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2011 Cumulative Supplement

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Chapter 1

TERRITORIAL (PERSONAL) JURISDICTION

D. INTERNATIONAL PERSONAL JURISDICTION

1. Same Tests, Similar Application

At Text page 46, add as Note 10:

The Supreme Court further explored personal jurisdiction in an international context in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) and in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

In *Goodyear*, a bus accident in France killed two boys from North Carolina. The boys' parents sued The Goodyear Tire and Rubber Company, an Ohio corporation, and three of that company's foreign subsidiaries, alleging that the accident was caused by a defective tire made in Turkey at the plant of one of the subsidiaries. The parents venued the action in North Carolina state court, and the three foreign subsidiaries challenged personal jurisdiction. A unanimous Supreme Court upheld the defense.

Because the episode-in-suit, the bus accident, occurred in France, and the tire alleged to have caused the accident was manufactured and sold abroad, North Carolina courts lacked specific jurisdiction to adjudicate the controversy. . . . Were the foreign subsidiaries nonetheless amenable to general jurisdiction in North Carolina courts? Confusing or blending general and specific jurisdictional inquiries, the North Carolina courts answered yes. Some of the tires made abroad by Goodyear's foreign subsidiaries, the North Carolina Court of Appeals stressed, had reached North Carolina through "the stream of commerce"; that connection, the Court of Appeals believed, gave North Carolina courts the handle needed for the exercise of general jurisdiction over the foreign corporations. [Citation omitted]

A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction. Such a connection does not establish the "continuous and systematic" affiliation necessary to empower North Carolina courts to entertain claims unrelated to the foreign corporation's contacts with the State.

131 S. Ct. at 2851.

Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952) thus remains the only Supreme Court decision post-*International Shoe Co. v. Washington*, 326 U.S. 310 (1945) in which general jurisdiction has been deemed applicable. The Supreme Court thinks that: “For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” 131 S. Ct. at 2853-54. It is doubtful whether anything else counts as enough for the exercise of general jurisdiction, especially after *Goodyear*.

A more complex issue is presented in *Mcintyre*. In that case, plaintiff Nicastro was injured while using a metal-shearing machine manufactured by defendant McIntyre. Nicastro sued in New Jersey, where the accident occurred. McIntyre was incorporated in England, operated there, and made the relevant machine there. An independent distributor sold McIntyre’s machines in the United States and sold only one machine (the relevant one) in New Jersey. Effectively, McIntyre’s only contact with New Jersey was its general desire that the independent American distributor sell McIntyre machines to anyone in the United States willing to buy them. The question presented, therefore, was whether a New Jersey state court could properly exercise personal jurisdiction over McIntyre, a foreign manufacturer, so long as McIntyre “[knew] or should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.” 131 S. Ct. at 2785 (quoting from the New Jersey Supreme Court decision).

Justice Kennedy’s plurality opinion, joined by Chief Justice Roberts, and Justices Scalia and Thomas, said no, “The defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.” 131 S. Ct. at 2788. In so opining, the plurality took to task Justice Brennan’s opinion in *Asahi* for in effect saying that when a defendant places a product into the stream of commerce, personal jurisdiction is still fair under the Due Process Clause as long as the defendant could foresee suit in the relevant jurisdiction. *Id.* “Justice Brennan’s concurrence, advocating a rule based on general notions of fairness and foreseeability, is inconsistent with the premises of lawful judicial power. This Court’s precedents make clear that it is the defendant’s actions, not his expectations, that empower a State’s courts to subject him to judgment.” 131 S. Ct. at 2789.

But Justices Breyer and Alito only concurred in the judgment in *Mcintyre*, not Justice Kennedy's reasoning. 131 S. Ct. at 2792-93. The two concurring Justices concluded that the New Jersey Supreme Court's articulated test was too automatic in favor of jurisdiction and that Justice Kennedy's plurality-opinion test was too strict. Justices Breyer and Alito instead reasoned that the plaintiff simply failed to prove that the single sale to New Jersey on the facts of the case supported an exercise of specific personal jurisdiction.

Justice Ginsburg then dissented, along with Justices Sotomayor and Kagan. These three Justices opined that *Mcintyre* should not be able to escape personal jurisdiction in New Jersey merely through the device of using an independent distributor. Instead, if *Mcintyre* "targeted the United States (including all the States that constitute the Nation)," 131 S. Ct. at 2797, then *Mcintyre* should be subject to suit in a specific state such as New Jersey. The three dissenters concluded that the effort to take to task Justice Brennan's concurring opinion in *Asahi* was effectively unnecessary, and that, in any event, *Asahi* was an easily distinguishable case. 131 S. Ct. at 2802-03.

What, then, does *Mcintyre* mean? That is hard to say. It did not give the clear guidance on "stream of commerce" personal jurisdiction theory for which some readers hoped. Plainly, it is not enough for a plaintiff to assert personal jurisdiction in a particular state merely on the basis that the defendant introduced a product into commerce that conceivably could wind up in the state. But that is not new law. Beyond that, *Mcintyre* will have to be construed narrowly in accordance with the *Marks* doctrine, i.e. when no single rationale commands a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[t] on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). Sweeping generalizations do not flow from the case.

Chapter 2

SUBJECT MATTER JURISDICTION

B: THE TWO MAJOR TYPES OF FEDERAL SUBJECT MATTER JURISDICTION

At page 94, concerning the citizenship of corporations, the Supreme Court held in *The Hertz Corp. v. Friend*, 130 S.Ct. 1181 (2010), that the principal place of business is the “nerve center.” This is the place where corporate decisions are made, and will usually be the headquarters. The decision puts an end to the debate over whether courts are to consider the “nerve center” or the “muscle center” or some combination (“place of activities”) in assessing the principal place of business.

C. SUPPLEMENTAL JURISDICTION

2. Statutory Analysis

At page 101, please replace Hypo #3 and the succeeding paragraph as follows:

Two plaintiffs, P-1 and P-2, both citizens of New York, join in a single case to sue D, who is a citizen of Florida. The claims arise from the same nucleus of operative fact and arise under state law. P-1’s claim against D exceeds \$75,000. P-2’s claim against D, however, is for \$50,000. Right away we see that P-1’s claim against D satisfies the reqts for diversity of citizenship. But P-2’s claim against D does not. Although the parties are of diverse citizenship, that claim does not exceed \$75,000. Moreover, because the case is not brought by a single plaintiff against a single defendant, the two claims cannot be aggregated. And since the claim arises under state law, it will not invoke federal question jurisdiction.

So what happens to the claim by P-2? In *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939), the Supreme Court held that it could not be joined in the same case as P-1’s claim. It concluded that *each* claim must meet the amount-in controversy requirement. Because P-2’s claim does not, it must be dismissed. P-1’s claim against D, however, can remain in federal court because it invoked diversity of citizenship jurisdiction.

D. EXPANSION OF JURISDICTION THROUGH STATUTORY GRANTS BASED UPON MINIMAL DIVERSITY

At page 154, before Note on Burden of Proof on Removal, add:

Obviously, the exceptions to CAFA require the district court to consider several factors in deciding whether to keep a case. In considering these factors, does the court limit itself to pleadings, or is it to look at evidence? The Ninth Circuit has held that a court must apply the local controversy exception to CAFA on the face of the pleadings only. It notes that there are three elements to that exception, and relies on statutory language on each. First, whether “significant relief is sought” – the court concludes that “sought” implies that it is limited to the pleadings. Second is whether defendant’s “alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class.” Here, too, the court concludes that it is limited to pleadings and may not look at evidence. But the third requirement is different. It is whether defendant “is a citizen of the” forum state. The use of “is” here implies that a fact must be established by evidence, not merely asserted in pleadings. *Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010 (9th Cir. 2011). The court was motivated in part by a fear that considering evidence on such matters as how many class members were citizens of the forum would force mini-trials on topics that overlapped with consideration of the merits.

Earlier decisions from two other courts are consistent with the Ninth Circuit approach of relying on pleadings. *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1245 (10th Cir. 2009); *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 157 (3d Cir. 2009).

On the other hand, the Eleventh Circuit has looked at extrinsic evidence on the “significant basis” element, though it failed to address why or whether the evidence was properly considered. *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1167-1168 (11th Cir. 2006).

At page 154, in Note on Burden of Proof on Removal, add:

The Seventh Circuit has decided two especially interesting CAFA cases. In *In re Sprint Nextel Corp.*, 593 F.3d 669 (7th Cir. 2010), plaintiffs brought a class action in state court, alleging that Sprint Nextel, a Kansas corporation, had conspired with other cellphone providers to impose artificially high prices for text messaging. The putative class consisted of Kansas residents with local telephone or billing numbers.

After defendant removed the case to federal court, plaintiffs argued that the home-state exception to CAFA applied. The Seventh Circuit, adopting a holding from the First Circuit, held that the home-state exception's reference to two-thirds means two-thirds of the members of the present class only, and not two-thirds of all plaintiffs in all related actions. The statutory reference to plural classes addresses a single case in which more than one class is asserted, and not multiple related cases. 593 F.3d at 672, *citing* Hanaford Bros. Co. Customer Data Security Breach Litig., 564 F.3d 75, 78-79 (1st Cir. 2009).

Nonetheless, the court concluded that the plaintiffs failed to satisfy their evidentiary burden of proving application of the exception by a preponderance of the evidence. The home-state exception requires that two-thirds of the class members be *citizens* (not residents) of the forum. Plaintiffs presented Kansas cell phone numbers and mailing addresses as evidence that two-thirds of the specified class were Kansas citizens. The court concluded, however, that this evidence, while perhaps indicating residence, was too speculative to show citizenship. It remanded to the district court with instructions that that court permit the plaintiffs to try again to demonstrate application of the home-state exception.

In *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 905 (7th Cir. 2010), plaintiffs sued in Illinois state court, alleging breach of warranty and product liability claims against Learjet, which is an Illinois corporation. Learjet removed the case to federal court, after which plaintiff moved to certify two classes. The district court denied certification and concluded that its refusal to certify a class eliminated federal jurisdiction under CAFA. Therefore, it remanded the case to state court. Learjet petitioned for leave to appeal the order of remand, arguing that refusal to certify did not destroy a federal court's jurisdiction.

The Seventh Circuit, in an opinion by Judge Posner, agreed. It concluded that subject matter jurisdiction attaches when the case is filed, which is, obviously, before any class is certified. Thus, “federal jurisdiction under the Class Action Fairness Act does not depend on certification. . . .” 592 F.3d at 806, *citing* Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1268 n.12 (11th Cir. 2009). It held that jurisdiction attaches when a class action is filed which will always happen prior to a ruling on certification. Rejection of certification does not divest the federal court of subject matter jurisdiction.

Chapter 3

JOINDER OF PARTIES AND CLAIMS

B. CLASS LITIGATION

Note: The American Law Institute's Principles of the Law of Aggregate Litigation were adopted and promulgated by the Institute on May 20, 2009, and have now been published in final form without substantial change from the provisions of the proposed final draft discussed at points though out this chapter. *See, e.g.*, Text, pages 198, 259-60, 262-63, 268, 270-72, 279, 289, 308, 326-27, 331.

2. Class Actions under Federal Rule 23

a. Rule 23(a) Requirements

At Text, page 169, insert the following parenthetical at the end of subdivision 2.a.:

(The importance of complying with Rule 23 is underscored by the Supreme Court's decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S.Ct. 1431 (2010), holding that, in a diversity case, Rule 23 permitted certification of a class action to recover statutory penalties prescribed by New York law even though New York rules of civil practice barred the maintenance of class actions to recover such penalties. This application of the *Erie* doctrine, which has generated considerable controversy, commanded no majority opinion. Justice Scalia, writing for himself and Justices Roberts, Thomas, and Sotomayor, concluded that Rule 23 clearly applied and was valid under the Rules Enabling Act because it regulated the manner and means of enforcing substantive rights, rather than the definition of those rights. Justice Ginsburg in a dissent joined by Justices Kennedy, Breyer, and Alito, concluded that New York law should be interpreted in light of important state regulatory interests, and that so construed, it was not in conflict with Rule 23 because it governed only the eligibility for a particular remedy, rather than the procedural aspects of class certification. Justice Stevens, who provided the necessary fifth vote for the majority, did not join in its reasoning. Rather, he argued that some state rules procedural in form nevertheless may be so bound up with state definitions of substantive rights that they must govern to avoid infringing the Rules of Decision Act's mandate that the Federal Rules must not abridge, enlarge or modify any substantive right. However, in his view, the New York

rule did not fall into that category. In view of the fractured nature of the decision, its future implications are uncertain. *See generally* Richard D. Freer and Thomas C. Arthur, *The Irrepressible Influence of Byrd*, 44 Creighton L. Rev. 61 (2010); Stephen B. Burbank and Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. Pa. L. Rev. 17 (2010.)

iii. Commonality and Typicality

At Text, page 179, insert the following sentence at the end of the first partial paragraph:

This conclusion undoubtedly will be revised in light of the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, *infra*. After *Dukes*, the “commonality” issue is likely to pose a significant obstacle to class certification in all class actions.

At Text, page 179, numbered paragraph 2, revise the first sentence of the paragraph to read as follows:

“In fact, before the Supreme Court’s 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*, the commonality requirement rarely appeared to be determinative . . . [etc.]”

At Text pages 182 through page 185, paragraph 2, Dukes v. Wal-Mart Stores, Inc.:

Replace this material with the following:

In *Dukes v. Wal-Mart Stores, Inc.*—which may be the largest employment discrimination class action in history—the Ninth Circuit, in a lengthy six-to-five *en banc* opinion, substantially affirmed the district court’s certification, under Rule 23(b)(2) (discussed *infra*), of a nationwide class action alleging that Wal-Mart had engaged in gender discrimination in pay and promotions in violation of Title VII of the Civil Rights Act of 1964 throughout its operations. Plaintiffs sought declaratory and injunctive relief, back pay, and punitive (but not compensatory) damages on behalf of the class. In the following principal opinion, the Supreme Court reversed, holding that class certification was improper, both (1) because the “commonality” requirement of Rule 23(a) was not satisfied, and (2) because the action did not meet the requirements for certification under Rule 23(b)(2). The Court was unanimous on the second point, which is discussed *infra*, part B.2.b.ii, dealing with subdivision (b)(2). By contrast, the Court divided five-

to-four on whether the “commonality” requirement of Rule 23(a) was satisfied:

WAL-MART STORES, INC. v. DUKES
Supreme Court of the United States
564 U.S. ____ (2011)

JUSTICE SCALIA delivered the opinion of the Court.

We are presented with one of the most expansive class actions ever. The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal-Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women. In addition to injunctive and declaratory relief, the plaintiffs seek an award of backpay. We consider whether the certification of the plaintiff class was consistent with Federal Rules of Civil Procedure 23(a) and (b)(2).

I

A

Petitioner Wal-Mart is the Nation’s largest private employer. It operates four types of retail stores throughout the country: Discount Stores, Supercenters, Neighborhood Markets, and Sam’s Clubs. Those stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. Each store has between 40 and 53 separate departments and 80 to 500 staff positions. In all, Wal-Mart operates approximately 3,400 stores and employs more than one million people.

Pay and promotion decisions at Wal-Mart are generally committed to local managers’ broad discretion, which is exercised “in a largely subjective manner.” Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.

Promotions work in a similar fashion. Wal-Mart permits store managers to apply their own subjective criteria when selecting candidates as “support managers,” which is the first step on the path to management. Admission to Wal-Mart’s management training program, however, does require that a candidate meet certain objective criteria, including an above-average performance rating, at least one year’s tenure in the applicant’s current position, and a willingness to relocate. But except for those requirements,

regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—*e.g.*, assistant manager, co-manager, or store manager—is similarly at the discretion of the employee’s superiors after prescribed objective factors are satisfied.

B

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal-Mart employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e–1 *et seq.*

....

These plaintiffs, respondents here, do not allege that Wal-Mart has any express corporate policy against the advancement of women. Rather, they claim that their local managers’ discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees, see 42 U. S. C. §2000e–2(k). And, respondents say, because Wal-Mart is aware of this effect, its refusal to cabin its managers’ authority amounts to disparate treatment, see §2000e–2(a). Their complaint seeks injunctive and declaratory relief, punitive damages, and backpay. It does not ask for compensatory damages.

Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to *all* Wal-Mart’s female employees. The basic theory of their case is that a strong and uniform “corporate culture” permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart’s thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at Wal-Mart’s stores in a nationwide class action.

C

Class certification is governed by Federal Rule of Civil Procedure 23. Under Rule 23(a), the party seeking certification must demonstrate, first, that:

“(1) the class is so numerous that joinder of all members is impracticable,

“(2) there are questions of law or fact common to the class,

“(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

“(4) the representative parties will fairly and adequately protect the interests of the class” (paragraph breaks added).

Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b). Respondents rely on Rule 23(b)(2), which applies when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”

Invoking these provisions, respondents moved the District Court to certify a plaintiff class consisting of “[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices.’” As evidence that there were indeed “questions of law or fact common to” all the women of Wal-Mart, as Rule 23(a)(2) requires, respondents relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal-Mart’s female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a “social framework analysis” of Wal-Mart’s “culture” and personnel practices, and concluded that the company was “vulnerable” to gender discrimination. . . .

D

A divided en banc Court of Appeals substantially affirmed the District Court’s certification order. The majority concluded that respondents’ evidence of commonality was sufficient to “raise the common question whether Wal-Mart’s female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII.” It also agreed with the District Court that the named plaintiffs’ claims were sufficiently typical of the class as a whole to satisfy Rule 23(a)(3), and that they could serve as adequate class representatives, see Rule 23(a)(4). With respect to the Rule 23(b)(2) question, the Ninth Circuit held that respondents’ backpay claims could be certified as part of a (b)(2) class because they did not “predominat[e]” over the requests for declaratory and injunctive relief, meaning they were not “superior in

strength, influence, or authority” to the nonmonetary claims.⁴

Finally, the Court of Appeals determined that the action could be manageably tried as a class action because the District Court could adopt the approach the Ninth Circuit approved in *Hilao v. Estate of Marcos*, 103 F. 3d 767, 782–787 (1996). There compensatory damages for some 9,541 class members were calculated by selecting 137 claims at random, referring those claims to a special master for valuation, and then extrapolating the validity and value of the untested claims from the sample set. The Court of Appeals “s[aw] no reason why a similar procedure to that used in *Hilao* could not be employed in this case.” . . . It would allow Wal-Mart “to present individual defenses in the randomly selected ‘sample cases,’ thus revealing the approximate percentage of class members whose unequal pay or nonpromotion was due to something other than gender discrimination.”

II

The class action is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” . . . In order to justify a departure from that rule, “a class representative must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members.” *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U. S. 395, 403 (1977) Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate. The Rule’s four requirements—numerosity, commonality, typicality, and adequate representation—“effectively ‘limit the class claims to those fairly encompassed by the named plaintiff’s claims.’” *General Telephone Co. of Southwest v. Falcon*, 457 U. S. 147, 156 (1982)

A

The crux of this case is commonality—the rule requiring a plaintiff to show that “there are questions of law or fact common to the class.” Rule

⁴ To enable that result, the Court of Appeals trimmed the (b)(2) class in two ways: First, it remanded that part of the certification order which included respondents’ punitive-damages claim in the (b)(2) class, so that the District Court might consider whether that might cause the monetary relief to predominate. Second, it accepted in part Wal-Mart’s argument that since class members whom it no longer employed had no standing to seek injunctive or declaratory relief, as to them monetary claims must predominate. It excluded from the certified class “those putative class members who were no longer Wal-Mart employees *at the time Plaintiffs’ complaint was filed*” (emphasis added).

23(a)(2).⁵ That language is easy to misread, since “[a]ny competently crafted class complaint literally raises common ‘questions.’” Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N. Y. U. L. Rev. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members “have suffered the same injury,” *Falcon*, *supra*, at 157. This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

“What matters to class certification ... is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.” Nagareda, *supra*, at 132.

Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that “sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,” 457 U. S., at 160, and that certification is proper only if “the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied,” *id.*, at 161; see *id.*, at 160 (“[A]ctual, not presumed, conformance with Rule

⁵ In light of our disposition of the commonality question, however, it is unnecessary to resolve whether respondents have satisfied the typicality and adequate-representation requirements of Rule 23(a).

23(a) remains ... indispensable”). Frequently that “rigorous analysis” will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped. “[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” *Falcon, supra*, at 160⁶ Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation. See *Szabo v. Bridgeport Machines, Inc.*, 249 F. 3d 672, 676–677 (CA7 2001) (Easterbrook, J.).

In this case, proof of commonality necessarily overlaps with respondents’ merits contention that Wal-Mart engages in a *pattern or practice* of discrimination.⁷ That is so because, in resolving an individual’s Title VII

⁶ A statement in one of our prior cases, *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156, 177 (1974), is sometimes mistakenly cited to the contrary: “We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” But in that case, the judge had conducted a preliminary inquiry into the merits of a suit, not in order to determine the propriety of certification under Rules 23(a) and (b) (he had already done that), but in order to shift the cost of notice required by Rule 23(c)(2) from the plaintiff to the defendants. To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other pretrial purpose, it is the purest dictum and is contradicted by our other cases.

Perhaps the most common example of considering a merits question at the Rule 23 stage arises in class-action suits for securities fraud. Rule 23(b)(3)’s requirement that “questions of law or fact common to class members predominate over any questions affecting only individual members” would often be an insuperable barrier to class certification, since each of the individual investors would have to prove reliance on the alleged misrepresentation. But the problem dissipates if the plaintiffs can establish the applicability of the so-called “fraud on the market” presumption, which says that all traders who purchase stock in an efficient market are presumed to have relied on the accuracy of a company’s public statements. To invoke this presumption, the plaintiffs seeking 23(b)(3) certification must prove that their shares were traded on an efficient market, . . . an issue they will surely have to prove *again* at trial in order to make out their case on the merits.

⁷ In a pattern-or-practice case, the plaintiff tries to “establish by a preponderance of the evidence that ... discrimination was the company’s standard operating procedure[,] the regular rather than the unusual practice.” *Teamsters v. United States*, 431 U. S. 324, 358 (1977) If he succeeds, that showing will support a

claim, the crux of the inquiry is “the reason for a particular employment decision,” *Cooper v. Federal Reserve Bank of Richmond*, 467 U. S. 867, 876 (1984). Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the crucial question *why was I disfavored*.

B

This Court’s opinion in *Falcon* describes how the commonality issue must be approached. There an employee who claimed that he was deliberately denied a promotion on account of race obtained certification of a class comprising all employees wrongfully denied promotions and all applicants wrongfully denied jobs. . . . We rejected that composite class for lack of commonality and typicality, explaining:

“Conceptually, there is a wide gap between (a) an individual’s claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual’s claim and the class claim will share common questions of law or fact and that the individual’s claim will be typical of the class claims.”

Falcon suggested two ways in which that conceptual gap might be bridged. First, if the employer “used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a).” *Id.*, at 159, n. 15. Second, “[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.” *Ibid.* We think that statement precisely describes respondents’ burden in this case. The first manner of bridging the gap obviously has no application here; Wal-Mart has no testing procedure or other companywide evaluation method that can be

rebuttable inference that all class members were victims of the discriminatory practice, and will justify “an award of prospective relief,” such as “an injunctive order against the continuation of the discriminatory practice.” *Teamsters, supra*, at 361.

charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.

The second manner of bridging the gap requires “significant proof” that Wal-Mart “operated under a general policy of discrimination.” That is entirely absent here. Wal-Mart’s announced policy forbids sex discrimination, and as the District Court recognized the company imposes penalties for denials of equal employment opportunity. The only evidence of a “general policy of discrimination” respondents produced was the testimony of Dr. William Bielby, their sociological expert. Relying on “social framework” analysis, Bielby testified that Wal-Mart has a “strong corporate culture,” that makes it “‘vulnerable’” to “gender bias.” He could not, however, “determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart. At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking.” 222 F. R. D. 189, 192 (ND Cal. 2004). The parties dispute whether Bielby’s testimony even met the standards for the admission of expert testimony under Federal Rule of Civil Procedure 702 and our *Daubert* case, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993). The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so, but even if properly considered, Bielby’s testimony does nothing to advance respondents’ case. “[W]hether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking” is the essential question on which respondents’ theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard what he has to say. It is worlds away from “significant proof” that Wal-Mart “operated under a general policy of discrimination.”

C

The only corporate policy that the plaintiffs’ evidence convincingly establishes is Wal-Mart’s “policy” of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have said “should itself raise no inference of discriminatory conduct,” *Watson v. Fort Worth Bank & Trust*, 487 U. S. 977, 990 (1988).

To be sure, we have recognized that, “in appropriate cases,” giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since “an employer’s undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination.” *Id.*, at 990–991. But

the recognition that this type of Title VII claim “can” exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements. And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s. A party seeking to certify a nationwide class will be unable to show that all the employees’ Title VII claims will in fact depend on the answers to common questions.

Respondents have not identified a common mode of exercising discretion that pervades the entire company—aside from their reliance on Dr. Bielby’s social frameworks analysis that we have rejected. In a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.

The statistical evidence consists primarily of regression analyses performed by Dr. Richard Drogin, a statistician, and Dr. Marc Bendick, a labor economist. Drogin conducted his analysis region-by-region, comparing the number of women promoted into management positions with the percentage of women in the available pool of hourly workers. After considering regional and national data, Drogin concluded that “there are statistically significant disparities between men and women at Wal-Mart . . . [and] these disparities . . . can be explained only by gender discrimination.” Bendick compared work-force data from Wal-Mart and competitive retailers and concluded that Wal-Mart “promotes a lower percentage of women than its competitors.”

Even if they are taken at face value, these studies are insufficient to establish that respondents’ theory can be proved on a classwide basis. . . . As Judge Ikuta observed in her dissent, “[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district level.” A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs’ theory of commonality depends.

There is another, more fundamental, respect in which respondents' statistical proof fails. Even if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal-Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists. Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance-based criteria—whose nature and effects will differ from store to store. In the landmark case of ours which held that giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory, the plurality opinion *conditioned* that holding on the corollary that merely proving that the discretionary system has produced a racial or sexual disparity *is not enough*. “[T]he plaintiff must begin by identifying the specific employment practice that is challenged.” *Watson*, 487 U. S., at 994 That is all the more necessary when a class of plaintiffs is sought to be certified. Other than the bare existence of delegated discretion, respondents have identified no “specific employment practice”—much less one that ties all their 1.5 million claims together. Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice.

Respondents' anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory. In *Teamsters v. United States*, 431 U. S. 324 (1977), in addition to substantial statistical evidence of company-wide discrimination, the Government (as plaintiff) produced about 40 specific accounts of racial discrimination from particular individuals. That number was significant because the company involved had only 6,472 employees, of whom 571 were minorities, and the class itself consisted of around 334 persons. Here, by contrast, respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal-Mart's 3,400 stores. Even if every single one of these accounts is true, that would not demonstrate that the entire company “operate[s] under a general policy of discrimination,” which is what respondents must show to certify a companywide class.

The dissent misunderstands the nature of the foregoing analysis. It criticizes our focus on the dissimilarities between the putative class members on the ground that we have “blend[ed]” Rule 23(a)(2)'s commonality requirement with Rule 23(b)(3)'s inquiry into whether common questions “predominate” over individual ones. That is not so. We quite agree that for purposes of Rule 23(a)(2) “[e]ven a single [common] question” will do. We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there *is* “[e]ven a single [common] question.” And

there is not here. Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.

In sum, we agree with [Ninth Circuit] Chief Judge Kozinski that the members of the class:

“held a multitude of different jobs, at different levels of Wal–Mart’s hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed Some thrived while others did poorly. They have little in common but their sex and this lawsuit.” (dissenting opinion).

....

Reversed.

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in part and dissenting in part.

....

Whether the class the plaintiffs describe meets the specific requirements of Rule 23(b)(3) is not before the Court, and I would reserve that matter for consideration and decision on remand. The Court, however, disqualifies the class at the starting gate, holding that the plaintiffs cannot cross the “commonality” line set by Rule 23(a)(2). In so ruling, the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment.

I

A

Rule 23(a)(2) establishes a preliminary requirement for maintaining a class action: “[T]here are questions of law or fact common to the class.” The Rule “does not require that all questions of law or fact raised in the litigation be common,” 1 H. Newberg & A. Conte, *Newberg on Class Actions* §3.10, pp. 3–48 to 3–49 (3d ed. 1992); indeed, “[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement,” Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 *Colum. L. Rev.* 149, 176, n.110 (2003). See Advisory Committee’s 1937 Notes on Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 138 (citing with approval cases in which “there was only a question of law or fact

common to” the class members).

A “question” is ordinarily understood to be “[a] subject or point open to controversy.” American Heritage Dictionary 1483 (3d ed. 1992). See also Black’s Law Dictionary 1366 (9th ed. 2009) (defining “question of fact” as “[a] disputed issue to be resolved ... [at] trial” and “question of law” as “[a]n issue to be decided by the judge”). Thus, a “question” “common to the class” must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members’ claims.

B

The District Court, recognizing that “one significant issue common to the class may be sufficient to warrant certification,” . . . found that the plaintiffs easily met that test. . . .

The District Court certified a class of “[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998.” . . . The named plaintiffs, led by Betty Dukes, propose to litigate, on behalf of the class, allegations that Wal-Mart discriminates on the basis of gender in pay and promotions. They allege that the company “[r]eli[es] on gender stereotypes in making employment decisions such as ... promotion[s] [and] pay.” Wal-Mart permits those prejudices to infect personnel decisions, the plaintiffs contend, by leaving pay and promotions in the hands of “a nearly all male managerial workforce” using “arbitrary and subjective criteria.” Further alleged barriers to the advancement of female employees include the company’s requirement, “as a condition of promotion to management jobs, that employees be willing to relocate.” Absent instruction otherwise, there is a risk that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men.

Women fill 70 percent of the hourly jobs in the retailer’s stores but make up only “33 percent of management employees.” 222 F.R.D., at 146. The plaintiffs’ “largely uncontested descriptive statistics” also show that women working in the company’s stores “are paid less than men in every region” and “that the salary gap widens over time even for men and women hired into the same jobs at the same time.”

The District Court identified “systems for ... promoting in-store employees” that were “sufficiently similar across regions and stores” to conclude that “the manner in which these systems affect the class raises issues that are common to all class members.” Vacancies are not regularly posted; from among those employees satisfying minimum qualifications, managers choose whom to promote on the basis of their own subjective impressions.

Wal-Mart’s compensation policies also operate uniformly across stores, the

District Court found. The retailer leaves open a \$2 band for every position's hourly pay rate. Wal-Mart provides no standards or criteria for setting wages within that band, and thus does nothing to counter unconscious bias on the part of supervisors.

Wal-Mart's supervisors do not make their discretionary decisions in a vacuum. The District Court reviewed means Wal-Mart used to maintain a "carefully constructed ... corporate culture," such as frequent meetings to reinforce the common way of thinking, regular transfers of managers between stores to ensure uniformity throughout the company, monitoring of stores "on a close and constant basis," and "Wal-Mart TV," "broadcas[t] ... into all stores."

The plaintiffs' evidence, including class members' tales of their own experiences, suggests that gender bias suffused Wal-Mart's company culture. Among illustrations, senior management often refer to female associates as "little Janie Qs." One manager told an employee that "[m]en are here to make a career and women aren't." A committee of female Wal-Mart executives concluded that "[s]tereotypes limit the opportunities offered to women."

Finally, the plaintiffs presented an expert's appraisal to show that the pay and promotions disparities at Wal-Mart "can be explained only by gender discrimination and not by ... neutral variables." Using regression analyses, their expert, Richard Drogin, controlled for factors including, *inter alia*, job performance, length of time with the company, and the store where an employee worked. The results, the District Court found, were sufficient to raise an "inference of discrimination."

C

The District Court's identification of a common question, whether Wal-Mart's pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware. The risk of discrimination is heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.

....

We have held that "discretionary employment practices" can give rise to Title VII claims, not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results. See *Watson v. Fort Worth Bank & Trust*, 487 U. S. 977, 988, 991 (1988). . . . In

Watson, as here, an employer had given its managers large authority over promotions. An employee sued the bank under Title VII, alleging that the “discretionary promotion system” caused a discriminatory effect based on race. Four different supervisors had declined, on separate occasions, to promote the employee. Their reasons were subjective and unknown. The employer, we noted “had not developed precise and formal criteria for evaluating candidates”; “[i]t relied instead on the subjective judgment of supervisors.”

Aware of “the problem of subconscious stereotypes and prejudices,” we held that the employer’s “undisciplined system of subjective decisionmaking” was an “employment practic[e]” that “may be analyzed under the disparate impact approach.”

The plaintiffs’ allegations state claims of gender discrimination in the form of biased decisionmaking in both pay and promotions. The evidence reviewed by the District Court adequately demonstrated that resolving those claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal-Mart’s stores. Rule 23(a)(2), setting a necessary but not a sufficient criterion for class-action certification, demands nothing further.

II

A

The Court gives no credence to the key dispute common to the class: whether Wal-Mart’s discretionary pay and promotion policies are discriminatory. See *ante* . . . (“Reciting” questions like “Is [giving managers discretion over pay] an unlawful employment practice?” “is not sufficient to obtain class certification.”). “What matters,” the Court asserts, “is not the raising of common ‘questions,’” but whether there are “[d]issimilarities within the proposed class” that “have the potential to impede the generation of common answers.”

The Court blends Rule 23(a)(2)’s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer “easily satisfied,” 5 J. Moore et al., *Moore’s Federal Practice* §23.23[2], p. 23–72 (3d ed. 2011). Rule 23(b)(3) certification requires, in addition to the four 23(a) findings, determinations that “questions of law or fact common to class members predominate over any questions affecting only individual members” and that “a class action is superior to other available methods for ... adjudicating the controversy.”

The Court’s emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions “predominate” over individual issues. And by asking whether the individual differences “impede”

common adjudication, the Court duplicates 23(b)(3)'s question whether "a class action is superior" to other modes of adjudication. Indeed, Professor Nagareda, whose "dissimilarities" inquiry the Court endorses, developed his position in the context of Rule 23(b)(3). See 84 N. Y. U. L. Rev., at 131 (Rule 23(b)(3) requires "some decisive degree of similarity across the proposed class" because it "speaks of common 'questions' that 'predominate' over individual ones"). . . . If courts must conduct a "dissimilarities" analysis at the Rule 23(a)(2) stage, no mission remains for Rule 23(b)(3).

Because Rule 23(a) is also a prerequisite for Rule 23(b)(1) and Rule 23(b)(2) classes, the Court's "dissimilarities" position is far reaching. Individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met. . . .

B

The "dissimilarities" approach leads the Court to train its attention on what distinguishes individual class members, rather than on what unites them. Given the lack of standards for pay and promotions, the majority says, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's."

Wal-Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion, *Watson* held, is a practice actionable under Title VII when it produces discriminatory outcomes. A finding that Wal-Mart's pay and promotions practices in fact violate the law would be the first step in the usual order of proof for plaintiffs seeking individual remedies for company-wide discrimination. . . . That each individual employee's unique circumstances will ultimately determine whether she is entitled to backpay or damages, §2000e-5(g)(2)(A) (barring backpay if a plaintiff "was refused ... advancement ... for any reason other than discrimination"), should not factor into the Rule 23(a)(2) determination.

. . . .

NOTES AND QUESTIONS

1. There is little doubt that *Dukes* is a watershed decision, but the full extent of its impact is uncertain. In an editorial published the day after the decision, the New York Times argued that "the majority opinion . . . will make it substantially more difficult for class-action suits in all manner of cases to move forward" and that "[n]ow, without saying what the actual

standard of proof is, the majority requires the potential members of a class show that they are likely to prevail at trial when they seek initial certification. In this change, the court has made fact-finding a major part of certification, increasing the cost and stakes of starting a class action.” *Wal-Mart Wins. Workers Lose*, New York Times, June 21, 2011, A26. Do you agree with this appraisal? Is a more limited reading possible?

2. Justice Scalia’s opinion does refer to the necessity to *consider* merits issues in determining whether the requirements of Rule 23 are satisfied. Review the critical passage. Does his opinion also require a trial court actually to *resolve* merits issues in ruling on class certification? Does it require a finding of a “probability of success” on the merits as the Times editorial argues? Or, as Justice Scalia’s opinion later suggests, does it merely require “significant proof” of a common discriminatory policy affecting all class members in the same way—proof that the majority concluded was lacking in *Dukes*?

As discussed in more detail, *infra*, Part B.2.b.iii (d), the extent to which merits issues must not simply be addressed, but *resolved*, on motion for class certification has posed considerable difficulties. The implications of *Dukes* in this respect are at best unclear. In particular it is unclear whether the majority in *Dukes* required the plaintiff to prove, by a preponderance of the evidence, after taking defendant’s contradictory evidence into account, that a common discriminatory policy affecting all class members in the same way existed, or simply required the plaintiffs to offer “significant proof” that it did. Does the second paragraph in the Court’s footnote 6 shed any light on this question?

3. According to Justice Scalia, why was Dr. Bielby’s “social framework analysis” insufficient? Why was plaintiffs’ statistical proof of discriminatory impact insufficient? Why was their anecdotal evidence insufficient? Does *Dukes* in effect foreclose subsequent Title VII class actions based on the discriminatory impact of discretionary employment practices? On remand, will it be possible for the *Dukes* plaintiffs to restructure their case so that a number of more limited class actions may proceed?

4. If *Dukes* effectively forecloses class proceedings in employment discrimination cases based on discretionary employment practices, will individual litigation remain viable in view of the potentially enormous expense of maintaining such actions? *See infra*, Chapter 7 discussing the basis for fee awards in such cases.

5. Does *Dukes* represent a major tightening of “commonality” analysis in all class actions, not just Title VII cases? Does *Dukes* reject the previously prevailing view that the “commonality” requirement is easily satisfied and requires that only one common question among the class exist? Under *Dukes*,

to satisfy the “commonality” requirement, must the named plaintiffs show, in all class actions, that the ultimate liability of the defendant to each class member turns on the same common questions of fact (*i.e.*, that the “answers” to the question of liability turn on common questions)? If not, what does *Dukes* require?

6. Both the majority and the dissent in *Dukes* rely upon the Court’s decision in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), holding that subjective employment policies may violate Title VII if they are shown to have had a discriminatory impact, even if they were not motivated by discriminatory intent. In *Watson*, the Court stated:

We are also persuaded that disparate impact analysis is in principle no less applicable to subjective employment criteria than to objective or standardized tests. In either case, a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices. It is true, to be sure, that an employer’s policy of leaving promotion decisions to the unchecked discretion of lower level supervisors should itself raise no inference of discriminatory conduct. Especially in relatively small businesses like respondent’s, it may be customary and quite reasonable simply to delegate employment decisions to those employees who are most familiar with the jobs to be filled and with the candidates for those jobs. It does not follow, however, that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain. In this case, for example, petitioner was apparently told at one point that the teller position was a big responsibility with “a lot of money ... for blacks to have to count.” Such remarks may not prove discriminatory intent, but they do suggest a lingering form of the problem that Title VII was enacted to combat. If an employer’s undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII’s proscription against discriminatory actions should not apply. In both circumstances, the employer’s practices may be said to “adversely affect [an individual’s] status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(2). We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.

In a later part of her opinion joined only by a plurality (including

Justice Scalia), Justice O'Connor discussed the evidentiary standards for proving a discriminatory impact case based on subjective employment criteria as follows:

First, we note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. Although this has been relatively easy to do in challenges to standardized tests, it may sometimes be more difficult when subjective selection criteria are at issue. Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities. . . .

Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. Our formulations, which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation.

7. Under *Watson*, would each member of the putative class in *Dukes* be entitled to present precisely the same expert evidence that the named plaintiffs presented in *Dukes* regarding Wal-Mart's discretionary employment practices in support of individual claims of discrimination? If so, why wasn't the requirement of Rule 23(a)(2) that "there are questions of law or fact common to the class" satisfied?

8. Justice Scalia's majority opinion in *Dukes* appears to conclude that showing that a discretionary employment policy is accompanied by statistical disparities in pay or promotion is insufficient as a matter of substantive law to establish a violation of Title VII. Is this reading of *Watson* justified? If so, what more must be shown? Does the dissent disagree with this reading of *Watson*, or is it more focused on whether a single question of liability common to the class exists, regardless of whether other facts might ultimately defeat a liability showing?

9. Is Justice Ginsburg correct in suggesting that the majority has improperly imported Rule 23(b)'s "predominance" requirement into Rule 23(a)? Or does the "typicality" requirement of Rule 23(a) itself implicitly incorporate a requirement for a considerable degree of class unity and cohesion going beyond the mere existence of some "common question"? (Whether this

requirement of sufficient “glue” to hold the class together is viewed as deriving from the “commonality” or “typicality” requirements of Rule 23 seems immaterial, since both are essential preconditions to the certification of any class action under Rule 23. The critical question is not the nomenclature, but how much “glue” is required. Does *Dukes* shed much light on the answer to that question outside of its specific context?)

10. Could it also be argued that even if the commonality requirement had been satisfied in *Dukes*, the action for declaratory and injunctive relief should not have been certified under subdivision (b)(2) because, regardless of the existence of some “common question,” plaintiffs had not shown that defendant had “acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole”? Rule 23(b)(2) (emphasis added). Unless a causal connection between Wal-Mart’s challenged policies and the alleged discrimination suffered by each class member could be shown by common proof, would those policies, in themselves, make declaratory or injunctive relief with respect to the entire class appropriate?

11. For a forceful argument that the real dispute in *Dukes* relates to the legal question whether Title VII makes illegal “structural” discrimination, such as Wal-Mart’s alleged practice of delegating excessive subjective discretion to local managers, which in turn enabled them to discriminate—even if unconsciously—against women, see Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 156 (2009) (“[t]he inference of a common wrong depends crucially on whether prohibited discrimination under Title VII encompasses the ‘conduit’ and ‘nexus’ notions of discrimination advanced in *Dukes*”). Professor Nagareda’s discussion of *Dukes* comes in the context of a broader argument that proper determination of class certification questions under Rule 23 often turns on a previous determination of the governing law, which in turn will reveal whether dissimilarities within the class that defeat class certification exist.

At Text, page 185, renumber paragraph 3 to be paragraph 12, and revise the first sentence to read as follows:

12. Should defenses unique to the class representative defeat commonality or typicality?

At Text, page 186, add the following at the end of renumbered paragraph 12 at the top of the page:

; *Randall v. Rolls-Royce Corp.*, 637 F.3d 818 (7th Cir. 2011) (class certification properly denied where claims of named class representatives were not typical because they were subject to defenses that would not defeat other class members’ claims). Cf. *CE Design Ltd. v. King Architectural Metals, Inc.*, 637

F.3d 721 (7th Cir. 2011) (class representative may be inadequate where she is subject to substantial, unique defenses that might distract conduct of the litigation, or where she is subject to “serious” credibility issues bearing on key issues in suit).

At Text, page 186, renumber numbered paragraph 4 to be paragraph 13.

iv. Adequate Representation

At Text, page 193-94, add the following new material at the end of numbered paragraph 8:

In *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137 (2009), Professor Jay Tidmarsh proposes abandoning the traditional approach to evaluating adequacy of representation focused primarily on conflicts of interest among and between class members and the named class representatives and/or collusion by the class representative or class counsel, in favor of “a single, easily determined metric: Representation by class representatives and counsel is adequate if, and only if, the representation makes class members no worse off than they would have been if they had engaged in individual litigation.” *Id.* at 1139.

In support of this departure, he argues that the Supreme Court has failed to provide meaningful guidance on how closely aligned the interests of the class must be, and that we “do not know whether a representative can stand in only for those claimants whose interests are exactly the same shade of grey, or, if not, how close the shades of grey must be.” *Id.* at 1156. Accordingly, the conflicts test for adequate representation “seems poorly suited for a world that involves a multiplicity of interests among class members.” *Id.* Moreover, an approach to adequate representation based on conflicts and collusion “has a deontological ring to it; it is a duty-based requirement that must be satisfied regardless of the consequences.” *Id.* By contrast, the justification for class litigation ultimately is “consequentialist” and utilitarian in nature. *Id.* Finally, he contends that conflicts of interest are inherent in most class litigation, not only in actions certified under Rule 23(b)(1) and (b)(2), but also in those certified under Rule 23(b)(3), and that rigorous enforcement of an interest-based adequate representation requirement therefore would prevent the certification of most class actions. Thus, an identity-of-interests approach to adequate representation is, in his view, unworkable. *Id.* at 1174-75. By contrast, Professor Tidmarsh contends that his “do no harm” approach to the issue, under which representation is adequate provided that no class member is worse off than she would be in individual litigation, would be “easy to apply” and would more closely mediate the self-interested behavior of class representatives and class counsel with the utilitarian, harm avoidance, and efficiency-based

underpinnings of class litigation itself. *See id.* at 1176, 1181. “The ‘do no harm’ principle insists that in exercising their autonomous right to advance their own litigation interests, [class representatives and class counsel] do not act in a way that harms the litigation interests of those for whom they serve as agents. It guarantees that the ‘society’ created by the class representative and class counsel works together for mutual advantage; the representative and counsel cannot represent those that the class action places at a disadvantage in relation to their autonomous right to bring individual litigation.” *Id.* at 1186.

Is Professor Tidmarsh’s confidence that his approach would be easily administered justified, particularly given that it admittedly would require the court to calculate, *for each class member*, their prospective recovery in individual litigation, multiplied by the probability of that recovery, and discounted by the costs of individual litigation, in comparison with the corresponding probable and cost-discounted recovery in the class action? *See id.* at 1177-78. How would this be done at the outset of litigation? Even if that difficulty could be overcome, is his proposal persuasive given his recognition that it would not require class recovery to be maximized and would tolerate grossly unequal allocations of recovery between class members and class representatives and class counsel? (For example, he advances the hypothetical of a negative-value suit in which 10 million customers have lost \$2 apiece as the result of an illegal overcharge, and acknowledges that the “do no harm” principle “would be satisfied if the case settled for \$10,000,003, with the class representative receiving \$3, the class counsel receiving \$10 million, and the remaining class members receiving nothing.” *Id.* at 1191.) In short, the “do no harm” principle would not require the net recovery and efficiency gains from the class proceeding to be equitably distributed among the class members. Professor Tidmarsh argues that this difficulty is tempered by the trial judge’s power to reject a class settlement on the ground that it is not fair, reasonable and adequate. *Id.* at 1193.

At Text, page 196, add the following at the end of numbered paragraph 5:

For a rare case holding that the district court properly refused to certify the class because the named plaintiff possessed insufficient knowledge of or interest in the action and was merely lending his name to the suit, *see Monroe v. The City of Charlottesville, Virginia*, 579 F.3d 380 (4th Cir. 2009).

b. The Rule 23(b) “Categories” of Class Actions

ii. Rule 23(b)(2)

**(b) The Problem of Monetary Relief in
Actions Maintained under Rule 23(b)(2)**

Delete Text pages 223-238 and replace it with the following:

As previously noted, the Supreme Court, in *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___ (2011), *supra*, unanimously agreed that the certification of the *Dukes* class action seeking back pay on behalf of a nationwide class of Wal-Mart employees under Rule 23(b)(2) was improper. The portion of the Court’s opinion dealing with that issue follows:

III

We also conclude that respondents’ claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2). Our opinion in *Ticor Title Ins. Co. v. Brown*, 511 U. S. 117, 121 (1994) (*per curiam*) expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.

A

Rule 23(b)(2) allows class treatment when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” One possible reading of this provision is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule. The key to the (b)(2) class is “the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.” Nagareda, 84 N. Y. U. L. Rev., at 132. In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

That interpretation accords with the history of the Rule. Because Rule 23 “stems from equity practice” that predated its codification, *Amchem Products, Inc. v. Windsor*, 521 U. S. 591, 613 (1997), in determining its meaning we have previously looked to the historical models on which the Rule was based,

Ortiz v. Fibreboard Corp., 527 U. S. 815, 841–845 (1999). As we observed in *Amchem*, “[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples” of what (b)(2) is meant to capture. 521 U. S., at 614. In particular, the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order. In none of the cases cited by the Advisory Committee as examples of (b)(2)’s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction. . . .

Permitting the combination of individualized and classwide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class. For that reason these are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. [Rule 23(b)(3), by contrast,] allows class certification in a much wider set of circumstances but with greater procedural protections. Its only prerequisites are that “the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Rule 23(b)(3). And unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive “the best notice that is practicable under the circumstances” and to withdraw from the class at their option. See Rule 23(c)(2)(B).

Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member’s individualized claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class. Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence

of notice and opt-out violates due process. See *Phillips Petroleum Co. v. Shutts*, 472 U. S. 797, 812 (1985). While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.

B

Against that conclusion, respondents argue that their claims for backpay were appropriately certified as part of a class under Rule 23(b)(2) because those claims do not “predominate” over their requests for injunctive and declaratory relief. They rely upon the Advisory Committee’s statement that Rule 23(b)(2) “does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages.” 39 F. R. D., at 102 (emphasis added). The negative implication, they argue, is that it *does* extend to cases in which the appropriate final relief relates only partially and nonpredominantly to money damages. Of course it is the Rule itself, not the Advisory Committee’s description of it, that governs. And a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule’s text, and that does obvious violence to the Rule’s structural features. The mere “predominance” of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)’s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt-out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a “predominating request”—for an injunction.

Respondents’ predominance test, moreover, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief. In this case, for example, the named plaintiffs declined to include employees’ claims for compensatory damages in their complaint. That strategy of including only backpay claims made it more likely that monetary relief would not “predominate.” But it also created the possibility (if the predominance test were correct) that individual class members’ compensatory-damages claims would be *precluded* by litigation they had no power to hold themselves apart from. . . .

. . . .

Finally, respondents argue that their backpay claims are appropriate for a (b)(2) class action because a backpay award is equitable in nature. The latter may be true, but it is irrelevant. The Rule does not speak of “equitable” remedies generally but of injunctions and declaratory judgments. As Title VII itself makes pellucidly clear, backpay is neither. See 42 U. S. C. §2000e–5(g)(2)(B)(i) and (ii) (distinguishing between declaratory and injunctive relief

and the payment of “backpay,” see §2000e–5(g)(2)(A)).

C

In *Allison v. Citgo Petroleum Corp.*, 151 F. 3d 402, 415 (CA5 1998), the Fifth Circuit held that a (b)(2) class would permit the certification of monetary relief that is “incidental to requested injunctive or declaratory relief,” which it defined as “damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief.” In that court’s view, such “incidental damage should not require additional hearings to resolve the disparate merits of each individual’s case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations.” We need not decide in this case whether there are any forms of “incidental” monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause. Respondents do not argue that they can satisfy this standard, and in any event they cannot.

Contrary to the Ninth Circuit’s view, Wal-Mart is entitled to individualized determinations of each employee’s eligibility for backpay. Title VII includes a detailed remedial scheme. If a plaintiff prevails in showing that an employer has discriminated against him in violation of the statute, the court “may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, [including] reinstatement or hiring of employees, with or without backpay ... or any other equitable relief as the court deems appropriate.” §2000e–5(g)(1). But if the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the “hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay.” §2000e–5(g)(2)(A).

We have established a procedure for trying pattern-or-practice cases that gives effect to these statutory requirements. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, “a district court must usually conduct additional proceedings ... to determine the scope of individual relief.” *Teamsters*, 431 U. S., at 361. At this phase, the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to “demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.”

The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The

percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. . . . We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to “abridge, enlarge or modify any substantive right,” 28 U. S. C. §2072(b) . . . , a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being “incidental” to the classwide injunction, respondents’ class could not be certified even assuming, *arguendo*, that “incidental” monetary relief can be awarded to a 23(b)(2) class.

NOTES AND QUESTIONS

1. Before the Supreme Court’s decision in *Dukes*, the courts of appeals had adopted various approaches to the propriety of certifying actions seeking both declaratory or injunctive relief and monetary relief, such as back pay and/or compensatory and punitive damages, under subdivision (b)(2). The principal decisions are reviewed on pages 223-238 of the Text. The leading and most influential approach was that of the Fifth Circuit in the *Allison* case, cited by the Supreme Court. *Allison*, drawing upon what the Supreme Court in *Dukes* characterized as a “negative implication” from the Advisory Committee Note to subdivision (b)(2), concluded that an action seeking both declaratory and injunctive relief and monetary relief could be certified under subdivision (b)(2) so long as the predominant relief sought was injunctive or declaratory. According to the court, this meant that any monetary relief must be “incidental to the requested injunctive or declaratory relief. . . . By incidental, we mean damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class . . . as a whole is established. . . . Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member’s circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual’s case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations.” 151 F.3d at 415. Notwithstanding, this explanation, however, the Fifth Circuit said that it would continue to adhere to circuit precedent that permitted the recovery of back pay in actions certified under subdivision (b)(2). That was because back pay was one element of the equitable “make whole” remedy authorized by

Title VII “similar to other forms of affirmative injunctive relief permitted in (b)(2) actions . . .” *Id.* By contrast, requests for compensatory and punitive damages were not “incidental” to equitable relief because they were not subject to objective, mathematical calculation, but turned on the individual, subjective circumstances of each class member. “The very nature of these damages, compensating plaintiffs for emotional and other intangible injuries, necessarily implicates the subjective differences of each plaintiff’s circumstances; they are an individual, not class-wide, remedy. The amount of compensatory damages to which any individual class member might be entitled cannot be calculated by objective standards. Furthermore, by requiring individualized proof of discrimination and actual injury to each class member, compensatory damages introduce new and substantial legal and factual issues.” *Id.* at 417.

By contrast, the Second Circuit, in *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147 (2d Cir. 2001), rejected this absolute exclusion of cases seeking compensatory and punitive damages from subdivision (b)(2), instead adopting a multi-factor balancing approach under which the district court should exercise its discretion to determine the relative importance of the remedies sought under all of the circumstances of the case, including whether reasonable plaintiffs would have sought declaratory and injunctive relief in absent a request for damages.

Finally, in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), the Ninth Circuit initially adopted an approach that appeared to turn upon an appraisal of the plaintiff’s primary motivation in bringing the action. In *Dukes* itself, however, the *en banc* panel abandoned this approach in favor of an analysis of whether the claims for monetary relief were “superior in strength, influence, or authority” to the nonmonetary claims.

2. It seems clear that the Supreme Court in *Dukes* “swept the deck clean” of all of these approaches. Although the Court cites the “incidental damages” standard of *Allison*, it does so only *arguendo*, holding that plaintiffs could not satisfy this standard because individualized determinations would be required to determine the amount of back pay, if any, to which they would be entitled. The Court pointedly reserves the question whether any form of monetary relief might be sufficiently “incidental” to a request for declaratory or injunctive relief to warrant certification of the entire action under Rule 23(b)(2), strongly suggesting that such cases must be extremely rare, if not non-existent. Further, the Court clearly rejects a key aspect of *Allison*—its holding that back pay *may* be awarded in an action certified under subdivision (b)(2) because it is an integral part of the equitable make whole remedy prescribed by Title VII.

3. Given the Court’s reasoning, can you envision any form of monetary relief that could be included in a class certified under Rule 23(b)(2)?

4. The Supreme Court was unanimous in this aspect of its opinion. Why do you suppose the dissenters were not more concerned? Is it because the necessity for notice and the right to opt out where monetary relief turning on the individual circumstances of each class member is at stake seems so apparent and because the dissenters did not believe that this additional requirement would pose a significant obstacle to civil rights enforcement? If so, were they correct in this last respect? Consider, for example, whether the statutory provision for awards of attorney’s fees in successful civil rights litigation (discussed in Chapter 7) provides a sufficient incentive to maintain such actions solely seeking injunctive and declaratory relief. Consider also whether individual Title VII plaintiffs have the resources to maintain a complex action, like *Dukes*, that does not turn on discrete acts of discriminatory treatment.

5. *Dukes* appears to leave open the possibility of “hybrid” certification in Title VII actions, under which class claims for declaratory and injunctive relief may be certified under subdivision (b)(2) and class claims for monetary relief may be certified under subdivision (b)(3). Does this provide a satisfactory answer to the concerns raised in the previous paragraph? Will cases seeking monetary relief always satisfy the “predominance” and “superiority” requirements of Rule 23(b)(3)? (Reconsider this question after your study of subdivision (b)(3), discussed *infra*.) Will a right to opt out significantly impede the ability of the parties to reach a comprehensive settlement under which the defendant affords some relief to all members of the plaintiff class without the necessity of a full trial in exchange for “total peace”? If a member of the class determines to opt out of the class proceedings addressing the issue of monetary relief, will she be able to invoke the collateral estoppel effect of the liability judgment entered in the phase I proceedings under (b)(2)?

iii. Rule 23(b)(3)

(a) Introduction

At Text, page 239, add the following new paragraph at the end of numbered paragraph 1:

For a helpful discussion of the predominance and superiority requirements of Rule 23(b)(3), see *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services, Inc.*, 601 F.3d 1159 (11th Cir. 2010). That action involved a class action challenge to hospital reimbursements. The court of appeals focused on variations in contracts and the necessity to litigate individual defenses such as waiver and ratification in determining that the district court had abused its discretion in finding the predominance

and superiority requirements to be satisfied. Even if the defendant's challenged conduct was based on a uniform policy rather than on the individual terms of the contracts, the questions of breach turned on what the individual contracts required and on the parties' course of dealing. Citing its previous decision in *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), the court of appeals stated that predominance turns on whether resolution of the common issues will have a more substantial impact on the resolution of each class member's claim than the remaining individual issues. The need for multiple subclasses (in this case based on six alleged types of contracts and the laws of six states) indicated that predominance and superiority were not satisfied. The court also rejected any firm distinction between liability and damages issues, saying that individual damages issues will not defeat predominance where damages can be calculated based on a formula or a statistical or mechanical method. *See also Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009) (to find predominance, the common issues must have a direct impact on every class member's effort to establish liability that is more important than the impact of individual issues).

At Text, page 244, add the following at the end of numbered paragraph 11:

See also Myers v. Hertz Corp., 624 F.3d 537 (2d Cir. 2010) (stating that although it is well established that the existence of a defense potentially implicating different class members differently does not necessarily defeat class certification, it is equally well established that courts must consider potential defenses in assessing the predominance requirement. Plaintiffs must show that the "more substantial" aspects of the litigation will be susceptible to generalized proof for all class members).

(d) The Relevance of the Merits in Ruling on Class Certification

At Text, page 267, add the following new paragraph after the end of the quotation from the Second Circuit's opinion in IPO:

Another important decision taking the same approach as *IPO* is *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008) in which the issue was whether the plaintiff could prove that defendants' alleged price fixing conspiracy had impacted all of the members of the class with evidence common to the class, thus satisfying the predominance requirement for class certification under Rule 23(b)(3). The trial court had granted class certification based on the testimony of plaintiffs' expert, without evaluating the weight of the testimony of defendants' expert. The court of appeals vacated and remanded, holding that a trial court may not certify a class based on a "threshold showing," but rather must find by a preponderance of

the evidence that all of the requirements of Rule 23 are satisfied, even if those findings overlap with the merits and even if they require evaluating the credibility of competing expert testimony.

At Text, page 268, add the following at the end of numbered paragraph 1:

In *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S.Ct. 2179 (2011), the Supreme Court unanimously rejected the Fifth Circuit’s requirement that the plaintiff must prove “loss causation” to obtain class certification in a securities fraud class action. However, the Court’s opinion appeared to accept that individual question of reliance would prevent class certification, and observed that plaintiffs must prove that the securities in question were traded in an “efficient market” to invoke the *Basic* presumption of reliance. In this respect, the Court’s opinion (in conjunction with the second paragraph of footnote 6 of the Court’s subsequent opinion in *Wal-Mart Stores, Inc. v. Dukes*, *supra*) might be read to have implicitly endorsed the approach of *IPO* and *Hydrogen Peroxide*. Ultimately, however, the Court declined definitively to resolve that question, stating that “[b]ecause we conclude the Court of Appeals erred by requiring EPJ Fund to prove loss causation at the certification stage, we need not, and do not, address any other question about *Basic*, its presumption, or how and when it may be rebutted.” *Id.* at 2187

At Text, page 268, replace numbered paragraph 3 with the following:

3. The American Law Institute’s Principles of the Law of Aggregate Litigation (2010) appears to follow the results in *IPO* and *Hydrogen Peroxide*. See *id.* § 2.06. For a general endorsement of increased scrutiny of the merits on class certification as consistent with the traditional “gatekeeping” role of judges, see Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 Geo. Wash. L. Rev. 324 (2011) (predicting that this trend is likely to magnify the workload of lawyers and judges, result in the certification of fewer classes, diminish trial court discretion, and promote more frequent settlement class certifications).

At Text, page 268, insert the following new paragraphs 5, 6, and 7 after numbered paragraph 4:

5. As previously discussed, the Supreme Court’s important decision in *Wal-Mart Stores, Inc. v. Dukes* strongly reaffirms the necessity of addressing merits issues in determining whether the requirements of Rule 23 are satisfied. In that case, the critical issue was whether all members of the putative class had been similarly affected by the same discriminatory employment practice. The majority appears to have held that the commonality requirement was not satisfied because plaintiffs had offered no “significant proof” that they were. Does this decision endorse the results in

IPO and *Hydrogen Peroxide* by requiring a district court to resolve factual disputes bearing on commonality and the other requirements of Rule 23 and to find that those requirements are satisfied by a preponderance of the evidence? (In this regard, consider also the Court’s ultimate conclusion that “[b]ecause respondents provide no *convincing proof* of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question. . .” (emphasis added).) Or does it merely require that the plaintiff have offered some “significant proof” that they are, regardless of whether the defendant has presented conflicting evidence? Consider in this connection not only the text of the majority opinion in *Dukes* addressing this issue, but also the second paragraph of footnote 6 to the opinion. If only “significant proof” is required, is *Dukes* consistent with *IPO* and *Hydrogen Peroxide*?

6. What constitutes “significant proof” (or “convincing proof”)? Is it proof that a reasonable juror could accept and that would be sufficient to withstand a motion for summary judgment or judgment as a matter of law? If more than that is required, does it make sense to require the plaintiffs to advance a greater degree of proof on issues that are identical to merits issues on motion for class certification than would be required for them to prevail at trial?

7. Note also the majority’s strong implication in *Dukes* that expert testimony submitted in support of (or opposition to) class certification must satisfy *Daubert* standards for admissibility. (For a discussion of *Daubert*, see *infra*, Ch. 9.C.5.) This issue has troubled the courts of appeals, but the emerging weight of authority has held that *Daubert* is fully applicable to expert evidence submitted on motion for class certification. See, e.g., *American Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010).

(e) The “Superiority Requirement of Rule 23(b)(3)

At Text, page 270, add the following at the end of numbered paragraph 7:

Compare *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010) (disproportionality of statutory to actual damages, enormity of potential class damages award, or defendant’s alleged good faith are not grounds for finding that a class action is not “superior”); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 145 (2^d Cir. 2001) (Sotomayor, J.) (“The effect of certification on parties’ leverage in settlement negotiations is a fact of life for class action litigants.”).

iv. The American Law Institute’s Proposed Reconceptualization

At text, page 271, fifth full paragraph: The references to §§ 2.04(a)(1) and 2.04(a)(2) should be to §§ 2.04(a) and 2.04(b).

D. CLASS ARBITRATION

At Text page 356, add the following at the end of paragraph 1:

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, [130 S.Ct. 1758](#) (2010), the Supreme Court appears to have significantly limited the availability of class arbitration in cases governed by the Federal Arbitration Act, without directly addressing the validity of class arbitration bars. The arbitration clause at issue was contained in charter party agreements between shipping companies operating “parcel tankers” and customers shipping liquids in small quantities. The arbitration clause was silent on the question of class arbitration.

AnimalFeeds, a customer, commenced a putative class action against the shipping companies alleging that the shipping companies had engaged in a price fixing conspiracy, and filed a demand for class arbitration. In apparent reliance on *Bazzle* (Text, pp. 355-56), the parties agreed that the question of class arbitration would be submitted to the arbitrators. The arbitration panel concluded that the arbitration clause allowed for class arbitration. On judicial review, the federal district court vacated the award on the ground that the arbitrators had proceeded in “manifest disregard” of the law. The Second Circuit reversed.

The Supreme Court in turn reversed in a five-to-three decision (Justice Sotomayor not participating). Without deciding whether the “manifest disregard” doctrine provides a proper basis for judicial review of an arbitration award under the FAA, the Court held that the order for class arbitration should be vacated under § 10(a)(4) of the FAA on the ground that the arbitrators had “exceeded their powers.” The Court first observed that the plurality opinion in *Bazzle* had addressed only the question whether the court or the arbitrators should determine whether class arbitration was permissible, and that Justice Stevens had concurred in the judgment only to produce a controlling judgment of the Court without taking a definitive position on that issue. Without revisiting that issue, the *Stolt-Nielsen* majority concluded that the arbitration panel had incorrectly concluded that class arbitration was permissible—a question not addressed in *Bazzle*. The Court held that under the FAA, the question of arbitration turns fundamentally on the consent of the parties and this includes the power of the parties to “specify *with whom* they choose to arbitrate their disputes.” *Id.*

[at 1774](#). It followed that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” [Id. at 1775](#). In *Stolt-Nielsen*, however, the arbitration clause was silent on the question of class arbitration and the parties had concurred before the arbitration panel that they had reached “no agreement” on that issue. Further, “[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate. That is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.” [Id.](#) Again, “[w]e think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties’ mere silence on the issue of class action arbitration constitutes consent to resolve their disputes in class proceedings.” *Id.*

The full implications of the opinion are unclear. Although the passages quoted above suggest that it is impermissible under the FAA to order class arbitration unless the parties have expressly authorized it, the Court, in footnote 10 of the opinion, stated that “[w]e have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration.” Further, portions of the opinion suggest that whether an adequate agreement existed should have been determined under applicable maritime or state law. The specific result in *Stolt-Nielsen* appeared to have turned, not simply on the silence of the arbitration clause at issue, but on the majority’s conclusion that the parties had concurred that “no agreement” on class arbitration had been reached. The outcome in other cases involving “silent” arbitration clauses is not necessarily foreclosed, although one would assume that courts in such cases would be hard pressed to find that the parties had agreed that class arbitration was permissible.

At Text, page 358, add the following at the end of numbered paragraph 5:

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Supreme Court, in a narrowly divided 5-to-4 decision, held that the *Discover Bank* rule invalidating class arbitration waivers in certain consumer contracts was preempted by the Federal Arbitration Act. The dispute arose from AT&T’s practice of charging sales tax on the retail value of phones that it had advertised as free. After the *Concepcions* filed a federal complaint, AT&T moved for arbitration in accordance with the terms of its contract with the *Concepcions*, which required all claims be brought in the parties’ “individual capacity, and not as a plaintiff or class member in any purported

class or representative proceeding.” *Id.* at 1744. Applying the *Discover Bank* rule, the Ninth Circuit declined to order arbitration on the ground that the arbitration provision was unconscionable. Even though the *Discover Bank* rule applied to all class action waivers, not just to arbitration agreements, and notwithstanding the savings clause of FAA section 2 that a written arbitration provision in a contract evidencing a transaction involving commerce “shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*” (emphasis added), the Supreme Court held that the application of California unconscionability doctrine was preempted because it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in enacting the FAA. *Id.* at 1753. Justice Scalia’s opinion for himself, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, reasoned that the purpose of the FAA was to “ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings” and that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at 1748. In particular, the point of FAA arbitration is to allow for “efficient, streamlined procedures tailored to the type of dispute.” *Id.* at 1749. Drawing on its decision in *Stolt-Nielsen, supra*, which had held that class arbitration requires the agreement of the parties, the Court concluded that class arbitration structurally differs from bilateral arbitration: “Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some experience relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.” *Id.* at 1750-51. Class arbitration sacrifices informality, which is the principal advantage of arbitration, making the process “slower, more costly, and more likely to generate procedural morass than final judgment.” *Id.* at 1751. Moreover, it greatly increases risks to defendants, with only very limited judicial review, making it more likely that errors will go uncorrected. “[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.” *Id.* at 1752. This would reduce the incentive to arbitrate because “[w]e find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.” *Id.* (The four dissenters argued that the *Discover Bank* rule, which applies to all class action waivers, not just

to arbitration agreements, fell squarely within the savings clause of section 2, and that class proceedings are fully compatible with the nature of arbitration and the purposes of the FAA.)

The implications of *Concepcion* in the consumer context are far reaching. After *Stolt-Nielsen*, some courts had continued to apply state unconscionability doctrine to class action waivers in adhesive consumer contracts. However, in light of that decision basing the availability of class arbitration on the agreement of the parties, they could not “sever” the class action waiver from the arbitration clause itself and order class arbitration despite the waiver. Instead, where the class arbitration waiver was deemed unconscionable, the only alternative was to deny enforcement of the arbitration agreement itself. As a result, consumers still might pursue judicial class proceedings to enforce their rights. See, e.g., *Fensterstock v. Education Finance Partners*, 611F.3d 124 (2d Cir. 2010); see also *In re American Express Merchants’ Litig.*, 634 F.3d 187 (2d Cir. 2011). After *Concepcion*, however, class arbitration waivers may no longer be invalidated under state unconscionability law, and courts must enforce the arbitration agreements in accordance with their terms unless some other generally applicable contract defense applies. As a result, the possibility of class proceedings may be entirely foreclosed, resulting, as the dissenters argued in *Concepcion*, in the inability of consumers holding small claims (such as the *Concepcions’* \$30.22 claim), as a practical matter, to seek redress and insulating defendants from liability for wrongdoing. (As Justice Breyer argued, “[w]hat rational lawyer would have signed on to represent the *Concepcions* in litigation for the possibility of fees stemming from a \$30.22 claim?”)

Query: In *Kristian, supra*, which invalidated a class arbitration bar on the ground that it prevented the effective vindication of plaintiffs’ statutory rights under the antitrust laws, the First Circuit noted the close parallels between its analysis and the unconscionability doctrine of *Discover Bank*. After *AT&T Mobility*, does the “vindication of statutory rights” analysis continue to provide a viable ground for invalidating class arbitration bars and permitting cases involving arbitration agreements having such bars to be litigated as class actions in court?

At Text, page 358, insert the following new subsection E to Chapter 3:

E. NON-CLASS AGGREGATE PROCEEDINGS

Increasing attention has been devoted to the importance of “non-class aggregations” in resolving toxic tort, product liability, and other claims possessed in common by large number of litigants where those claims are unsuited for joinder in a single action or for class certification. Such proceedings include, for example, multi-district and other consolidated

actions, and informal private collections of the claims of many parties by cooperating private counsel who have amassed large inventories of similar cases. (Consolidated proceedings are discussed in depth in Chapter 4.) The American Law Institute’s Principles of the Law of Aggregate Litigation (2010) devotes particular attention to the issues raised by such proceedings. It classifies consolidated proceedings as “administrative aggregations,” which include “a collection of related lawsuits . . . proceeding under common judicial supervision or control.” *Id.* at § 1.02(b). Such “administrative aggregations” are said to include “all proceedings that enable judges to coordinate separate lawsuits for efficient processing. . . . Examples are intradistrict consolidations, multidistrict consolidations, and bellwether trials. . . . Informal administrative aggregation occurs when judges handling related cases in different courts or jurisdictions achieve coordination by working together outside the ambit of specific rules or statutes, as with federal-state coordination in mass-tort cases.” *Id.*, cmt. b(2). By contrast, private or “informal” aggregations are coordinated by private persons. “Usually the claims or defenses share a factual connection and are managed by attorneys who work cooperatively on behalf of all claimants or respondents. For example, all claimants may assert injuries stemming from the same product, and their attorneys may jointly attempt to negotiate a settlement of all claims with the manufacturer.” *Id.*, cmt. b(3).

Because almost all such non-class aggregate proceedings have settlement as their ultimate objective, the problems of achieving a global settlement in that context have received particular attention. *See, id.*, §§ 3.15-3.18, addressing non-class aggregate settlements. The main problems are that individual, unlike class, counsel, lack the power to enter a binding settlement without the consent of their clients, the need to offer the defendant “comprehensive peace” as an inducement for settlement, consequent pressures exerted on plaintiffs by their counsel to accept the settlement, and the prospect that a minority of class members may “hold out” to obtain more favorable treatment. The controversial proposals of the ALI in that regard, which turn on a provision to allow plaintiffs to give “advance consent” to a settlement subsequently approved by a prescribed supermajority of claimants, are reviewed below and in Chapter 7.A, *infra*.

A large volume of literature has addressed the problems raised by non-class aggregate proceedings. Some significant contributions include:

(1) Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 KAN. L. REV. 889 (2010) (arguing that the presumption of cohesion underlying class certification frequently is fictitious, and that, conversely, in non-class aggregate litigation settings, plaintiffs may possess a community of interests by virtue of post litigation communication and consensus that justifies binding them by settlement and other decisions

reached in accordance with group governance procedures to which they have agreed). “Given that ‘presumed cohesion’ justifies binding absent litigants to a class action judgment, if group cohesion in nonclass aggregation is real then there is ample historical and theoretical justification for allowing plaintiffs to limit their ability to pursue their own claims. When litigants form groups and morally obligate themselves to other group members through voluntary promises and assurances, it makes sense to reinforce those obligations . . . and bind plaintiffs’ collective interests regardless of whether their cohesion predated or postdated the decision to sue.” *Id.* at 903. *See also* Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1 (2009); Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1 (2009)(noting the difficulties of defining and achieving procedural justice norms in the setting of non-class aggregations).

(2) Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979 (2010). Professor Erichson reviews the ethical issues posed by non-class aggregate settlement agreements that effectively impose a requirement for all claimants represented by the contracting plaintiffs’ firms to accept a lump sum settlement to be allocated among claimants by the plaintiffs’ attorneys. These include conflicts of interest among the claimants and between claimants and their lawyers, problems in allocating and misallocation of the settlement fund among claimants, extortion by holdouts, the creation of “slush funds” and deception to counter the hold out problem, violation of the lawyers’ duties of loyalty, difficulties in obtaining informed consent, and collusion between plaintiffs’ counsel and defendants. Although recognizing that “mass aggregate settlements are an essential component in the resolution of widespread disputes” (*id.* at 1023), he argues that the desirability of obtaining global peace should not lead ethics committees or rulemakers to alter rules to promote all-or-nothing settlements. Rather, where class certification and settlement is not feasible, the alternative of “most-or-nothing” settlements, in which walkaway clauses, for example, require 85, 90, or 95% participation, may achieve a sufficiently comprehensive peace while presenting far fewer ethical concerns.

(3) Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011) reviews the increasing importance of non-class aggregate settlements in mass accident and other settings unsuited for class certification. The authors note the emergence of strategies to sidestep the requirement for individual consent to settlement, such as that employed in the *Vioxx* litigation, under which counsel entering the “settlement agreement” with Merck were required to recommend the settlement to all of their eligible clients and, if any client decided not to participate, were required to withdraw from representing the nonsettling clients. Under these terms, over 99.79% of eligible claimants enrolled, achieving “closure” for the defendant, lawyers, and the judicial system.

Professors Erichson and Zipursky argue that such arrangements promoting “lawyer empowerment” to settle mass actions violate established ethical prohibitions including the requirement that a lawyer abide by the client’s decision whether to settle a matter, the requirements that lawyers exercise independent professional judgment on behalf of and render candid advice to their clients, the prohibition against settlement agreements that restrict a lawyer’s right to practice, and ethical restrictions on terminating the lawyer-client relationship, noting that “[c]ases overwhelmingly reject the idea that a lawyer may fire a client for declining a settlement against the lawyer’s advice.” *Id.* at 287

Professors Erichson and Zipursky also examine the alternative approach to achieving closure embodied in section 3.17(b) of the ALI’s *Principles of the Law of Aggregate Litigation* (2010). Under that provision, which has been controversial, a lawyer or group of lawyers who represent two or more claimants on a non-class basis may settle their claims on an aggregate basis provided that each claimant gives advance written consent allowing each participating claimant to be bound by a substantial majority vote of all claimants concerning an aggregate settlement proposal (or a substantial majority vote of each category of claimants). The agreement may occur at or after the formation of the lawyer-client relationship, but must be fully informed, must specify the approval procedure (which may not be assigned to counsel), and must specify the manner of allocating the proceeds of the settlement among claimants or provide for the future development of an allocation mechanism. The lawyers must also advise the claimants that this is an alternative method of settlement, and that they are not required to enter the agreement and that the lawyer may not terminate an existing relationship because the claimant declines to enter the agreement. Such agreements are permissible only in cases involving a substantial amount in controversy and a large number of claimants. § 3.17(c). Finally, the agreement is enforceable only if it is “procedurally” fair and reasonable under all of the circumstances, and any settlement entered pursuant to the agreement is enforceable only if it is substantively fair and reasonable. § 3.17(d), (e). Non-compliance with the requirements of § 3.17 including compliance with the procedures of §§ 3.17 (b) and (c) and the procedural and substantive fairness of the settlement under §§ 3.17(d) and (e) would be open to challenge in court. § 3.18. This “advance consent” procedure is recommended as an alternative to the currently prevailing aggregate settlement rule, which permits a client to give informed consent to a settlement only after all of its terms and its allocation among claimants are known. *See* § 3.17(a).

The objectives of the ALI proposal are to permit lawyers to achieve the benefits of joint representation by maximizing settlement value for all claimants without the threat of “holdouts” by some claimants seeking to exert

control over the settlement and demand premiums for their agreement, because “even the threat of such a holdout may cause the defendant to withhold the premium associated with complete peace, thereby inuring to the detriment of all the represented claimants.” *Id.*, cmt. b.

Notwithstanding its worthy objectives, Professors Erichson and Zipursky find the ALI proposal as objectionable as the procedure employed in *Vioxx*. In their view, the proposal, which would require a major change in the aggregate settlement rules in effect in all jurisdictions prohibiting such advance consents, would improperly “shift power from clients to lawyers in ways that not only raise concerns about the authenticity of consent but also put lawyers in a role that is inconsistent with loyal representation of clients.” 96 *Cornell L. Rev.* at 298. They argue that the proposal shifts too much settlement power from claimants to their lawyers, and that the dynamics of the lawyer-client relationship in mass litigation virtually guarantee that supermajority approval will be obtained, making client consent illusory and “inauthentic.” “Rather than eliminating the problem of informed consent, the proposal frontloads the problem. It raises questions about whether clients, at the time they sign retainer agreements, can understand the implications of waiving their control over the settlement.” *Id.* at 301. Expecting unsophisticated clients to refuse the advance consent provision when it is recommended by their lawyers is unrealistic. *Id.* at 303. Of even greater concern, such an advance agreement presents conflicts of interest among claimants which should be unwaivable before the terms of the settlement are known. *Id.* at 304-311. Finally, Professors Erichson and Zipursky argue that the need for total “closure” in the mass action context has been overblown and that adequate resolutions can be obtained under traditional rules without sacrificing the bedrock right of client consent. *Id.* at 318-20. “Mass tort settlements over the past several decades typically have *not* provided closure of the sort that Merck obtained in *Vioxx* and that the ALI proposal aims to secure. Yet, settlements have occurred, and this fact is not surprising. Even without the absolute closure envisioned by the *Vioxx* terms and the ALI proposal, a mass settlement can allow a defendant to put the majority of litigation behind it, reduce litigation expenses, and quantify the remaining risk.” *Id.* at 319. In the end, “[c]onsent—not closure—determines legitimacy.” *Id.* at 269.

(4) Richard A Nagareda, *Embedded Aggregation in Civil Litigation*, 95 *CORNELL L. REV.* 1105 (2010). In this article, Professor Nagareda argues that the litigation world does not neatly divide itself between class litigation, on the one hand, and individual litigation with its effects confined to the named parties, on the other. Rather, he addresses increasingly important instances in which lawsuits, because of the scope of the right of action asserted, the nature of the remedy sought, or the character of the alleged wrong, have an “embedded” aggregate character extending beyond the named parties, and,

consequently, give rise to demands for the lawsuit to bind non-parties, even though the requisites for class certification are not satisfied. As examples, he notes the possibility of numerous FOIA actions seeking demands for the same documents, actions seeking punitive damages based on a course of conduct affecting numerous plaintiffs, in which due process constraints prevent punishment of the defendant for injuries to non-plaintiffs but permit the jury to consider injury to others in evaluating the defendant's culpability with respect to the named plaintiff, and aggregate settlements of numerous personal injury claims arising from mass torts that have market wide effects. Professor Nagareda explores the use of "hybrid" non-class centralizing procedures to resolve instances of such "embedded" aggregation, such as centralization of repetitive FOIA litigation in a single forum, creation of a public right of action for civil penalties that may be asserted by private litigants by analogy to *qui tam* litigation, and a regulated regime in which individual tort litigants may consent in advance to the aggregate settlement of their claims on certain conditions by a small number of law firms controlling the prosecution of large inventories of claims (an approach endorsed in the ALI's Principles of the Law of Aggregate Litigation § 3.17(b)). (Professor Nagareda also explores the evolution of the Vioxx settlement in great detail.) In sum, "[w]hat is needed is not civil process created on the fly but, rather, studied and deliberate effort to expose the hybrid quality of innovations like FOIA, punitive damages, and aggregate settlements . . . and to subject them to commensurately hybrid forms of legal regulation. In this endeavor, the poles of the one-on-one lawsuit and the U.S.-style class action define useful fixed points along a continuum, but neither alone provides the necessary roadmap for the uncharted territory in between. That territory . . . comprises the domain for serious thinking about aggregate procedure in the twenty-first century." *Id.* at 1170.

Chapter 4

COORDINATION AND CONSOLIDATION OF OVERLAPPING LITIGATION

C. OVERLAPPING LITIGATION IN FEDERAL AND STATE COURTS

At page 405, after the paragraph beginning “Third” add:

The Supreme Court emphasized the narrowness of the “relitigation” exception to the anti-injunction act in *Smith v. Bayer Corp.*, 2011 U.S. LEXIS 4559 (June 16, 2011). In that case, a plaintiff filed a class action in federal court against Bayer; the court denied class certification, after which a different plaintiff, representing roughly the same class on roughly the same claims, sued Bayer in state court. Bayer asked the federal court to enjoin the state court from certifying a class. The district court issued such an order and the Eighth Circuit affirmed. The Supreme Court reversed, and held that the lower courts exceeded their power under the relitigation exception.

That provision applies only when (1) the issue decided by the federal court is the same as that presented to the state court and (2) the parties in the two cases are the same or fall within “a few discrete exceptions to the general rule against binding nonparties.” The facts failed to satisfy either criterion. First, because the state class action rule did not mirror Rule 23, and the state courts had not indicated a willingness to interpret them as coterminous, the issue decided by the federal court was not the same as that presented to the state tribunal. Second, the plaintiff in the second case was not a party to the first case, and thus could not be bound. Though a nonparty may be bound if he was a member of a class, this nonparty preclusion could not apply here, because the federal court in the first case denied class certification. Thus the plaintiff in the second case was not bound by the judgment in the first.

D. OVERLAPPING LITIGATION IN AMERICAN AND FOREIGN COURTS

At page 430, at the end of Note 1 add: In *Winter v. NRDC*, 555 U.S. 7 (2008), the Court held that the mere possibility of irreparable harm to a plaintiff was sufficient, in some circumstances, to justify a preliminary

injunction. Under that case, a plaintiff must show that irreparable harm is likely, and not just possible. The majority opinion failed, however, to discuss the validity of a sliding scale approach that some circuits use. In *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011), the Ninth Circuit held that the sliding scale approach survives *Winter*. The elements are weighed: (1) likely to succeed on merits, (2) likely to suffer irreparable harm absent the injunction, (3) balance of equities tips in his favor, and (4) injunction in public interest. Under the sliding scale approach, an injunction can issue if the likelihood of success is such that serious questions going to the merits are raised and the balance of hardships tips heavily in the plaintiff's favor.

In *Cottrell*, the Ninth Circuit holds that this approach survives *Winter*. The Seventh and Second Circuits agree. *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35-358 (2d Cir. 2010); *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009)(weaker claim on merits can support preliminary injunction depending on “net harm” that could be prevented by the injunction).

The Ninth Circuit did, however, refine its approach. While “serious questions” may justify a preliminary injunction, *Winter* commands that all four factors be addressed. Plaintiff must make a showing on all four. Before *Winter*, serious questions could support an injunction so long as the balance of equities was in plaintiff's favor. Now, however, she will have to show likelihood of irreparable injury and that the injunction is in the public interest.

The Fourth Circuit has concluded that *Winter* abrogated the sliding scale approach. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009), vacated on other grounds, 130 S.Ct. 2371 (2010).

At page 430, add:

7. After entry of judgment but before TKS paid it, the district court retained ancillary enforcement jurisdiction and could enter the preliminary injunction. After TKS paid the judgment, however, the Eighth Circuit held, there was no tension between the foreign and American court systems. While the clawback statute was an affront to the American judgment, the court explained, that was a problem to be addressed, if at all, by the political branches, and not by the federal courts. Accordingly, the Eighth Circuit

vacated the injunction and remanded to the district court with instructions to dismiss. *Goss International Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 359-368 (8th Cir. 2007). The parties ultimately settled the dispute in September 2009.

Chapter 5

CHOICE OF LAW ISSUES IN COMPLEX LITIGATION

At page 442, add: There is an interesting symposium on Complexity and Aggregation in Choice of Law at 14 Roger Williams U. L. Rev. 1-95 (2009).

Chapter 6

JUDICIAL MANAGEMENT AND CONTROL OF PRETRIAL PROCEDURE

E. JUDICIAL CONTROL THROUGH SANCTIONS

At page 542, at the end of the second paragraph, add:

In *Shum v. Intel Corp.*, 629 F.3d 1360 (Fed. Cir. 2010), the Federal Circuit held that Rule 54(d)(1) permits award of costs to only one litigant as the “prevailing” party. The district court in the case, noting that both plaintiff and defendant won on some points and lost on others, concluded that both “prevailed.” The Federal Circuit held that there can only be one prevailing party, and affirmed the alternative holding by the district court that defendant prevailed. In a mixed-judgment case, one can prevail without winning on all claims. Here, defendant won on all of plaintiff’s state-law claims, including by 12(b)(6) on some claims before trial and summary judgment on others. After jury hung on plaintiff’s other claims, court entered JMOL for defendants. Defendant avoided \$400,000,000 in liability and plaintiff won only correction of inventorship on five of seven patents. A sharp dissent concluded that plaintiff had won and there should have been an order of no costs.

At page 546, at the end of Note 1, add:

The Sixth Circuit has made clear that § 1927 applies only to individual lawyers, and does not permit imposition of fees on a law firm. *BDT Prods., Inc. v. Lexmark Intern., Inc.*, 602 F.3d 742 (6th Cir. 2010). For another good example of the imposition of fees under § 1927, see *Norelus v. Denny’s, Inc.*, 628 F.3d 1270 (11th Cir. 2010)(counsel vexatiously and unreasonably multiplied proceedings through errata sheet for deposition).

At page 548, concerning Inherent Authority, add:

In *Carr v. Tillery*, 591 F.3d 909 (7th Cir. 2010), a lawyer sued his former partners over division of fees, and alleged RICO violations. It was the eighth suit against the same defendants regarding division of fees. Section 1927 did not apply, because it does not address conduct before suit is filed. But a court has the inherent power to punish by an award of attorney’s fees or other monetary sanction. There is a common law principle that is

“concerned with protecting the courts from being overwhelmed by baseless litigation as with protecting litigants from harassment.” 591 F.3d at 920.

A plaintiff whose contention that he could sue as a private attorney general under the Medicare Secondary Payer Act had continually been rejected by courts, filed another such case in the Eastern District of Tennessee. The court dismissed the case, after which the defendants moved for sanctions. Rule 11 did not apply because the dismissal made it impossible for the defendants to provide the safe harbor required by that rule. Section 1927 did not apply because it does not permit sanctions against a represented party or law firm. Nonetheless, the court employed its inherent power to assess sanctions (consisting of attorney’s fees of over \$250,000) based upon what it concluded was bad faith and baseless claims. The plaintiff and law firm were jointly and severally liable for the sanction. *Stalley v. Mountain States Health Alliance*, 2010 U.S. Dist. LEXIS 8346 (E.D. Tenn. 2010)

Chapter 7

APPOINTMENT, ORGANIZATION, AND COMPENSATION OF LEAD, LIAISON, AND CLASS COUNSEL

A. APPOINTMENT OF CLASS AND LEAD COUNSEL

3. The Emergence of Active Judicial Involvement in the Selection and Appointment of Class and Lead Counsel

a. Appointment and Powers of Lead and Liaison counsel

At Text, page 562, insert the following new paragraph 7 after paragraph 6:

In Charles Silver and Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010), Professors Silver and Miller advance a wide-ranging critique of the prevailing “quasi-class action” approach to MDL management. They contend that the common practice of judicial appointment of lead attorneys and control of their compensation through contingent fee caps and forced transfers from non-lead lawyers (*see infra*, Ch.7.B.7) has serious disadvantages, including compromising judicial independence, requiring judges to make decisions without adequate information and standards, lack of transparency, overcompensating some lawyers while undercompensating others, and often producing a suboptimal level of “common benefit” work. They further contend that such forced taxation of fees is not justified by the common fund doctrine. As an alternative, they propose a “default rule” that control of an MDL should be vested in the attorney or group of attorneys with the most valuable client inventories, who would then select and retain other attorneys to perform common benefit work at an agreed upon rate of compensation to be taxed against the recoveries of all claimants. It is unclear why they think the suggested procedure is more consistent with the common benefit doctrine than the currently prevailing practice. However, they make a strong argument that their proposal would improve the selection, compensation and monitoring of counsel performing common benefit work in comparison with the current approach.

4. Note on the Organization of Defense Counsel in Complex Cases

At Text, page 585, insert the following new material at the end of the first partial paragraph at the top of the page:

; Christopher R. Leslie, *Judgment Sharing Agreements*, 58 DUKE L.J. 747 (2009) (arguing, in the context of judgment sharing agreements among antitrust price-fixing defendants, that such agreements may undermine deterrence by decreasing settlement probability and values, may make price fixing cartels more attractive to risk averse defendants, may reduce the willingness of some conspirators to settle and provide evidence against others, and may stabilize price fixing cartels, and suggesting that antitrust judgment sharing agreements should be subject to civil discovery and to antitrust challenge under the rule of reason).

B. AWARD OF ATTORNEY'S FEES IN COMPLEX LITIGATION

3. The “Lodestar” Method of Determining Fee Awards

At Text pages 608-09, paragraphs 8 and 9, add:

In *Perdue v. Kenny*, [130 S.Ct. 1662](#) (2010), the Supreme Court reaffirmed that upward adjustments of the lodestar fee award to take account of “superior performance” are permissible only in “extraordinary circumstances.” In that case (in which plaintiffs had obtained an extensive class action consent decree reforming the foster care system in two Georgia counties), the federal district court had enhanced the lodestar fee amount of \$6 million by 75%, resulting in a total award of \$10.5 million. The court based this award on the facts that class counsel had been required to advance substantial case expenses over a three year period with no on-going reimbursement, that class counsel were not paid on an on-going basis, that obtaining fee and expense reimbursement was contingent on the outcome of the case, and that counsel had exhibited “a higher degree of skill, commitment, dedication, and professionalism . . . than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench.” [Id. at 1670](#). The Eleventh Circuit affirmed.

The Supreme Court reversed. The Court first articulated “six important rules” derived from its previous decisions. First, a reasonable fee must be sufficient to induce a capable attorney to undertake meritorious civil rights cases, but must not produce a windfall. Second, the lodestar method yields a fee that is presumptively sufficient. Third, fee enhancements for superior performance may be granted, but only in “rare” and “exceptional” circumstances. Fourth, an enhancement may not be based on a factor subsumed in the lodestar calculation. Thus, novelty and complexity of a case generally may not be used for enhancement because these factors are reflected in the hours expended, and superior performance generally will not support an enhancement because the quality of representation normally is reflected in the reasonable hourly rate. Fifth, the party seeking an

enhancement bears the burden of justification. Sixth, the proponent must produce “specific evidence” supporting the award. [Id. at 1672-73.](#)

The Court then identified the following limited circumstances in which an enhancement for superior attorney performance might be justified: (1) Where the attorney’s hourly rate used in the lodestar calculation did not reflect the attorney’s market value, demonstrated in part in the litigation, as, for example, where the rate was set solely with reference of years since admission to the bar. (2) Where the case involves an “extraordinary outlay of expenses and the litigation is exceptionally protracted” ([id. at 1674](#)) beyond the delay in reimbursement normally to be expected in such cases. (In such “exceptional” cases, the enhancement must be reasonably and objectively determined, as by applying a standard rate of interest to the outlays of expenses.) (3) Where, in “extraordinary circumstances . . . an attorney’s performance involves exceptional delay in the payment of fees” ([id. at 1675](#)) beyond that normally to be anticipated, applying a similar objective method.

The Court specifically rejected the argument that performance enhancements could be made on the ground that departures from hourly billing taking superior results into account are becoming increasingly common in the private market. “[I]f hourly billing becomes unusual, an alternative to the lodestar method may have to be found. However, neither respondents nor their *amici* contend that that day has arrived.” [Id.](#)

Applying these standards, Justice Alito, in an opinion for five Justices, concluded that the enhancement was improper because it was “essentially arbitrary.” The district court had not calculated the portion of the enhancement due to extraordinary outlays for expenses and delayed reimbursement, and the court had not linked delay in receipt in fees to proof that the delay was outside the “normal range expected by attorneys who rely on § 1988 for the payment of their fees or quantify the disparity.” [Id. at 1676.](#) Reliance on the contingency of the outcome was impermissible under *Dague*. Finally, in relying on “a comparison of the performance of counsel in this case with the performance of counsel in unnamed prior cases,” the trial court “did not employ a methodology that permitted meaningful appellate review.” [Id.](#)

Justice Breyer, in an opinion joined by Justices Stevens, Ginsburg, and Sotomayor, concurred in the Court’s conclusion that enhancements to the lodestar for superior attorney performance resulting in exceptional success are proper in some cases, but dissented from the result on the ground that the Court had not agreed to decide whether exceptional circumstances justified the fees award in the case before the Court and the district court had not, in any event, abused its discretion in granting such an enhancement.

Chapter 8

DISCOVERY

C. ELECTRONIC DISCOVERY

At Text *page 675, add before the first full paragraph:*

The Minnesota Professional Responsibility Board ruled in 2010 that an attorney, under the professional conduct rules, has a professional duty to avoid revealing a client's secrets in metadata when sending electronic documents. The Board noted in its opinion that metadata can be “scrubbed” from the electronic material before being sent, and that under the duty of competence “steps can be taken to prevent or minimize the transmission of metadata.” The Board did comment, though, that in some contexts, such as litigation, “it may be impermissible or illegal” to remove metadata “from evidentiary documents in the context of litigation.” Lawyer’s Professional Responsibility Board, Opinion 22 (Mar. 26, 2010).

The Board also observed that the receiving lawyer who discovers the metadata must promptly notify the supplier of the metadata. But, “[w]hether the lawyer [who must notify a sender under the rule] is required to take additional steps, such as returning the original document, is a matter of law. . . .” *Id.*

The Vermont Bar Association in a recent ethics opinion follows the Minnesota approach on the sender scrubbing the metadata before it is electronically sent, but implies that the receiving lawyers can and perhaps should search for metadata under a duty of diligence. The opinion goes on to say “whether inadvertent disclosure of privileged information constitutes a waiver of the document's privileged status is a question of substantive law.” However, “Vermont lawyers are subject to the obligation to notify opposing counsel if they receive documents that they know or reasonably should know were inadvertently disclosed,” the opinion concludes. Vermont Bar Association Professional Responsibility Section, Ethics Opinion 2009-1.

At Text *page 683, add after Notes and Questions:*

Developing Concerns

As electronic discovery becomes increasingly complex and pervasive in modern litigation, courts and lawyers alike have begun to acknowledge concern over “the lack of a uniform standard governing when the duty to preserve commences, the level of culpability required to justify sanctions, the nature and severity of sanctions, and the scope of the duty to preserve evidence and whether it is tempered by principles of proportionality” *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 2010 U.S. Dist. LEXIS 93644 (D. Md. Sept. 9, 2010). Illustrating this factious and problematic jurisprudence, even courts within the same jurisdiction struggle to issue consistent holdings, finding in one instance that sanctions are not appropriate without proof that “information of significance” has been lost, *Orbit One Communications, Inc. v. Numerex Corp.*, 2010 WL 4615547 (S.D.N.Y. Oct. 26, 2010), and in another, that sanctions may be proper even if the information lost is not relevant, *Pension Committee of the Univ. of Montreal Pension Plan v. Bank of America Securities, LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 11, 2010). The lack of a consistent standard for preservation and sanctions has left many organizations and institutions with the costly task of attempting to “conduct themselves in a way that will comply with multiple, inconsistent standards” and contributed significantly to the cost of litigation where ESI plays a role, leaving some to call for a harmonization of these discordant approaches. *Victor Stanley*, 2010 U.S. Dist. LEXIS 93644.

E. ATTORNEY CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

At Text page 698, add a new #5 in Notes and Questions:

5. The United States Supreme Court, in 2009, ruled that judicial orders requiring disclosure of attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, [337 U.S. 541](#) (1949). The Court noted that “[e]ffective appellate review can be had by other means. . . .” The Court identified such other possible means as including postjudgment review, criminal contempt appeals, certifications under [28 U.S.C. § 1292](#)(b), and writs of mandamus. *Mohawk Industries v. Carpenter*, [130 S. Ct. 599, 608-09](#) (2009).

F. DISCOVERY SANCTIONS

At Text page 729, add:

7. The subject of spoliation is likely to remain a hot topic for the indefinite future. There is a growing body of case law addressing the question of the appropriate sanction for willful, grossly negligent, or negligent destruction of discoverable material, especially in this electronic age. Consider, for example, the opinion below:

**THE PENSION COMMITTEE OF THE UNIVERSITY OF MONTREAL
PENSION PLAN v. BANC OF AMERICA SECURITIES, LLC,**
United States District Court for the Southern District of New York
[2010 U.S. Dist. LEXIS 4546](#) (Jan. 15, 2010, as amended May 28, 2010)

SCHEINDLIN, UNITED STATES DISTRICT JUDGE.

AMENDED OPINION AND ORDER

Zubulake Revisited: Six Years Later

I. INTRODUCTION

In an era where vast amounts of electronic information is available for review, discovery in certain cases has become increasingly complex and expensive. Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party. As discussed six years ago in the *Zubulake* opinions, when this does not happen, the integrity of the judicial process is harmed and the courts are required to fashion a remedy. Once again, I have been compelled to closely review the discovery efforts of parties in a litigation, and once again have found that those efforts were flawed. As famously noted, "[t]hose who cannot remember the past are condemned to repeat it." By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records -- paper or electronic -- and to search in the right places for those records, will inevitably result in the spoliation of evidence.

In February, 2004, a group of investors brought this action to recover losses of 550 million dollars stemming from the liquidation of two British Virgin Islands based hedge funds in which they held shares: Lancer Offshore, Inc. and OmniFund Ltd. (the "Funds"). Plaintiffs have asserted claims under the federal securities laws and under New York law against former directors, administrators, the auditor, and the prime broker and custodian of the Funds. The Funds were managed by Lancer Management Group LLC ("Lancer") and its principal, Michael Lauer. The Funds retained Citco Fund Services (Curacao) N.V. ("Citco NV") to perform certain administrative duties, but it eventually resigned as administrator of the Funds. On April 16, 2003, Lancer filed for bankruptcy. On July 8, 2003, the Funds were placed into receivership in the Southern District of Florida.

In October, 2007, during the discovery process, Citco NV, its parent company, the Citco Group Limited, and former Lancer Offshore directors who were Citco officers (collectively with Citco NV, the "Citco Defendants") claimed that substantial gaps were found in plaintiffs' document productions. As a result, depositions were held and declarations were submitted. This occurred from October, 2007 through June, 2008. Following the close of this discovery, the Citco Defendants moved for sanctions, alleging that each plaintiff failed to preserve and produce documents -- including those stored electronically -- and submitted false and misleading declarations regarding their document collection and preservation efforts. The Citco Defendants seek dismissal of the Complaint -- or any lesser sanction the Court deems appropriate -- based on plaintiffs' alleged misconduct.

Because this is a long and complicated opinion, it may be helpful to provide a brief summary up front. I begin with a discussion of how to define negligence, gross negligence, and willfulness in the discovery context and what conduct falls in each of these categories. I then review the law governing the imposition of sanctions for a party's failure to produce relevant information during discovery. This is followed by factual summaries regarding the discovery efforts -- or lack thereof -- undertaken by each of the thirteen plaintiffs against whom sanctions are sought, and then by an application of the law to those facts. Based on my review of the evidence, I conclude that all of these plaintiffs were either negligent or grossly negligent in meeting their discovery obligations. As a result, sanctions are required.

II. AN ANALYTICAL FRAMEWORK AND APPLICABLE LAW

From the outset, it is important to recognize what this case involves and what it does not. This case does not present any egregious examples of litigants purposefully destroying evidence. This is a case where plaintiffs failed to timely institute written litigation holds and engaged in careless and

indifferent collection efforts after the duty to preserve arose. As a result, there can be little doubt that some documents were lost or destroyed.

The question, then, is whether plaintiffs' conduct requires this Court to impose a sanction for the spoliation of evidence. To answer this question, there are several concepts that must be carefully reviewed and analyzed. The first is plaintiffs' level of culpability -- that is, was their conduct of discovery acceptable or was it negligent, grossly negligent, or willful. The second is the interplay between the duty to preserve evidence and the spoliation of evidence. The third is which party should bear the burden of proving that evidence has been lost or destroyed and the consequences resulting from that loss. And the fourth is the appropriate remedy for the harm caused by the spoliation.

A. Defining Negligence, Gross Negligence, and Willfulness in the Discovery Context

While many treatises and cases routinely define negligence, gross negligence, and willfulness in the context of tortious conduct, I have found no clear definition of these terms in the context of discovery misconduct. It is apparent to me that these terms simply describe a continuum. Conduct is either acceptable or unacceptable. Once it is unacceptable the only question is how bad is the conduct. That is a judgment call that must be made by a court reviewing the conduct through the backward lens known as hindsight. It is also a call that cannot be measured with exactitude and might be called differently by a different judge. That said, it is well established that *negligence* involves unreasonable conduct in that it creates a risk of harm to others, but *willfulness* involves intentional or reckless conduct that is so unreasonable that harm is highly likely to occur.

It is useful to begin with standard definitions of each term and then to explore the conduct, in the discovery context, that causes certain conduct to fall in one category or another.

[Negligence] is conduct "which falls below the standard established by for the protection of others against unreasonable risk of harm." [Negligence] is caused by heedlessness or inadvertence, by which the negligent party is unaware of the results which may follow from [its] act. But it may also arise where the negligent party has considered the possible consequences carefully, and has exercised [its] own best judgment.¹

¹ [10] PROSSER & KEETON ON TORTS § 31 at 169 (5th ed. 1984) (quoting RESTATEMENT (SECOND) OF TORTS § 282) (citations omitted).

The standard of acceptable conduct is determined through experience. In the discovery context, the standards have been set by years of judicial decisions analyzing allegations of misconduct and reaching a determination as to what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding. A failure to conform to this standard is negligent even if it results from a pure heart and an empty head.

“Gross negligence has been described as a failure to exercise even that care which a careless person would use.” According to a leading treatise -- *Prosser & Keeton on Torts* -- most courts find that gross negligence is something more than negligence “and differs from ordinary negligence only in degree, and not in kind.”

The same treatise groups willful, wanton, and reckless into one category that requires “that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.”²

Applying these terms in the discovery context is the next task. Proceeding chronologically, the first step in any discovery effort is the preservation of relevant information. A failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful. For example, the intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached, is willful. Possibly after October, 2003, when *Zubulake IV* was issued, and definitely after July, 2004, when the final relevant *Zubulake* opinion was issued, the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.

The next step in the discovery process is collection and review. Once again, depending on the extent of the failure to collect evidence, or the sloppiness of the review, the resulting loss or destruction of evidence is surely negligent, and, depending on the circumstances may be grossly negligent or willful. For example, the failure to collect records -- either paper or electronic -- from key players constitutes gross negligence or willfulness as does the destruction of email or certain backup tapes after the duty to preserve has attached. By contrast, the failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation,

² [13] *Id.* at 213 (citing RESTATEMENT (SECOND) OF TORTS § 500 and collecting cases).

as opposed to just the key players, could constitute negligence. Similarly, the failure to take all appropriate measures to preserve ESI likely falls in the negligence category. These examples are not meant as a definitive list. Each case will turn on its own facts and the varieties of efforts and failures is infinite. I have drawn the examples above from this case and others. Recent cases have also addressed the failure to collect information from the files of former employees that remain in a party's possession, custody, or control after the duty to preserve has attached (gross negligence) or the failure to assess the accuracy and validity of selected search terms (negligence).

B. The Duty to Preserve and Spoliation

Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. The right to impose sanctions for spoliation arises from a court's inherent power to control the judicial process and litigation, but the power is limited to that necessary to redress conduct "which abuses the judicial process." The policy underlying this inherent power of the courts is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth. . . . The courts must protect the integrity of the judicial process because, "[a]s soon as the process falters . . . the people are then justified in abandoning support for the system." ³

The common law duty to preserve evidence relevant to litigation is well recognized. The case law makes crystal clear that the breach of the duty to preserve, and the resulting spoliation of evidence, may result in the imposition of sanctions by a court because the court has the obligation to ensure that the judicial process is not abused.

It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation. "[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." ⁴ A plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.

³ [22] *Silvestri v. General Motors*, 271 F.3d 583, 589 (4th Cir. 2001) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991), and *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993)) (citations omitted).

⁴ [26] *Treppel*, 249 F.R.D. at 118 (quoting *Zubulake IV*, 220 F.R.D. at 218).

C. Burdens of Proof

The third preliminary matter that must be analyzed is what can be done when documents are no longer available. This is not an easy question. It is often impossible to know what lost documents would have contained. At best, their content can be inferred from existing documents or recalled during depositions. But this is not always possible. Who then should bear the burden of establishing the relevance of evidence that can no longer be found? And, an even more difficult question is who should be required to prove that the absence of the missing material has caused prejudice to the innocent party.

The burden of proof question differs depending on the severity of the sanction. For less severe sanctions -- such as fines and cost-shifting -- the inquiry focuses more on the conduct of the spoliating party than on whether documents were lost, and, if so, whether those documents were relevant and resulted in prejudice to the innocent party. As explained more thoroughly below, for more severe sanctions -- such as dismissal, preclusion, or the imposition of an adverse inference -- the court must consider, in addition to the conduct of the spoliating party, whether any missing evidence was relevant and whether the innocent party has suffered prejudice as a result of the loss of evidence.

On the question of what is "relevant," the Second Circuit has provided the following guidance:

[O]ur cases make clear that "relevant" in this context means something *more than sufficiently probative to satisfy Rule 401* of the Federal Rules of Evidence. Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that "the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction." ⁵

It is not enough for the innocent party to show that the destroyed evidence would have been responsive to a document request. The innocent party must also show that the evidence would have been helpful in proving its claims or defenses -- *i.e.*, that the innocent party is prejudiced without that evidence. Proof of relevance does not necessarily equal proof of prejudice.

In short, the innocent party must prove the following three elements: that the spoliating party (1) had control over the evidence and an obligation to

⁵ [29] Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108-09 (2d Cir. 2002) (quoting *Kronisch*, 150 F.3d at 127) (emphasis added).

preserve it at the time of destruction or loss; (2) acted with a culpable state of mind upon destroying or losing the evidence; and that (3) the missing evidence is relevant to the innocent party's claim or defense.

Relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner. . . . Although many courts in this district presume relevance where there is a finding of gross negligence, application of the presumption is not required. However, when the spoliating party was merely negligent, the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction. . . .

No matter what level of culpability is found, any presumption is rebuttable and the spoliating party should have the opportunity to demonstrate that the innocent party has not been prejudiced by the absence of the missing information. If the spoliating party offers proof that there has been no prejudice, the innocent party, of course, may offer evidence to counter that proof. While requiring the innocent party to demonstrate the relevance of information that it can never review may seem unfair, the party seeking relief has some obligation to make a showing of relevance and eventually prejudice, lest litigation become a "gotcha" game rather than a full and fair opportunity to air the merits of a dispute. If a presumption of relevance and prejudice were awarded to every party who can show that an adversary failed to produce any document, even if such failure is completely inadvertent, the incentive to find such error and capitalize on it would be overwhelming. This would not be a good thing.

To ensure that no party's task is too onerous or too lenient, I am employing the following burden shifting test: When the spoliating party's conduct is sufficiently egregious to justify a court's *imposition* of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants *permitting* the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses. If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required.

D. Remedies

The remaining question is what remedy should the court impose. . . . Where the breach of a discovery obligation is the non-production of evidence, a court has broad discretion to determine the appropriate sanction. . . .

It is well accepted that a court should always impose the least harsh sanction that can provide an adequate remedy. The choices include -- from least harsh to most harsh -- further discovery, cost-shifting, fines, special jury instructions, preclusion, and the entry of default judgment or dismissal (terminating sanctions). The selection of the appropriate remedy is a delicate matter requiring a great deal of time and attention by a court.

The Citco Defendants request dismissal -- the most extreme sanction. However, a terminating sanction is justified in only the most egregious cases, such as where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence by burning, shredding, or wiping out computer hard drives. As described below, there is no evidence of such misconduct in this case.

Instead, the appropriate sanction here is some form of an adverse inference instruction that is intended to alleviate the harm suffered by the Citco Defendants. Like many other sanctions, an adverse inference instruction can take many forms, again ranging in degrees of harshness. The harshness of the instruction should be determined based on the nature of the spoliating party's conduct -- the more egregious the conduct, the more harsh the instruction.

In its most harsh form, when a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true. At the next level, when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption. Even a mandatory *presumption*, however, is considered to be rebuttable.

The least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating party's rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party. This sanction still benefits the innocent party in that it allows the jury to consider both the misconduct of the spoliating party as well as proof of prejudice to the innocent party. Such a charge should be termed a "spoliation charge" to distinguish it from a charge where the a jury is *directed* to presume, albeit still subject to rebuttal, that the missing evidence would have been favorable to the innocent party, and from a charge where the jury is *directed* to deem certain facts admitted.

Monetary sanctions are also appropriate in this case. . . . Awarding monetary sanctions "serves the remedial purpose of compensating [the movant] for the reasonable costs it incurred in bringing [a motion for sanctions]." This

sanction is imposed in order to compensate the Citco Defendants for reviewing the declarations, conducting the additional depositions, and bringing this motion.

Three final notes. *First*, I stress that at the end of the day the judgment call of whether to award sanctions is inherently subjective. A court has a "gut reaction" based on years of experience as to whether a litigant has complied with its discovery obligations and how hard it worked to comply. *Second*, while it would be helpful to develop a list of relevant criteria a court should review in evaluating discovery conduct, these inquiries are inherently fact intensive and must be reviewed case by case. Nonetheless, I offer the following guidance.

After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant *Zubulake* opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

Finally, I note the risk that sanctions motions, which are very, very time consuming, distracting, and expensive for the parties and the court, will be increasingly sought by litigants. This, too, is not a good thing. For this reason alone, the most careful consideration should be given before a court finds that a party has violated its duty to comply with discovery obligations and deserves to be sanctioned. Likewise, parties need to anticipate and undertake document preservation with the most serious and thorough care, if for no other reason than to avoid the detour of sanctions.

III. PROCEDURAL HISTORY

In the summer of 2003, a group of investors formed an ad hoc "policy consultative committee" to represent the interests of the Funds' investors, including "monitor[ing] the court proceedings" against Lancer and the Funds and "retain[ing] legal counsel as necessary . . ." On September 17 and 18, 2003, this group of investors met prospective legal counsel. Although some plaintiffs had previously retained counsel, in October or November, 2003, plaintiffs retained BRBI and Berman as lead counsel for this suit. This lawsuit was then instituted on February 12, 2004 in the Southern District of

Florida. On October 25, 2005, the case was transferred to this Court as a result of defendants' motion to transfer venue.

IV. PLAINTIFFS' EFFORTS AT PRESERVATION AND PRODUCTION

Shortly after its retention in October or November, 2003, Counsel contacted plaintiffs to begin document collection and preservation. Counsel telephoned and emailed plaintiffs and distributed memoranda instructing plaintiffs to be over, rather than under, inclusive, and noting that emails and electronic documents should be included in the production. Counsel indicated that the documents were necessary to draft the complaint, although they did not expressly direct that the search be limited to those documents.

This instruction does not meet the standard for a litigation hold. It does not direct employees to *preserve* all relevant records -- both paper and electronic - - nor does it create a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee. Rather, the directive places total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel. Throughout the litigation, Counsel sent plaintiffs monthly case status memoranda, which included additional requests for Lancer-related documents, including electronic documents. But these memoranda never specifically instructed plaintiffs not to destroy records so that Counsel could monitor the collection and production of documents.

In 2004, a stay pursuant to the Private Securities Litigation Reform Act ("PSLRA") was instituted and remained in place until early 2007. Counsel "did not focus [their] efforts . . . on discovery" while the PSLRA discovery stay was in place and plaintiffs did not issue a written litigation hold until 2007. In May, 2007, the Citco Defendants made their first document requests.

Depositions of plaintiffs commenced on August 30, 2007. Those depositions revealed that there were gaps in plaintiffs' document production. By October, 2007, the Citco Defendants were dissatisfied with plaintiffs' efforts to produce missing documents. In response to a request from the Citco Defendants, the Court ordered plaintiffs to provide declarations regarding their efforts to preserve and produce documents.

* * *

V. DISCUSSION

A. Duty to Preserve and Document Destruction

By April, 2003, Lancer had filed for bankruptcy, UM had filed a complaint with the Financial Services Commission of the British Virgin Islands, Hunnicutt and the Chagnon Plaintiffs had retained counsel, and the Chagnon Plaintiffs had initiated communication with a number of other plaintiffs. It is unreasonable to assume that the remaining plaintiffs -- all sophisticated investors -- were unaware of the impending Lancer collapse while other investors were filing suit and retaining counsel. Accordingly, each plaintiff was under a duty to preserve at that time. While, as discussed below, the duty to issue a written litigation hold might not have been well established at that time, it was beyond cavil that the duty to preserve evidence included a duty to preserve electronic records.

The burden then falls to the Citco Defendants to demonstrate that documents were destroyed after the duty to preserve arose. . . .

The paucity of records produced by some plaintiffs and the admitted failure to preserve some records or search at all for others by all plaintiffs leads inexorably to the conclusion that relevant records have been lost or destroyed.

B. Culpability

The age of this case requires a dual analysis of culpability -- plaintiffs' conduct before and after 2005. The Citco Defendants contend that plaintiffs acted willfully or with reckless disregard, such that the sanction of dismissal is warranted. Plaintiffs admit that they failed to institute written litigation holds until 2007 when they returned their attention to discovery after a four year hiatus. Plaintiffs should have done so no later than 2005, when the action was transferred to this District. This requirement was clearly established in this District by mid-2004, after the last relevant *Zubulake* opinion was issued. Thus, the failure to do so as of that date was, at a minimum, grossly negligent. The severity of this misconduct would have justified severe sanctions had the Citco Defendants demonstrated that any documents were destroyed *after* 2005. They have not done so. It is likely that most of the evidence was lost before that date due to the failure to institute written litigation holds.

Almost all plaintiffs' pre-2005 conduct, apart from the failure to issue written litigation holds, is best characterized as either grossly negligent or negligent because they failed to execute a comprehensive search for documents and/or failed to sufficiently supervise or monitor their employees' document collection. For some plaintiffs, no further evidence of culpable conduct is offered. For others, the Citco Defendants have provided additional evidence. For example, one plaintiff -- the Bombardier Foundation -- admitted that it destroyed backup data in 2004, after the duty to preserve at least some backup tapes was well-established. Similarly, several plaintiffs failed to collect and preserve documents of key players -- including members of investment committees and/or boards of directors. One further problem bears mention. Each plaintiff was directed by this Court to submit a declaration documenting its search efforts for two periods -- 2003/2004 and 2007/2008, as well as any steps taken in between. In the end, almost every plaintiff submitted a declaration that -- at best -- lacked attention to detail, or -- at worst -- was intentionally vague in an attempt to mislead the Citco Defendants and the Court. In addition, plaintiffs had a duty to adequately prepare knowledgeable witnesses with respect to these topics. Which files were searched, how the search was conducted, who was asked to search, what they were told, and the extent of any supervision are all topics reasonably within the scope of the inquiry. Several plaintiffs violated this duty.

From my review of the evidence submitted by the parties and discussed at the hearings held on October 30, 2007 and April 22, 2008, I conclude that no plaintiff engaged in willful misconduct. However, as outlined below, I find that 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, and the Bombardier Foundation acted with gross negligence, and the Altar Fund, L'Ecole Polytechnique, Okabena, the Corbett Foundation, Commonfund, KMEFIC, and UM acted in a negligent manner.

C. Relevance and Prejudice

For those plaintiffs that were grossly negligent, I find that the Citco Defendants have "adduced enough evidence" that plaintiffs have failed to produce relevant documents and that the Citco Defendants have been prejudiced as a result. Thus, a jury will be permitted to presume, if it so chooses, both the relevance of the missing documents and resulting prejudice to the Citco Defendants, subject to the plaintiffs' ability to rebut the presumption to the satisfaction of the trier of fact.

For those plaintiffs that were negligent, the Citco Defendants must

demonstrate that any destroyed documents were relevant and the loss was prejudicial. To meet this burden, the Citco Defendants begin by pointing to the 311 Documents. While many of these documents may be relevant, the Citco Defendants suffered no prejudice because all were eventually obtained from other sources. As noted by plaintiffs, "Citco possesses every one of the 311 [D]ocuments; indeed, every one of these documents was marked as an exhibit and used by Citco at depositions." The Citco Defendants had the opportunity to question witnesses about these documents and will be able to introduce them at trial. Severe sanctions based on the failure to produce the 311 Documents is not justified.

By contrast, it is impossible to know the extent of the prejudice suffered by the Citco Defendants as a result of those emails and documents that have been permanently lost due to plaintiffs' conduct. The volume of missing emails and documents can never be learned, nor can their substance be known. . . . Such documents may have been helpful to the Citco Defendants, helpful to plaintiffs, or of no value to any party. But it is plaintiffs' misconduct that destroyed the emails and documents. Given the facts and circumstances presented here, I can only conclude that the Citco Defendants have carried their limited burden of demonstrating that the lost documents would have been relevant. The documents that no longer exist were created during the critical time period. Key players must have engaged in correspondence regarding the relevant transactions. There can be no serious question that the missing material would have been relevant.

Prejudice is another matter. The Citco Defendants have gathered an enormous amount of discovery -- both from documents and witnesses. Unless they can show through extrinsic evidence that the loss of the documents has prejudiced their ability to defend the case, then a lesser sanction than a spoliation charge is sufficient to address any lapse in the discovery efforts of the negligent plaintiffs.

D. Individual Plaintiffs

Because this motion involves the conduct of thirteen plaintiffs, and because the Citco Defendants have charged each plaintiff with distinct discovery misconduct, a factual summary as to each plaintiff is required. In addition, because the stakes are high for both sides, and because sanctions should not be awarded lightly nor should discovery misconduct be tolerated, it is important to carefully review that conduct to determine whether any plaintiff engaged in culpable conduct and, if so, what level of culpability should be assigned. Each plaintiff's discovery efforts is described below together with my determination of the adequacy of those efforts.

* * *

E. Sanctions

The Citco Defendants have demonstrated that most plaintiffs conducted discovery in an ignorant and indifferent fashion. With respect to the grossly negligent plaintiffs -- 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, and the Bombardier Foundation -- I will give the following jury charge:

The Citco Defendants have argued that 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, and the Bombardier Foundation destroyed relevant evidence, or failed to prevent the destruction of relevant evidence. This is known as the "spoliation of evidence."

Spoliation is the destruction of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. To demonstrate that spoliation occurred, the Citco Defendants bear the burden of proving the following two elements by a preponderance of the evidence:

First, that *relevant* evidence was destroyed after the duty to preserve arose. Evidence is relevant if it would have clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence; and

Second, that if relevant evidence was destroyed after the duty to preserve arose, the loss of such evidence would have been favorable to the Citco Defendants.

I instruct you, as a matter of law, that each of these plaintiffs failed to preserve evidence after its duty to preserve arose. This failure resulted from their gross negligence in performing their discovery obligations. As a result, you may presume, if you so choose, that such lost evidence was relevant, and that it would have been favorable to the Citco Defendants. In deciding whether to adopt this presumption, you may take into account the egregiousness of the plaintiffs' conduct in failing to preserve the evidence.

However, each of these plaintiffs has offered evidence that (1) no evidence was lost; (2) if evidence was lost, it was not relevant; and (3) if evidence was lost and it was relevant, it would not have been favorable to the Citco Defendants.

If you decline to presume that the lost evidence was relevant or would have

been favorable to the Citco Defendants, then your consideration of the lost evidence is at an end, and you will *not* draw any inference arising from the lost evidence.

However, if you decide to presume that the lost evidence was relevant and would have been unfavorable to the Citco Defendants, you must next decide whether any of the following plaintiffs have rebutted that presumption: 2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, or the Bombardier Foundation. If you determine that a plaintiff has *rebutted* the presumption that the lost evidence was either relevant or favorable to the Citco Defendants, you will *not* draw any inference arising from the lost evidence against that plaintiff. If, on the other hand, you determine that a plaintiff has *not rebutted* the presumption that the lost evidence was both relevant and favorable to the Citco Defendants, you may draw an inference against that plaintiff and in favor of the Citco Defendants -- namely that the lost evidence would have been favorable to the Citco Defendants.

Each plaintiff is entitled to your separate consideration. The question as to whether the Citco Defendants have proven spoliation is personal to each plaintiff and must be decided by you as to each plaintiff individually.

In addition, all plaintiffs are subject to monetary sanctions. The Citco Defendants are entitled to an award of reasonable costs, including attorneys' fees, associated with reviewing the declarations submitted, deposing these declarants and their substitutes where applicable, and bringing this motion. The Citco Defendants shall submit a reasonable fee application to this Court for approval. Once approved, the costs are to be allocated among these plaintiffs.

I have also considered whether the Citco Defendants should be entitled to additional discovery. If a lesser sanction is appropriate that is always a better course. With regard to Coronation and Okabena, plaintiffs admit that backup tapes exist and have not been searched. They do not explain why such a search cannot still be conducted. The goal of discovery is to obtain evidence, not to issue sanctions. Thus, Coronation and Okabena are ordered to search their backup tapes for the relevant period at their expense, or demonstrate why such backup tapes cannot be searched, within thirty days.

Further discovery is not necessary for the remaining plaintiffs. Given the number of submitted declarations and numerous depositions that have already occurred in this action, more discovery of the remaining plaintiffs would not be fruitful. At this stage, the costs of conducting further discovery would far outweigh the benefit of any results. Therefore, no further discovery

is warranted.

VI. CONCLUSION

For the reasons discussed above, the Citco Defendant's motion for sanctions is granted in part. While litigants are not required to execute document productions with absolute precision, at a minimum they must act diligently and search thoroughly at the time they reasonably anticipate litigation. All of the plaintiffs in this motion failed to do so and have been sanctioned accordingly.

The Clerk of the Court is directed to close this motion (Docket No. 248).

SO ORDERED.

The court in *Pension Committee* identifies a difficult balancing issue for the judicial system. On the one hand, the system should ensure that parties and their lawyers adhere to their discovery obligations and face sanctions if they do not. On the other hand, the sanctions should not be so draconian as to encourage parties to spend their time searching for sanctionable conduct instead of focusing on developing the merits of cases.

8. Note that the sanctionable conduct in *Pension Committee* was deemed grossly negligent or negligent. For an analysis of the approach to take when the court believes conduct has been willful, consider *Rimkus Consulting Group, Inc. v. Cammarata*, [688 F. Supp. 2d 598](#) (S.D. Tex. 2010) (ruling that an adverse jury inference would be available in circumstances where the jury finds that a party intentionally destroyed emails to prevent their use in litigation).

Chapter 9

DISPOSITION WITHOUT TRIAL

B. DISMISSAL ON THE PLEADINGS

1. The Use of Heightened Pleading Standards in Complex Cases

At Text, top of page 780, add the following at the end of numbered paragraph 4:

Post-*Twombly* appellate decisions suggest that many counsel are finding ways to meet the *Twombly/Iqbal* pleading standard: *See, e.g., In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) (stating that the question under *Twombly* is whether the complaint establishes a “nonnegligible probability that the claim is valid,” and that the allegations of antitrust conspiracy were sufficient because they went beyond parallel conduct to allege facilitating practices such as meetings designed for “co-opetition,” direct exchanges of price information, prices rises in the face of steeply falling costs, adoption of a uniform pricing structure, and simultaneous price increases); *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85 (3d Cir. 2010) (stating that *Twombly* does not impose heightened pleading requirement in antitrust cases, although complex cases may require more factual allegations to survive; finding allegations of direct evidence of conspiracy and of antitrust injury in the form of reduced reimbursement rates sufficient); *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010) (finding allegations that insurance brokers conspired with insurance “partners” to refer business to them in exchange for inflated contingent commissions did not sufficiently imply a horizontal conspiracy among the insurers themselves, because it would have been in the self interest of each insurer to participate in such vertical arrangements, but that allegations of submitting sham “protective” bids to avoid competing for renewal business were sufficient under *Twombly*); *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010) (finding antitrust complaint alleging that defendants had conspired through joint ventures to fix the price of digital music sufficient under *Twombly*). *See also Swanson v. Citibank, N.A.* 614 F.3d 400, 404-05 (7th Cir. 2010) (holding that claim of racial discrimination in rejecting a home equity loan satisfied *Twombly*; distinguishing “straightforward” cases where it was sufficient to allege the type of discrimination, by whom it was committed, and when it was committed, from more complex cases, where the plaintiff is required to allege “more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff’s mind at least, the dots should be connected”; stating that the Supreme Court has required to plaintiff to “give

enough details about the subject-matter of the case to present a story that holds together”).

At Text, top of page 780, add the following paragraphs 5, 6, and 7 after paragraph 4:

5. Bills, probably symbolic, have been introduced in Congress, for the purpose of reinstating pre-*Twombly* pleading standards. See, e.g., S. 1504, 111th cong., 1st Sess. (July 22, 2009) (Notice Pleading Restoration Act of 2009) (providing that except as otherwise provided by an Act of Congress or by an amendment to the FRCP which takes effect after the date of enactment of the Act, “a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957).”) See also H.R. 4115, 111th Cong., 1st Sess. (Nov. 19, 2009) (“Open Access to Courts Act of 2009).

6. *Twombly* and *Iqbal* have generated an enormous amount of academic commentary adopting various interpretations of their meaning and significance. Some of the more important efforts include:

(1) Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010). Revisiting the subject of his previous article in the Iowa Law Review (Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009)), Professor Bone sharply criticizes *Iqbal* as an “ill-advised holding and a poorly reasoned opinion” (*id.* at 885) which adopts a much stricter pleading standard than *Twombly*. He identifies two key deficiencies in *Iqbal*. First, the Court’s “two-pronged” approach, which entirely disregards allegations characterized as “legal conclusions” before evaluating the sufficiency of the remaining allegations is “incoherent” (*id.*, p. 849) because there is no clear distinction between facts and legal conclusions, and the sufficiency of the complaint necessarily must be evaluated by considering its allegations as a whole. Second, facilitated by this misguided distinction, the Court in *Iqbal* engaged in “thick screening” of cases based on an appraisal of their likelihood of success at trial, rather than the “thin screening” for “truly meritless suits” (*id.* at 851)—i.e., those in which “the defendant *clearly* is not liable as an *objective* matter” (*id.* at 870)—adopted in *Twombly*. “Thin screening” merely requires that plaintiffs’ allegations taken as a whole imbue the judge with a low level of confidence that defendant’s conduct departed from the baseline of legality: *Twombly* sets “a relatively low confidence threshold. A complaint is sufficient if the story it tells differs significantly from what is treated as the normal baseline state of affairs associated with lawful conduct, and in a way that suggests illegality.” *Id.* at 876. By contrast, “thick screening” under *Iqbal* requires a greater level of factual specificity to permit the judge to evaluate the likelihood of success at trial.

“The assessment of likely trial success that the thick screening model requires is an all-things-considered prediction based on what the complaint tells the judge about the facts and what the judge knows from her experience about how facts like the ones alleged are usually proved in similar cases.” *Id.* at 873. Bone regards the thick screening model as “highly problematic” because despite its screening benefits, it entails high costs, particularly the cost of screening out meritorious suits in which plaintiff may not have access to private information such as the defendant’s state of mind or intent absent discovery. *Id.* at 878-79. Professor Bone does not support legislation returning to pre-*Twombly* notice pleading, but argues that the Supreme Court is not well equipped to evaluate and balance the competing policies implicated by pleading standards, which instead should be addressed through the rulemaking process.

Query: will it be as easy as Professor Bone suggests for courts to apply a “notice plus” “thin screening” model which will permit them accurately to appraise the merit of a suit in the absence of discovery, based on their view of whether the facts alleged in the complaint tell a “narrative” that departs from the “baseline” of legal conduct? In any event, isn’t Professor Bone clearly correct in concluding that *Iqbal* represents an undesirable extension of *Twombly*?

(2) Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules”*, 2009 WIS. L. REV. 535 (2009). In a thoughtful exploration of the costs of our “foundational assumptions” that the Federal Rules must be trans-substantive and are not subject to amendment outside the legislative or rulemaking process, Professor Burbank notes that *Twombly*’s plausibility standard, like *Tellabs*, requires the discretionary weighing of competing inferences and expresses the (since-dashed) hope that *Iqbal* might be decided on a basis (such as the prescription of federal common law rules of fact pleading in cases involving official immunity) that will not “further . . . deform the general pleading landscape.” *Id.* at 555. He recognizes the prospect, however, that the Supreme Court might (as it did) simply “take a different view of the appropriate contextual plausibility judgment than did the lower courts in *Iqbal*,” and observes that this might constitute “an invitation to the lower courts to make ad hoc decisions, often reflecting buried policy choices, and in any event with little fear of reversal because of the impotence of federal appellate review to police discretionary decision making.” *Id.* at 557. *Twombly* was “an invitation to the lower federal courts to screen out complaints in disfavored classes of cases, whether they are disfavored because of their perceived discovery burdens or for some other reason.” *Id.* at 560. A particularly troublesome consequence may be that *Twombly* will “deny court access to those who, although they have meritorious claims, cannot satisfy its requirements either because they lack the resources to engage in extensive pre-filing investigation or because of informational

asymmetries.” *Id.* at 561. Noting the important social policy judgments impacted by pleading rules, such as the availability of court access, compensation for injury, and the enforcement of social norms, he argues that Supreme Court, unlike Congress or rulemakers, “was not well positioned institutionally to evaluate even the *procedural* costs and benefits of tightening the pleading screws on plaintiffs, even in the isolated substantive-law context involved in the [*Twombly*] case,” and “even less well positioned to estimate the procedural costs and benefits of a general rule of plausible pleading . . . let alone the nonprocedural costs and benefits of such a rule” *Id.* at 559-60.

(3) Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010). Professors Clermont and Yeazell argue that in adopting a “robust gatekeeping regime,” the Court has “invent[ed] a foggy test for the threshold stage of every lawsuit” that has “destabilized the entire system of civil litigation” and that any such departure should come as a result of the rulemaking process. *Id.* at 823. They contend that the Court’s novel new test adopted “a procedural mechanism without precedent in the law” which requires a court to evaluate the “factual convincingness” of plaintiff’s claims as if on motion for summary judgment, but based on bare factual allegations without procedural protections or the benefits of discovery (*id.* at 832-33); that application of the test, which turns on context and the judge’s own “judicial experience and common sense,” is unpredictable and will vary from judge to judge, causing the test’s “destabilization to spread virally through the civil-justice system” (*id.* at 844); and that the test “came by a legal process that, as applied to the pleading problem, could possibly disrupt procedural design for years to come,” and was based on no data supporting the need for a greater pleading gatekeeping role. *Id.* at 846-48. “It is entirely arguable that pleading should provide additional, and more vigorous, gatekeeping. But before discarding the pleading system that has been in place for many years, we ought to discuss its virtues and failures soberly and with the relevant information before us. The rulemaking bodies should have hosted that discussion.” *Id.* at 850.

(4) In Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53 (2010), Professor Dodson argues that the “plausibility” standard of *Twombly* and *Iqbal* has “dramatically changed” the focus of pleading practice from notice and legal sufficiency to the factual sufficiency of plaintiff’s claims, with the goal of screening out meritless claims, but that factual insufficiency often is a poor proxy for meritlessness because of information asymmetry between plaintiffs and defendants, particularly where necessary information is peculiarly within the knowledge or possession the defendant. To resolve this dilemma, Dodson recommends, by analogy to practice in some states, a new regime of carefully limited presuit or predissmissal discovery to permit plaintiffs to gather information necessary to support the complaint. This

“new discovery” could play “a crucial role in rectifying information asymmetry and alleviating the injustice of overscreening meritorious claims, while still protecting defendants from unwarranted discovery burdens.” *Id.* at 56. One may wonder whether such “limited” discovery” would suffice to meet the stringent demands of *Twombly* and *Iqbal*, particularly in cases involving a defendant’s state of mind.

(5) In Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010), Professor Hartnett argues that the distinction between factual allegations, which must be accepted as true on motion to dismiss, and legal conclusions, which are not entitled to a presumption of truth, is of long standing and does not represent a major departure. To the extent that a conclusory allegation in the plaintiff’s complaint requests the court to infer the existence of an essential element of plaintiff’s cause of action (such as the existence of a conspiracy or of discriminatory intent) from other, factual allegations of the complaint, *Twombly*’s plausibility standard “can be understood as equivalent to the traditional insistence that a factual inference be reasonable.” *Id.* at 474. A conclusory allegation not entitled to a presumption of truth is “one that asserts ‘the final and ultimate conclusion which the court is to make in deciding the case for him,’ that is, one that alleges an element of a claim. Such an allegation is not itself assumed to be true, but must be supported by the pleader going a ‘step further back,’ and alleging the basis from which this conclusion follows.” *Id.* at 491. Such an analysis is contextual, and some inferences are easier to draw than others. “Significantly, determinations of plausibility depend on baseline assumptions about the way the world usually works. What strikes a judge as plausible depends on the judge’s sense of what is (to use the *Twombly* Court’s term) ‘natural.’” *Id.* at 498. By contrast, to the extent that a conclusory allegation of an essential element of plaintiff’s claims merely asserts that the pleader believes, in good faith, that discovery is likely to reveal evidence supporting that allegation as permitted by FRCP 11(b)(3), Hartnett argues that a court retains discretion to order limited and focused discovery before ruling on a pending motion to dismiss. He recognizes that this method of “taming” *Twombly* and *Iqbal* is difficult to square with the some language in those decisions, particularly *Iqbal*’s clear statement that discovery should not be permitted if a complaint is, on its face, inadequate, but argues that this aspect of *Iqbal* should be limited to cases involving the assertion of a qualified immunity defense by government officials.

Notwithstanding Professor Hartnett’s belief that “precision here can lead to clarity for both drafter and reader as to whether a pleader intends an allegation to be an ordinary factual one as to which he seeks discovery or a conclusion he seeks the court to draw as to an element of the claim,” (*id.* at 505-06), one might wonder how a court is to distinguish which allegations should be placed in the latter category and which in the former, as to which

discovery would be permitted. Moreover, even where the court believes that a conclusory allegation in the complaint, in effect, asks it to infer an essential element of plaintiff's claim, doesn't the requirement that that inference be "reasonable" in light of other, more factual allegations (which themselves must be accepted as true), in effect transform the motion to dismiss into threshold summary judgment procedure, in which the court is ask to make factual inferences without the benefit of discovery and based on highly subjective and discretionary determinations of what is "natural" applying its own "judicial experience and common sense."?

(6) Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010). In this broad ranging analysis of the asserted justifications for and impact of the "plausibility" pleading standard of *Twombly* and *Iqbal*, Professor Miller concludes that those decisions "may have transformed the relatively delineated purpose of the Rule 12(b)(6) motion into a potentially draconian method of foreclosing access based on an evaluation of the plausibility of the challenged pleading's factual presentation, filtered through the Court's invocation of extra-pleading 'judicial experience and common sense'" (*id.* at 22); that this represents a "radical departure" (*id.*, at 28) from the focus on notice and legal sufficiency adopted by the Rules drafters in 1938 that has "destabilized both the pleading and the motion-to-dismiss practices as they have been known for over sixty years;" that this development has been based on inadequately substantiated claims of undue litigation expense and abuse by corporate and defense interests ("[n]ot only are claims of excessive litigation costs questionable, but there is also no litmus test to identify extortionate settlements or measure how frequently they occur" (*id.*, at 65)); and that the decisions take inadequate account of the costs they have imposed on "citizen access, a level litigation playing field, and the other values of civil litigation" including private attorney general enforcement of important public policies. He argues that *Twombly* and *Iqbal* "should be seen as the latest steps in a long-term trend that has favored increasingly early case disposition in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits. It also marks a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth." *Id.* at 10. In particular, "[i]t is uncertain how plaintiffs with potentially meritorious claims are expected to plead with factual sufficiency without the benefit of some discovery, especially when they are limited in terms of time or money, or have no access to important information that often is in the possession of the defendant." *Id.* at 43. He argues that "[i]f litigation costs are to be considered in applying the pleading and motion-to-dismiss rules, *all* costs should be taken into account, including those borne by plaintiffs, the expenditure of system resources, and the loss to society from any impairment of important public policies as a result of non-enforcement." *Id.* at 61.

Professor Miller accordingly urges the Advisory Committee on Civil Rules (or Congress), who possess a more wide-angle view of all the relevant benefits, costs, and systemic impacts, to revise these developments, and offers several suggestions for their consideration, including the institution of some form of “limited preinstitution discovery,” or a procedure for limited discovery following the filing of a motion to dismiss on “plausibility” grounds, and improvements in case management techniques.

(7) A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009). In this perceptive article, Professor Spencer criticizes “plausibility pleading” as lacking clarity and precision, and as potentially contrary to the interests of justice by denying court access and procedural fairness to litigants possessing potentially meritorious claims. He develops a “descriptive theory” of contemporary plausibility pleading doctrine, arguing that it requires a litigant to allege “objective facts” and supported implications that “describe events about which there is a *presumption of impropriety*.” *Id.* at 5. Where, on the other hand, the objective facts set out in the complaint “present a scenario that, if true, is neutral with respect to wrongdoing by the defendant” (*id.* at 16), additional “speculative suppositions” (such as the existence of a conspiracy or of discriminatory intent) will not make it sufficient. Rather, additional objective facts that support implications suggestive of wrongdoing must be included to avoid dismissal. *Id.* at 17. In sum, “a scenario possessing a presumption of impropriety based on objective facts and supported implications states a plausible claim, while neutral facts relying on speculative suppositions to show liability” do not. *Id.* at 18. Professor Spencer argues that this theory explains why the form complaint for negligence appended to the Federal Rules is sufficient, while the complaint in *Twombly* was not.

Professor Spencer then turns to an evaluation of this test in light of the core values implicated by a pleading regime: notice, efficiency, and justice. He concludes that notice is largely irrelevant to understanding contemporary standards of pleading sufficiency. Rather, plausibility pleading appears to be primarily informed by efficiency concerns of avoiding unwarranted costs to defendants and the judicial system from the prosecution of unmeritorious claims. In this respect, however, he views plausibility pleading under *Twombly* as “overinclusive” because it may screen out meritorious claims, and because by denying court access and procedural fairness to litigants possessing potentially meritorious claims that depend on a defendant’s subjective motivations or concealed evidence, it may unduly impair the interests of justice. He concludes that in cases where the information necessary to overcome the presumption of propriety is unknown or unknowable from the plaintiff’s perspective, “[r]ecalibrating the doctrine to permit more generalized allegations of certain components of a claim, coupled perhaps with discovery reform that permits greater access to pre-filing or

staged discovery could go a long way toward restoring a proper balance between efficiency and access.” *Id.* at 36. In a subsequent article, Professor Spencer takes sharp issue with the Court’s application of *Twombly* in *Iqbal*. A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 1 (2010).

(8) Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010). In a thought-provoking article, Professor Steinman observes that *Twombly* is one of the most frequently cited Supreme Court cases of all time. He argues that many courts and commentators have over-read *Twombly* and *Iqbal* as having altered pre-existing practice by adopting a heightened pleading standard that requires courts to evaluate the factual plausibility of the allegations of the complaint. Instead, he contends that those decisions simply require that, after disregarding “conclusory” allegations, the remaining allegations of the complaint, if accepted as true, support the existence of each essential element of a viable claim for relief. If it does, the complaint may not be dismissed on the ground that those allegations are implausible or unsupported by other, more detailed factual allegations. “In short, only conclusoriness is a basis for refusing to accept the truth of an allegation; implausibility is not” and “the troublesome plausibility standard is rendered irrelevant when a plaintiff provides nonconclusory allegations for each element of a claim.” *Id.* at 1298-99. Professor Steinman acknowledges that drawing the line between insufficient “conclusory” and factually sufficient allegations will not be easy, but argues for a standard of “plain pleading” under which the basic factual transactions underlying the complaint are clearly set out. “A plaintiff’s complaint must provide an adequate transactional narrative, that is, an identification of the real-world acts or events underlying the plaintiff’s claim. When an allegation fails to concretely identify *what* is alleged to have happened, that allegation is conclusory and need not be accepted as true at the pleadings phase.” *Id.* at 1334. He argues that, if interpreted and applied in this manner, *Twombly* and *Iqbal* are consistent with previous Supreme Court decisions interpreting Rule 8, as well as with the exemplary forms appended to the Federal Rules.

Query: Given the necessity to identify and disregard “conclusory” allegations, no matter how defined, won’t the resulting evaluation of the complaint inevitably involve subjective evaluation of the factual plausibility of plaintiff’s claims before any opportunity for discovery has been afforded, given that plaintiffs’ allegations of some essential elements of a viable claim for relief, such as the existence of a conspiracy or discriminatory intent, have been treated as if they did not exist? Despite the ingenuity of his argument, does Professor Steinman really come to grips with the obvious implications of *Twombly* and *Iqbal*?

7. Commentators have debated the actual impact of *Twombly* and *Iqbal* on dismissal rates. See, e.g., Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010) (presenting a statistical analysis of the effects on grants of motions to dismiss of *Twombly* and *Iqbal* in comparison with those under *Conley*. Hatamyar concludes, based on the results of a multinomial logistic regression analysis of a randomly selected sample of cases, that although the “notice pleading” ideal of *Conley* had in fact been seriously eroded by the time of *Twombly*, those decisions, particularly *Iqbal*, have significantly increased the odds that a motion to dismiss will be granted with leave to amend, rather than denied. Additionally, in civil rights cases, “motions to dismiss were granted at a higher rate (53%) than in all cases combined (49%), and the rate 12(b)(6) motions were granted in those cases increased from *Conley* (50%) to *Twombly* (55%) to *Iqbal* (60%).”); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) (arguing that *Twombly* and *Iqbal* have, in effect advanced the summary judgment fact-screening of cases to the pleading stage and have had a disproportionate impact on the dismissal of civil rights and employment discrimination cases, which may reflect judges’ subjective impressions and unconscious bias against such litigation); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 ILL. L. REV. 1011 (2009) (presenting data and analysis suggesting that *Twombly* has increased the rate at which motions to dismiss are granted in Title VII employment discrimination cases).

Compare Joe S. Cecil, George W. Cort, Margaret S. Williams & Jared J. Battaillon, *Motions to Dismiss for Failure to State a Claim After Iqbal, Report to the Judicial Conference Advisory Committee on Civil Rules* (Federal Judicial Center, March 2011). This study examines whether there was an increase in the rate of grants (with or without leave to amend) of motions to dismiss in 23 federal districts accounting for 51% of all civil filings between two nine month periods ending in June 2006 (pre-*Twombly*) and June 2010 (post-*Iqbal*), respectively, excluding prisoner and pro se actions. Contrary to the articles previously reviewed, which were primarily based on decisions published in computerized legal reference systems, the study considered both published and unpublished decisions. After adjusting for factors that the authors deemed to be unrelated to *Twombly* and *Iqbal*, such as differences among types of filings and across districts, and whether the motion was in response to an amended complaint, the study concludes that although there was a significant increase in the rate of *filing* motions to dismiss following *Iqbal* (from 4.0% to 6.2%), there was no statistically significant increase in the adjusted *grant rates* for such motions except in cases involving financial instruments. In particular, the authors conclude that there was no statistically significant increase in the grant rates in cases involving

employment discrimination and civil rights. The implications of this study no doubt will continue to be examined, because it also showed that there was in fact an increase between 2006 and 2010 from 66% to 75% in the rate at which some or all of the relief sought by the motion was granted. The conclusion that this did not show a statistically significant increase turned on the “adjustments” that the authors made for factors deemed unrelated to *Twombly* and *Iqbal*, including differing grant rates in differing districts, differences in the composition of cases, and whether the motion was made in response to a previously amended complaint. (One might question, for example, whether the adjustment for previously amended complaints was appropriate given that the amendment itself may have been in response to *Twombly* or *Iqbal*.)

D. SETTLEMENT

1. The Dynamics of Settlement in Complex Litigation

At Text, page 825, insert the following at the end of numbered paragraph 2 at the bottom of the page:

A recent Symposium, *Against Settlement: Twenty-Five Years Later*, 78 *FORDHAM L. REV.* 1117 (2009) contains a series of articles debating Professor Fiss’s position, including arguments that settlements may, in many settings, promote the law-declaring and justice-achieving values he endorses, and possess independent public interest values as well, such as “the ability of a legal system to resolve the repeat harms associated with mass society” which is “itself an important justice value, one that brings recompense to the many, deters untoward behavior, and provides a critical private lever to prevent state regulatory monopoly.” Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 *FORDHAM L. REV.* 1177, 1179 (2009). Fiss himself, continues to adhere to his central point that “the purpose of adjudication is not the resolution of a dispute, not to produce peace, but rather justice” (Owen M. Fiss, *The History of an Idea*, 78 *FORDHAM L. REV.* 1273, 1276 (2009)), and argues that “the bargaining that normally takes place between litigants characterized, as I then assumed, by the pursuit of self-interest, imbalances of material resources, inequalities of information, and strategic behavior, has no connection to justice whatsoever.” *Id.* at 1277.

Chapter 10

STREAMLINING THE TRIAL PROCESS

F. *IN RE FIBREBOARD* AND TRIAL BY STATISTICS

At Text page 882, add to Note 10:

The Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) has expressly disapproved of the Trial by Formula approach discussed in part above:

We have established a procedure for trying [employment] pattern-or-practice cases When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, “a district court must usually conduct additional proceedings . . . to determine the scope of individual relief.” [Citation omitted] At this phase, the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to “demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.”

The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery – without further individualized proceedings. [Citation omitted] We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to “abridge, enlarge or modify any substantive right,” 28 U.S.C. § 2072(b) . . . ; a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.”

131 S. Ct. at 2561.

What do you think the import of this language is in general? Is the Supreme Court signaling that there are significant due process issues with formulaic approaches to resolving complex litigation issues?

Consider for example the following language from the majority opinion in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), in which the Supreme Court, in a narrowly divided 5-to-4 decision, held that the *Discover Bank* rule invalidating class arbitration waivers in certain consumer contracts was preempted by the Federal Arbitration Act. “[C]lass arbitration greatly increases risks to defendants [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.” 131 S. Ct. at 1752. Do you think the Supreme Court agrees with the defense view that aggregation of damages will often present unacceptable risk of error?

For an interesting discussion of some of the issues involved in trial-by-formula in the class action context, see Frank Burt & Ramiro Areces, ‘A Profound Disquiet’: *Losing Sight of Defendants’ Rights in Rule 23 Class Certification Analysis*, 79 U.S.L.W. 1575 (2010).

Chapter 11

PRECLUSION

C. PRECLUSION IN CLASS ACTIONS

2. Relitigation of the Issue of Adequate Representation

At Text, page 926, add the following at the end of paragraph 5:

In *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 KAN. L. REV. 917 (2010), Professor Patrick Woolley offers a forceful rebuttal to two important underpinnings of the ALI Principles. First, he argues that by confining the concept of adequate representation to “structural” conflicts of interest that can be determined *ex ante*, the Principles improperly disregard defects in the performance of class counsel that fall below a standard of reasonable care and due diligence, which also are key components of due process adequacy analysis and which should expose a class judgment rendered in their absence to collateral attack. Professor Woolley argues that “if proper attention is paid to the purpose of adequate representation—protecting the interests of individual class members in the economic value of their claims—there is no reason to suppose that the constitutional meaning of adequate representation can be limited to a prophylactic focus on structural conflicts. Courts cannot realistically protect the interests of absent class members by focusing solely on the absence of ‘structural defects’ as *Aggregate Litigation* narrowly defines that term. The self-interest of lawyers, for example, may lead them to neglect the interests of the class (or segments of the class) in important ways that are not always predictable prior to settlement.” *Id.* at 934.

Second, predicated in part on this conception of the adequate representation requirement, Professor Woolley argues that the Principles’ attempt to confine collateral attacks on class judgments to cases in which the judgment-rendering court “failed to make the necessary findings of adequate representation, or failed to afford class members reasonable notice and an opportunity to be heard as required by applicable law” should be rejected. Reprising the arguments advanced in Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383 (2001), he argues that long-standing principles of collateral attack, as well as the Supreme Court’s decisions in *Shutts* and *Taylor v. Sturgell*, make clear that absent class members are not required to appear in the action or otherwise take action to protect their right to adequate representation in the class proceedings, that class counsel or other “class objectors” have no right to represent the absentees’ interests in that regard,

and that collateral attack is available if the promise of adequate representation “at all times” is violated. “The notion that defendants . . . or self-selected objectors with no fiduciary obligation to the class could bind absent class members appears flatly inconsistent with basic principles of preclusion.” *Id.* at 955. He also argues that, under *Shutts*, adequate representation in fact is an essential pre-condition to the assertion of personal jurisdiction over absent class members. *Id.* at 961. A failure to opt out cannot elide this requirement because “the Court in *Shutts* focused heavily on the fact that an individual will not have to act in the forum to protect his interests. If an individual were required to appear in the forum to protect his interests—as he might well have to do if he were denied the right to collaterally attack a judgment for inadequate representation—he would be stripped of the very protection on which the Court relied to conclude that a failure to opt out could be deemed jurisdictionally significant in the class context.” *Id.* at 969. In short, echoing the position of Professor Monaghan (Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (1998)), he argues that a failure to opt out represents only a “limited and conditional” consent to personal jurisdiction—conditional on fulfillment of the adequate representation requirement. Although he recognizes that Congress might enact a law providing for nationwide amenability to jurisdiction in federal court and mandatory “process-like notice” on absent class members requiring them to raise adequacy objections in the class court, he argues that nothing in existing law authorizes that approach. *Id.* at 962, 975. In sum, “*Aggregate Litigation* has many virtues, but its cramped understanding of the adequate-representation requirement and its effort to severely restrict the availability of collateral attack should be soundly rejected.” *Id.* at 977.

At Text, page 926, add the following at the end of paragraph 6:

In *Smith v. Bayer Corp.*, 131 S.Ct. 2368 (2011), the Supreme Court unanimously rejected the result in *In re Bridgestone/ Firestone*. In *Smith*, following the removal of a West Virginia consumer class action against the manufacturer of a cholesterol-lowering medication to federal district court and its transfer to a multidistrict court, the federal court denied class certification for failure to satisfy the predominance requirement of Rule 23(b)(3). Two other consumers then sought to certify the same class asserting similar claims in an action pending in West Virginia state court. The federal district court enjoined the state court from considering the class certification motion and the court of appeals affirmed the issuance of the injunction on the ground that it fell within the “relitigation” exception to the Anti-injunction Act. *See supra*, Ch.4.C. The Supreme Court emphatically reversed, holding that the relitigation exception is very narrow and should be strictly construed and that “an injunction can issue only if preclusion is clear beyond peradventure.” *Id.* at 2376. Applying this strict test, the injunction was

improper on two grounds. First, issue preclusion was inapplicable because defendant had not demonstrated that the legal standard governing class certification under Federal Rule 23 in the first action was identical to the standard governing class certification under the West Virginia counterpart of Rule 23, which might be more liberally construed. The issues in the two actions therefore had not been shown to be the same. Second, the injunction was improper because the unnamed members of the uncertified putative class in the first action were not “parties” to that action as is required for issue to preclusion to apply, and no exception permitting the preclusion of non-parties (*see infra*, part D) was applicable. “The definition of the term ‘party’ can on no account be stretched so far as to cover a person like Smith, whom the plaintiff in a lawsuit was denied leave to represent.” *Id.* at 2379. Further, the rule permitting absent members of a certified class to be bound by the judgment was inapplicable, because the first action was not a properly certified class action. “If we know one thing about the McCollins suit, we know that it was *not* a class action. Indeed, the very ruling that Bayer argues ought to be given preclusive effect is the District Court’s decision that a class could not be properly certified.” *Id.* at 2380. The Court recognized the force of defendant’s policy argument that its ruling would permit seriatim attempts at certifying identical classes by different members of a putative class, but found that argument insufficient to override settled principles of preclusion law. Instead, the remedy lay in principles of *stare decisis* and comity among courts, which it expected would be applied with particular force in view of the broad availability of removal under CAFA (which was inapplicable in *Smith* itself). “. . . Congress’s decision to address the relitigation concerns associated with class actions through the mechanism of removal provides yet another reason for federal courts to adhere in this context to longstanding principles of preclusion.” *Id.* at 2382.

D. PRECLUSION OF NONPARTIES TO A PREVIOUS ACTION

2. Circumstances in which Non-Parties May Be Precluded

b. “Virtual Representation”

At Text, page 953, add the following new material at the end of numbered paragraph 1:

For an argument that current doctrine strictly limiting non-party preclusion based on conceptions of adequate representation and “class action exceptionalism” has resulted in a poor alignment of reasons for non-party preclusion, on the one hand, and the circumstances in which it is now permitted, on the other, and suggesting a more flexible approach extending non-party preclusion beyond the class action setting based on a recognition that participatory rights are not required in lawsuits that “do not single out any person for individual treatment but instead affect everyone only as a

result of adjudicating an impersonal status that they all happen to occupy,” and that, even in cases where participatory rights exist, those rights are not absolute but are mediated by institutional concerns relevant to the fairness and justness of adjudication, see Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 610 (2011). Professor Bone explores several implications of his argument, concluding that it would support preclusion of issues actually litigated in *Taylor v. Sturgell*, and increased barriers to collateral attacks on class actions settlements based on allegations that representation was inadequate.