narrow exception for the small class of cases in which a user fee would discourage socially productive projects.

A. Extension to Commercial-Contract Cases

The argument for extending the proposed user fee to commercial contracts generally follows directly from the foregoing analysis of its application to contribution claims. First, the public good of deterrence can be disregarded because the proposal applies only to the internal commercial consequences for the contracting parties that flow from contract breach. These contracting parties have the incentive to minimize joint costs through predispute contracts that provide optimal terms to reasonably reduce the risks of breach, including by specifying the preferred means (courts or arbitration) for enforcing the terms of the agreement.[59] Second, the other public good of adjudication that we have discussed, precedent making, is addressed by the proposal's waiver provision, which would apply to any extension of the user fee.

Compensation objectives, though not necessarily involving a public good, should also be set aside. The reasons for this are unrelated to our proposed user fee. Essentially, civil liability is a poor and often counterproductive means of providing risk-averse parties with needed insurance.[60] In view of the prevalence of commercially

59. *See* Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 558 (2003) (arguing that arbitration is more accurate and therefore reduces the likelihood of under- and over-deterrence from contract breach); Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1594 (2005) (noting that arbitrators are more reliable interpreters of contracts than judges or juries).

60. *See* TILLINGHAST-TOWERS PERRIN, *supra* note 22, at 17; *see also* A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1469–70 (2010) (finding that the tort system is very expensive, as roughly two dollars of legal expenses are incurred for every dollar an accident victim receives).

and governmentally supplied insurance, we see no reason for compensation objectives to play a meaningful role in determining the extension of the user fee. Moreover, commercial parties can employ various standard or customized contract terms to address risk of loss from breach. In any event, arbitration is a fully adequate substitute for adjudication as a source of compensation. Indeed, arbitration may well be superior given its potential to deliver compensation at lower cost and with less delay than courts.[61]

The principal problem raised by applying the user fee generally to commercial-contract cases relates to situations in which making a predispute agreement entails more expected cost than benefit for the parties. For example, the parties may anticipate high negotiation costs and a small probability of reaching an agreement. In other cases they may perceive the risk of breach and resulting litigation as so remote as to justify considering the matter if and when the risk materializes. More generally, there will be cases in which the parties engage in transactions—usually sporadically or in a one-off deal—that involve relatively small amounts of money.

However, the practical opportunity to negotiate and conclude predispute contracts is by no means the entire problem. Indeed, exempting such cases for that reason alone would forfeit a large amount of the user fee's potential benefits. To be sure, in these cases, the user fee has no relevant influence over the parties' decision to litigate in court or pursue arbitration. Essentially, the parties end up in court by default. Yet, the user fee still plays a useful role in constraining the parties from overusing judicial resources while investing in litigation. By raising the costs of litigating contract claims in court, the user fee provides two benefits beyond influencing the parties' choice between adjudication and arbitration. First, increasing litigation costs will reduce the parties' investment in litigation and thereby lower their consumption of judicial resources toward the optimal level. Second, the expected increase in litigation costs also increases the costs of the joint venture, lowering the project's activity level and, correspondingly, its accident risk. Similarly, the expected increase in litigation will discourage the parties from opportunistically committing or claiming breach of contract. These benefits are obtained regardless of the parties' actual preference for court or arbitration. Because the motives for filing and investing more or less in lawsuits

61. *See* Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1200 (2003) (arguing that arbitration has achieved prominence in the United States largely due to the delays and costs which make judicial litigation remote and unattractive).

are rationally severable, the parties' frustrated preference is irrelevant to achieving the benefits from the application of the user fee.

B. Narrow Exception

There is one possible exception: a small class of cases in which elimination of the public subsidy for adjudication would discourage parties from engaging in socially productive projects. Such cases would be exceedingly rare as they require the conjunction of two highly unlikely conditions. First, the parties would lack a practical opportunity to negotiate and conclude predispute contracts specifying their preference for litigating in court or arbitration (or lack the means to pay for arbitration or other nonjudicial alternatives). Second, the monetary value of their project must be so small that its fate would be determined by adding the marginal expected expense of a user fee to the costs of litigating a commercial case in court. In our estimation, these conditions would not arise together in the vast majority of judicially adjudicated commercial-contract cases. To the extent that exemption for this small class of unusual cases is desirable, we suggest that courts or legislatures adopt an amount-in-controversy test that sets a low threshold for application of the user fee.

The key to the problematic nature of cases in which predispute contracting is uneconomical relates to the effect of the user fee on the parties' incentives to engage in socially productive, albeit low monetary value, joint ventures or other commercial deals. If the parties anticipate paying for the costs of enforcing their contracts in court, but lack the practical opportunity to opt for cheaper enforcement in arbitration, they may, in some cases, conclude that the expected costs of judicial enforcement outweigh the total expected net payoff from the deal. Basically, these contracting parties find themselves in a similar predicament to that of "strangers," who, as we noted above, face the choice between overpaying for adjudication and having no legal means of protecting their interests. In some of these cases, it is plausible to assume that the numbers will work out in favor of pricey adjudication, but in other cases they may compel the parties to forgo the deal altogether.

For example, suppose the parties expect that their investment of $50 on one project will yield a total payoff of $100 if a court or arbitrator enforces the contract terms, but only $40 if neither means of enforcement is available. Suppose further that for court enforcement, the parties' private litigation costs would be $35, the

public cost would be $20, and the arbitration cost would be $25. Finally assume that predispute contracting to specify arbitration would cost them $30. In this scenario, the parties would not spend $30 to save either $10 in litigation cost ($35 for court enforcement - $25 for arbitration enforcement) or even $25 in net profit after suit ($100 from arbitration enforcement - $50 project investment - $25 litigation cost). Hence they would face the difficult choice between judicial enforcement and no law enforcement. In the absence of a user fee, the parties would exercise their default option of suit because, while they would incur $35 in private litigation costs, the commitment to sue would preserve expected net profit of $15 ($100 if court enforcement - $50 project investment - $35 litigation cost). However, if they were charged the $20 user fee, total costs would exceed the expected net value of litigation, leading the parties to forgo suit and—lacking alternative means of enforcing the contract—to abandon the project altogether.[62] Of course, the parties could negotiate and conclude a postdispute agreement (for example, by contracting after suit commences) to arbitrate their contract claim and save the $10 extra cost of litigating their claim in court. Once the dispute arises, however, the parties' relative advantage in court and arbitration may vary given factual and legal attributes of the actual claim, so their preferences for adjudication versus arbitration may also have changed from what they were ex ante. Moreover, the parties may also inflate bargaining costs in fighting over splitting the $10 saving from opting for arbitration. Thus, while postdispute contracts for "alternative dispute resolution" provide a realistic option, these contracts are infrequently used due to bargaining costs and strategic obstacles.[63] Presuming the option of postdispute contract will be prohibitively expensive in some fraction of cases, we set it aside to focus on the problem at hand: applying the user fee when the parties could not practically avoid litigating their contract case in court.

We surmise that such problematic cases are likely to arise in a negligible fraction of commercial-contract situations. To begin with, a large number of litigable disputes involve large-scale projects or joint ventures in which the parties plainly possess the necessary

62. The $55 total cost of litigation ($35 litigation cost plus $20 user fee) yields $50 net contract-enforcement value ($100 if court enforcement - $50 project investment), rendering the suit, and consequently the project ($40 if no court enforcement - $50 project investment) uneconomical.

63. *See* Maurits Barendrecht & Berend R. De Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure on the Market for Dispute Resolution Services?* 7 CARDOZO J. CONFLICT RESOL. 83, 83 (2006) (discussing the psychological, strategic, and institutional costs of negotiating a procedure to resolve an ongoing dispute).

information, economic incentive, and practical means to negotiate and conclude predispute contracts. Notable examples include contract disputes over patent and other intellectual property joint ventures, purchase and sale of commercial real estate or medical and other professional partnerships, no-competition employment agreements, corporate mergers and acquisitions, and other financial deals. Many large-scale cases arise from joint-venture-related mass accidents, often including claims for contribution. There is exceedingly little chance that a contribution claim would qualify for exemption as it would be rare that the party seeking contribution would have a sufficiently "deep pocket" to bear disproportionate damages yet lack the strong profit motive to specify its choice between court and arbitration in a predispute contract. Coverage disputes between liability insurers or between the insurers and their joint-venture insureds provide another prime allocative example of mass-accident-spawned contract claims.[64] Similar to contribution claims, insurance-coverage disputes are an endemic feature of complex mass-accident litigation and rival the enormous amount of judicial resources consumed by the underlying litigation. Often, the central factual and legal questions presented in such litigation will be mooted by settlement in the underlying litigation.[65]

Again, the problem is not that predispute contracting is uneconomical. Although there may be many such situations, there is good reason to believe that predispute contracting is economical in the vast majority of cases due to the low cost of arbitration. Generally, contracting parties can readily and cheaply incorporate both relevant industry practice and standardized, streamlined, and inexpensive

64. For examples from the *Deepwater Horizon* disaster asking for declaratory judgment regarding the scope of Transocean's insurance policy based on reciprocal indemnity agreements between BP and Transocean, see Amended Complaint for Declaratory Judgment at 4, No. 02009 (S.D. Tex. June 8, 2010); and Complaint for Declaratory Judgment, Certain Underwriters at Lloyd's London v. BP PLC, No.10-1823 (S.D. Tex. May 21, 2010). For examples from other mass accident litigations, see Elger Mfg. Inc. v. Liberty Mut. Ins. Co., 972 F.2d 805, 805 (7th Cir. 1992) (interpreting the "trigger provision" for liability insurance coverage for product liability design claims by thousands of homeowners against a nationwide manufacturer of plastic plumbing systems); Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1034 (D.C. Cir. 1981) (reviewing rights and obligations of parties under general liability policies issued to manufacturer of thermal insulation products containing asbestos).

65. *Cf.* San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, 162 Cal. App. 3d 358, 361–74 (1984) (reviewing insurer's duty to provide independent counsel when divergent interests between insurer and insured are brought about by terms of the coverage policy); Alan O. Sykes, *Judicial Limitations on the Discretion of Liability Insurers to Settle or Litigate: An Economic Critique*, 72 TEX. L. REV. 1345, 1345–48 (1994) (exploring judicial constraints on an insurer's discretion to reject settlement offers and the potential of rejected offers to lead to litigation that results in a judgment in excess of both the settlement offer and policy limits).

modes of arbitration into their contracts.[66] The pertinent information will be supplied to the parties by their insurers, bankers, and trade associations, as well as by their lawyers. Arbitration associations supply information about the various arbitral options free of charge to potential buyers. Sellers of insurance and financial products and services also supply this information, which works to spread the market cost amongst those who actually purchase the good.[67]

But even if many cases involve uneconomic predispute contracting, we think that it is highly unlikely that a problematic case will arise in which the prospect of a user fee determines the fate of a potentially productive commercial project. The simple reason is that it would be most unusual for the parties to sue over a commercial-contract matter involving stakes so small that charging the parties a user fee would decide the fate of their project. Few such claims find their way into court. The high private costs and risks of litigation see to that.

Because these cases are likely to be few in number and to present complex project- and litigation-specific questions, it is doubtful that it would be cost effective for courts to conduct a factual inquiry to identify problematic cases that qualify for exemption from the user fee. We think that the best way to avoid this cost is to impose an amount-in-controversy requirement,[68] such as that used in diversity cases to allocate federal-court resources.[69] The amount in controversy can be determined with little difficulty in most cases by simply examining the damage allegations in the pleadings.[70]

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66. THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 291 (3d ed. 2009).

67. *See, e.g.*, *Major Arbitration and Mediation Rules and ADR Programs*, AM. ARB. ASS'N, http://www.adr.org/commercial_arbitration (last visited Sept. 24, 2011) (providing information on institution's role in the dispute resolution process, such as designing and developing alternative dispute resolution systems for various organizations).

68. However, it seems likely that legislation would have to establish an amount-in-controversy test.

69. *See* 28 U.S.C. § 1332 (2006) (setting the amount-in-controversy requirements for federal diversity jurisdiction cases in the district courts at $75,000 and at $5 million for class actions removed from state courts).

70. There may be some complicated cases. The most difficult would be those in which the stakes involved in the particular dispute fall below the proposed amount-in-controversy threshold, but the ruling would resolve questions of more general application to the parties' contractual relationship. Thus, courts should go beyond the pleadings to examine the nature of the transaction and the parties' businesses to determine whether the dispute arises from a unique, one-off deal for both parties, such as the purchase and sale of a piece of property or small business, or whether it arises as a part of a course of dealings or from one series of actual or potential transactions, such that the value of the adjudication to either or both parties in the aggregate exceeds the amount in controversy. For example, although less than the amount in controversy may be involved in a particular dispute concerning a truck-leasing contract, the requirement may be met by the aggregate value of resolving the dispute as applied to similar

VI. CONCLUSION

In closing we offer additional comments on the design and application of the proposed user fee. First, we underscore the general warrant for applying the user fee to commercial contracts. By eliminating the excessive incentive of contracting parties to litigate commercial-contract cases in court, the user fee should lower the average delay cost and thereby increase the average deterrence effect across other types of civil cases. The main reason to apply the user fee in commercial-contract cases and not in other types of civil actions is that, in the former, contracting parties possess the practical means as well as the strong motivation to minimize total costs of the project through optimal contract terms governing price, performance, and resolution of potential disputes.[71] These contracts consequently minimize total social costs (except for the overconsumption of judicial resources). In other types of civil cases, parties lacking access to judicially enforced civil liability would not be similarly situated to minimize the sum of social costs from accident risk and use of courts.[72]

Second, while we suggested the possibility that a certain class of commercial-contract claims might be exempted from the user fee, we emphasized that there is no empirical evidence suggesting the need for such an exemption. As we explained, the problematic contract cases require the unlikely confluence of two key factors: the deals

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pending or potential disputes. However, we conjecture that courts will incur little cost to conduct such inquiry. By the time the user fee is assessed at the close of the case, the courts will usually be able to apply information they have already acquired and examined for other purposes, such as in reviewing discovery, affidavits, and other party submissions to decide dispositive motions and the like.

71. *See* Johnson & Matherne, *supra* note 10, at 86 (stating that defense, indemnity, and insurance obligations are common in oil industry contracts in the Gulf of Mexico).

72. Indeed, in many "contract" cases, the parties are not effectively motivated to minimize the total social costs of the deal. Although the seller usually is a commercial party, we do not extend the scope of our proposal to the typical consumer goods contract. The principal reason is that the disparity in information between the individual consumer and the commercial seller is likely to prevent the parties from reaching a privately and socially optimal arrangement regarding the terms governing the choice between judicial and arbitral resolution of disputes. Despite competition pressures, the seller is apt to promulgate a one-sided standard form contract in its favor regarding predispute terms. *See* Jaime Dodge & David Rosenberg, *Collective Adjudication of Financial Services and Other Cross-Border Mass Injury Cases*, 2010 EUR. J. CONSUMER L. 141, 172–76. The widespread use of arbitration clauses that bar class actions is evidence of the socially undesirable nature of these contracts. Such anti-class-action clauses vest the seller with superior litigation power over the consumer and thereby not only skew the outcome of disputes in its direction but also disable arbitrators from investing optimally in deciding the common questions in dispute. *Id.* at 145–53. It is troubling that in the recent decision of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011), enforcing arbitration provisions that bar class actions, neither the majority nor the dissenting opinion addressed the biasing effects of such clauses.

must involve a relatively high risk of contract breach and a low margin of profit. The exemption might be justified, depending on administrative cost, if these conditions obtained to such an extent that the contracting parties (1) could not afford the costs of either incorporating an arbitration clause into their contract or paying the user fee for adjudication and therefore lacked the means to legally enforce the contract; *and consequently* (2) would be compelled to forgo their project altogether. Assuming that it might be necessary and worthwhile for society to promote such projects by publicly subsidizing the adjudication of related contract disputes, we recommended adopting an amount-in-controversy test set at a very low dollar threshold to counter the incentive of contracting parties to game the exemption or simply to overinvest in litigating claims in court. To avoid such contract disputes consuming high-priced judicial services, we suggest assigning exempted cases to lower-priced specialized or small-claims courts.[73]

Third, some additional observations about the scope of the waiver are in order. In commercial-contract cases, most of the legal questions relate to "default rules" that courts establish to fill gaps, clarify terms, and provide other content that parties would probably prefer, but that would entail substantial costs for them to negotiate and specify in their contracts.[74] However, unlike legal precedents in regulatory cases that are legally binding, default rules are only presumptively binding. Contracting parties can freely accept or reject judicially proffered default rules according to their determination of how useful and costly it would be for them to customize their arrangement. Moreover, to a large extent, trade associations, book publishers, lawyers, arbitrators, and other nonjudicial sources devise and supply optional default rules. As such, why should the public subsidize the courts that make these rules? The best explanation is that default rules, as a species of precedent, provide a public good that litigants would often invest too little in producing in the absence of the

73. In very small contract claim cases, the extent of the public subsidy for adjudication is open to empirical question. Essentially, the taxes businesses pay to fund courts can be viewed as the premium for public insurance covering some "average" amount of adjudicative services in the event a contractual dispute arises. Thus, even absent a user fee, consumption of judicial resources is not completely subsidized because business taxes help pay for judicial resources. Payment of such an ex ante tax might support exempting cases of the problematic sort described above. Of course, litigants in these cases would have an incentive to overuse courts so levying a user fee would still be necessary to prevent excessive consumption of judicial resources.

74. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 89–92 (1989) (commenting that default rules are rules that parties would have negotiated if the costs of negotiating every contingency were sufficiently low).

subsidy. However, arbitration is a close substitute for courts in making default rules, particularly in major areas of business that are organized on the basis of specialized, technically sophisticated knowledge and industry-specific customs and practices. But this argument overlooks the regulatory dimension of judicially created default rules. Courts fashion default rules not only to save private contracting costs. These relatively standardized rules together with canons of contract construction are also designed to avoid unnecessary expenditure of judicial resources on interpretation and enforcement of contracts. Essentially, these public "adjudicative" savings are passed through to the contracting parties in lower user fees and other litigation expenses, hence lowering total project costs. In short, exempting default rulemaking from the user fee produces combined private and judicial cost savings that outweigh the public cost of the subsidy.[75]

Finally, as we have explained, in motivating the contracting parties to arbitrate more commercial-contract cases, the user fee will open up space on dockets to enable speedier access to courts for the other types of civil cases. Reducing delay costs for such cases may well increase the rate and volume of their litigation. Consequently, court congestion is likely to remain constant notwithstanding the application of the user fee.[76] Solving the problem of court congestion will take more than a user fee. For example, whole classes of litigation must be removed from judicial purview (e.g., by adopting a no-fault insurance regime for automobile accidents), and the substantive and procedural elements of liability in many areas must be modified (e.g., by expanding use of consumer-contract class actions). Despite its limits, however, making contracting parties pay for adjudication of their commercial-contract disputes will redirect a significant amount of judicial resources to higher and better social uses.

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75. In clarifying the scope of the waiver provision, we emphasize that one type of legal question in contribution cases should not benefit from publicly subsidized adjudication regardless of its substantiality. As we previously noted, contribution cases may raise questions of law that were presented but mooted by settlement in the underlying litigation between plaintiffs and (some or all of) the joint venturers. While these legal questions are real, relevant, and necessary to adjudicating the contribution case, the parties have incentives to collusively seek a mutually beneficial ruling that adversely affects potential plaintiffs—plaintiffs who the present contribution litigants, as repeat players, may contemplate facing in future cases.

76. *See* Priest, *supra* note 34, at 529–30 (noting that the adoption of more sophisticated settlement methods, such as Alternative Dispute Resolution, seems to have little effect on court congestion).