MEGACASES, DIVERSITY, AND THE ELUSIVE GOAL OF WORKPLACE REFORM

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Abstract: Structural reform litigation, lawsuits that aim to create systemic change, dates back to the school desegregation cases of the 1950s and today continues with employment discrimination class action suits. Some of America's most important companies—Home Depot, Texaco, and Coca-Cola among them—have been subject to such litigation. This Article discusses the legal impetus towards the settling of such suits via consent decrees, and it examines several major consent decrees and the factors influencing the success or failure of each. The Article concludes that the defendant's acceptance of the desirability of creating a diverse workplace, coupled with making specific people accountable for delivering diversity, is a key component to a successful consent decree.

INTRODUCTION

Class actions have changed the stakes of employment discrimination litigation. The initial workplace cases, although critical in addressing discriminatory practices, overwhelmingly involved individual claims.[1] That changed with the Civil Rights Act of 1991.[2] It expanded compensatory and punitive damages, and made jury trials a matter of right,[3] thus providing economic incentives for class claims. From 2001 to 2004, a time when the number of class action suits was decreasing across the board, the number of employment discrimination class suits rose by sixty-seven percent.[4] These cases have produced scores of mul-

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[1] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794 (1973).

[2] Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 1981a (2000)).

[3] 42 U.S.C. § 1981a(c); *see also* Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 814 (2004).

[4] Melissa M. Mulkey, *Class Dismissed: Defending and Preventing Employment Class Actions in Your Workplace*, 12 HR ADVISOR: LEGAL & PRAC. GUIDANCE, Aug. 2006, at 3 (noting the

timillion-dollar settlements against some of the nation's largest employers.[5] They have encouraged greater use of litigation to address deeply entrenched corporate practices. In addition, the consent decrees have inspired increasingly sophisticated social science research on the remedies that do—and do not—make a difference in workplace inclusivity.[6] With successful models of employment discrimination consent decrees now in place, informed by recent sociological research, the question now arises: what are the most successful methods to address workplace diversity, and are the most promising methods effective only at the risk of losing the soul of the antidiscrimination principle?

A number of the employment cases against major corporations from the late 1990s and early 2000s resulted in multimillion-dollar settlements. In 1996, Texaco settled a race discrimination class action for more than $175 million.[7] Four years later, Coca-Cola paid over $190 million to settle a class action with similar race allegations.[8] The past decade has seen a cascade of enormous settlements in discrimination class action suits: in 1997, Publix Supermarkets, one of the country's largest grocery chains, paid $81.5 million to settle claims of systematic sex discrimination in promotions, raises, and wage opportunities by 150,000 women;[9] also in 1997, Home Depot agreed to settle a lawsuit by 25,000 current and former employees for discriminatory pay and promotion practices;[10] in 2004, Boeing paid $72 million to settle claims by almost 18,000 female employees involving similar allegations;[11] that same year, brokerage firm Morgan Stanley paid $54 million to settle an Equal Employment Opportunity Commission ("EEOC") suit claiming sex discrimination and sexual harassment, including outings to strip clubs, groping of women, and denial of training, mentoring, promotion opportunities, and pay raises to women.[12] Large settlements have

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filing of 222 federal employment discrimination class action suits in 2001, and 349 such suits in 2004). *But see* Allan Kanner, *Interpreting the Class Action Fairness Act in a Truly Fair Manner*, 80 TUL. L. REV. 1645, 1666–67 (2006) (noting hostility of the federal courts to class actions).

[5] *See infra* notes 7–19 and accompanying text.

[6] *See infra* notes 369–388 and accompanying text.

[7] For a discussion of the Texaco settlement, see *infra* notes 154–187 and accompanying text.

[8] For a discussion of the Coca-Cola settlement, see *infra* notes 226–261 and accompanying text.

[9] Associated Press, *Supermarket Chain Settles Bias Suit*, CHI. TRIB., Jan. 25, 1997, at 3.

[10] For a discussion of the Home Depot settlement, see *infra* notes 188–206 and accompanying text.

[11] *Boeing to Pay $72M to Settle Sex Discrimination Suit.* LAW. WKLY., Nov. 21, 2005, at 22.

[12] Shyamal Majumdar, *From Glass Ceiling to Pay Gap*, BUS. STANDARD, July 16, 2004, at 8.

occurred in the public sector as well. The U.S. Postal Service just settled the largest disability discrimination suit in history for $61 million.[13]

In February 2007, the U.S. Court of Appeals for the Ninth Circuit approved a California federal district court's certification of a class of potentially more than 1.6 million women in *Dukes v. Wal-Mart, Inc.*,[14] the largest employment discrimination class action in American history.[15] The plaintiffs claim that Wal-Mart systematically denied women good job assignments, pay, and promotions.[16] One month earlier, a federal district court certified a class action against Costco on behalf of approximately 700 female middle managers who made allegations similar to those made against Wal-Mart.[17] One month after the Ninth Circuit decision, the EEOC filed its largest discrimination action in many years—a class action lawsuit against Walgreens on behalf of an estimated 10,000 employees, including managers and pharmacists, for discriminating on the basis of race in store assignments and locations.[18] The EEOC settled with Walgreens less than six months later for $20 million.[19]

Defendants are at risk not just for potential liability but also for legal expenses. Even if the class certifications are later reversed, the defense costs and litigation fees for major class actions can run into the millions of dollars.[20] These costs, both monetary and human,

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[13] Molly Selvin, *Postal Service Settles Bias Suit*, L.A. TIMES, June 12, 2007, at 3. The claims of over 7500 current and former postal workers survived an initial review. *Id.*

[14] 474 F.3d 1214, 1222 (9th Cir. 2007).

[15] *Wal-Mart Faces Biggest Sex Bias Case in U.S. History*, PITTSBURGH TRIB. REV., Feb. 7, 2007, *available at* http://www.pittsburghlive.com/x/pittsburghtrib/s_492070.html.

[16] Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 141 (N.D. Cal. 2004).

[17] Ellis v. Costco Wholesale Corp., 240 F.R.D. 627, 636–43 (N.D. Cal. 2007). The similarity of allegations is not surprising, as the plaintiffs' lawyer in Costco, Brad Seligman, is the same attorney who filed the Wal-Mart class action. A key statistic in the plaintiffs' allegations is that whereas forty-five percent of Costco's employees are female, only thirteen percent of the company's managers are women. Steven Greenhouse & Michael Barbaro, *Costco Bias Suit Is Given Class-Action Status*, N.Y. TIMES, Jan. 12, 2007, at C9. The plaintiffs "claimed that women effectively were barred from the top store jobs at Costco because the company didn't post openings, explain application procedures or provide promotion criteria. Instead, store managers . . . are selected informally by a 'tap on the shoulder' in a process that mostly benefited men . . . ." Abigail Goldman, *California and the West Costco Job-bias Lawsuit Advances*, L.A. TIMES, Jan. 12, 2007, at 2.

[18] Diane Stafford, *Class Action Lawsuit Alleges Discrimination at Walgreens*, KANSAS CITY STAR, Mar. 8, 2007, at C1.

[19] *Walgreens to Pay $20 Million to Settle Bias Suit*, HR.BLR.COM, July 16, 2007, http://hr.blr.com/news.aspx?id=76198.

[20] *See, e.g.*, Suzie Amer, *Here Comes Trouble*, RESTAURANT BUS., June 1, 2002, at 14 (noting that in 1999 when Shoney's entered what was then the largest wage-hour settlement in history for eighteen million dollars, "after four years of litigation[,] Shoney's defense lawyer fees alone totaled $7 million"); *see also* Lynne Duke, *Shoney's Bias Settlement Sends $105 Million Signal*, WASH. POST, Feb. 3, 1993, at A1; BRIGHTLINE COMPLIANCE, SAVE MONEY, http://

coupled with the potential for adverse publicity as well as liability exposure, have prompted some of the recent massive settlements.[21] The nature of consent decrees also has changed over the course of the past decade.[22] In settling these megacases, corporations have agreed to a variety of remedies that have been folded into court-approved settlements. Some of the larger settlements have specific amounts set aside for oversight groups, task forces, the creation of training programs, or revision of personnel procedures.[23] In short, some of these larger consent decrees have contemplated extensive judicial monitoring over a long period of time and have mandated internal changes in corporate employment practices.

Employment discrimination class action suits are part of a new wave of structural reform litigation. Like their predecessors—the school segregation cases in the 1950s, the housing and voting inequalities cases in the 1960s, prison and jail conditions suits in the 1970s, and environmental lawsuits in the 1980s and 1990s—these are systemic challenges to major institutions affecting large segments of the public.[24] Although the total number of employment discrimination class actions may not be large on a yearly basis, their effects on corporate employment practices—even for smaller employers who pattern after the larger shops—can be immense.[25]

This Article explores the effectiveness of employment discrimination class action suits in reforming workplace cultures, promoting corporate accountability, and implementing real diversity. Because consent decrees are essentially private resolutions of disputes, it is important to assess whether companies follow through on the reforms they promise

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www.brightlinecompliance.com/training/save-money.html (last visited Feb. 15, 2008) (estimating attorneys' fees on a single employment law claim if it goes to trial at $250,000); HEHR & ASSOCIATES, EMPLOYMENT PRACTICES LIABILITY, http://www.hehrassociates.com/html/epl.htm (last visited Feb. 15, 2008) (estimating the defense cost of the average employment practices claim that goes to trial at $450,000).

[21] *Change in Course: Reeling from Racial Charges, Texaco Does Right Thing*, HOUSTON CHRON., Dec. 20, 1996, at A46 [hereinafter *Texaco Does Right Thing*].

[22] *See infra* notes 231–239 and accompanying text (describing the Coca-Cola settlement, which included both monetary damages as well as an independent task force which operated for five years to implement diversity reform efforts).

[23] *See infra* notes 169, 197, 235 and accompanying text.

[24] Professor Melissa Hart notes, for example, that "Wal-Mart is, after all, the largest private employer in the world, with a workforce that is nearly 1% of the U.S. working population." Melissa Hart, *The Possibility of Avoiding Discrimination: Considering Compliance and Liability*, 39 CONN. L. REV. 1623, 1625 (2007).

[25] *See infra* notes 306–308 and accompanying text.

to implement and whether those modifications are effective.[26] Reviewing the architecture and aftermath of consent decrees in five major employment discrimination cases—the cases against Shoney's, Texaco, Home Depot, Mitsubishi, and Coca-Cola—the Article evaluates the ways in which consent decrees have changed over time and the lessons learned from the implementation of these settlements.[27] This Article also compares recent social science literature on the efficacy of mechanisms to promote diversity with features of the consent decrees and later structural and numeric outcomes in these landmark cases.[28]

Part I considers the ways in which the contours of employment discrimination class action suits are changing.[29] It addresses the factors that are encouraging the twin trends toward settlement of larger cases and an emphasis on nonmonetary relief.[30] On the procedural side, the growing consensus that Rule 23(b)(2) class actions are not an appropriate vehicle for damage awards is channeling employment discrimination suits toward structural remedies.[31] On the substantive side, a split exists among the circuits as to whether claims of company-wide excessive subjectivity in hiring and promotion practices conflict with class certification requirements of commonality of claims and predominance of similar issues.[32] The uncertainty of this legal foundation for class claims also pushes plaintiffs toward settlement and the request for structural changes in employment practices.

Part II of the Article steps back to examine the use of class action lawsuits as vehicles for reform in contexts outside of employment.[33] It focuses on class action and other complex litigation in the areas of prison conditions and civil rights, and how these cases from the 1950s through the 1980s reconceived the role of the judiciary and redesigned public institutions.[34] The emergence of judges more likely to engage in active oversight of institutions like schools and prisons had consequences for employment discrimination class litigation: it created a judiciary increasingly skilled in managing complex cases and

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[26] *See* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 717–18 (2003).

[27] *See infra* notes 132–317 and accompanying text.

[28] *See infra* notes 318–407 and accompanying text.

[29] *See infra* notes 48–77 and accompanying text.

[30] *See infra* notes 64–77 and accompanying text.

[31] FED. R. CIV. P. 23(b)(2).

[32] Melissa Hart, *Learning From Wal-Mart*, 10 EMP. RTS. & EMP. POL'Y J. 355, 375 (2006).

[33] *See infra* notes 78–116 and accompanying text.

[34] *See infra* notes 78–116 and accompanying text.

served as an implicit warning that judges would be willing to permit litigation to reshape workplaces.

Part III looks at the end game of employment discrimination class action suits.[35] It questions initially whether the threats of negative publicity and prospects of the economic consequences of litigation can induce businesses, particularly large corporations, to be attentive to equality and diversity issues in the workplace.[36] Although the threats of large economic losses (from litigation defense costs and risks of damage awards) and adverse publicity can be the catalysts for settlement, those economic risks do not, on their own, seem to be sufficient factors to prompt significant restructuring of workplaces. Both the recent burgeoning of employment practices liability insurance and the continued expansion of the reach of mandatory arbitration undermine the economic leverage of class actions to induce changes in corporate behavior.[37]

The second half of Part III examines the hallmarks of successful consent decrees.[38] This section identifies several features of more promising settlements: the tenacity and creativity of courts exercising oversight and their willingness to appoint judicial surrogates (such as decree monitors or task forces); the transparency of the process; the understanding that change requires the dedication of resources and encompasses a long time span; the creation of progress benchmarks or goals; and, importantly, the corporation's commitment to changing its workplace culture.[39] These features emphasize accountability, a quality that is absolutely critical in reshaping workplaces in terms of equality and diversity. New research in organizational sociology confirms that the implementation of specific practices that make people accountable for change is more effective in increasing diversity than educating employees about stereotypes and biases.[40]

These findings have important implications for companies of all sizes. Though the stakes are higher in class actions, most lawsuits are

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[35] *See infra* notes 118–317 and accompanying text.

[36] *See infra* notes 266–308 and accompanying text.

[37] *See* Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 190–95 (2007) (on mandatory arbitration). *See generally* Ed E. Duncan, *Insurance Coverage for Sexual Harassment in the Workplace*, 51 PRAC. LAW. 51 (2005) (on employment liability insurance).

[38] *See infra* notes 318–407 and accompanying text.

[39] *See infra* notes 318–407 and accompanying text.

[40] *See infra* notes 369–388 and accompanying text.

not class actions, and the overwhelming majority of all lawsuits settle.[41] Lawyers in the employment discrimination arena anticipate that the lessons learned by larger corporations in prominent class action litigation will "'trickle down' to smaller retailers."[42] The majority of businesses suable under Title VII of the Civil Rights Act of 1964 ("Title VII") have adopted some form of antidiscrimination program, which usually requires the business's employees to undergo diversity training.[43] If one of the conclusions to be drawn from both recent social science research and experiences in major class action settlements is that accountability matters more than education in generating organizational change, this could prompt smaller companies to revisit their corporate practices.

The last Section of the Article addresses resistance to change.[44] Unsurprisingly, in those situations in which corporations seemed most committed to changing their corporate cultures regarding equality and diversity, consent decrees seemed to work most effectively. The question then is what to do about corporate executives who seem most entrenched in their current employment practices. One answer may be to develop an understanding that diversity is good for business. The socioeconomic literature makes a strong case that workplace diversity creates favorable economic consequences for corporations.[45] Thus, although diversity training programs that stress tolerance and inclusion on the basis of various identity characteristics may not create appreciable results in terms of changing workforce demographics and practices, education about the business case for diversity may generate those results. One feature emerging from the business management literature is that smaller to mid-size companies are more resistant than larger companies to the idea that diversity is economically advantageous.[46] This may be the target population where education about the business

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[41] *See, e.g.*, Edward Winter Trapolin, Comment, *Sued into Submission: Judicial Creation of Standards in the Manufacture and Distribution of Lawful Products—The New Orleans Lawsuit Against Gun Manufacturers*, 46 LOY. L. REV. 1275, 1299 (2000) (noting that "[n]inety-eight percent of all lawsuits settle").

[42] Ritu Bhatnagar, Note, Dukes v. Wal-Mart *as a Catalyst for Social Activism*, 19 BERKELEY WOMEN'S L.J. 246, 248 (2004).

[43] *See* Kurt Eichenwald, *Texaco Plans Wide Program for Minorities*, N.Y. TIMES, Dec. 19, 1996, at 1.

[44] *See infra* notes 393–407 and accompanying text.

[45] David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1553 (2004).

[46] *See* Don Gudmundson & Linda S. Hartenian, *Workforce Diversity in Small Business: An Empirical Investigation*, 38 J. SMALL BUS. MGMT. 27, 28–29 (2000).

case for diversity could have the most significant impact. The Article ends, though, with a question rather than an answer—it asks whether stressing the market case can eclipse the moral or philosophical case in favor of diversity.[47]

I. The Volume and Structure of Class Action Suits

Several new doctrinal developments in the procedural rules for class certification as well as the substantive law of employment discrimination are combining to channel employment discrimination class actions toward consent decrees.[48] After describing the volume of class action suits in recent years, this Part discusses the influence on settlements of rulings about the propriety of damage awards in Rule 23(b)(2) class actions and the appropriateness of class certification for claims of excessive subjectivity.[49]

The number of employment discrimination class actions filed in federal court dropped from a high of almost twelve hundred (1174) in 1976, to a low of thirty-two in 1991.[50] In the wake of the Civil Rights Act of 1991, there has been a slow increase in federal employment class actions,[51] with eighty-five filed in 1997–98 and 1998–99.[52] For the first quarter century after the enactment of Title VII, courts certified very few employment discrimination class actions. By the mid- to late

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[47] *See infra* notes 412–413 and accompanying text.

[48] *See infra* notes 50–77 and accompanying text. Consent decrees are the judicial approval of the parties' consensual settlement, although the court retains equitable jurisdiction to modify the agreement and supervise its enforcement. *See* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986) (holding that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial").

[49] *See infra* notes 50–77 and accompanying text.

[50] Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 Akron L. Rev. 813, 820 (2004) (citing Scott Shively, *Resurgence of the Class Action Lawsuit in Employment Discrimination Cases: New Obstacles Presented by the 1991 Amendments to the Civil Rights Act*, 23 U. Ark. Little Rock L. Rev. 925, 926 (2001)).

[51] Michael W. Hawkins, *Current Trends in Class Action Employment Litigation*, 19 Lab. Law. 33, 34 (2003).

[52] Hart, *supra* note 50, at 829 (citation omitted). Summary data on state class actions are difficult to obtain; federal court statistics on caseloads are much more complete and available. Gregory G. Wrobel & Michael J. Waters, *Early Returns: Impact of the Class Action Fairness Act on Federal Jurisdiction over State Law Class Actions*, 21 Antitrust 45, 49 n.41 (2006). Commentators are in agreement that as federal judges became skeptical of class actions in the 1990s, more were filed in state court, but in plaintiff-friendly fora, and this was a large part of the impetus for the Class Action Fairness Act. *See, e.g.*, Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1593, 1595 (2006).

1990s, courts began to certify classes with increasing frequency.[53] Although most of the cases that are filed—according to one study, sixty-nine percent—will not be certified as class actions, a majority of what would become employment class actions are settled even before a lawsuit is filed.[54]

The Class Action Fairness Act of 2005 ("CAFA"), which expanded federal subject matter jurisdiction over most damage class actions, facilitates removal of cases to federal court.[55] CAFA allows defendants to remove those class actions of 100 or more class members where minimal diversity is met and their claims aggregate to more than $5 million.[56]

Class action and collective action filings under Title VII, the Age Discrimination in Employment Act, and the Fair Labor Standards Act increased significantly in 2006.[57] The politics of a conservative administration may have impeded more aggressive pursuit of EEOC pattern or practice cases—challenges to an employer's systemic habits of discrimination.[58] Nonetheless, in 2005, the EEOC established a Sys-

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[53] *See* Hayley Buckridge, Note, *Merging Without Purging: Incentivizing Boards of Directors to Promote Diversity Through M & A*, 20 ST. JOHN'S J. LEGAL COMMENT. 443, 463 (2006).

[54] Hawkins, *supra* note 51, at 56.

[55] *See* Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.A. (West 2001 & Supp. 2006)); *see also* Robert H. Klonoff, *Introduction to the Symposium: The Twentieth Anniversary of* Phillips Petroleum Co. v. Shutts, 74 U. MO. KAN. CITY L. REV. 487, 491 (2006) ("CAFA provides that most major class actions (including the lion's share of multi-state and nationwide class actions) will be heard in federal court."); Alan B. Morrison, *Removing Class Actions to Federal Court: A Better Way to Handle the Problem of Overlapping Class Actions*, 57 STAN. L. REV. 1521, 1535 (2005).

[56] 28 U.S.C.A. § 1332 (West 2001 & Supp. 2006).

[57] Gerald L. Maatman, Jr., *Annual Workplace Class Action Litigation Report: Significant Federal Employment Discrimination Litigation and EEOC Pattern or Practice Rulings*, 58 LAB. L.J. 53, 56 (2007); *see* Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2000); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2000); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

[58] *Oversight of the Civil Rights Division: Hearing before the S. Judiciary Comm.*, 109th Cong. (2006) (statement of Joseph Rich, Director of Fair Housing and Community Development, Lawyer's Committee for Civil Rights Under Law), *available at* http://judiciary.senate.gov/testimony.cfm?id=2434&wit_id=5849. As Joseph Rich explained:

> Since the beginning of the Bush Administration, 34 Title VII cases have been filed, of which ten are pattern or practice cases, the most important employment discrimination cases brought by the Department [of Justice] both in their impact and complexity. Only two of the pattern or practice cases brought by the [Civil Rights] Division allege discrimination against African-Americans and these were not filed until February and July, 2006, more than five years into the Bush Administration and after considerable attention had been brought to the failure to bring such cases. In its first two years alone, the Clinton Administration filed thirteen pattern or practice cases, eight of which

temic Task Force that developed recommendations published in early 2006, of ways to enhance the EEOC's role in combating systemic discrimination, which it defines as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location."[59] Given the EEOC's new systemic litigation initiative, the number of pattern or practice lawsuits may rise in the future.[60]

Most lawsuits, and particularly complex cases, settle anyway, and this trend toward settlement is likely to increase. If certified as class actions, these cases have a much greater likelihood of settling.[61] One estimate from the Federal Judicial Center is that only three to six percent of *all* class action lawsuits are tried—and that fraction is smaller still for employment discrimination class actions.[62] The already large number of suits that settle may be increased by several changes in substantive and procedural law.[63]

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raised race discrimination claims. Moreover, two of the ten employment pattern or practice filings—filed before the recent cases alleging discrimination against African-Americans—are "reverse" discrimination cases, alleging discrimination against whites.

Id.

[59] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, SYSTEMIC TASK FORCE REPORT TO THE CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 1 (2006), *available at* http://www.eeoc.gov/abouteeoc/task_reports/systemic.html. The plans include hiring additional experts to help identify systemic discrimination and litigation support personnel to address it, coordinating with other federal agencies to bring complex litigation, and nationalizing systemic litigation by assisting field offices that will have primary responsibilities for handling suits. The EEOC can litigate pattern or practice cases—the equivalent of private class actions—without meeting the Rule 23 requirements for class certification. *See* Gen. Tel. Co. of the Nw. v. Equal Employment Opportunity Comm'n, 446 U.S. 318, 320 (1980).

[60] Press Release, Seyfarth Shaw LLP, Third Annual Workplace Class Action Report from Seyfarth Shaw of 2006 Collective Action Litigation Defines Trends for 2007 (Jan. 22, 2007), http://www.seyfarth.com/index.cfm/fuseaction/news_pub.news_pub_detail/object_id/1bde952d-9df1-41e2-a3ae-ab710ef2ad63/ThirdAnnualWorkplaceClassActionReportfromSeyfarthShawof2006CollectiveActionLitigationDefinesTrendsfor2007.cfm.

[61] One statistic comes from "[a] 2005 study by the Federal Judicial Center of class actions filed in or removed to federal court . . . between . . . 1999 and . . . 2002"—it "found that 89 percent of the cases in which class certification was granted settled" and noted that "44 percent of all of the cases, including those not certified, settled." Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, 20 ANTITRUST 26, 26 (2005) (citing THOMAS E. WILLGING & SHANNON R. WHEATMAN, AN EMPIRICAL EXAMINATION OF ATTORNEYS' CHOICE OF FORUM IN CLASS ACTION LITIGATION 50, tbl.19 (Fed. Judicial Ctr. 2005)).

[62] THOMAS E. WILLGING, ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 167, tbl.16 (Fed. Judicial Ctr. 1996).

[63] *See* Hart, *supra* note 32, at 375 (on excessive subjectivity theory); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97

A confluence of several factors is driving the increasing inclinations toward settlement of large employment discrimination class actions as well as a focus on equitable relief. These factors include new theories of relief with company-wide consequences, procedural barriers to bringing Rule 23(b)(2) damage claims, and the recognition of greater managerial activism on the part of federal judges that prompts corporations to enter into consent decrees.[64]

As with any litigation, the underlying substantive law shapes the contours of these class action suits. In particular, class action employment discrimination suits reflect a significant, recently developed theory in employment law: the idea of liability for excessive subjectivity in employment practices.[65] If courts accept this theory, it permits sweeping challenges to company-wide practices and makes class lawsuits more likely. Claims alleging excessively subjective decisions pose difficult issues, however, when it comes to class certification. The nature of a claim of subjective hiring procedures is inevitably in tension with the class requirements of commonality and predominance.[66] The discriminatory "practice" is said to be subjective and discriminatory decision making, and thus liability would be based on the absence of company-wide standards for hiring, promotion, or compensation. The argument, in short, is that decision making about employees is too individualized and subjective. That makes it difficult to contend that such claims should be handled as class actions, for which common issues must predominate. A number of courts thus have found that claims of excessive subjectivity do not satisfy the class certification requirements, as such claims are based essentially on the absence of commonality, and individual issues will predominate.[67] This certification

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COLUM. L. REV. 2010, 2010 (1997) (using Judge Jack Weinstein as an example of managerial activism on the part of federal judges); Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 215 (on procedural barriers to bringing 23(b)(2) damage claims).

[64] *See supra* note 63 and accompanying text.

[65] *See* Hart, *supra* note 32, at 375.

[66] *See infra* note 67 and accompanying text.

[67] *Compare* Caridad v. Metro-N. Commuter R.R., 191 F.3d 283, 286 (2d Cir. 1999) (permitting class certification), Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 151 (N.D. Cal. 2004) (finding sufficient commonality), *and* McReynolds v. Sodexho Marriott Servs., Inc., 208 F.R.D. 428, 430 (D.D.C. 2002) (permitting class certification), *with* Gutierrez v. Johnson & Johnson, 467 F. Supp. 2d 403, 411–13 (D.N.J. 2006) (denying class certification), *and* Colindres v. Quietflex Mfg. Co., 235 F.R.D. 347, 377–79 (S.D. Tex. 2006) (denying claim for classwide punitive damages). Regarding remedies for excessive subjectivity, see Hart, *supra* note 24, at 1635–48.

issue will make it more difficult for plaintiffs to bring class claims and will nudge them toward settlement.

A prominent procedural issue that seems to be funneling large employment cases toward structural settlements is the difficulty of bringing Rule 23(b)(2) class claims for damages. Typically plaintiffs prefer class certification under this Rule because that path does not entail the expense of giving class members the notice of their rights to opt out required when pursuing monetary damages claims under Rule 23(b)(3).[68] Although the circuits are split, the growing consensus is that 23(b)(2) certification is appropriate only when monetary damages are incidental to equitable relief.[69] Claims for compensatory damages are inappropriate for 23(b)(2) certification because the individual claims predominate over the request for declaratory or injunctive relief.[70]

The class certification decision is pivotal for plaintiffs who are trying to leverage substantial settlements. The difficulties of proving large-scale cases of excessive subjectivity while obtaining class certification, coupled with the barrier to pursuing Rule 23(b)(2) damages class actions, have moved plaintiffs toward an emphasis on settlements in which defendants promise institutional reform.[71] For example, the primary goal in the current litigation against Wal-Mart is not damages but transformation of the company's treatment of employees.[72] Indeed, the Wal-Mart plaintiffs seek "class-wide injunctive and declara-

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[68] *See* Mullenix, *supra* note 63, at 215.

[69] *See, e.g.*, Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 651 (6th Cir. 2006); Cooper v. S. Co., 390 F.3d 695, 702 (11th Cir. 2004); Monreal v. Potter, 367 F.3d 1224, 1226 (10th Cir. 2004); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 407 (5th Cir. 1998); Miller v. Balt. Gas & Elec. Co., 202 F.R.D. 195, 198 (D. Md. 2001); Augustin v. Jablonsky, No. 99CV3126(DRH)(ARL), 2001 WL 770839, at *1 (E.D.N.Y. Mar. 8, 2001); Bacon v. Honda of Am. Mfg., Inc., 205 F.R.D. 466, 479 (S.D. Ohio 2001); Ramirez v. DeCoster, 194 F.R.D. 348, 351 (D. Me. 2000); *see also* Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994) (mentioning the "substantial possibility" that money damages class actions are only appropriate for certification under Rule 23(b)(3)). *But see* Molski v. Gleich, 318 F.3d 937, 942 (9th Cir. 2003); Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147, 162–63 (2d Cir. 2001).

[70] *Reeb*, 435 F.3d at 641.

[71] *See, e.g.*, Haynes v. Shoney's, Inc., No. 89-30093-RV, 1993 WL 19915, at *20 (N.D. Fla. Jan. 25, 1993).

[72] Steven Greenhouse & Constance L. Hays, *Wal-Mart Sex-Bias Suit Given Class-Action Status*, N.Y. TIMES, June 23, 2004, at A1 ("'Our clients got into this seeking to change the way they do business. . . . We would never settle for just money.'" (quoting plaintiffs' attorney Joe Sellers)); *see* Robert Fisher, Note, Dukes v. Wal-Mart*: Can 1.5 Million Women Save Employment Discrimination Class Actions?*, 12 CARDOZO J.L. & GENDER 1009, 1030 (2006).

tory relief, lost pay, and punitive damages. They do not seek any compensatory damages on behalf of the class."[73]

Related factors influencing the movement toward structural relief in employment class litigation are the increasing sophistication of plaintiffs' counsel, the development of public interest organizations committed to impact litigation, and the use of labor organizing strategies in conducting litigation and marshalling accompanying press.[74] The last decade has witnessed an evolution from cases brought by individual and isolated plaintiffs' counsel to repeat players as lead counsel for plaintiffs' classes,[75] as well as class actions supported by advocacy organizations that amass foundational support for litigation and offer financial support, technical expertise, and litigation assistance in complex employment discrimination cases.[76] The expertise helps channel employment discrimination cases to consent decrees because plaintiffs' counsel want to avoid the expenses of a mammoth trial and have the experience in structuring favorable settlements.[77]

In short, the nature of employment discrimination class action lawsuits is changing. A variety of procedural, substantive, and expertise reasons are routing these cases toward consent decrees.

II. Class Action Lawsuits as Vehicles for Structural Reform

Long before theorists began noticing that the large-scale remedies required in class action lawsuits had the power to restructure the workplace, class actions were transforming other social institutions, such as

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[73] *Dukes*, 222 F.R.D. at 141.

[74] *See infra* notes 75–77 and accompanying text.

[75] *See, e.g.*, David Streitfeld, *It's Berkeley vs. Bentonville as Lawyers Take on Wal-Mart*, L.A. Times, June 28, 2004, at A1. For example, Cyrus Mehri, a Washington, D.C. attorney, served as class counsel in both the Texaco and Coca-Cola cases. Mehri & Skalet PLLC, Cyrus Mehri, http://web2.customwebexpress.com/meska/sub/cyrus-mehri.jsp (last visited Feb.27, 2008). Barry Goldstein was a lawyer for the plaintiffs in the Home Depot and Shoney's litigation. Anna Oberthur, *The Justice Files: Three Legal Pros Make a Difference*, Oakland, Mar. 2007, *available at* http://www.oaklandmagazine.com/media/Oakland-Mag-azine/March-2007/The-Justice-Files.

[76] Fisher, *supra* note 72, at 1024–25 (discussing public organizations such as The Impact Fund and the Equal Rights Advocates). In the Wal-Mart suit, three nonprofit advocacy groups, the Impact Fund, Equal Rights Advocates, and the Public Justice Center, worked with plaintiffs' counsel. Wal-Mart Class Website, Attorney Profiles, http://www.walmartclass.com/public_attorneyprofiles.html (last visited Feb. 15, 2008).

[77] *See* Oberthur, *supra* note 75; *see also* Shima Baradaran-Robison, Comment, *Kaleidoscopic Consent Decrees: School Desegregation and Prison Reform Consent Decrees After the Prison Litigation Reform Act and* Freeman-Dowell, 2003 BYU L. Rev. 1333, 1339–41 (discussing three general incentives for entering into consent decrees: the flexibility of judicial oversight, the broader relief available, and the benefits of avoiding litigation).

schools and prisons.[78] The theoretical predicate emerged from Harry Kalven and Maurice Rosenfeld's seminal article on the class action procedural device as "an effective means of group redress" to supplement administrative enforcement efforts.[79] The practical inspiration for collective public interest litigation was, of course, the 1954 Supreme Court decision in *Brown v. Board of Education*.[80] In Professor Stephen Yeazell's words, "*Brown* changed everything."[81] What *Brown* demonstrated for litigants was that "a carefully designed litigation strategy, supported by modest resources, could remake the social landscape."[82]

Forward-looking judges were also pivotal in the history of civil rights enforcement. A number of federal judges, "unlikely heroes," undertook innovative efforts to address the sweeping problems of segregation during the civil rights battles of the 1950s and 1960s.[83] As examples of these rulings, Alabama Federal District Judge Frank M. Johnson, Jr., certified two defendant classes of Alabama officials to desegregate prisons and detention facilities,[84] eliminated the literacy requirements used by local voter registration boards to reduce the number of blacks voting,[85] and declared unconstitutional the segregated bus system in Montgomery.[86] Judge John Minor Wisdom on the U.S. Court of Appeals for the Fifth Circuit, in a comprehensive school desegregation opinion, put forward the position that *Brown* mandated more than the elimination of de iure segregation—it meant the obligation of states to "furnish . . . fully integrated education."[87]

In New Orleans, despite state officials' promised resistance, Federal District Judge Skelly Wright insisted on desegregation in accor-

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[78] Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 887.

[79] Harry Kalven, Jr. & Maurice Rosenfeld, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 687 (1941). For a discussion of the influence of Kalven and Rosenfeld's concepts, see Stephen C. Yeazell, Brown, *the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1978–79 (2004).

[80] *See generally* 347 U.S. 483 (1954).

[81] Yeazell, *supra* note 79, at 1981.

[82] *Id.*

[83] *See generally* JACK BASS, UNLIKELY HEROES (1981).

[84] *See* Washington v. Lee, 263 F. Supp. 327, 333 (M.D. Ala. 1966) (desegregating detention facilities and prisons in Alabama), *aff'd per curiam*, 390 U.S. 333 (1968).

[85] STEVEN F. LAWSON, BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969, at 268 (1976).

[86] JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE FIGHT OVER CIVIL RIGHTS 111 (1993).

[87] United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 846 (5th Cir. 1966).

dance with the Supreme Court's mandate of "all deliberate speed."[88] When these judges courageously insisted on rights for despised minorities, they faced majoritarian hostility:

> By the end of 1960, Skelly Wright had become the most hated man in New Orleans. Pairs of federal marshals alternated in eight-hour shifts at his home to ensure his physical safety, and they escorted him to and from work. With few exceptions, old friends would step across the street to avoid speaking to him.[89]

More recent examples include William Wayne Justice, a federal district judge in Texas who became instrumental in bringing about prison reform through court oversight.[90] In the early 1970s, Judge Justice consolidated a number of individual pro se prisoner petitions and ultimately certified a class of over 30,000 inmates (confined in various different facilities) that, in 1980, became the legendary prison conditions case *Ruiz v. Estelle*.[91] He found a number of aspects of the Texas prison system unconstitutional—the perpetual overcrowding; brutality, including egregious methods of discipline; and systematic inattention to prisoners' medical conditions.[92] The judge ordered the United States to participate in assisting prisoners with litigation because they were outlawyered by the Texas Department of Corrections.[93] Then he appointed special masters to oversee the implementation of his injunctive orders that, among other things, required a specific amount of square feet of space per inmate in dormitories, mandated that the Department of Corrections keep records of disciplinary hearings, and compelled adequate exercise opportunities for inmates.[94]

Although the district court entered a final judgment on a consent decree in 1992, Judge Justice retained jurisdiction over eight areas of

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[88] Bush v. Orleans Parish Sch. Bd., 138 F. Supp. 337, 342 (E.D. La. 1956), *aff'd*, 242 F.2d 156 (5th Cir. 1957).

[89] BASS, *supra* note 86, at 115; *see also* William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 2 (1992) (observing that his "name was on the 'ten most wanted' list of judicial activists for much of [his] nearly quarter-century on the bench").

[90] William Wayne Justice, *The Origins of* Ruiz v. Estelle, 43 STAN. L. REV. 1, 1 (1990); Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 614 (2006).

[91] *See generally* Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part, vacated in part, and modified in part*, 679 F.2d 1115 (5th Cir. 1982); *see* Justice, *supra* note 90, at 1; Schlanger, *supra* note 90, at 614.

[92] Justice, *supra* note 89, at 9.

[93] Justice, *supra* note 90, at 10 ("The prisoners had . . . no earthly idea of how to present their contentions in a legally significant way.").

[94] *Ruiz*, 503 F. Supp. at 1389–90.

prison conditions, such as overcrowding.[95] In 2001, almost thirty years after the inception of the lawsuit, the court continued to exercise oversight over three areas where deplorable conditions persisted: the "conditions of confinement in administrative segregation, the failure to provide reasonable safety to inmates against assault and abuse, and the excessive use of force by correctional officers in Texas prisons," where, the court noted, "today's prisoners remain victims of an unconstitutional system."[96]

Ruiz and other prison cases, such as the U.S. District Court for the Middle District of Alabama's 1976 decision in *Pugh v. Locke*[97] and the U.S. Supreme Court's 1979 decision in *Bell v. Wolfish*,[98] represented a sweeping change from individual complaints about instances of prisoner maltreatment to a movement of institutional reform through litigation that contested the entire system of prison conditions. They also envisioned an entirely different conception of the role of the judiciary.

These complex cases, with judges engaged in managerial activism, are not just relics of the civil rights era. In the early 1980s, Chief Judge Jack Weinstein of the U.S. District Court for the Eastern District of New York, presided over the settlement of the Agent Orange litigation.[99] This was a landmark class action suit against Dow, Monsanto, and other manufacturers of the herbicide dioxin brought by Vietnam veterans who alleged that these defoliants caused various types of cancers and genetic and birth defects in soldiers and their children.[100] Judge Weinstein made a number of rulings that nudged the parties toward settlement.[101] He brought the U.S. government into the case on an indemnity theory, revealed how he might rule on a number of legal issues by making tentative or preliminary findings, hired a settlement consultant, then appointed several special masters to facilitate the settlement, and finally conducted an "around-the-clock negotiating marathon" to settle the case.[102] At the time, it was the largest personal injury settlement in history, with a class of 2.4 million Vietnam veterans and their wives and children, a fund of over $200 million, a

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[95] Ruiz v. Estelle, 161 F.3d 814, 816 (5th Cir. 1998).

[96] Ruiz v. Johnson, 154 F. Supp. 2d 975, 1001 (S.D. Tex. 2001).

[97] *See generally* 406 F. Supp. 318 (M.D. Ala. 1976).

[98] *See generally* 441 U.S. 520 (1979).

[99] *See generally In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

[100] *Id.* at 746.

[101] Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 344–45 (1986).

[102] *Id.*

settlement and distribution plan, and a judicially constructed complex administrative structure to process claims.[103]

Judge Weinstein used similar techniques when he presided over asbestos, diethylstilbestrol ("DES"), handgun, and tobacco cases.[104] Some of Judge Weinstein's critics disapproved of the activism of his intervention.[105] But his supporters and detractors agree that Judge Weinstein's commitment of judicial resources and active intervention were crucial to the settlement of the case.[106] In Professor Martha Minow's words, "Through his bold personal transcendence of the traditional role of the judge, Weinstein has attempted to fashion global resolutions to multijurisdictional conflicts . . . ."[107]

Judge Weinstein is not alone in striving toward more comprehensive settlements of high stakes, multiple-party complex litigation

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[103] *See id.* at 341; Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 547 (2002). The distribution included a later-reversed distribution of settlement proceeds to an independent foundation without court oversight to provide veterans' assistance services to the class. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 179, 185–86 (2d Cir. 1987), *aff'g in part, rev'g in part* 611 F. Supp. 1396 (E.D.N.Y. 1985). Judge Weinstein's Agent Orange compensation system has had enduring influence, serving as a model for the compensation fund for September 11th victims. *See* Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1, 23 (2006).

[104] *See generally* Scott Fruehwald, *Individual Justice in Mass Tort Litigation: Judge Jack B. Weinstein on Choice of Law in Mass Tort Cases*. 31 HOFSTRA L. REV. 323 (2002).

[105] *See, e.g.*, Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579, 590 (1994). Linda Mullenix argues:

> Judge Weinstein's overarching theory of judicial power is even more disturbing than his superficial treatment of the problems of managerial judging. Again, to his credit, Judge Weinstein simply and forthrightly dismisses the notion that judges should clothe themselves with any mantle of neutrality or impartiality. Judge Weinstein believes that judges ought to be biased, feeling, involved, opinionated, and result oriented. . . . [I]n this debate [over judicial power], Judge Weinstein sails off the end of the known universe. Judge Weinstein would transform judges into legislators, community workers, ministers, evangelists, administrative bureaucrats, and executive branch policymakers.

Id.; *see also id.* at 579 n.3 (citing *Benchmark*, NEW YORKER, May 3, 1993, at 36 (calling Judge Weinstein "Orrin Hatch's worst nightmare—the apotheosis of the liberal activist judge")). *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). The activist critique may be one that Judge Weinstein would embrace, as he "believes that an activist government plays a legitimate role in fostering the trust necessary to break out of collectively self-defeating pursuits of individual interests." David Luban, *Heroic Judging in an Antiheroic Age*, 97 COLUM. L. REV. 2064, 2076 (1997).

[106] *See, e.g.*, Schuck, *supra* note 101, at 348 ("According to virtually all of the lawyers who participated in the negotiation of the Agent Orange settlement, Judge Weinstein's distinctive intervention was essential to the settlement.").

[107] Minow, *supra* note 63, at 2010.

through alternative dispute resolution methods.[108] Indeed, these "megacases" have forced an expansion in the role of the judge from simply presiding over traditional litigation to more active participation in mediating global solutions.[109] Rule 23 itself foresees a more involved role for the judge in, for instance, the requirement of approval of settlement agreements.[110]

One feature that has both encouraged and assisted with greater judicial oversight of complex cases has been the rise in the use of judicial surrogates.[111] Judges, particularly in the past two decades, have increasingly turned to compliance monitors such as special masters or independent supervisors to assure fulfillment of their orders.[112] Lawsuits in contexts outside of employment—such as those concerning antitrust, child welfare and foster care, treatment of inmates in mental hospitals, and questionable police practice cases—have created external monitoring structures ranging from corporate boards to civilian review boards to avenues for plaintiffs to report back to the court.[113] Again, in other contexts, courts have also experimented with special masters, magistrates, or judicial adjuncts to oversee implementation of settlement agreements.[114]

Despite the rise of greater activism in case management among judges, particularly in civil rights and mass tort cases as detailed above, for the most part they do not like to extend themselves in projects of continuing oversight because they have few enforcement tools and

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[108] *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281 (1976).

[109] *See, e.g.*, Eric D. Green, *Re-Examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons from Microsoft and Other Megacases*, 86 B.U. L. REV. 1171, 1171 (2006).

[110] *See* FED. R. CIV. P. 23(e)(1)(A).

[111] *See* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1197 (2005).

[112] *See id.*

[113] Martin Guggenheim, *State-Supported Foster Care: The Interplay Between the Prohibition of Establishing Religion and the Free Exercise Rights of Parents and Children:* Wilder v. Bernstein, 56 BROOK. L. REV. 603, 626 (1990); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board*, 28 COLUM. HUM. RTS. L. REV. 551, 561–62 (1997); Marcia Robinson Lowry, *Why Settle When You Can Win: Institutional Reform and* Marisol v. Giuliani, 26 FORDHAM URB. L.J. 1335, 1346 (1999); Brad H. v. City of New York*: Inmates at Hospitals' Forensic Units Are Covered by Settlement Providing Discharge Planning*, N.Y.L.J., Apr. 22, 2005, at 19; Kathleen A. Maron et al., *Competition Litigation in Telecommunications in 2004 and Beyond: An Overview of Antitrust, Predatory Pricing, Competitive Access, Overbuilds, and Other Competitive Issues* 92 (PLI Patents, Copyrights, Trademarks, and Literary Prop., Course Handbook Series No. G0-01GH. 2003), WL 778 PLI/Pat 9.

[114] *See, e.g.*, Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2170 n.193 (1989).

overambitious oversight projects diminish the power of the court.[115] Absent the direct supervision of judges, one development of the past decade has been the turn toward independent settlement monitors.[116] The next Part addresses the evolution of judicial monitoring and other innovations in the implementation of employment discrimination class action consent decrees.[117]

III. Employment Discrimination Class Action Settlements and the Reform of Workplace Cultures

Employment discrimination class action suits settled in the early to mid-1990s emphasized monetary relief, and plaintiffs seemed minimally interested in structural remedies.[118] In the early years of employment discrimination class action settlements, courts left it to defendants to report to plaintiffs about their implementation of remedial structures.[119] Class attorneys, having received fees, retained little incentive to monitor corporate behavior or mount a follow-up action. Individual plaintiffs, whose stake typically are small, had limited motivation to supervise the attorneys and lacked resources and ability to ensure corporate compliance.[120]

During the 1990s, courts varied between compelling defendants to report to plaintiffs' counsel about progress with compliance,[121] mandating defendants to develop internal structures for equal employment

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[115] *See generally* Chayes, *supra* note 108.

[116] *See* Kessler, *supra* note 111, at 1197.

[117] *See infra* notes 118–407 and accompanying text.

[118] *See* Lynne Duke, *Shoney's Bias Settlement Sends $105 Million Signal*, Wash. Post, Feb. 3, 1993, at A1; Philip Hager, *State Farm to Pay Women $157 Million for Job Bias*, L.A. Times, Apr. 29, 1992, at A1.

[119] *See, e.g.*, Haynes v. Shoney's, Inc., No. 89-30093-RV, 1993 WL 19915, at *21, 23 (N.D. Fla. Jan. 25, 1993) (requiring defendants to submit quarterly progress reports to plaintiffs' class counsel).

[120] *See, e.g.*, John C. Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, Law & Contemp. Probs., Summer 1985, at 6; Sylvia R. Lazos, Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 Mich. L. Rev. 308, 319 (1985).

[121] *See, e.g.*, *Haynes*, 1993 WL 19915, at *20 (approving a consent decree establishing a $105 million settlement fund for race discrimination suit); *see also* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 Tex. L. Rev. 1249, 1325 (2003) ("During the four years it was under a consent decree, Home Depot appears to have filed only one progress report, which provided no data and which the plaintiffs' attorneys summarily approved with the conclusory statement that the numbers were better than before.").

opportunity monitoring,[122] more recently requiring members of defendants' senior management to oversee human resources to ensure compliance with the consent decree,[123] or some combination of the foregoing. Most judges were interested in disposing of cases before them and had limited interest in, or resources available for, continual monitoring of settlement implementation.[124]

The past decade has witnessed an evolution in the contours of employment discrimination class action settlements. Some of the earlier settlements focused on monetary relief, whereas the later ones emphasize structural changes in workplace policies.[125] Professor Tristin Green made the point that class treatment of claims and class-wide relief can change the nature of the workplace by dismantling discriminatory organizational structures.[126] One feature of recent behemoth class action settlements has been an emphasis on establishing structures, primarily in the form of task forces, charged with supervisory responsibilities to help monitor the implementation of settlements.[127] Companies settling cases in the early to mid-1990s seemed more interested in publicity correctives than in creating foundational changes in employment practices and procedures.[128] Judges responsible for approving consent decrees seemed increasingly willing to engage in some form of extended court oversight, either themselves or through judicial surrogates.[129]

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[122] *Haynes*, 1993 WL 19915, at *20–25; *see infra* notes 335–338 and accompanying text (discussing Mitsubishi's separate equal employment opportunity structure called the Opportunity Programs Department).

[123] *Haynes*, 1993 WL 19915, at *6; *see also, e.g.*, Astor v. Rent-A-Center, Inc., Nos. C051093, C051352, 2007 WL 184741, at *2 (Cal. Ct. App. Jan. 25, 2007) (noting that the defendant hired a "Senior Vice President in charge of human resources to enforce the consent decree and to develop a 'professional' human resources function as required by the decree").

[124] *See* Luban, *supra* note 105, at 2082; *see also* Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709, 739 (1989) ("[M]ost class settlements get approved with little objection and generally little judicial involvement.").

[125] Dorothy J. Gaiter, *Eating Crow: How Shoney's, Belted by a Lawsuit, Found the Path to Diversity*, WALL ST. J., Apr. 16, 1996, at B4 ($132.5 million settlement in lawsuit against Shoney's, filed in 1989); Tammy Joyner & Janita Poe, *Coke Settlement Sets New Standards for Corporations*, ATLANTA J.-CONST., Nov. 19, 2000, at 1 (noting that structural reforms were key to the 2000 Coca-Cola settlement).

[126] Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 709–10 (2003).

[127] *See* Joyner & Poe, *supra* note 125.

[128] *See* Darryl Van Duch, *Bad PR Spurs Cave-ins: Some Companies Are Settling to Contain Harm from Negative Publicity*, NAT'L L.J., Oct. 13, 1997, at A1.

[129] *See* Kessler, *supra* note 111, at 1197.

This Part first examines several representative settlements of large employment discrimination class action suits—the cases against Shoney's, Texaco, Home Depot, Mitsubishi, and Coca-Cola.[130] Next, it evaluates the ways in which consent decrees have changed over time and the lessons learned from the implementation of these settlements.[131] No case is a perfect example of any specific theme, but viewed together they present a picture of cases building on each other.

A. *The Evolution of Consent Decrees*

1. The Early 1990s: *Shoney's*

One of the early and highly visible employment discrimination class action suits was filed against Shoney's in 1989.[132] It included allegations of widespread sexual harassment and race discrimination.[133] The plaintiffs recounted numerous instances in which Raymond Danner, the company's founder, CEO, and principal shareholder, made it clear to his managers he did not want black employees, thought having blacks working in his stores would turn away white customers, and used ghastly racial slurs.[134] Literature professor Steve Watkins has written a history of the suit in *The Black O: Racism and Redemption in an American Corporate Empire*.[135] The title of the book comes from evidence that emerged during the lawsuit: white managers testified in depositions that they were directed to blacken in the letter "O" in Shoney's on employment applications from African Americans so that those forms could later be easily identified and discarded.[136] If black applicants were hired, they were routed to kitchen jobs and away from management.[137] An executive at Shoney's said that Danner had talked about making a contribution to the Ku Klux Klan, "saying, 'Those guys are really right.'"[138] Ultimately the consent decree cov-

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[130] *See infra* notes 132–263 and accompanying text.

[131] *See infra* notes 264–407 and accompanying text.

[132] *See* Michelle Hiskey, *Suit: Shoney's Franchisee Keeps Blacks in Kitchens*, ATLANTA J.-CONST., Oct. 12, 1989, at B1.

[133] *Haynes*, 1992 WL 752127, at *1.

[134] STEVE WATKINS, THE BLACK O: RACISM AND REDEMPTION IN AN AMERICAN CORPORATE EMPIRE 30, 215–22 (1997).

[135] *See generally id.*

[136] *Id.* at 5.

[137] *See* Editorial, *Paying the Price for Discriminating*, BALT. SUN, Dec. 23, 1992, at 12A.

[138] *Id.*

ered 200,000 current and former employees and job applicants in twenty-three states.[139]

The cash portion of the $132.5 million settlement provided $105 million for over 20,000 individual class members to be allocated according to a formula depending on whether the member was an applicant or current or former employee, the number of incidents of discrimination, and when they occurred.[140] Equitable relief included the appointment of a new senior management official to supervise human resources, two equal employment opportunity managers, and two recruitment administrators; the adoption of grievance and disciplinary procedures, hiring and promotion goals, and training programs; the creation of a tuition reimbursement program to encourage continuing education; and the establishment of job qualification and performance standards to ensure fair employment practices.[141] Shoney's also adopted an affirmative action plan. The decree required defendants to submit quarterly progress reports to plaintiffs' class counsel.[142]

The magnitude of the Shoney's settlement was substantial relative to the size of the company, caused the chain to post an earnings loss of $26.6 million in 1992, and prompted the company to spend almost $200 million over a four-year period on salaries and contracts with minority vendors to mend its reputation.[143] One of the implementation mechanisms Shoney's adopted was to tie management bonuses to the diversity objectives in the consent decree. By 1997, African Americans constituted 21% of Shoney's managers (compared to 14.5% when the suit was filed in 1989) and 35% of the entire workforce (up from 28% in 1989).[144] The decree was to remain in effect for ten years,[145] but the decree allowed Shoney's to petition the court for termination of its oversight after seven years—which the company successfully did.[146]

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[139] *Haynes*, 1993 WL 19915, at *7; Susan Sturm, *Second Generation Employment Discrimination*, 101 COLUM. L. REV. 458, 463 n.367 (2001).

[140] Gaiter, *supra* note 125.

[141] *See generally Haynes*, 1993 WL 19915.

[142] *Id.* at *21, 23.

[143] An attorney for Shoney's shareholders calculated the 1995 revenues of both Texaco and Shoney's and estimated that "a comparable settlement for Texaco would have cost approximately $4.5 billion as compared to the $176 million it actually paid." Michelle McCann, Note, *Shareholder Proposal Rule:* Cracker Barrel *in Light of* Texaco, 39 B.C. L. REV. 965, 968 n.37 (1998).

[144] L.A. Winokur, *Shoney's Progress Noted Since Settlement*, ATLANTA J.-CONST., Nov. 16, 1997.

[145] *Haynes*, 1993 WL 19915, at *14.

[146] E-mail from Barry Goldstein, Attorney, Goldstein, Demchack, Baller, Borgen & Dardarian, to Lawrence MacLachlan, Director of Research & Instructional Services, Uni-

The lawsuit seemed to encourage changes in a company steeped in a culture of Southern apartheid. At the time the lawsuit was filed, the average age of the members of the board of directors was seventy-two.[147] As the lawsuit was underway, Danner stepped down as chairman; his successor J. Mitchell Boyd issued an apology backed by a commitment to send millions of dollars worth of business to minority contractors.[148] As one newspaper noted: "Even before settling the suit, Shoney's struck a voluntary covenant with the Southern Christian Leadership Conference. Since then, the company has pumped more than $194 million—26 percent more than its goals—into minority-owned companies and organizations, and into black employees' salaries."[149]

Shoney's quickly became one of Fortune Magazine's top fifty companies for minorities by 1998, registering as thirteenth out of the fifty best companies in the country for diversity hiring, promotion, and retention.[150] But the next year, the company had dropped to thirty-ninth out of fifty: when the bottom-line flattened out, seemingly so did Shoney's commitment to diversity.[151] Shoney's ranked thirty-sixth out of fifty in 2000,[152] but was missing from the list in 2002, 2004, and 2006.[153]

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versity of Missouri Kansas City School of Law (May 15, 2007, 5:23 PM) (on file with author).

[147] Dorothy J. Gaiter, *A Commitment to Workplace Diversity*, ATLANTA J.-CONST., Apr. 17, 1996, at D2.

[148] *Id.*

[149] *Id.*

[150] Lixandra Urresta & Jonathan Hickman, *The Diversity Elite*, FORTUNE, Aug. 3, 1998, at 114 ("After a $135 million discrimination settlement, minorities account for 30% of the restaurant chain's managers, and Shoney's has gone from diversity sinner to winner.").

[151] Edward Robinson & Jonathan Hickman, *The Diversity Elite*, FORTUNE, July 19, 1999, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/1999/07/19/263120/index.htm ("Diversity took a back table to financial travails at Shoney's last year. The company lost $107.7 million in 1998, and first-quarter revenues were down 12%. Shoney's added just one minority franchisee in '98.").

[152] Christine Y. Chen & Jonathan Hickman, *America's 50 Best Companies for Minorities*, FORTUNE, July 10, 2000, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2000/07/10/283788/index.htm.

[153] *See 100 Best Companies to Work for, Minorities*, CNNMONEY.COM, http://money.cnn.com/magazines/fortune/bestcompanies/minorities (last visited Feb. 28, 2008) (2006 list); Cora Daniels et al., *50 Best Companies for Minorities*, FORTUNE, June 28, 2004, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2004/06/28/374393/index.htm; Jonathan Hickman, *America's 50 Best Companies for Minorities*, FORTUNE, July 8, 2002, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/2002/07/08/325854/index.htm.

2. *Texaco*

In 1996, two managerial-level employees of Texaco in New York sued the company alleging that it systematically favored less experienced white employees over blacks in pay, promotions, and job opportunities, and created a racially hostile work environment.[154] One of the lead plaintiffs, Bari-Ellen Roberts, said that executives downgraded her performance review because they said she was "uppity," subjected her to other racial stereotypes, and passed her over for promotions.[155] Other witnesses claimed that white employees and managers referred to black employees as "niggers" and "porch monkeys."[156] The plaintiffs moved for class certification, but the Texaco case was settled before the court heard arguments on the class certification motion.[157]

The settlement was prompted by tapes released to the media that allegedly contained racial slurs and a discussion of plans to destroy documents regarding the lawsuit.[158] A senior finance department staffer surreptitiously tape-recorded executives calling African-American workers "black jelly beans," expressing resentment of Black History Month and Kwanzaa celebrations, and talking about whether to destroy evidence in the suit.[159] When the tapes were made public, they prompted a blaze of adverse publicity and a threatened product boycott; within weeks Texaco announced the $176 million settlement.[160]

Following the release of the tapes and operating on a parallel track to its settlement negotiations, Texaco "conducted an extraordinary independent internal investigation of its corporate culture by disbursing six or seven executive team members to Texaco worksites" to gather

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[154] Roberts v. Texaco, Inc., 979 F. Supp. 185, 189 (S.D.N.Y. 1997).

[155] Bari-Ellen Roberts & Jack E. White, Roberts v. Texaco: A True Story of Race and Corporate America 163–64 (1998).

[156] Kurt Eichenwald, *Texaco Executives, on Tape, Discussed Impeding Bias Suit*, N.Y. Times, Nov. 4, 1996, at A1.

[157] *Texaco Signs Settlement in Race-Bias Suit: Plaintiffs' Lawyers Value Agreement at $176 Million*, Dallas Morning News, Nov. 16, 1996, at 1A [hereinafter *Texaco Signs Settlement in Race-Bias Suit*] ("After dragging on for 2 1/2 years, the case was settled in 10 days of urgent negotiations that began Nov. 5, the day after the disclosure of secret tape recordings of senior Texaco executives denigrating black workers and plotting to destroy incriminating evidence in the lawsuit.").

[158] *Texaco Does Right Thing*, *supra* note 21.

[159] Hanna Rosin, *Cultural Revolution at Texaco*, New Republic, Feb. 2, 1998, at 15, 16. *Compare* Anne Fisher, *Texaco: A Series of Racial Horror Stories*, Fortune, May 11, 1998, at 186 ("black jelly beans"), *with* Kurt Eichenwald, *Investigation Finds No Evidence of Slur on Texaco Tapes*, N.Y. Times, Nov. 11, 1996, at A1.

[160] *See infra* notes 267–271 and accompanying text (discussing how the negative publicity prompted a rapid settlement).

employees' perceptions.[161] Texaco management also hired an esteemed retired African-American federal judge, A. Leon Higginbotham, the former Chief Judge of the U.S. Court of Appeals for the Third Circuit, to consult with Texaco on its internal review of its own corporate culture.[162] An important factor in the Texaco settlement and implementation process was the attitude of its recently appointed CEO Peter Bijur. Once the tapes were released, Bijur realized he had a problem with senior management and in addition to "what most Task Force members perceived as his own genuine humanitarian commitment to anti-discrimination policies, Bijur made equality and fairness a top management priority."[163]

The settlement provisions included a cash payment of $115 million, including a one-time 11% pay raise, to 1400 black employees who were potential class plaintiffs.[164] It also created an independent "Equality and Tolerance Task Force" to evaluate employment policies and monitor workplace practices for five years. The task force members had outstanding credentials and exceptional star firepower: former U.S. Assistant Attorney General for Civil Rights and current Governor of Massachusetts, Deval Patrick; retired Chief Judge of the U.S. Court of Appeals for the Third Circuit, John J. Gibbons; founding member of Black Women's Agenda, Inc., Dr. Jeffalyn Johnson; retired director and vice chairman of Texaco, Allen J. Krowe; law professor Mari Matsuda; former Chair and CEO of United Press International. Luis Nogales; and former Solicitor of Labor Thomas S. Williamson, Jr.[165] Two years after the formation of the task force, Texaco asked one of its members, Deval Patrick, to become the company's new general counsel and its first black vice president.[166] Texaco agreed to give the seven-member task force essentially veto power over human resources decisions and implementation of the settlement goals.[167] Because of Texaco's proactive efforts toward self-investigation, the task force collaborated with

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[161] CATHY CRONIN-HARRIS & DAVID M. WHITE, NEGOTIATING ENDURING CORPORATE CHANGE: A CASE STUDY ON THE TASK FORCE ON EQUALITY AND FAIRNESS IN *ROBERTS V. TEXACO INC.* 14 (2005).

[162] *Id.* at 14–15.

[163] *Id.* at 20.

[164] Rosin, *supra* note 159, at 15.

[165] The plaintiffs and the company each chose three members of the task force and then agreed on a chair. When Deval Patrick became general counsel at Texaco, health care management professor Dr. James Rosser succeeded him. CRONIN-HARRIS & WHITE, *supra* note 161, at 21, 47–54. The judge presiding over the Texaco litigation attended meetings of the task force at times. *Id.* at 24.

[166] Reuters. *Texaco Names General Counsel.* N.Y. TIMES, Dec. 18, 1998, at C19.

[167] CRONIN-HARRIS & WHITE, *supra* note 161, at 12.

Judge Higginbotham and Texaco management to evaluate and respond to (rather than compel) some of the initiatives begun by the company.[168]

Texaco's task force was exceptionally well funded. The settlement agreement provided a separate fund of $35 million to encompass all task force activities—including compensating task force members, staff, and experts—over the five-year period, as well as Texaco's consultant and staff time and expenses to implement program changes.[169] It was also notable for its level of engagement and oversight. The task force held meetings lasting one to two days each month, conducted focus groups to interview employees, met with company representatives, assessed historical data from the company about its employment practices, and researched methods of benchmarking progress.[170] When members of the task force talked to employees, they requested specific information, such as, "What are you appraising people for? How are they informed of expectations? How do your methods compare to competitors' best practices in your own and other industries?"[171]

The design of better practices took eighteen months before any implementation began, and task force members assisted in educating employees about the new procedures and policies.[172] The task force issued annual reports that identified progress and areas that needed improvement. Reviewers from the International Institute for Conflict Prevention and Resolution pointed out that the very existence of the task force and Texaco's obligation to report to the task force twice a year forced the company to prioritize diversity.[173] The settlement also committed the company to transparency. Under the terms of the decree, for five years the EEOC could "monitor Texaco's compliance with federal law that prohibits workplace discrimination by inspecting Texaco's premises and records and interviewing current or former salaried employees," and, each year, "Texaco must give the EEOC a report that gives information about vacancies filled by promotion. For every vacancy filled, Texaco must describe the job opening, outside recruit-

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[168] *Id.* at 16.
[169] *Id.* at 24.
[170] *Id.* at 24–25.
[171] *Id.* at 25.
[172] CRONIN-HARRIS & WHITE, *supra* note 161, at 25–26.
[173] *Id.* at 22.

ment notices, internal job posting and documentation of career ladders."[174]

Another distinguishing feature of the Texaco settlement was that it seemed to have company buy-in at the highest levels. Texaco made commitments to remake its corporate culture.[175] Before the task force even got underway, Texaco proactively announced its intent to change policies.[176] Three weeks after announcing the settlement, CEO Peter Bijur unveiled a complex proposal to diversify its workforce, including pledges to boost minority employment, raise the number of minority and female managers, increase the company's purchases from female- and minority-owned businesses, promote diversity training, and reward managers who accomplish diversity goals.[177] An important part of Texaco's approach was that its initiatives did not focus solely on racial diversity. Even though the genesis of the litigation was in allegations of race discrimination, Texaco's consultant Judge Higginbotham stressed, and the company adopted, a broader view of the need to develop policies that would promote antidiscrimination and equality along a variety of dimensions, not just racial diversity.[178]

In 1996, when it announced the settlement, Texaco set numerical goals for itself.[179] Bijur pledged to increase minority employees from twenty-three to twenty-nine percent, black employees from nine to thirteen percent, and female employees from thirty-two to thirty-five percent by 2000.[180] Although Texaco's hiring patterns reflected this commitment,[181] the volatility of the energy market and attrition, voluntary retirements, and the acceptance of generous severance packages when Texaco announced its merger with Chevron in 2000, frus-

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[174] Gail Appleson, *EEOC to Monitor Texaco's Hiring for Five Years*, HOUSTON CHRON., Jan. 4, 1997, at 1.

[175] Eichenwald, *supra* note 43.

[176] *Id.*

[177] *Id.*; *see also* CRONIN-HARRIS & WHITE, *supra* note 161, at 37–38.

[178] CRONIN-HARRIS & WHITE, *supra* note 161, at 13–15.

[179] Eichenwald, *supra* note 43.

[180] *Id.*

[181] CRONIN-HARRIS & WHITE, *supra* note 161, at 34. Kathy Cronin-Harris and David M. White note that:

> [O]f 161 hires by mid-1999, 23% were African-Americans and 49% were women. . . . African-Americans constituted 12.4% of 404 new hires and women constituted 40.6% of the new hires during 2000. . . . Of 74 new hires in the first six months of 2001, women constituted 47% and African-Americans constituted 18.9%.

Id.

trated the goals.[182] At the end of 2000, total minority employment was equal to its 1996 number at twenty-three percent, whereas the percentage of African-American employees had risen only from nine to ten percent and the percentage of females dropped to twenty-seven percent.[183] The merger of Chevron and Texaco in 2001, has made assessment of further progress in diversity hiring difficult.[184]

The company also promised to increase its purchasing from female- and minority-owned businesses, from $135 million in 1996, to $1 billion four years later.[185] In 1998, when Deval Patrick became Texaco's general counsel, he announced that the company had to date "awarded more than $400 million in contracts to firms owned by minorities and women."[186] The CEO's commitment and the transparency of Texaco laying out its remedial plans may have helped set the tone for equal employment practices; since the settlement, courts have routinely granted Texaco summary judgment in subsequent reported discrimination cases against it.[187]

3. The Mid-1990s: *Home Depot*

Butler v. Home Depot, Inc., filed in the Northern District of California in 1994, was a pattern or practice suit in which the female plaintiffs, over 17,000 current and former employees and 200,000 unsuccessful applicants in ten western states that comprised the company's West Coast division, alleged that the company engaged in an "entirely subjective" pattern of hiring, promotion, training, and compensation deci-

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[182] *Id.*

[183] *Id.* at 33–34.

[184] *Id.* at 40.

[185] *See Texaco's Spending with Minority Firms Ahead of 5-Year Plan*, WALL ST. J., Mar. 17, 1999, at B14.

[186] Ross Kerber, *Boston Attorney Deval Patrick to Take Counsel Post at Texaco, Stepping Down as Head of Task Force Overseeing Firm's Treatment of Minorities*, BOSTON GLOBE, Dec. 16, 1998, at C1. Neither Home Depot nor Texaco has ranked on the Fortune/Money/CNN "Best Companies to Work for" since before 1998. *See* Great Places to Work Institute, 100 Best Companies to Work for 2007, http://www.greatplacetowork.com/best/list-bestusa-2008.htm (last visited Feb. 28, 2008) (links for years going back to 1998).

[187] *See, e.g.*, Smith v. Texaco, Inc., 263 F.3d 394, 417–18 (5th Cir. 2001) (vacating district court order certifying class in race discrimination suit because underlying substantive allegations dismissed); Koger v. Texaco, No. 4:04-CV-205-JEC, 2007 WL 951752, at *10 (N.D. Ga. Mar. 28, 2007) (granting summary judgment for the defendant in a race and retaliation claim); Rando v. Texaco Ref. & Mktg. Inc., 165 F. Supp. 2d 1209, 1211 (D. Kan. 2001) (granting summary judgment for the defendant in a race and disability discrimination case).

sions.[188] This produced a segregated workforce with women in lower-paying jobs with limited promotion opportunities. The case settled only three days before trial, following a two-day required mediation.[189] In early 1998, the judge approved a consent decree providing a settlement fund of $65 million and $22.5 million in attorneys' fees, costs, and expenses.[190]

The Home Depot settlement exemplifies what Professor Michael Selmi calls "the recalcitrance model" in which "the company refuses to acknowledge any problems or potential liability even while agreeing to make substantial changes and paying large sums of money in settlement."[191] The settlement permitted Home Depot to create its own goals for compliance with the consent decree.[192] Selmi noted that "Home Depot has also been reluctant to provide any information regarding the changes it has made, and the initial progress report required under the terms of the consent [decree] was filed under seal."[193]

Although the emphasis of the Home Depot settlement was monetary, it resulted in some reforms of internal employment procedures.[194] A primary complaint in the Home Depot lawsuit had been that supervisors, who were predominantly men, made subjective decisions about jobs and promotions that led to a pattern of women being denied advancement opportunities.[195] One structural change implemented as a result of the consent decree was a Job Preference Process that installed a computer kiosk in each store, into which job applicants or current employees could input their qualifications and job preferences.[196] This system was intended to help eliminate subjective decision making based on stereotypes by automatically including applicants in appropriate job pools.

The settlement also required the company to interview at least three candidates for any management position and develop internal positions to monitor hiring and promotion processes.[197] Finally, the

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[188] No. C-944-4335-SI, 1996 WL 421436, at *1–2 (N.D. Cal. Jan. 25, 1996) (order certifying class action).

[189] Selmi, *supra* note 121, at 1285.

[190] *Id.*

[191] *Id.* at 1281.

[192] *Id.* at 1285–86.

[193] *Id.* at 1286.

[194] Selmi, *supra* note 121, at 1285.

[195] Butler v. Home Depot, No. C-95–2182 ST, 1997 U.S. Dist. LEXIS 16296, at *49–50 (N.D. Cal. Aug. 29, 1997) (citation omitted).

[196] Sturm, *supra* note 139, at 512–13 (citing Consent Decree at 32, *Butler*, 1997 U.S. Dist. LEXIS 16296 (No. C-95-2182 ST)).

[197] *Id.* at 513–14.

consent decree mandated that the company report to class counsel on progress implementing these reforms, at least while the decree was in existence.[198]

In June of 2002, the court ended its oversight more than a year before the decree was supposed to expire because the court found "genuine and enthusiastic compliance" by the company with the settlement goals.[199] Home Depot reported that in the five years between 1996 and 2001, the company had increased female store managers in the western district from eight to fourteen percent, female assistant store managers from fifteen to twenty percent, and female sales associates from sixteen to twenty-two percent.[200] The plaintiffs' attorney, David Borgen, commented, "We are satisfied that there's been a sea change of culture at Home Depot and that substantial opportunities have opened up for women."[201] On the parties' joint motion, the court approved the termination of the decree "eighteen months before it was due to expire" even though the company had "failed to meet half of its own benchmarks."[202] Whether these structural changes, viewed in the context of the entire settlement and later events, actually accomplished the objectives of the initial lawsuit is a matter of some dispute.[203]

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[198] *Id.* at 517.

[199] *Court Ends Supervision of Home Depot Hiring*, ST. LOUIS POST-DISPATCH, June 25, 2002, at C2.

[200] Joyce E. Cutler, *Court Terminates Home Depot Sex Discrimination Consent Decree*, Daily Lab. Rep. (BNA), No. 125, at A5 (June 28, 2002).

[201] *Id.*

[202] Selmi, *supra* note 121, at 1285–88.

[203] *Compare* Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 302 (viewing the Home Depot consent decree as "constructing the architecture for accountable, legitimate, and effective problem solving" through developing a "remedial structure [that] established practices that would generate information needed to address the problem on an on-going basis, involve people with expertise and responsibility for implementing the system, and set up internal and external accountability mechanisms. The deliberative process for remedial formulation included operations people and experts in system design, as well as plaintiffs' counsel, in-house counsel, and senior human resources professionals."), *with* Selmi, *supra* note 121, at 1325 ("During the four years it was under a consent decree, Home Depot appears to have filed only one progress report, which provided no data and which the plaintiffs' attorneys summarily approved with the conclusory statement that the numbers were better than before."). One news publication described a second suit brought by the EEOC on behalf of a woman who complained she was passed over for promotion in favor of less qualified men, noting: "This is the second time the EEOC has sued the Atlanta-based retailer. In August 2001, the EEOC filed a class-action lawsuit against the retailer for allegedly failing to promote qualified women to lucrative positions." *See EEOC Sues Home Depot Again for Alleged Sex Discrimination*, HOME CHANNEL NEWS, Sept. 16, 1992, at 6.

Intriguingly, in August of 2001, the EEOC filed another class action lawsuit against Home Depot on behalf of a woman in Texas for gender-based promotion discrimination and retaliation.[204] Three years later, the company entered into a consent decree with EEOC to resolve another class-wide sex, race, and national origin discrimination and retaliation lawsuit in Colorado.[205] Home Depot again denied that it had engaged in any misconduct.[206]

4. *Mitsubishi*

In 1996, the EEOC filed a class action suit against Mitsubishi Motors on behalf of almost half of the 900 past and present female employees at one of its plants.[207] The allegations were of egregious conduct—ranging from verbal abuse and propositioning to groping and physical assault—and may have been perpetrated by as many as 400 of

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[204] *EEOC Files Gender-Bias Suit Against Home Depot*, NAT'L. HOME CTR. NEWS, Aug. 27, 2001, at 1. The resolution of this suit does not seem to be a matter of public record.

[205] *Home Depot to Pay $5.5 Million to Resolve Class Discrimination Lawsuit in Colorado*, WORKPLACE ANSWERS, Aug. 25, 2004, http://www.workplaceanswers.com/News/Home-Depot-to-Pay-$5.5-Million-to-Resolve-Class-Di63.aspx.

[206] Julie Dunn, *Home Depot Settles EEOC Lawsuit*, DENVER POST, Aug. 26, 2004, at C1. Since then, numerous other plaintiffs have filed individual suits. *See, e.g.*, Halfacre v. Home Depot U.S.A., Inc., No. 05-6619, 2007 WL 1028860, at *1 (6th Cir. 2007) (granting summary judgment to Home Depot for a race discrimination claim, but denying summary judgment for a retaliation claim); Beltran v. Home Depot, No. 7:08cv00192, 2007 WL 1960609, at *1 (W.D. Va. 2007) (denying Home Depot's motion to dismiss concerning a race discrimination claim brought by an employee); Maldonado v. Home Depot U.S.A., Inc., No. EP-06-CA-232-FM, 2007 WL 1849026, at *1 (W.D. Tex. 2007) (granting Home Depot's summary judgment motion concerning a disability discrimination claim brought by an employee who was terminated); Lewis v. Home Depot U.S.A., Inc., No. A-06-CA-058-LY, 2007 WL 1100422, at *9 (W.D. Tex. 2007) (denying Home Depot's summary judgment motion in an age discrimination case); St. George v. Home Depot U.S.A., Inc., No. CV-04-1210-PCT-LOA, 2007 WL 604925, at *1–2 (D. Ariz. 2007) (describing sexual harassment suit filed by twenty-one women who alleged they had been exposed to inappropriate verbal and physical abuse by male employees); Andrews v. Home Depot U.S.A., Inc., No. A.03CV5200, 2005 WL 1490474, at *1 (D.N.J. 2005) (denying Home Depot's motion to strike certification of a class concerning a claim of national origin discrimination). But that is true for other major corporations as well. *See infra* note 261 and accompanying text. The cases against Home Depot, however, seem to be surviving summary judgment with greater frequency than those against Coca-Cola or Texaco. *See, e.g.*, *Smith*, 263 F.3d at 417–18 (vacating district court order certifying class in race discrimination suit because underlying substantive allegations dismissed); *Koger*, 2007 WL 951752, at *10 (granting summary judgment for the defendant in a race and retaliation claim); *Rando*, 165 F. Supp. 2d at 1211 (granting summary judgment for the defendant in a race and disability discrimination case).

[207] Marion Crain & Ken Matheny, *"Labor's Divided Ranks": Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1546 (1999).

the 3000 male workers there.[208] It is no small irony that these events occurred at a plant in the town of Normal, Illinois.[209]

When Mitsubishi received the EEOC's charge, it immediately organized protests, paid 3000 employees to demonstrate, and arranged to bus them to the Chicago office of the EEOC to protest the suit.[210] This move generated an exceptional amount of bad publicity, which prompted Mitsubishi, after only several weeks and before settling the lawsuit, to hire former U.S. Secretary of Labor Lynn Martin as a consultant to the company.[211]

Although the hiring of Martin was perceived as merely "a publicity ploy,"[212] Martin and her staff developed a template of more than thirty recommendations for the company to implement that would create a model workplace free of sex and race discrimination.[213] To emphasize accountability, the centerpiece of Martin's recommendation was a "zero tolerance task force" that would oversee grievance review.[214] Other recommendations included developing comprehensive sexual harassment training, creating and continually updating specific job descriptions, implementing merit-based managerial compensation tied to corporate goals, enforcing a uniform code of con-

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[208] The women autoworkers alleged misogynist conduct in the plant by both male autoworkers and supervisors, including physically abusing women (e.g., slapping women on the buttocks, touching their breasts and crotches), pinning sexually obscene signs to the backs of unknowing women, placing obscene graffiti on the fenders of cars coming down the assembly line and obscene pop-ups which appeared unexpectedly in the cars when women were assembling them, wrapping automotive parts in pornographic newspapers, assaulting women with factory equipment (e.g., placing hoses, wrenches, and air guns between women's legs), playing pranks on women (e.g., dousing the seats of cars that women must sit on with butane, making obscene motions with bananas, placing plastic penises in buckets of tools), sabotaging women's work (which sometimes led to injuries), circulating pornographic photos of production-line workers and male managers having sex with women who did not work at the plant during a private party, posting lists on the walls ranking the women in the plant by their estimated breast sizes, and abusing women verbally (e.g., referring to women as "sluts," "whores," and "bitches"; referring to them by their breast size numbers; and asking them about their sexual habits and preferences). *Id.* at 1546–47; *see also* Michael Selmi, *Sex Discrimination in the Nineties, Seventies Style: Case Studies in the Preservation of Male Workplace Norms*, 9 EMP. RTS. & EMP. POL'Y J. 1, 20 (2005).

[209] Crain & Matheny, *supra* note 207, at 1548.

[210] Peter Annin & John McCormick, *More than a Tune-up: Tough Going in a Fight Against Sexual Harassment*, NEWSWEEK, Nov. 24, 1997, at 50–52.

[211] *See* Van Duch, *supra* note 128; *see also* Andrea McGrath, Note, *The Corporate Ombuds Office: An ADR Tool No Company Should Be Without*, 18 HAMLINE J. PUB. L. & POL'Y 452, 452–53 (1997).

[212] McGrath, *supra* note 211, at 452–53.

[213] Cathy Nelligan Norman, *How to Create a Model Workplace*, VT. EMP. L. LETTER, Dec. 1997, at 2.

[214] *Id.*

duct, surveying employees and reporting findings, adding employee relations supervisors, offering career planning to all employees, and creating transparency with an annual "state of the workplace" company statement.[215] The federal district judge to whom the case was assigned appointed retired Federal Appellate Judge and former White House Counsel Abner Mikva to act as a special master and facilitate a settlement.[216] According to numerous reports, Mikva deserves exceptional credit for mediating the settlement,[217] although the federal district court's decision, in early 1998, that the EEOC had the authority to bring pattern or practice claims for sexual harassment may have also played a role in the resolution of the case.[218]

In 1998, the EEOC entered a consent decree for $34 million in monetary relief, the largest settlement amount to that point in history for a sexual harassment case.[219] Mitsubishi also agreed to revise its sexual harassment policies and complaint procedures to maintain a "zero tolerance policy concerning sexual harassment, sex-based harassment and retaliation against individuals who report harassment"—including specific provisions such as the commitment to promptly investigate and prepare written findings regarding any allegation of harassment and proposed remedial actions within seven days.[220] The consent decree installed a panel of three decree monitors for the three years the decree was in effect.[221] Two years later, the monitors found that Mitsubishi had made "commendable progress in improving its systems for preventing [sexual harassment] and dealing with it appropriately when it occurs."[222] At the end of the three-year period, the monitors approved the progress Mitsubishi made under the con-

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[215] Michael Bologna, *Lynn Martin Unveils 34-Point Plan for Making Mitsubishi Model Workplace*, Daily Lab. Rep. (BNA), No. 30, at AA-1 (Feb. 13, 1997).

[216] Press Release, U.S. Equal Employment Opportunity Comm'n, Mitsubishi Motor Manufacturing and EEOC Reach Voluntary Agreement to Settle Harassment Suit (June 11, 1998) [hereinafter EEOC Mitsubishi Press Release], *available at* http://www.eeoc.gov/press/6-11-98.html.

[217] *See, e.g.*, Kirstin Downey Grimsley, *Mitsubishi Settles Suit for $34 Million*, PALM BEACH POST, June 12, 1998, at 1A ("Attorneys for both sides credited Abner Mikva . . . for helping to bring the long-warring parties to an amicable resolution after four weeks of talks.").

[218] Equal Employment Opportunity Comm'n v. Mitsubishi Motor Mfg. of Am., Inc., 990 F. Supp. 1059, 1071 (C.D. Ill. 1998).

[219] EEOC Mitsubishi Press Release, *supra* note 216.

[220] Joint Motion for Entry of Consent Decree at 45, *Mitsubishi Motor Mfg.*, 990 F. Supp. 1059 (No. 96-1192), *available at* http://www.eeoc.gov/policy/docs/mmma.html.

[221] *Id.*

[222] Press Release, U.S. Equal Employment Opportunity Comm'n, Monitors Say Mitsubishi in Compliance with EEOC Consent Decree; Sexual Harassment 'Firmly Under Control' at U.S. Plant (Sept. 6, 2000), *available at* http://www.eeoc.gov/press/9-6-00.html.

sent decree and supported its termination but reminded the company "to remain vigilant and proactive in combating harassment."[223]

Early indications were that the Mitsubishi lawsuit "stem[med] the proliferation of harassment," but raised questions whether the steps taken by the company, including the appointment of six full-time employees to address harassment complaints and training, were actions that smaller companies could duplicate.[224] Some commentators have questioned whether the Mitsubishi settlement was effective in transforming a discriminatory corporate culture, citing several subsequent lawsuits alleging racial harassment and age discrimination at the plant in Normal, Illinois.[225]

5. *Coca-Cola*

In 1999, several individual plaintiffs sued Coca-Cola, alleging systematic discrimination on the basis of race in salary, promotions, and performance evaluations, and later added class claims on behalf of 2200 current and former African-American employees.[226] The claims of managers exercising unbridled subjective discretion in performance appraisals echoed claims made in the Texaco suit; the allegations, however, were not of racial invectives but instead of ignoring, overlooking, and failing to promote qualified blacks.[227]

In early 2000, public pressure for a settlement mounted. A former Coca-Cola manager, Larry Jackson, took thirty Coca-Cola employees with him on a bus ride from Atlanta, Georgia, to the shareholders' meeting in Wilmington, Delaware, to threaten a boycott of Coca-Cola products unless Coca-Cola addressed its record on diversity and fair

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[223] Press Release, U.S. Equal Employment Opportunity Comm'n, EEOC Responds to Final Report of Mitsubishi Consent Decree Monitors (May 23, 2001) [hereinafter EEOC Responds Press Release], *available at* http://www.eeoc.gov/press/5-23-01.html.

[224] Joanna Grossman, *Sexual Harassment in the Workplace: Do Employers' Efforts Truly Prevent Harassment or Just Prevent Liability?*, FINDLAW, May 7, 2002, http://writ.news.findlaw.com/grossman/20020507.html.

[225] Cheryl L. Wade, *"We Are an Equal Opportunity Employer": Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541, 1552 n.54 (2004) (citing Lisa Girion, *Fired U.S. Mitsubishi Managers File Suit*, L.A. TIMES, Aug. 3, 2001, at C1; *Mitsubishi Settles Racial Discrimination Suit*, ST. LOUIS POST-DISPATCH, Apr. 2, 2001, at 5).

[226] Ingram v. Coca-Cola Co., 200 F.R.D. 685, 686, 697 (N.D. Ga. 2001).

[227] Cyrus Mehri et al., *One Nation, Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability and Workplace Fairness*, 9 FORDHAM J. CORP. & FIN. L. 395, 433–35 (2004). This is unsurprising, as the accomplished Cyrus Mehri was lead counsel in both cases. *See supra* note 75.

treatment.[228] The Reverend Jesse Jackson also spoke to the audience at the shareholders' meeting to pressure Coca-Cola to settle.[229] Less than two months after this meeting, the plaintiffs and Coca-Cola reached an agreement to settle in principle and then spent four more months hammering out the details of the settlement, which was announced in November of 2000.[230]

The Coca-Cola consent decree presented several historic features. Though the $192.5 million was a record settlement amount, key to the settlement was an independent, seven-member court-supervised task force that would operate for four years to oversee Coca-Cola's diversity reform efforts and elimination of subjective decision making, investigate complaints, and report back to the court on progress.[231] Importantly, the task force recommendations would be binding on the company unless Coca-Cola sought judicial relief from the court.[232] Like the Texaco task force, the Coca-Cola task force comprised an all-star cast: headed by former Secretary of Labor Alexis Herman, it included M. Anthony Burns, who was chairman of Ryder System, Inc., and a member of the Board of Directors of Chase Manhattan; former chair of the EEOC Gilbert F. Casellas; labor and employment lawyer Edmund D. Cooke, Jr.; law professor Marjorie Fine Knowles; former Assistant Attorney General for Civil Rights Bill Lan Lee; and René A. Redwood, former Special Assistant to Secretary of Labor Robert Reich and executive director of the Presidential Glass Ceiling Commission.[233] The settlement also required Coca-Cola to hire an ombudsman, who was housed in a separate facility and would report directly to the CEO of Coca-Cola, to investigate any complaints of discrimination.[234] In addition to funding the task force expenses and salary amply at $44 million, the settlement provided $83 million in compensatory damages and back pay for current and former employees, $43.5 million for salary

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[228] Constance L. Hays, *Group of Black Employees Calls for Boycott of Coca-Cola Products*, N.Y. TIMES, Apr. 20, 2000, at C1.

[229] *Id.*

[230] *See Soft Drink Maker Agrees to Pay $192.5M to Settle Racial Discrimination Lawsuit*, CNN.COM, Nov. 16, 2000, http://money.cnn.com/2000/11/16/companies/coke.

[231] Joyner & Poe, *supra* note 125.

[232] *Ingram*, 200 F.R.D. at 688.

[233] Fifth Annual Report of the Task Force at 1, *Ingram*, 200 F.R.D. 685 (No. 1-98-CV-3679) [hereinafter Fifth Annual Task Force Report], *available at* http://www2.coca-cola.com/ourcompany/task_force_report_2006.pdf.

[234] Joyner & Poe, *supra* note 125.

equity adjustments over ten years, and attorneys' fees and expenses of $20.7 million.[235]

The task force appointed two "joint experts"—independent industrial psychologists—to advise it.[236] These specialists developed a set of best practices for human resources systems and ensured that Coca-Cola's proposed systems comported with these practices. As an example, the company created job descriptions that reflected the skills needed for the jobs so that hirings and promotions were based on skill sets rather than personalities or other subjective factors. In its first three years, the task force oversaw the development and then monitored the implementation of those systems. During the fourth year, the task force marked the progress of the company "in developing a comprehensive diversity strategy linking diversity to business goals."[237] The task force oversight and advice worked so well that the defendant, Coca-Cola, voluntarily requested an additional fifth year of court oversight.[238] During the final, extra year of oversight, the task force assessed the restructuring of the company's personnel practices over the past five years, the commitment of senior management to the diversity goals of the settlement, and the measurement of results.[239]

The Coke settlement was "the real thing."[240] In the initial settlement, Coca-Cola made a commitment to excelling among Fortune 500 companies in promotion of equal employment opportunities free from discrimination and to fostering "an environment of inclusion, respect and freedom from retaliation."[241] The cornerstone of the settlement was embodied in the Statement of Principle: "The Company recognizes that diversity is a fundamental and indispensable value and that the Company, its shareholders and all of its employees will benefit by striving to be a premier 'gold standard' company on diversity."[242]

Coca-Cola committed to change its corporate "culture by designing and implementing a comprehensive strategy that links diversity to

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[235] *Ingram*, 200 F.R.D. at 688.

[236] These experts were Dr. Irwin Goldstein, Dean of the College of Behavioral Sciences at the University of Maryland, and Dr. Kathleen Lundquist, a national expert in human resources process. Fifth Annual Task Force Report, *supra* note 233, at 2 & n.4.

[237] *Id.* at 3.

[238] *Id.* at 2.

[239] *Id.* at 4.

[240] This was an advertising theme for Coca-Cola in the 1990s. *See* Coca-Cola Television Advertising Home Page, Themes for Coca-Cola Advertising (1886–1999), http://memory.loc.gov/ammem/ccmphtml/colatime5.html (last visited Feb. 15, 2008). *See generally* CONSTANCE L. HAYS, THE REAL THING 340 (2004).

[241] Fifth Annual Task Force Report, *supra* note 233, at 2.

[242] *Id.*

business goals and makes diversity a business imperative."[243] The implementation of this goal centered on the construction of Diversity Advisory Councils, led by senior management and charged with responsibilities for achieving results. The Diversity Advisory Councils were empowered to implement diversity initiatives and were advised to engage in "[r]epeated, consistent internal communications to employees" about the diversity mission.[244] The company considered achievement of equal employment opportunity goals as a factor in management bonuses.[245] Coca-Cola committed $1 billion toward launching training and mentoring programs, working with minority suppliers, and increasing economic partnerships and investment in urban communities.[246]

This clearly articulated philosophy—"that diversity is critical to the success of the business"—produced measurable results.[247] In the five years between 2000 and 2006, Coca-Cola increased diversity considerably among its senior officers, moving from eight percent minorities and sixteen percent females in 2000, to twenty-one percent minorities and twenty-seven percent females in 2006.[248] The company also improved diversity in the pipeline jobs that would later fill senior management positions, augmenting the percentage of minorities in these jobs from twenty-one to twenty-seven percent between 2002 and 2006.[249] Of the company's 824 new hires overall between 2005 and 2006, "nearly 54% were women, 47% were minorities, and 31% were African-Americans"—and these percentages were similar to the new hire rates for these groups between 2004 and 2005.[250]

The numbers, of course, do not tell the full story. The task force conducted anonymous electronic surveys of the entire workforce to measure employees' attitudes about the diversity climate at Coca-Cola.[251] With an extremely high response rate of seventy-four percent, the respondents perceived that the company was committed to both

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[243] *Id.* at 5.

[244] *Id.*

[245] *Id.* at 70. In 2007, the company stated that twenty percent of management bonuses are tied to diversity results. DiversityInc, Top 50 for Diversity Profiles, No. 4: The Coca-Cola Company, http://www.diversityinc.com/public/1801.cfm (last visited Feb. 15, 2008).

[246] Fifth Annual Task Force Report, *supra* note 233, at 39; *see also* Associated Press, *Coca-Cola Reaches Settlement in Racial Discrimination Suit*, HOUSTON CHRON., June 15, 2000, at 2.

[247] Fifth Annual Task Force Report, *supra* note 233, at 6.

[248] *Id.* As the report noted, "[t]hat is a 68% increase in women and a 161% increase in minority membership within the officer ranks in a five-year time span." *Id.*

[249] *Id.*

[250] *Id.* at 15.

[251] *Id.* at 21.

diversity and equal opportunity.[252] In 2006, the levels of positive responses on a variety of questions—ranging from whether management demonstrated a commitment to diversity to whether employees believed the company treated them fairly—were the highest they had been since the task force began surveying employees in 2002, and the numbers were substantially higher than the baseline levels measured in the first survey.[253]

An important part of the Coca-Cola story was the dedication of the CEOs during the time of the settlement and its implementation. The CEO at the time of the settlement was Douglas Daft, and his commitment to enhancing diversity within the company led him to hire Deval Patrick from the Equality and Fairness Task Force to serve as Coca-Cola's general counsel.[254] Three years into the monitoring, Neville Isdell replaced Daft as Chairman and CEO, and he requested a meeting with the federal judge overseeing the case to seek an additional year of court oversight.[255] A former protestor against apartheid when he was a college student in South Africa, Isdell understood the necessity of making diversity programs an integral part of the company's strategic plan, and commented, "'This is not about settling a lawsuit, about complying with a court order. This is just what we need to do as a business.'"[256] The final task force report applauded the company's progress during the years of oversight, made specific recommendations for the human resource systems and their monitoring, and encouraged Coca-Cola to continue its annual surveys of employee perception of the diversity climate to "keep holding itself accountable."[257]

Judge Richard Story of the U.S. District Court for the Northern District of Georgia, who oversaw the litigation and settlement, offered some insights into the success of the Coca-Cola settlement. He said that in part it was the talents of the extraordinary task force, but in large part, for Coca-Cola, the "settlement stopped being a way to end litigation" and became something more.[258] The defendant developed a genuine interest in "wanting to create the gold standard of business practices that other settlements could draw on so as not to reinvent

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[252] Fifth Annual Task Force Report, *supra* note 233, at 21.

[253] *Id.* at 21–23.

[254] William C. Smith, *A Bias Buster*, NAT'L L.J., Dec. 16, 2002, at A9.

[255] Duane D. Stafford, *Coke's Diversity Case Closed*, ATLANTA J.-CONST., Dec. 2, 2006, at C1.

[256] *Id.*

[257] Fifth Annual Task Force Report, *supra* note 233, at 7.

[258] Telephone Interview with Hon. Richard Story (July 19, 2006).

the wheel."[259] In 2007, Coca-Cola was ranked fourth in the nation on DiversityInc's "Top 50 Companies for Diversity," based on factors such as CEO commitment to diversity, hire and retention rates, and supplier diversity. [260] Although Coca-Cola and its bottling enterprises have faced subsequent employment lawsuits, no courts have certified class actions against the company, and the vast majority of individual lawsuits have resulted in dismissal of the plaintiffs' suits.[261]

Now, this may remind some of the punch line to the joke about the light bulb—the light bulb has to really want to change. The next Sections of this Article discuss structural pressures on corporations, and the hallmarks of successful consent decrees.[262] The final Section addresses economic arguments that might be persuasive to companies if they do not have a similar change of heart and independently develop a commitment to diversity practices or are not operating under a consent decree.[263]

B. *Risks and Threats as Instruments of Cultural Change*

This Section addresses those forces that may initially force a settlement: the threat of litigation and its accompanying costs, as well as possible negative publicity.[264] In several of the major cases discussed above, the threat of adverse publicity—coupled with potential eco-

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[259] *Id.*

[260] DiversityInc, *supra* note 245. None of the other major corporations discussed above (Shoney's, Home Depot, Mitsubishi or Texaco-Chevron) were among the top 50. *Id.*

[261] *See, e.g.*, Laosebikan v. Coca-Cola Co., 167 F. App'x 758, 760 (11th Cir. 2006) (affirming district court's grant of summary judgment dismissing race discrimination suit); Espinoza v. Coca-Cola Enter., Inc., 167 F. App'x 743, 743, 744 (10th Cir. 2006) (affirming summary judgment of race discrimination and retaliation claim where plaintiff altered employment records and was justifiably terminated); Voltz v. Coca-Cola Enter. Inc., 91 F. App'x 63, 63 (10th Cir. 2004) (approving the district court's grant of summary judgment in a race discrimination case alleging failure to promote in which the plaintiff had limited supervisory experience); Carrion v. Coca-Cola Bottling Co. of New England, No. 3:05-cv-1720, 2006 WL 3526748, at *4 (D. Conn. Dec. 1, 2006) (granting summary judgment against a plaintiff who alleged race and national origin discrimination); Johnson v. Coca-Cola Enter. Inc., No. Civ.A. 05-1479, 2006 WL 2873474, at *1, 12 (W.D. La. Oct. 6, 2006) (dismissing reverse discrimination failure to promote claim by a white male); Holman v. Coca-Cola Enter., Inc., No. 4:05CV1032 HEA, 2006 WL 2460795, at *1 (E.D. Mo. Aug. 23, 2006) (granting company's motion for summary judgment in suit alleging racial harassment where the plaintiff had a substantial number of on-the-job rule infractions); Lumpkin v. Coca-Cola Bottling Co. United, Inc., 216 F.R.D. 380, 382 (S.D. Miss. 2003) (denying class certification to claims brought by a group of black employees who alleged pay and promotion discrimination over a period of thirty-five years).

[262] *See infra* notes 264–392 and accompanying text.

[263] *See infra* notes 393–407 and accompanying text.

[264] *See infra* notes 266–317 and accompanying text.

nomic consequences—prompted the consent decree.[265] Whether these risks alone compel a transformation in corporate practices, however, is unclear.

1. Threats of Negative Publicity

The threat of negative publicity can factor into employment discrimination class settlements, but unless a company desires to become a model citizen like Coca-Cola, the public relations aspects of the suits have operated primarily to induce settlements. The continued litigation of class suits can garner negativity publicity, cost hundreds of thousands of dollars in attorneys' fees, and risk significant financial losses. This set of intertwined concerns—about negative publicity coupled with other economic risks—has prompted some of the larger class action settlements.[266]

One of the primary catalysts behind the mammoth Texaco settlement was the release to the public of a secret tape-recording on which senior company executives made disparaging comments about black employees and casually plotted the destruction of documents relating to the ongoing race discrimination suit.[267] Jesse Jackson and other civil rights leaders threatened a "crippling" nationwide consumer boycott of Texaco products and a stock divestiture campaign.[268] As Professor Steven Ramirez noted, "Once allegations of Texaco's misconduct surfaced, its shareholders suffered stunning losses, as its market capitalization plunged by $1 billion."[269] Within eleven days of the release of the tape, Texaco Chairman Peter Bijur issued a public apology and announced the $176 million settlement.[270] Although the resolution was compelled at least in part by the $540 million in damages claimed in the suit, the settlement came swiftly after disclosure of the tabloid-worthy tapes, and the company's attention focused on damage control and image.[271]

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[265] *See* Van Duch, *supra* note 128.

[266] *See id.*

[267] *Texaco Does Right Thing*, *supra* note 21.

[268] Jason B. Johnson, *Jackson Vows Boycott of Companies in Dispute*, BOSTON HERALD, Nov. 15, 1996, at 29.

[269] Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 108 (2000).

[270] *See Texaco Signs Settlement in Race-Bias Suit*, *supra* note 157 ("After dragging on for 2 1/2 years, the case was settled in 10 days of urgent negotiations that began Nov. 5, the day after the disclosure of secret tape recordings of senior Texaco executives denigrating black workers and plotting to destroy incriminating evidence in the lawsuit.").

[271] *See id.*

Other examples of the use of adverse publicity to influence settlements include threatened boycotts at Mitsubishi, public shaming of Shoney's, and a publicity campaign intended to protest Cracker Barrel's policies against hiring gays and lesbians.[272] An open question is whether the media, consumer, and political pressure that can impel a quick resolution and settlement undermine the longer term fulfillment of those promises made under pressure.[273] The longer term successes[274] in two of the cases of relatively swift settlements—Texaco and Coca-Cola[275]—suggest perhaps not.

The adverse publicity—and its leverage effect—may depend significantly on the type of discrimination and the company against which it is alleged. As Professor Michael Selmi has pointed out, public shaming for race discrimination may be far more effective than for sex discrimination: "While there is a clear societal consensus against race discrimination—and no company wants to be labeled as racist—there is far less of a consensus regarding sex discrimination, particularly when that discrimination is based on common stereotypes."[276] Query whether allegations like those in the case of *Dukes v. Wal-Mart*[277] may do something to raise social consciousness about sexist stereotypes.

Unlike products liability class action suits—like with Bridgestone/Firestone tires or tobacco manufacturers agreeing to produce lower nicotine cigarettes—where a class settlement demands a change in the product itself, the negative publicity about workplace conditions that employment discrimination lawsuits can generate does not automatically command consumer attention.[278] It is industry specific. A component parts supplier or manufacturer of farm equipment or heavy industrial machinery may not be concerned about public image. With products like those produced by Texaco, Coca-Cola, Pepsi,

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[272] *See, e.g.*, Steve Early, *Our Collective Bargain*, NATION, Feb. 25, 2002, at 25; Gaiter, *supra* note 125, at B4; *Mitsubishi Picketing Concerning Lawsuits Is Readied by Groups*, WALL ST. J., May 8, 1996, at B3; Barbara Presley Noble, *Gay Group Asks Accord in Job Dispute*, N.Y. TIMES, Nov. 25, 1992, at D4; Rayner Pike, *Mitsubishi's Vows of Reforms End Boycott*, BOSTON GLOBE, Jan. 16, 1997, at C2.

[273] Selmi, *supra* note 121, at 1250.

[274] *See supra* notes 258–261 and accompanying text.

[275] Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 737 n.146 (2006) (observing that "the case against Coca-Cola was settled without any substantial motions having been decided").

[276] Selmi, *supra* note 121, at 1288–89.

[277] *See supra* notes 14–16 and accompanying text.

[278] Reuters, *Firestone Settlement Is Approved*, N.Y. TIMES, July 25, 2003, at C18 ("[Firestone] agreed to incorporate technology that improves tire capability at high speeds in the manufacture of certain tires for seven years.").

or Home Depot, the consumer is often a primary end user of the product.[279] If the demand for diversity comes from customers that *are* companies—insisting, for example, that the law firms to which they outsource work use female and minority attorneys to do the company's legal work—this can be influential in changing the law firm's diversity practices.[280]

A critical question for corporations is whether the public relations damage will have a financial impact. Although boycotts can cause some long term reputation damage and the need to address a tarnished public image, eventually the negative publicity subsides.[281] Furthermore, the publicity risks—and thus perhaps any internal impetus to change behaviors—are much larger for branded corporations because part of the product they sell is goodwill.[282] Though the lawsuit and accompanying negative publicity may provide the wake-up call, perhaps the more significant force driving a settlement is the possibility for financial exposure—the prospects of damages and defense costs.[283]

2. Monetary Compensation, Threats of Litigation, and Corporate Practices

The evidence is mixed as to whether actual lawsuits or simply the threat of lawsuits (and the accompanying risks of damage awards and the costs of litigation defense) impels changes in corporate practice.

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[279] *See* Allanna Sullivan & Peter Fritsch, *Texaco Chairman Meets Advocates for Civil Rights*, WALL ST. J., Nov. 13, 1996, at B3 (discussing Jesse Jackson's threat to pickets gas stations if the Texaco suit was not settled).

[280] Angela Brouse, Comment, *The Latest Call for Diversity in Law Firms: Is It Legal?*, 75 U. MO. KAN. CITY L. REV. 847, 848–49 (2007) ("As more corporations become committed to diversity, they in turn expect their service providers to reflect the same commitment to diversity. Businesses that have worked hard to present an image that reflects diversity do not want their attorneys to destroy such a perception."); *see also* Karen Donovan, *Pushed by Clients, Law Firms Step Up Diversity Efforts*, N.Y. TIMES, July 21, 2006, at C6.

[281] *Cf.* Richard Kevin Zepfel, Note, *Stopping a "Gruesome Parade of Horribles": Criminal Sanctions to Deter Corporate Misuse of Recombinant DNA Technology*, 59 S. CAL. L. REV. 641, 661 (1986) ("For adverse publicity to be effective, however, studies show that reports must frequently and prominently link the specified corporation with its 'bad' act."). *But see* Marguerite Rigoglioso, *Consumer Boycotts Work—Just Ask French Winemakers*, STANFORD GRADUATE SCH. BUS. NEWS, Apr. 2006, http://www.gsb.stanford.edu/news/research/stratman_leslie_boycotts.shtml. *See generally* David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001).

[282] I am indebted to several participants at the Second Annual Colloquium on Current Scholarship in Labor and Employment Law, September 29, 2007, particularly Michael Selmi and Michael Zimmer, for making this point to me.

[283] *Texaco Does Right Thing*, *supra* note 21 (release of racially offensive tapes quickly followed by Texaco action to improve racial diversity).

Although some evidence exists that it does, the more specific studies of the impact of employment discrimination class action settlements on stock prices and shareholder values suggests not.[284] This Subsection considers the competing positions that the threat of litigation and its potential economic consequences change corporate practices and, conversely, that economic pressures are not significant influences on corporate practices regarding race and gender equality.[285]

First, consider the large amounts paid in recent employment discrimination class action settlements: $132 million by Shoney's, $172 million by Texaco, and $192.5 million by Coca-Cola.[286] On the surface, these numbers alone might shock a corporation to change its practices and have some ripple effect in related industries. Yet, a number of studies indicate that, depending on the size of the company, the size of the award, and the portion of the settlement that is covered by insurance, some corporations simply view these as transaction costs, as the costs of doing business.[287] According to Michael Selmi, who conducted statistical calculations regarding whether major class action settlements resulted in losses in shareholder value, "the lawsuits do not substantially influence stock prices, either at their filing or their settlement, and when there is an effect, it tends to be short-lived . . . . [T]he lawsuits do not result in significant financial losses to shareholder value."[288] The Coca-Cola settlement, for example, was about 0.1% of the firm's capitalization for the year, and it may or may not have resulted in the dilution of share value of about six cents per sixty-dollar share in the year of the settlement—or that might have been due to other factors.[289] The Texaco settlement, although impressively large at $170 million, spread those amounts "out over a five-year period—and the company's 1996 revenue alone exceeded $30 billion."[290] Although the $104 million Home Depot settlement "ate up 20 percent of the company's quarterly profits,"[291] that is only five percent of the company's profits for the settlement year.

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[284] Selmi, *supra* note 121, at 1250.

[285] *See infra* notes 286–308 and accompanying text.

[286] Gaiter, *supra* note 125 (Shoney's settlement); Joyner & Poe, *supra* note 125 (Coca-Cola settlement); *Texaco Signs Settlement in Race-Bias Suit*, *supra* note 157.

[287] *See* Selmi, *supra* note 121, at 1250.

[288] *Id.*

[289] *Id.*

[290] *Id.* at 1274.

[291] Mark Albright, *Investors Push Atlanta-Based Home Depot on Diversity*, ST. PETERSBURG TIMES, Apr. 15, 1998, at 1E.

More general evidence regarding class action cases in the last decade supports the idea that recoveries did not increase. Professors Theodore Eisenberg and Geoffrey P. Miller conducted an examination of 370 class action lawsuits of all types, including torts, consumer, civil rights, securities, and employment cases, which were settled in the ten-year period between 1993 and 2002. They found "no robust evidence that either recoveries for plaintiffs or fees of their attorneys increased over time."[292] Over the decade that the study encompassed, the average settlement was $100 million.[293] Though the average hit a low of $25 million in 1996, and rose to $274 million in 2000—a year that saw four settlements topping $1 billion each—Eisenberg and Miller concluded that "[t]he mean client recovery has not noticeably increased over the last decade."[294] They also found that "[n]either the mean nor the median level of fee awards has increased over time . . . ."[295]

Some evidence, though, suggests that employment discrimination lawsuits in the future may cost corporations more.[296] The U.S. Chamber of Commerce predicts that employment discrimination lawsuits in the near future will cost corporations "billions and billions of dollars."[297] The lawsuits of the future may herald escalating damages in discrimination suits, and companies may perceive an increase in the amounts needed to settle lawsuits and the accompanying risks.[298] Several firms that have been sued for employment discrimination have worked hard to repair their images and revisit their practices.[299] If changes occurring

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[292] Geoffrey P. Miller & Theodore Eisenberg, *Attorney Fees in Class Action Settlements: An Empirical Study* 1 (N.Y. Univ. Ctr. for Law & Bus., Working Paper CLB-03-017, 2003), *available at* http://w4.stern.nyu.edu/emplibrary/03-017.pdf.

[293] *Id.* at 16. Everything was calculated in inflation-adjusted dollars as of 2002. *Id.*

[294] *Id.* at 16–17.

[295] *Id.* at 24.

[296] *See* Jerry Crimmins, *Pay Claims Lead Class Action Surge: Report*, 152 CHI. DAILY L. BULL., Feb. 22, 2006, at 1 ("In 2005, 'The top 10 private plaintiff settlements totaled $1.06 billion, while the top 10 government litigation settlements totaled $396.15 million,' according to [a national report by Seyfarth, Shaw LLP].").

[297] Betsy Morris et al., *How Corporate America Is Betraying Women: Forty Years After Sex Discrimination Became Illegal, a Huge Gap in Pay and Promotions Still Yawns. Now Angry Women Are Suing Their Employers—and Winning. How Afraid Should You Be?*, FORTUNE, Jan. 10, 2005, at 64, 66.

[298] Cheryl Wade, *The Impact of U.S. Corporate Policy on Women and People of Color*, 7 J. GENDER RACE & JUST. 213, 225 (2003) (describing "meteoric rise in amounts paid to settle discrimination claims").

[299] Institutional Shareholder Servs., U.S. Proxy Voting Manual (2005), http://www.issueatlas.com/content/free/content/menutop/content/subscription/usvmfiles/x10455.html ("Shoney's, Publix Super Markets Inc., and Advantica Restaurant Group, Inc., (which owns Denny's Restaurants) similarly engaged in aggressive minority hiring and supplier-

in the securities field are analogous, just as the wave of securities class actions prompted the creation of internal reviews mechanisms,[300] the potential for liability may persuade larger corporations to undertake their own equal employment compliance reviews in advance of litigation.

Another factor in the litigation risk equation is pressure from shareholders. The threat of shareholder derivative actions for breach of fiduciary duties in the failure to investigate or monitor allegations of discrimination or other shareholder proposals to promote diversity can compel greater corporate attentiveness to diversity and avoidance of discrimination.[301] Insistence on disclosure of information can force transparency about employment practices.[302]

Actual lawsuits may induce better corporate behavior. In the years since the filing of the *Dukes* class action suit against Wal-Mart in 2001, the company has established an "Office of Diversity" to promote diversity initiatives.[303] Wal-Mart also "hired outside consultants to improve the 'objectivity' of job criteria. Officer compensation is now linked to diversity goals—bonuses are reduced by as much as fifteen percent if goals are not met."[304] In 2006, only the second year that Wal-Mart released a report on diversity statistics to the EEOC, comparisons with Wal-Mart's 2005 numbers show that the company made small increases

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diversity efforts after being hit with legal claims for discrimination. All three companies have since ranked among *Fortune* magazine's top 50 best companies for minorities.").

[300] Although the securities situation is certainly more complicated because of potential criminal liability, on this issue, see Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781, 795 (2001).

[301] Wade, *supra* note 298, at 228–31; Buckridge, *supra* note 53, at 495 n.266.

[302] In 1996, several investment funds urged a shareholder's vote on a resolution that would "require Shoney's to account publicly for its efforts since 1994 to reverse discriminatory employment and purchasing practices." Andrea Adelson, *Shareholders Press Shoney's on Bias Issue*, N.Y. TIMES, Dec. 26, 1996, at 1. Although the Securities and Exchange Commission (the "SEC") ultimately upheld the corporation's right to prohibit shareholder resolutions on workplace matters, the company voluntarily agreed to produce the information the shareholders sought. *S.E.C. Upholds Resolution Curb*, N.Y. TIMES, Feb. 28, 1997, at D2.

[303] Orly Lobel, *Big-Box Benefits: The Targeting of Giants in a National Campaign to Raise Work Conditions*, 39 CONN. L. REV. 1685, 1692 (2007).

[304] Winnie Chau, *Something Old, Something New, Something Borrowed, Something Blue and a Silver Sixpence for Her Shoe:* Dukes v. Wal-Mart *and Sex Discrimination Class Actions*, 12 CARDOZO J.L. & GENDER 969, 1004–05 (2006) (noting that the company also "set up a $25 million private equity fund to support businesses owned by women and members of minority groups over the next five years, although a spokeswoman vehemently denied any connection between the establishment of the fund and the company's legal woes").

in the numbers of female and minority employees in all categories, including managers.[305]

It is unclear whether employment discrimination lawsuits against some large corporations induce other corporations to take pre-emptive reviews of their own pay and promotion practices and undertake diversity initiatives. Some evidence exists that they do.[306] Professor Orly Lobel suggests that, in the past, automakers such as Ford or General Motors "shap[ed] labor relations for the market at large."[307] Currently, the larger "Big Box" stores, such as Wal-Mart, serve not only as targets for labor and antidiscrimination lawsuits to reshape workplaces, but also as symbols of corporate change and models of best practices.[308]

3. Effects of Mandatory Arbitration and Employment Practices Liability Insurance

Several other factors slant against the efficacy of employment class actions to send messages to change corporate practices. Two structural changes in the architecture of lawsuits and financial risks are particularly significant: the rise of mandatory arbitration and employment practices liability insurance. Employers are increasingly requiring employees unrepresented by unions—and even union-represented employees who are under a collective bargaining agreement that contains a clear waiver of statutory rights—to arbitrate their employment discrimination claims.[309] Mandatory arbitration is pervasive: one survey of Fortune 1000 companies some years ago revealed that seventy-nine

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[305] Marcus Kabel, *More Women, Minorities Become Managers at Wal-Mart*, HOUSTON CHRON., Apr. 21, 2007, at 5 ("Women made up 60.9 percent of Wal-Mart's employees last year, compared to 60.5 percent the year before. Minorities were 33.1 percent versus 31.8 percent, including blacks at 17.5 percent, up from 16.8 percent. Hispanics accounted for 11.4 percent, compared to 11.2 percent in 2005. The rate for Asians was 3.1 percent versus 2.7 percent in 2005. . . . [Wo]men made up 39.7 percent of Wal-Mart's managers and officials last year, compared to 38.8 percent in 2005. Minorities held 23.2 percent of those positions, compared to 21.3 percent the year before.").

[306] Lobel, *supra* note 303, at 1688.

[307] *Id.*

[308] *Id.* (noting that "Wal-Mart employs approximately 1.8 million people in the United States alone").

[309] Fischl, *supra* note 37, at 190–95; Carol Van Sambeek, *The Four Corners Approach to Judging the Enforceability of Arbitration Agreements, Which Waive Statutory Rights to Litigate Employment Discrimination Claims*, 5 APPALACHIAN J.L. 247, 253–57 (2006). Individuals, however, can still bring EEOC charges, and the EEOC can litigate those claims on behalf of individuals. *See* Equal Employment Opportunity Comm'n v. Waffle House, Inc., 534 U.S. 279, 282–85 (2002).

percent of them used arbitration.[310] Although employees win in arbitration slightly more than half the time, the monetary value of the awards, individually arbitrated, does not pose anything like the risks the company faces in major class action litigation.[311]

The overlay of insurance must be taken into account in assessing the deterrent effect of monetary compensation. The employment practices liability insurance ("EPLI") market is rocketing into prominence. In 1999, only ten percent of employers had EPLI, but by 2001, over half of Fortune 500 companies had EPLI coverage—and it is estimated that within a few more years "70 percent of employers will purchase some form of that coverage."[312] As just one example, insurance covered a sizeable part of the Texaco settlement.[313] An open question with employment practices liability insurance is whether the typical intentional acts exclusion precludes coverage for disparate treatment suits.[314] Although to obtain EPLI, employers usually must have risk prevention practices in place,[315] the availability of insurance may diminish employers' incentives to change their behavior because their exposure to liability is limited.

The evidence about the effect of lawsuits and the threat of lawsuits on corporate employment practices is mixed.[316] Although the expectation might be that monetary compensation—particularly on the order of hundreds of millions of dollars—will create the incentives for changes in corporate practices, the presence of insurance and the exis-

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[310] Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL'Y REV. 573, 578 n.22 (2005) (citing *Alternative Dispute Resolution: Most Large Employers Prefer ADR as Alternative to Litigation, Survey Says*, Daily Lab. Rep. (BNA), No. 93, at A4 (May 14, 1997). The use of arbitration has increased since the late 1990s. *See generally* Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44 (2004).

[311] Michael Delikat & Morris M. Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, 6 A.B.A. SEC. LITIG. 1, 1 (2003), http://www.arb-forum.com/rcontrol/documents/ResearchStudiesAndStatistics/2003DelikatKleinerConflictManagement.pdf. Another study demonstrated an interesting gender tilt: male arbitration complainants were more than twice as likely than female arbitration complainants to receive a full award, whereas females were almost twice as likely to receive a split award—the award of some relief, but particularly the denial of attorneys' fees. LeRoy, *supra* note 310, at 589.

[312] *See generally* Duncan, *supra* note 37.

[313] Selmi, *supra* note 121, at 1274.

[314] *See* Richard A. Bales & Julie McGlighy, *Insuring Title VII Violations*, 27 S. ILL. U. L.J. 71, 80–82 (2002).

[315] Nancy H. Van der Veer, Comment, *Employment Practices Liability Insurance: Are EPLI Policies a License to Discriminate? Or Are They a Necessary Reality Check for Employers?*, 12 CONN. INS. L.J. 173, 176 (2006).

[316] *See* Lobel, *supra* note 303, at 1688.

tence of mandatory and binding arbitration both diminish the economic leverage. Cumulatively, it appears that although actual lawsuits may induce changes, the threat of suits and accompanying negative publicity are not entirely sufficient motivators for change. The next Section returns to the major employment discrimination class settlements of the past decade and considers the features of those consent decrees that seem most responsible for changing the business practices of the companies.[317]

C. *Consent Decrees That Transform Workplace Cultures*

This Section addresses the hallmarks of successful consent decrees—the situations in which the settlements of major employment discrimination class action suits have been effective in changing corporate cultures.[318] Several of the features of employment discrimination class actions that seem successful in changing corporate job equality practices and developing a diversity commitment are extended court oversight or monitoring, the commitment of corporate executives, and progress benchmarks or goals.[319] What these features all touch on and contribute to—and what is absolutely crucial—is accountability.[320] Those employment discrimination consent decrees that have led to measurable results in hiring and promotion changes have had key provisions commanding corporate and managerial accountability. This idea that accountability for change is central is supported by research in the social sciences.[321] One of the interesting developments that is demonstrated by both the history of consent decrees and empirical research is that diversity training—educating employers and employees about stereotypes and biases—does not alone lead to changes in corporate cultures.[322]

1. Judicial Oversight

One trait of successful consent decrees in the employment context has been extensive judicial oversight. This is reminiscent of other models of institutional reform litigation that restructured conditions in

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[317] *See infra* notes 318–392 and accompanying text.

[318] *See infra* notes 319–392 and accompanying text.

[319] *See infra* notes 323–394.

[320] Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 Am. Soc. Rev. 589, 611 (2006).

[321] *See id.*

[322] *See id.*

schools, prisons, and voting booths—the judicial involvement occurred over an extended period of time.[323] In the torts and products realms, courts and the Multidistrict Litigation Panel created quasi-administrative agencies to patiently oversee the processing of claims.[324] In the employment discrimination area, the courts that have taken more aggressive oversight responsibilities have had better outcomes.[325] Conversely—although it is admittedly a small sample—the absence of continued judicial supervision seems associated with a dearth of changes in diversity practices.[326]

Under the terms of the Shoney's settlement, the plaintiffs' lawyers monitored the company's compliance.[327] Though Shoney's demonstrated an initial impressive commitment to diversity—rising to the thirteenth best of the Fortune top 50 in diversity practices within five years of the settlement—the company fell off the charts shortly after that.[328] Similarly, the Home Depot settlement required reports to class counsel, and the court approved termination of the consent decree a year and a half before it was supposed to end, even though the company had achieved fewer than half of its goals.[329] Although it is not possible to establish the causal connection and prove the negative—that Home Depot did not learn a lesson from the earlier class action—it may be reasonable to conclude that the later class action lawsuits against it with similar allegations are not a coincidence.[330] Although it is difficult to trace the reasons—economics, industry changes, or other causes—the results in both Home Depot and Shoney's suggest that perhaps the absence of continued judicial scrutiny contributed to the lack of sustained cultural changes in those two companies.[331]

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[323] Mark L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1766 (1999) ("The [prison] litigation in Arkansas took seventeen years. The litigation in Texas took twenty years, from 1972 to 1992."); *see also* Schuck, *supra* note 101, at 348; *supra* notes 95–104 and accompanying text.

[324] *See, e.g.*, Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Cases*, 59 FLA. L. REV. 383, 411 (2007).

[325] *See supra* notes 154–187, 126–261 and accompanying text (discussing Texaco and Coca-Cola settlements, respectively).

[326] *See* Selmi, *supra* note 121, at 1285–88 (discussing lack of judicial oversight of Home Depot settlement).

[327] *See supra* notes 121–122 and accompanying text.

[328] *See supra* notes 150–153 and accompanying text.

[329] *See supra* note 202 and accompanying text.

[330] *See subra* notes 204–206 and accompanying text.

[331] *See* Selmi, *supra* note 121, at 1285–88 (discussing lack of judicial oversight of Home Depot settlement).

In the case of Mitsubishi, the EEOC initiated the case, which brought government attention, expertise, and interest in programmatic reform on the plaintiffs' side.[332] Although the company initially began with a hard-line defense strategy, it fairly quickly hired former Secretary of Labor Lynn Martin as a consultant.[333] Retired judge and then Special Master Abner J. Mikva helped negotiate the consent decree.[334] The decree provided for a team of three respected experts in employment law to serve as monitors to oversee implementation of the settlement.[335] The monitors investigated, tracked progress, and oversaw the creation of an independent "Opportunity Programs Department" that reported directly to Mitsubishi's president and that was responsible for all equal employment matters, including the handling of any sexual harassment complaints.[336] The final report of the monitors filed with the federal district court concluded that Mitsubishi had made significant progress under the consent decree: "While its program . . . has not been free of problems, we believe Mitsubishi has exhibited a strong commitment to preventing and controlling sexual and sex-based harassment in the workplace. Serious incidents of sexual harassment are rare."[337] The report urged continued vigilance and the maintenance of the independent department for investigation of sexual harassment allegations.[338] In light of subsequent lawsuits against the company at the same plant, query whether three years of oversight was sufficient.

Two of the megacases, Coca-Cola and Texaco, used task forces to serve in the position of independent monitors.[339] Both task forces had highly qualified members.[340] Both the Texaco Equality and Tolerance Task Force and the Coca-Cola task force were engaged with the companies, their practices, and their employees.[341] They developed familiarity with company policies, practices, and people and oversaw changes in hiring and promotion procedures. They approached job assessments with a high level of sophistication, hiring human relations experts to

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[332] *See* EEOC Responds Press Release, *supra* note 223.

[333] *See* Van Duch, *supra* note 128.

[334] *See* EEOC Mitsubishi Press Release. *subra* note 216.

[335] Dominic Bencivenga, *Mitsubishi Settlement: Outside Monitors Given Insiders' Responsibility*, N.Y.L.J., June 18, 1998, at 5.

[336] EEOC Responds Press Release, *supra* note 223.

[337] *Id.*

[338] *Id.*

[339] *See* Joyner & Poe, *supra* note 125.

[340] *See supra* notes 165, 233 and accompanying text.

[341] *See* Joyner & Poe, *supra* note 125.

advise them.[342] The use of these monitoring bodies extended judicial oversight in effective ways and could serve as a model for implementation of consent decrees in future lawsuits.[343] In the diversity arena, even without lawsuits, companies are beginning to use voluntary external diversity councils.[344]

2. Commitment of Corporate Executives

Another feature that is emblematic of successful employment discrimination class settlements is corporate commitment to antidiscrimination and cultural diversity in the workplace and a high level of engagement by those responsible for implementation of those policies. Professor Cheryl Wade demonstrates that CEOs have enormous influence in producing corporate cultures.[345] What matters most in terms of establishing corporate culture and vision are not promises or pronouncements about diversity and equality, but "the implicit messages transmitted by context"—in other words, the behaviors, the results produced, the numbers, and the demonstrated commitment to principles through the advancement of women and racial minorities.[346]

The CEOs in several of the large settlements exhibited an immediate and attentive focus on diversity and equality. Texaco's CEO Peter Bijur "quickly acknowledged in public that Texaco had a serious problem," he settled the lawsuit, and then, after investigation, "fired one executive and stripped the other two, already retired, of their benefits."[347] Even prior to the commencement of the Equality and Fairness Task Force's investigations, "Bijur insisted that each one of Texaco's human-resources committees have at least one racial minority and one woman as a member."[348] In the second year of the implementation of the consent decree, Texaco asked a member of the task force, Deval Patrick, former head of the U.S. Civil Rights Division, to become its

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[342] *See supra* note 236 and accompanying text.

[343] Witness the increasing use of corporate monitors in securities, tax, and fraud cases as adjunct enforcement officers to government regulatory bodies. *See generally* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007).

[344] Yoji Cole, *Diversity Councils: Task Forces for Change*, DIVERSITYINC, Aug. 9, 2006, http://www.diversityinc.com/public/99.cfm.

[345] Cheryl Wade, *Transforming Discriminatory Corporate Cultures: This Is Not Just Women's Work*, 65 MD. L. REV. 346, 347 (2006).

[346] *Id.* at 372.

[347] *Rooting Out Racism*, BUS. WK., Jan. 10, 2000, at 66.

[348] *Id.*

general counsel.[349] Corporate boards make a serious statement when they hire people who have civil rights experience and dedication.

The Coca-Cola settlement also benefited from an exceptionally committed CEO. Neville Isdell, who joined Coca-Cola during the middle of the monitoring period, requested a meeting with the judge overseeing the case, and ultimately Coca-Cola requested an additional year of court oversight.[350] Company engagement and support for diversity and antidiscrimination is crucial to changing corporate culture—in particular, leaders who are committed to cultural change.[351]

3. Accountability Versus Training

Of the major employment consent decrees discussed above, several contained provisions that created specific accountability for change.[352] This was accomplished through several different mechanisms: the development of standards for job decisions, the construction of diversity objectives or benchmarks, tying compensation and rewards to attainment of those goals, and, particularly, giving people executive-level authority to make, and responsibility for making, changes that resulted in greater equality and diversity.[353]

One device for creating responsibility for change was to establish guidelines or procedures that limited freewheeling subjective judgments in hirings or promotions. Thus, the identification of specific skill sets required for jobs, as the task force did in the Texaco settlement, or qualification and performance standards as the Shoney's consent decree did, cabined discretion and established parameters for job decisions.[354] Even the job kiosks established by the Home Depot settlement that allowed computerized input of job preferences were targeted toward this end.[355]

A number of the settlements constructed diversity objectives and tied rewards to attainment of those goals. These benchmarks created transparency as well as specific objectives and measurable criteria for

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[349] Reuters, *supra* note 166.

[350] *See supra* notes 238–239 and accompanying text.

[351] William Raspberry, *Texaco's Lesson: Executives—Not Policies—Set Workplace Tone*, ORLANDO SENTINEL, Nov. 17, 1996, at G3.

[352] *See supra* notes 141, 174 and accompanying text.

[353] *See supra* notes 141, 174, 180 and accompanying text.

[354] *See supra* notes 141, 174 and accompanying text.

[355] *See supra* note 196 and accompanying text.

evaluation.[356] Shoney's initially linked management rewards to achievement of diversity goals.[357] Texaco and Coca-Cola also rewarded managers who met diversity objectives.[358] All three companies realized measurable results by tying managerial rewards to diversity goals.[359] On the other hand, the Home Depot eve-of-trial settlement that encompassed primarily monetary relief did not seem to have procedures in place to make individuals responsible for attaining the goals of the decree.[360] It is unsurprising that the company failed to meet half of its goals; what is more surprising is the joint motion of the parties for termination of the decree.[361]

Texaco even set specific numeric targets for its hiring goals.[362] Coca-Cola's clear establishment of diversity as a hiring and promotion priority led to significant increases in the percentages of women and minorities in management jobs and in positions that fed into management jobs.[363]

Accompanying these numeric indicators of progress, several of the settlements created structures of responsibility. They specifically identified individuals whose job it was to implement working diversity policies and made these positions executive level.[364] The Shoney's consent decree required the appointment of one senior management official to be in charge of human resources, along with two recruitment managers and two employment managers.[365] In the Coca-Cola settlement, senior managers led Diversity Advisory Councils that were charged with the responsibility of implementing diversity initiatives.[366] The Texaco task force was extensively involved in oversight and Deval Patrick ascended to the position of general counsel. In addition, Texaco appointed an assistant to the chairman whose responsibility was oversight of diversity issues.[367] The company also held focus group

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[356] *See* Mehri et al., *supra* note 227, at 397 (proposing that publicly traded companies be required to report workforce diversity data with the SEC annually).

[357] *See* Winokur, *supra* note 144.

[358] *See supra* notes 177, 245 and accompanying text.

[359] *See supra* notes 144–153, 179–184, 247–253 and accompanying text.

[360] *See supra* notes 191–198 and accompanying text.

[361] *See supra* notes 201–202 and accompanying text.

[362] *See supra* note 180 and accompanying text.

[363] *See supra* notes 248–250 and accompanying text.

[364] *See, e.g.*, *Haynes*, 1993 WL 19915, at *6.

[365] *Id.*

[366] *See supra* note 244 and accompanying text.

[367] Warren F. Grienenberger, *Institutional Investors and Corporate Governance* 371, 391 (PLI Corp. Law and Practice Handbook Series, No. B4-7173, 1997), WL 970 PLI/Corp 371.

meetings with local managers to create awareness that diversity was a "corporate imperative;" implemented a bonus system for managers who achieved diversity objectives, and changed other recruitment and succession planning practices.[368]

The success of the measures in several class action consent decrees that created structures of accountability is supported by research on corporate practices outside the class action context. Three sociologists, Alexandra Kalev of the University of California, Berkeley, Frank Dobbin of Harvard, and Erin Kelly of the University of Minnesota, just completed a pathbreaking study of more than seven hundred private sector workplaces between 1971 and 2002, to compare the effectiveness of several antidiscrimination measures and strategies at increasing diversity in the bottom ranks of management.[369] The researchers compared Employer Information Report EEO-1 data that private companies are required to submit to the EEOC with survey responses from those businesses to assess seven methods of promoting diversity within corporations: affirmative action plans, diversity committees, diversity managers, diversity training, diversity evaluations for managers, networking programs, and mentoring programs.[370] They found that "[s]tructures that embed accountability, authority, and expertise (affirmative action plans, diversity committees and task forces, diversity managers and departments) are the most effective means of increasing the proportions of white women, black women, and black men in private sector management."[371]

Although a myriad of factors affect diversity (organizational structure, the legal environment, diversity in the internal and external labor pools that feed jobs, and composition of the top management, among other factors), the findings are striking because of literature that has developed about stereotyping and bias. Numerous studies have found that cognitive biases and ingroup and outgroup stereotyping occur unthinkingly.[372] For years, the thought among corporate managers has been that using diversity training to create awareness of these uncon-

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[368] CRONIN-HARRIS & WHITE, *supra* note 161, at 26, 37–38, 41.

[369] Kalev et al., *supra* note 320, at 589.

[370] *Id.* at 590.

[371] *Id.* at 611.

[372] *See, e.g.*, Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143, 147 (2004). *See generally* Linda Hamilton Krieger, *The Context of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186–1217 (1995) (reviewing cognitive bias literature); Denise Sekaquaptewa et al., *Stereotypic Explanatory Bias: Implicit Stereotyping as a Predictor of Discrimination*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 75 (2003).

scious biases would help eradicate them and lead to equality and fairness in the workplace.[373] What the Kalev study found was that this assumption of education as a cure made "a leap of faith between causes and remedies," and that altering structures of responsibility is instead the best way to accomplish organizational change with respect to diversity.[374]

A somewhat surprising finding was that diversity training had a negligible effect on the admission of women and minorities to the ranks of corporate management. The researchers discovered that "[p]ractices that target managerial bias through feedback (diversity evaluations) and education (diversity training) show virtually no effect in the aggregate."[375] These biases can be viewed as "'irresistible stereotypes,' or biases so deeply ingrained that they simply can't be taught away in a one-day workshop."[376] Indeed, some research shows that diversity training programs can, paradoxically, activate bias, create backlash, and have "a negative effect on the promotion of minorities."[377] If employees perceive corporate policies as unfairly creating opportunities for only some employees—say, minorities and women—they are unlikely to comply with those policies and rules.[378]

The Kalev study found that although the effects of various anti-discrimination measures vary across subgroups of white women, black women, and black men:

> Structures establishing responsibility (affirmative action plans, diversity committees, and diversity staff positions) are followed by significant increases in managerial diversity. Programs that target managerial stereotyping through education and feedback (diversity training and diversity evaluations) are not fol-

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[373] *See, e.g.*, Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1309–10 (2003).

[374] Kalev et al., *supra* note 320, at 591.

[375] *Id.* at 611.

[376] Lisa Takeuchi Cullen, *The Diversity Delusion*, TIME, May 7, 2007, at 74.

[377] Kalev et al., *supra* note 320, at 594 (citing Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 514 (2003)); *see also* Deborah L. Kidder et al., *Backlash Toward Diversity Initiatives: Examining the Impact of Diversity Program Justification, Personal and Group Outcomes*, 15 INT'L J. CONFLICT MGMT. 77, 79 (2004); *cf.* Erin Kelly & Frank Dobbin, *How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996*, 41 AM. BEHAV. SCIENTIST 960, 963 (1998) (noting that diversity training may be displacing affirmative action). *See generally* HELEN HEMPHILL & RAY HAINES, DISCRIMINATION, HARASSMENT, AND THE FAILURE OF DIVERSITY TRAINING: WHAT TO DO NOW (1997).

[378] *See* Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings*, 70 BROOK. L. REV. 1287, 1299–1301 (2005).

> lowed by increases in diversity. Programs that address social isolation among women and minorities (networking and mentoring programs) are followed by modest changes.[379]

In specific, the findings showed that following adoption of an affirmative action plan, "the odds for white men in management decline by 8 percent; the odds for white women rise by 9 percent; and the odds for black men rise by 4 percent" with no significant effects for black women.[380] The creation of a diversity committee increased the odds for white women to enter the ranks of management by nineteen percent, the odds for black women by twenty-seven percent, and the odds for black men by twelve percent, while the implementation of a full-time diversity staff increased those odds by eleven percent for white women, thirteen percent for black women, and fourteen percent for black men.[381] Diversity training, on the other hand, "is followed by a 7 percent decline in the odds for black women, . . . a 6 percent rise in the odds for white women, but an 8 percent decline in the odds for black men."[382]

The analysis in the Kalev study that accountability matters more than diversity training comports with the results of other studies of organizations and behavioral change, as well as several of the larger employment discrimination class action consent decrees and other companies' experiences outside the class settlement context.[383] The major consent decrees required diversity training as part of the settlement. As described by Professor Susan Sturm, the diversity training offered by Texaco sounds problematic, if not laughable:

> Texaco also agreed to transform its corporate culture by redesigning and expanding its sensitivity awareness and diversity training programs. Texaco's revamped diversity program consists of a two-day seminar. On the first day, Awareness Day, employees are encouraged to uncover the negative assumptions they have of others and how their own behavior influences those around them. Games and exercises help each

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[379] Kalev et al., *supra* note 320, at 590.

[380] *Id.* at 602, 604.

[381] *Id.* at 604.

[382] *Id.*

[383] *See, e.g.*, Earnest Friday & Shawnta S. Friday, *Managing Diversity Using a Strategic Planned Change Approach*, 22 J. MGMT. DEV. 863, 864 (2003) (suggesting that treating diversity as a distinct and valuable phenomenon, and aligning "the organization's diversity initiatives (designed to manage diversity) with the organization's strategic goals" will make diversity "an integral part of the organization's culture").

> trainee with the process of self-evaluation. The day ends with trainees writing a personal action plan to facilitate their behavioral change. Day two focuses on diversity issues. Among other activities, employees are shown a video cartoon entitled "A Peacock in the Land of Penguins." Although the video is designed to promote cultural understanding, one commentator described it as filled with stereotypical assumptions about women and minorities.[384]

In addition, Texaco refused to subject its ranks of supervisors to diversity training, possibly because "it had put 80% of its existing supervisors through diversity training the year before the task force was even constituted."[385]

Some of the disappointing results of diversity training may have to do with the substance of the programs. One study of small and mid-size organizations' diversity training in a region of the Midwest showed that it was ineffective because it began and ended simply with awareness levels of knowledge and failed to tie the training to any of the businesses' initiatives.[386] Other researchers demonstrate how time-limited diversity training usually is, with one study reporting that "the vast majority of [diversity] training programs (72%) last a day or less."[387] Although harassment training can raise awareness of legal responsibility, it does not seem to have "long term effects on attitudes or behavior."[388] Although it is doubtful that diversity training reduces discriminatory or harassing behavior, accountability for antidiscrimination and diversity does produce results.

Apart from consent decrees, companies that have undertaken aggressive diversity efforts with clear accountability have yielded impressive results. As one example, in 2000, General Electric appointed Deborah Elam as vice president and chief diversity officer and implemented strategies for creating employee networks, establishing

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[384] Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 27 (2001) (footnotes omitted).

[385] CRONIN-HARRIS & WHITE, *supra* note 161, at 38.

[386] Linda M. Hite & Kimberly S. McDonald, *Diversity Training Pitfalls and Possibilities: An Exploration of Small and Mid-Size US Organizations*, 9 HUM. RESOURCE DEV. INT'L 365, 365 (2006).

[387] Bisom-Rapp, *supra* note 384, at 40 n.319 (citing Sara Rynes & Benson Rosen, *A Field Survey of Factors Affecting the Adoption and Perceived Success of Diversity Training*, 48 PERSONNEL PSYCHOL. 247, 257 (1995)).

[388] Kimberly Krawiec, *Organizational Misconduct: Beyond the Principal-Agent Model*, 32 FLA. ST. U. L. REV. 571, 596 (2005) (citing studies).

formal mentoring arrangements, recruiting at colleges with high percentages of minority students, and holding frequent planning meetings regarding diversity efforts.[389] The percentages of women and minorities among General Electric officers rose from twenty-two percent in 2000, to thirty-four percent in 2005, while the percentages of women and minority senior executives rose from twenty-nine percent to forty percent during the same time frame.[390]

These results are not just the isolated experiences of a single company that created an executive-level diversity officer. Though more than three-quarters of the Fortune 1000 companies had some form of diversity program by 2001, those companies that made managers responsible for achieving diversity goals ranked highest in terms of results: "[o]f the top 50 best companies for minorities, 38 tied managers' bonuses to diversity goals."[391] The cumulative evidence from class action settlements and other corporate experiences in efforts to promote a diverse workforce is that diversity training may not yield results, but oversight and accountability do.

Most of the results discussed in this Section occurred in contexts in which a company wanted to reform its culture or was under a consent decree in which the company had promised to do so. The final Section addresses prospects for arguments that might be useful in developing corporate commitments to diversity in companies that are resistant to change.[392]

D. *Corporate Cultural Change and the Economic Case for Diversity*

One factor in the implementation of consent decrees that seemed to be important in bringing about workplace change was a commitment to diversity and equality by CEOs.[393] Corporate responsiveness may not depend exclusively on the goodwill of directors or CEOs. Corporations are beginning to understand that diversity in the workforce and in management correlates with financial success. Numerous studies, both in this country and others, have demonstrated that "diversity is good for business."[394]

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[389] Lisa Takeuchi Cullen, *Employee Diversity Training Doesn't Work*, TIME, Apr. 26, 2007, at 74.

[390] *Id.*

[391] Institutional Shareholder Servs., *supra* note 299.

[392] *See infra* notes 393–407 and accompanying text.

[393] *See supra* notes 163, 177, 186, 254–259 and accompanying text.

[394] Wilkins, *supra* note 45, at 1553.

In America, businesses are responding to a number of trends that have emerged in the past fifteen years, including the increasing labor share and consumer power of women and minorities.[395] Those corporations that understand the economics of diversity are developing diversity initiatives, hiring "diversity consultants," creating supplier contracts with minority businesses, and even signing amicus briefs in support of affirmative action.[396]

The social argument in favor of diversity is that diverse perspectives on issues result in "decisions [that] are much more reflective of a well-rounded and robust exchange of ideas."[397] The market arguments in favor of diversity are compelling. The Federal Glass Ceiling Commission examined early data about workforces among the top 500 Standard and Poor's companies that were diverse along race and gender dimensions: "[t]he researchers found that the stock performance (annualized return) of the 100 companies making the strongest efforts toward equal employment opportunity (EEO) was 2.5 times greater than that of 100 companies that rated lowest in EEO effort."[398] Other studies support the conclusion that business with higher percentages of women and people of color on their boards of directors

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[395] *Id.* at 1556; *see also* Rita Barreto Craig, *Taking Diversity to a Higher Level*, 10 HR ADVISOR: LEGAL & PRAC. GUIDANCE, Feb. 2004, at 2 ("The majority of the people entering the workforce today and in the future will be people of color, women, and immigrants. Nearly 54 million people in the United States have disabilities. They represent the largest 'non-ethnic minority' group.").

[396] Wilkins, *supra* note 45, at 1553; *see also* Brief for Amici Curiae 65 Leading American Businesses, Gratz v. Bollinger, No. 02–241, 539 U.S. 244 (2003) & Grutter v. Bollinger, No. 02–516, 539 U.S. 306 (2003). A debate has raged for decades in legal scholarship between the "property" and "social entity" theories of corporate governance—whether management's job is solely to maximize profits or to use some of those profits to further social causes. *See generally* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261 (1992). Understandings are beginning to develop that corporate social responsibility offers economic advantages, *see, e.g.*, Mark Freeman, *Doing Well by Doing Good: Linking Human Rights with Corporate Self-Interest*, 6 INT'L BUS. L.J. 741, 744 (2001), and jurisdictions have passed constituency statutes that authorize corporate directors who might otherwise fear shareholder suits to consider effects of corporate action on multiple constituencies in addition to shareholders. *See* Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 27–28 (1992).

[397] Carl G. Cooper, *Diversity: Denied, Deferred or Preferred*, 107 W. VA. L. REV. 685, 688 (2005).

[398] Kenneth L. Karst, *Equal Citizenship at Ground Level: The Consequences of Nonstate Action*, 54 DUKE L.J. 1591, 1615 (2005) (citing FED. GLASS CEILING COMM'N, U.S. DEP'T OF LABOR, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 14 (1995)).

or in executive-level jobs "'outperform the stock performance of companies without women or people of color in these positions.'"[399]

These results correspond with experiences of European companies—that diversity improves not just corporations' reputations or images but also permits employee recruitment from a broader talent pool, promotes employee retention, and produces tangible financial benefits.[400] Diverse companies are also better able to relate to different cultures in a global marketplace. European studies show that workforce diversity leads to greater innovation in products and the promotion of new services.[401] In one survey, of 495 European companies responding, eighty-two percent thought that diversity initiatives had a positive effect on their businesses.[402]

Some evidence is emerging that, although the largest corporations understand the business case for diversity, small and mid-size companies do not.[403] Smaller companies may have less motivation to diversify their workforces because some of the advantages of diversity—such as hiring from larger talent pools or marketing to ethnic communities or foreign markets—may not be among the pressing concerns of small or mid-size businesses.[404] Mid-level managers may resist a "[t]op-down initiative" in favor of diversity that they perceive as threatening—although it is at this level that information about the business justifications for diversity initiatives may be most effective.[405] Similarly, some of the costs of diversity—such as navigating interpersonal conflicts among dissimi-

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[399] Brouse, *supra* note 280, 851–52 (quoting Executive Diversity Services, Inc., http://www.executivediversity.com/case/index.htm (last visited Feb. 28, 2008)); *see also* David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value* 16 (Okla. State Univ., Working Paper, 2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304499.

[400] EUROPEAN COMM'N, THE BUSINESS CASE FOR DIVERSITY: GOOD PRACTICES IN THE WORKPLACE 5 (2005), *available at* http://ec.europa.eu/employment_social/publications/2005/ke7005617_en.pdf.

[401] *Id.* at 5–6.

[402] *Id.* at 29.

[403] *See infra* notes 406–407 and accompanying text.

[404] Gudmundson & Hartenian, *supra* note 46, at 28–29. Also, at least in the torts arena, small business owners do not worry much about being sued. *See* John Tozzi, *After the $54M Dry Cleaner Lawsuit*, BUS. WK., July 9, 2007, *available at* http://www.businessweek.com/smallbiz/content/jul2007/sb2007079_276352.htm (noting that "in 2006 members of the National Association of Manufacturers ranked fear of litigation last on a list of 10 factors hurting their businesses").

[405] *See* Donald C. Langevoort, *Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit and the Corporate Promotion Tournament*, 61 WASH. & LEE L. REV. 1615, 1634, 1635–40 (2004); *see also* Ramirez, *supra* note 269, at 128 (arguing that boards of directors have a fiduciary obligation to avoid diversity mismanagement).

lar employees—or at least the perception of those costs, can be amplified in smaller companies.[406] Yet, the economic advantages of diversity accrue to small businesses as well. One study of over 200 small businesses (fifty-seven percent with fewer than fifteen employees), including corporations, sole proprietorships, and partnerships in a major metropolitan area, concluded that "[f]irms with more culturally diverse work forces were found to have a greater positive percentage change in revenue, net income, and CEO income in selected years than firms with less culturally diverse work forces."[407] It is with this population of small to mid-size companies that education about the business advantages of diversity could have the greatest impact.

Conclusion

This Article focuses on the attributes of employment discrimination class action settlements that are effective in promoting changes in workplace customs and practices regarding equality and diversity. One piece of the informational picture emerging from the experiences with these settlements—and one that is supported by organizational research in the social sciences—is that education alone (in this context, diversity training) seems fairly ineffective in changing workplace cultures. What is most effective is accountability and responsibility for organizational change. This has been produced in different ways in the various cases.

In some cases, such as Texaco and Coca-Cola, the creation of organizational structures—initially task forces engaged in oversight, and later internal, executive-level positions responsible for continuing cultural change—mattered in terms of the numeric representation of women and people of color in the workforce and in the pipeline for management jobs. A number of the settlements had progress benchmarks and created transparency in their hiring and promotion practices, either by publishing their numbers to the EEOC as Texaco did, opening their process to applicants by soliciting employee prefer-

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[406] Ramirez, *supra* note 269, at 129. *See generally* Frances Milliken & Luis Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 Acad. Mgmt. Rev. 402 (1996).

[407] Linda S. Hartenian & Donald E. Gudmundson, *Cultural Diversity in Small Business: Implications for Firm Performance*, 5 J. Developmental Entrepreneurship 209, 209, 211 (2000); *see also* Steven R. Ash, *Why Should Small Businesses Care About Employee Diversity?: Five Areas of Research that Influence Organizational Results*, 20 J. Small Bus. & Entrepreneurship 223, 226 (2007) ("Experimental evidence indicates that groups composed of members with dissimilar characteristics are more creative than homogenous groups.").

ences for jobs as Home Depot did, or creating specific objectives and measurable criteria for promotion into job categories as several companies did. Specific measures of accountability tied managerial salaries to the achievement of diversity objectives. Time and patience were important too. In the Mitsubishi case, judicial oversight lasted only three years.[408] In Home Depot, the decree was terminated eighteen months before it was supposed to expire.[409] Although no single factor correlates with the success or failure of any individual settlement, it is notable that both Mitsubishi and Home Depot faced additional lawsuits subsequent to these class actions.[410]

The consent decrees reviewed in this Article may be sui generis in terms of their size. They were accompanied by the commitment of adequate resources to create executive-level diversity officers and resolve pay equity problems. A number of results, though, can be extrapolated from these large models to replicate on a smaller scale with companies that may not have the same financial resources. One of the most important features of cultural change—creating accountability for it—does not depend on corporate resources. Other features of class settlements that may be more readily adopted by smaller companies are evaluations of the fairness of personnel review processes, and the revision of internal practices to promote transparency of the process or to create specific objectives and measurable criteria for promotion into job categories.[411] For companies of all sizes, many of these are just good practices that will help provide some inoculation against future lawsuits.

The business management literature suggests that though larger companies are persuaded by the economic case for workforce diversity, small and mid-size companies may not be. One danger of promoting the market support for diversity is that exclusively economic arguments can overshadow the moral or philosophical case for racial justice. Some commentators worry that if economic arguments are stressed, this shifts the focus away from the heart of the antidiscrimination principle.[412] At this juncture, however, the value of the infor-

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[408] *See supra* note 223 and accompanying text.

[409] *See supra* note 202 and accompanying text.

[410] *See supra* notes 204–206, 225 and accompanying text.

[411] Hawkins, *supra* note 51, at 58–61.

[412] *See* Thomas W. Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. LEGAL EDUC. 351, 352 (2004). *See generally* Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795 (suggesting various limits on the market arguments for diversity among executive level officers and directors).

mation about the benefits of diversity needs to be more widely disseminated. Although most major corporations seem aware of the economics benefits of having their workforces resemble the demographics of the nation, smaller companies may be less attentive and responsive to the need for diversity.[413] This may be the point where education within corporations—not diversity training, but education about the economics of diversity—could change the contours and practices of the workplace.

[413] *See* Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 709 (2004).