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The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and its Effects

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by

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I. INTRODUCTION

The last decade has seen an explosion of employment discrimination class action lawsuits that have been resolved through record-breaking settlements. The best known of these cases is the $176 million settlement involving Texaco, a settlement that came on the heels of the much publicized discovery of tape-recorded meetings that seemed to indicate the use of explicit racial epithets by management level employees.[1] There have also been substantial settlements involving Coca-Cola ($192 million), Home Depot ($104 million), Shoney's ($105 million), Publix Markets ($81 million), and State Farm Insurance Co. ($157 million).[2] A recently filed sex discrimination suit against Wal-Mart appears poised to set a new record.[3]

Despite the proliferation of these high-profile cases, we know surprisingly little about their effects on either the firms that have been sued or the plaintiff classes. For example, we do not know whether the lawsuits produce substantial benefits to the plaintiff class, prompt a

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1 The Texaco case is discussed in the section III.A, *infra*.

2 The Home Depot case is discussed in section III.B, *infra*. For discussions of the other settlements see Philip Hager, *State Farm to Pay Women $157 Million for Job Bias*, L.A. TIMES, April 29, 1992, at A1; Allen Myerson, *Supermarket Chain to Pay $81 Million to Settle a Bias Suit*, N.Y.TIMES, Jan. 25, 1997, at A1 (Publix); Henry Unger, *Coke to Settle Racial Suit with $192.5 Million Deal*, ATLANTA J. & CONST., Nov. 17, 2000, at 1A; Lynne Duke, *Shoney's Bias Settlement Sends $105 Million Signal*, WASH. POST, Feb. 3, 1993, at A1. As discussed in more detail below, the reported settlement amounts often exaggerate the actual cost of the settlement by stating the maximum possible cost over an extended period of time. *See* text accompanying note 225, *infra*.

3 *See* Reed Abelson, *Six Women Sue Wal-Mart Charging Job and Promotion Bias*, NEW YORK TIMES, June 20, 2001, at C1.

change in corporate culture, or exact costs that are likely to serve as an adequate deterrent against discrimination. Because all of the large cases have been resolved through settlements rather than trials, we also do not know whether the cases involve provable claims of discrimination. In this article, I will seek to add to our knowledge by analyzing the effect these large class action lawsuits have on firms and plaintiffs. The first part of the article involves an empirical analysis designed to assess whether the lawsuits, or their settlements affect shareholder value as measured by their effect on the stock prices.[4] In the second part of the article, I will present three case studies of lawsuits involving Texaco, Home Depot and Dennys to explore whether the lawsuits produce substantial changes within the corporations or provide meaningful benefits to the plaintiff class.[5]

This study challenges many of the prevailing views on employment discrimination class action litigation. The statistical study demonstrates that the lawsuits, neither in their filing nor settlements, substantially affects stock prices, and when there is an effect it tends to be short-lived. Yet, although the lawsuits do not result in significant financial losses to shareholder value, managers often take them seriously – more seriously than the financial impact of the suits typically justify. Stated somewhat differently, while investors do not appear to be significantly interested in the lawsuits, managers frequently are. Taking the lawsuits seriously, however, does not mean that the managers implement meaningful reform; on the contrary, I will suggest that the settlements frequently produce little to no substantive change within the corporations and whatever changes are implemented tend to be cosmetic in nature and primarily designed to address public relations problems. As demonstrated in the case studies, many companies, such as Texaco and Home Depot, fail to enact meaningful changes in their

[4] *See* section II *infra*.
[5] *See* section III *infra*.

employment practices and the monetary recoveries constitute the sole direct benefit the lawsuits provide to the plaintiff class.

When divided by the size of the class, these benefits tend to be relatively modest, averaging about $10,000 per class member, or well below what a plaintiff could expect to recover in a successful individual suit.[6] Moreover, given the size of the defendant corporations, the damages also fail to pose a significant deterrent threat to firms. To give but one example, the record-setting settlement involving Coca-Cola amounted to less than 0.15% of the firm's capitalization.[7] Although the damage amounts are often insufficient to compensate plaintiffs or deter defendants, other parties involved in the litigation fare significantly better. Attorneys are routinely receiving fee awards that are four to six times their actual fees, and a host of groups loosely tied to the diversity industry are likewise collecting a disproportionate share of the settlement funds through diversity training, purchases from minority suppliers, and contributions to various minority groups either as part of the settlement or to repair public relations damage.[8]

The limited effect the suits have on stock prices also provides an empirical challenge to the ability of markets to eliminate discrimination. Gary Becker hypothesized long ago that firms that engaged in employment discrimination would ultimately be driven out of the market because of their inefficient discriminatory tastes.[9] But if lawsuits alleging discrimination, settlements of those suits, or the remedial changes that follow the settlement do

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[6] The benefits provided to the plaintiffs are discussed in section IV.A, *infra.* In a previous study, I documented that discrimination settlements obtained by the Equal Employment Opportunity Commission in 1997 averaged $23,000, while the mean trial recovery in litigation initiated by private plaintiffs was approximately $100,000. *See* Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1297, 1435 (1998).

[7] The relation between the settlement and a firm's value is set forth in Table III, *infra.* *See also* Constance L. Hays, *Coke's Black Employees Step up Pressure to Resolve a Racial Discrimination Lawsuit*, N.Y. TIMES, Mar. 23, 2000, at C1 (noting that a penny a share amounted to $37 million in pretax earnings). At the time of the settlement, Coca-Cola's stock price hovered at about $60, with the settlement shaving approximately 6 cents off the price. The

[8] In both the Texaco and Denny's cases, minority and women-owned businesses obtained substantial increases in business with the companies. See text accompanying notes –.

[9] *See* GARY BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971).

not affect firm value, then it is difficult to see how the market would provide an adequate deterrent to discrimination. Both the aggregate data and the case studies suggest that there is no reason to expect the market to punish firms because of their discriminatory employment practices.

These findings reflect a substantial shift in the nature of employment discrimination litigation, and in discrimination itself. Not so long ago, class action employment discrimination suits were defined as a quintessential form of public law litigation where monetary relief was generally viewed as far less important than the institutional reform the suit ultimately produced.[10] Yet, today the lawsuits have largely become just another variation of a tort claim where monetary relief is the principal, and often the sole, goal of the litigation. Along with this shift in emphasis has come a dramatic change in our perspective on the persistence of discrimination, as there is no longer any concerted effort to eliminate discrimination, but instead efforts are directed at providing monetary compensation for past discrimination without particular concern for preventing future discrimination or even remedying past discrimination through injunctive relief. For firms, discrimination claims are now like accidents – a cost of doing business, which necessarily implies that a certain level of discrimination will persist.

One reason for the change in the nature of the litigation is that employment discrimination class actions have evolved into a purely private realm with little to no government oversight – indeed, I will suggest with little oversight of any kind. With some exceptions, most courts never become involved in fashioning an appropriate remedy or overseeing the

[10] In his seminal article on public law litigation, Professor Abram Chayes identified employment discrimination as one of the "avatars" of public law litigation. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976). For other similar perspectives see Robert Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905 (1978) (describing Title VII as implicating public law rights); Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 321 (1988) (identifying consent decrees in employment discrimination cases as a hallmark of public law); Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 887 ("Large-scale Title VII remedies are typical of 'public law' litigation . . .").

implementation of the consent decree, so enforcement is largely left to private plaintiffs' attorneys, or their recent offshoots, Diversity Task Forces, neither of which has a sufficient interest in the ongoing proceedings to ensure change actually occurs.[11]

This study will contain two distinct but related parts. The first part involves an empirical study of the effect class action employment discrimination lawsuits have on firms. This part of the study relies on an event study's technique, a statistical methodology that seeks to measure the effect of a particular event, in this case the filing and settlement of class action litigation, on firm value. The event studies model has been widely used to assess the impact of litigation in previous studies.[12] The second part of this study will involve three case studies to see how firms react to class action litigation. The three case studies involve three distinct responses to class action litigation by Texaco, Home Depot and Denny's, and I will suggest that each provides a model response under particular circumstances, models that I label public relations (Texaco), recalcitrance (Home Depot), and reform (Denny's). In the last part of the article, I will offer some suggestions for reform, including increased monetary damages for the plaintiffs and monitoring for the settlement, so as to restore the original public purpose to the litigation. At the same time, this article will be largely descriptive in nature with a primary intent of analyzing the nature of class action employment discrimination today.

II. THE EMPIRICAL STUDY

If the filing or settling of class action discrimination lawsuits adversely affects defendant firms, we would expect that effect to be reflected in lower stock prices. To measure that effect, this part of the article relies on what is known as an event study, a methodology that has been widely used in economics and finance to measure the impact of specific events on firm

[11] Diversity Task Forces have been adopted in the cases involving Texaco, Coca-Cola and Mitsubishi. The task forces are discussed in more detail in section IV.C.
[12] *See* sources cited *infra* note 13.

value.[13] An event study is a statistical technique designed to isolate the impact of an event on a firm's stock price, and, as described in more detail below, it does so by measuring the stock's return after the event is announced against the return that would have been expected had the event not occurred.[14] In this way, it is possible to determine what effect, if any, the particular event had on the stock price. The methodology of the study will be explained further following a discussion of the underlying hypothesis and the data on which the study is based.

A. The Hypothesis.

This study measures the effect the filing of a class action lawsuit and its settlement have on a firm's stock price, with the expectation that either event will negatively affect the stock price. The filing of a class action discrimination suit against a corporation presents the possibility that the firm will experience significant costs from the suit, either from the money the firm may pay to resolve the suit, or be ordered to pay following a trial. In addition to the financial cost, firms may also experience reputational costs from being identified as a firm that discriminates. This will be particularly true if the lawsuit generates national news, as is true for all of the cases analyzed here. Predicting that the filing of suit will adversely affect stock prices is consistent with many prior studies examining the effect of various kinds of

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[13] *See, e.g.*, Sanjai Bhagat, et al., *The Costs of Inefficient Bargaining and Financial Distress: Evidence from Corporate Lawsuits*, 35 J. OF FINANCIAL ECON. 221 (1994) (analyzing the effect of interfirm lawsuits on the value of corporate litigants); Sanjai Bhagat, et al., *The Shareholder Wealth Implications of Corporate Lawsuits*, 27 FINANCIAL MGT. 5 (1998) (analyzing the effect of filings and settlements on corporations); John M. Bizjak & Jeffrey L. Coles, *The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm*, 85 AMER. ECON. RVW. 436 (1995); Joni Hersch, *Equal Employment Opportunity and Firm Profitability*, 26 J. OF HUMAN RESOURCES 140 (1990) (measuring effect of discrimination lawsuits); Michael I. Muoghalu, et al., *Hazardous Waste Lawsuits, Shareholder Returns, and Deterrence*, 57 SOUTHERN ECON. J. 357 (1990); David Prince & Paul Rubin, *The Effects of Product Liability Litigation on the Value of Firms*, 4 AMER. LAW AND ECON. J. 44 (2002); W. Kip Viscusi & Joni Hersch, *The Market Response to Product Safety Litigation*, 2 J. OF REGULATORY ECON. 215 (1990) (assessing impact of product safety litigation on firm value).

[14] For an overview of event study methodology see JOHN Y. CAMPBELL, THE ECONOMETRICS OF FINANCIAL MARKETS 149-180 (1997); A. Craig MacKinlay, *Event Studies in Economics and Finance*, 36 J. OF ECON. LIT. 13 (1997).

lawsuits — product liability, securities and discrimination — on stock prices, most of which have found that the lawsuits result in a loss of shareholder value.[15]

Settlements should also negatively affect stock prices, particularly if the value of the settlement is higher than what the market was expecting. Here again, the financial costs are not the only costs the lawsuits can exact from firms. Employment discrimination settlements often require changes in institutional practices, and they may also require firms to engage in some form of what might be labeled affirmative action by requiring that members of the affected class receive employment preferences.[16] Even if the settlement does not require affirmative action, the perception may be just as important as the reality, as investors may believe that the firm will be required to engage in affirmative action and may also view affirmative action as inconsistent with efficient employment practices. All of these factors should lead to a decrease in the stock price based on the settlement of the lawsuit,[17] and this study is designed to test these hypotheses.

B. The Data.

This study involves class action employment discrimination lawsuits filed or settled between November 1991 through August 2001 in which the defendants were corporations that were publicly traded on the New York Stock Exchange. The beginning date of the time

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[15] *See, e.g.*, Bhagat et al., *supra* note 13, at 6 ("We find that no matter who brings a lawsuit against a firm . . . defendants experience economically meaningful and statistically significant wealth losses upon the filing of the suit."); Bizjak & Coles, *supra* note 13, at 437 (filings of private antitrust suits result in a wealth loss for defendants of 0.6% of the firm's equity value . . .); Joni Hersch, *supra* note 13, at 150 (finding significant negative effect for class action filings).

[16] *See* United States v. Paradise, 480 U.S. 149 (1987) (requiring one-to-one promotions for members of class to remedy past discrimination); Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (permitting remedial race-conscious relief).

[17] There are two ways in which the stock price might increase based on the settlement. The price may increase to the extent the settlement is lower than the market was expecting, and some studies have found such an effect that mitigates the initial drop in the stock price at the time of filing. *See, e.g.,* Sanjai Bhagat et al., *The Costs of Inefficient Bargaining and Financial Distress: Evidence from Corporate Lawsuits*, 35 J. OF FINANCIAL ECON. 221, 245 (1994) (finding that "the loss attributed to the filing was often regained upon settlement . . ."). This effect is generally dependent on an initial wealth loss attributable to the filing, and would be captured in the current study. Additionally, as noted below, it is conceivable that the stock price would increase if the settlement were seen as a sign that inefficient employment practices would be eliminated.

frame was selected to coincide with the passage of the Civil Rights Act of 1991, which made damages available for the first time to plaintiffs who successfully sued under Title VII of the 1964 Civil Rights Act.[18] Prior to the passage of the Act, plaintiffs were limited to equitable relief, typically back pay which rarely offered the prospect of substantial damages.[19] The availability of damages significantly increased the cost of discrimination and likewise produced a sharp increase in class action litigation.[20]

The study focuses on class action lawsuits rather than individual lawsuits because, with few exceptions, only class action litigation raises the threat of costs that would be substantial enough to interest an investor or to deter firms. Even after the passage of the 1991 Act, most individual cases are resolved for under $25,000,[21] and given the sheer volume of individual cases, it is not reasonable to expect investors to react to each case that receives some publicity. Class action lawsuits, on the other hand, have the potential to cost the firm millions of dollars, as well as to generate adverse publicity, and the initial uncertainty regarding their potential monetary impact provides the kind of information that should be of interest to investors. Additionally, class action lawsuits remain relatively rare. Approximately seventy-five employment discrimination lawsuits that include class action allegations are filed in any given year, compared to the approximately twenty-thousand individual cases.[22] The scarcity of class action lawsuits means that such suits should send a potent signal to interested parties, particularly when the potential size of the award is taken into account.

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[18] *See* 42 U.S.C. § 2000e; 42 U.S.C. § 1981a.

[19] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (discussing remedial objectives of Title VII).

[20] *See* David Segal, *Lawyers Stake a Claim on Bias Lawsuits: With More Cases in Litigation, Firms Cash In on Billable-Hour Bonanza*, WASH. POST, Jan. 27, 1997, at A1 (discussing impact Civil Rights Act of 1991 had on class action litigation).

[21] This figure is based on settlements obtained by the EEOC. *See* Selmi, *supra* note 6, at 1432-33. For cases that are resolved at trial, the awards tend to be substantially higher, particularly for private plaintiffs where the median award between 1992-95 was $91,000. *Id.* at 1434. It is important to note, however, that only about 8% of the cases are resolved through a trial. *Id.*

[22] Based on figures compiled by the Administrative Office of the Courts, 70 employment class action suits were filed in 1997, 85 in 1998 and 74 in 1999. *See* Administrative Office of the Courts, Judicial Business of the Courts, Annual Reports for 1997, 1998, 1999, tables X-5.

Since the statistical part of this study focuses on the reaction of investors, the data include class action lawsuits that were reported in the New York Times, the Wall Street Journal, the Washington Post, and the Los Angeles Times. These four newspapers were selected because of their national scope, which makes it reasonable to assume that information published in these papers would reach investors in one way or another, either directly through the newspapers themselves or through wire or news services affiliated with the newspapers.[23] Because the sample includes only those cases that were reported in the national press, it likely overrepresents large noteworthy cases, while overlooking smaller and less publicized cases. By the same measure, the cases included in this study should have the greatest potential to influence shareholder value precisely because of the publicity they received. As a result, restricting the data to large nationally reported cases is a measure that should bias the study in favor of finding an effect on firm value.[24] I also chose to focus only on firms that were traded on the New York Stock Exchange so as to control for broad market changes in the stock index. This proved to be

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[23] A limited check supported this assumption. I checked to determine whether information published in one of the above-referenced newspapers was carried in other major newspapers and invariably five or six other major city newspapers ran a similar story on the same day the story was reported in one of the four papers relied on for this study, with several papers typically carrying the story a day or so later. A number of prior studies seeking to measure the effect of events on stock prices have focused exclusively on stories reported in the Wall Street Journal. *See, e.g.*, Bhagat et al, *supra* note 13 at 15; Hersch, *supra* note 13, at 141. While the Wall Street Journal is likely the best single source of information for investors, restricting the study to one paper appears unnecessary, particularly since the number of individuals holding stock has increased substantially in the last decade. *See* Cheryl Russell & Marcia Mogelonsky, *Riding High on the Market*, AMER. DEMOGRAPHICS 46, 48 (April 2000) (noting that In 1998, nearly 49% of households owned stock, up from 32 percent a decade earlier). Nevertheless, with only a few exceptions, most of the lawsuits analyzed in this study were reported in the Wall Street Journal, and a separate analysis of the cases that only appeared in that paper found no significant difference with the results generally reported in this study. When the story appeared in more than one newspaper, the stories generally ran on the same day. On the few occasions when the stories ran on different days, I relied on the earliest date as the event date.

[24] An exception to this principle might arise due to the size of the firms that are included in the analysis, all of which are large firms. While these firms are likely to garner the most publicity, they are also in the best position to absorb the financial costs of the suit. In contrast, smaller firms may have more to lose through a class action lawsuit to the extent the information relating to the company was available to investors. This is less likely with smaller companies because in addition to their lower news coverage they are also typically covered by fewer stock analysts.

a very modest limitation because there were only three class action lawsuits reported by the national press for firms traded on other exchanges.[25]

Limiting the study to publicly traded companies proved a more significant restriction than excluding companies traded on exchanges other than the NYSE. Although such a limitation is obviously necessary for a study measuring the effect on stock prices, it had the effect of eliminating several of the largest class action suits, including a case against State Farm that settled for approximately $157 million, an $81 million suit against Publix, and the high profile sexual harassment cases against Mitsubishi motors that ultimately settled for $45 million.[26] Neither State Farm nor Publix is publicly traded, and Mitsubishi is traded only on the Japanese stock exchange. Additionally, suits against governments, which make up a significant portion of the class actions that have been filed or settled in the last decade, were likewise excluded from the study.[27]

The stock prices were drawn from publicly available sources, including yahoo!finance, and siliconinvestor. Where data was missing from those sources, newspapers and publications that list historical stock prices were used to supplement the data. The Standard and Poors 500 index was used to measure the expected returns over time.

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[25] The three cases involved O'Charley's and Rent-A-Center, both of which trade on the NASDAQ, and Crown Central Petroleum which trades on the American Stock Exchange. *See Settlement Reached in Suit Over Alleged Racial Bias*, WALL ST. J., July 23, 1996, at B4 (discussing $7.5 million settlement with O'Charley's); *Crown Central is Sued for Alleged Gender, Race Discrimination*, WALL ST. J., July 1, 1997, at C23 (describing the filing of class action suit); *Rent-A-Center, Inc.*, WALL ST. J., July 10, 2000, at A15 (noting $2 million settlement for sex discrimination suit involving Rent-A-Center). Rent-A-Center subsequently entered a settlement in a different case for $47 million. *See* Kristin Downey Grimsley, *Rent-A-Center to Pay $47 Million to Settle Sex-Bias Suit*, WASH. POST, Mar. 9, 2002, at A9.

[26] *See* Kathy Bergen & Carol Kleiman, *Mitsubishi Will Pay $34 Million: The Biggest Settlement in a Sexual Harassment Suit is Seen as a Wake-Up Call*, CHI. TRIBUNE, June 12, 1998, at A1; Philip Hager, *State Farm to Pay Women $157 Million for Job Bias*, L.A. TIMES, April 29, 2002, at A1. There were two cases involving Mitsubishi, one filed by the EEOC settled for $34 Million while a private suit settled for $9.5 million. *See Mitsubishi Harassment Settlement Approved,* N.Y. TIMES, June 26, 1998, at D20 (court approved $34 million settlement in case filed by EEOC, which followed $9.5 million settlement in private suit).

[27] The largest discrimination settlement to date was, in fact, filed against the United States in a twenty-year old case involving the Voice of America. *See* Bill Miller & David A. Vise, *U.S. Settles Job Bias Case: A Record $508 Million is Due Women in USIA Dispute*, WASH. POST, Mar. 23, 2000, at A01.

This study isolates two relevant events: (1) the filing of a lawsuit and (2) the notice of a settlement. In some cases, only one event was reported, typically the filing of the lawsuit but there were also several cases where the settlement was reported while the original case filing was not. Other significant litigation events are occasionally reported in the newspapers, but they did not seem as likely to influence investment decisions, in large part because the events were reported infrequently. For example, the required court approval of a settlement agreement was occasionally noted in national newspapers but it was rare that the approval differed from the original notice of settlement, and therefore does not seem likely to impact investor decisions.[28] Newspapers also frequently report when the Equal Employment Opportunity Commission joins, or seeks to join, an existing lawsuit, or when a class was certified, but these occurrences were too rare to measure, and again not clearly of interest to investors.[29]

The cases that are included in the database are described in the accompanying Appendices One and Two. The study includes thirty-three class action lawsuits filed against publicly-traded corporations, and twenty-six settlements against publicly-traded corporations.[30] Only six of the cases appear in both files, as many of the cases have not yet been resolved and other cases that were settled during the study's timeframe were initially filed before the starting

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[28] The only exception involved the sex discrimination suit against Smith Barney, which the district judge initially refused to approve. *See* Peter Truell, *Judge Rejects Proposed Pact in Sex Harassment Case*, N.Y. TIMES, June 25, 1998, at D20. The Court ultimately approved a revised agreement. *See* Patrick McGeehan, *Judge Approves Class-Action Settlement for Sex Harassment at Smith Barney*, WALL ST. J., July 27, 1998, at B6.

[29] It is conceivable that investors would assume that the resources of the EEOC would significantly affect the outcome of the litigation, though this assumption often proves incorrect. Particularly in the last decade, the EEOC has often jumped into litigation well after the case has commenced, or even after it has settled as it did in the case against Texaco, and seems to do so primarily as a public relations vehicle. *See* text accompanying notes 260-62, *infra*. Nevertheless, it is certainly possible that investors would treat EEOC intervention as meaningful, but this study did not measure that effect.

[30] This number of cases falls within the range used in previous event studies. *See, e.g.*, John M. Bizjak & Jeffrey L. Coles, *The Effect of Private Antitrust Litigation on the Stock-Market Valuation of Firms*, 85 AMER. ECON. REV. 436, 442 (1995) (sample of 26 cases); Sanjai Bhagat, John Bizjak & Jeffrey L. Coles, *The Shareholder Wealth Implications of Corporate Lawsuits*, 27 FINAN. MGT. 5, 16 (1998) (sample size for defendant settlements of 29); Mark S. Johnson, Ron C. Mittelhammer & Don P. Blayney, *Stock Price Reaction to Regulation in the Meat Packing Industry*, 45 J. OF AGRIC. ECON. 31, 35 (1993) (sample size of 23).

date. It also appears that some resolutions are not reported in the national press even when the filing was. Race discrimination cases accounted for nearly 65% of the class action filings, with nearly three times as many race (22) as sex discrimination (8) claims. There were only two age discrimination claims, as well as one claim based on National Origin, though several cases included multiple allegations. Two-thirds (22) of the cases have been filed since 1996, the year of the much publicized settlement involving Texaco.

The settlements are more evenly divided among race, sex and age discrimination claims, with 10, 9 and 4 respectively. The aggregate value of the settlements total more than $1 billion, with a mean recovery of $44.3 million and a median of $28 million. The mean recovery for race discrimination claims was $58.9 million, with a median of $28 million, while the sex discrimination claims yielded about half as much, with a mean recovery of $24.9 and a median recovery of $10 million. Consistent with past studies, the age discrimination claims produced the largest settlements with a mean recovery of $71.12 million and a median of $46.75. However, in this instance, the mean figure for age discrimination cases was significantly skewed by a $183 million settlement against Lockheed-Martin. It is also worth noting that all of the cases were the product of a negotiated settlement; none of the cases was resolved through a trial. Indeed, in only one case, that involving Lucky Stores in 1992, was there even a trial to determine the defendant's liability.[31] There was also no case where the defendant prevailed at trial. When these cases are resolved, it is invariably by settlement rather than trial.

C. The Statistical Analysis.

As previously noted, the statistical portion of this study relies on a technique known as an event study. Event studies, in turn, rely on the efficient markets hypothesis, which

[31] *See* Stender v. Lucky Stores, 803 F. Supp. 259 (N.D. Cal. 1992).

states in its strong form that new information is quickly incorporated into stock prices.[32] This assumption has been borne out in many prior event studies which have found that new information is typically incorporated into a stock price within one to three days of the event having been reported.[33]

An event study seeks to measure the effect of a particular event, in this instance the filing and settling of class action employment discrimination litigation, on a firm's stock price. For the purposes of the statistical analysis, an event is defined as the publication of the story in one of the four newspapers described earlier, and the date of publication is defined as the event date. For each event, the day the story was published is defined as day 0, and the previous trading day is represented as -1, and together these two days make up the event period.[34] A two-day event period helps capture any changes that might have occurred the day before the particular event. This is especially important in the case where information leaked into the market prior to the official announcement, and event studies commonly used a two-day period.[35]

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[32] The seminal work defining the efficient markets hypothesis is Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383 (1970). Although the efficient markets hypothesis is not without its critics, the model underlies most event studies. *See, e.g.*, John M. Bizjiak & Jeffrey L. Coles, *supra* note –, at 438 (relying on efficient markets hypothesis to measure effect of antitrust litigation); Kathleen Engelmann & Bradford Cornell, *Measuring the Cost of Corporate Litigation: Five Case Studies*, 17 J. LEGAL STUD. 377, 378 & n.3 (1988) (noting that "we are implicitly assuming markets are efficient"); W. Kip Viscusi & Joni Hersch, *supra* note 13, at 216 ("The underlying assumption is that stock markets operate in an efficient manner.").

[33] *See* Eugene F. Fama, *Efficient Capital Markets II*, 46 J. OF FINANCE 1575, 1601 (1991) ("The typical result in event studies on daily data is that, on average, stock prices seem to adjust within a day to event announcements."); Michael I. Muoghalu, et al., *Hazardous Waste Lawsuits, Stockholder Returns, and Deterrence*, 57 SOUTHERN ECON. J. 357, 362 (1990) (stock prices adjusted within a day of announcement); Wallace N. Davidson, et al., *The Effectiveness of OSHA Penalties: A Stock-Market Based Test*, 33 INDUSTRIAL RELATIONS 283, 290 (1994) (finding that "the stock market reaction is confined to a very narrow period (e.g., the three-day interval)"). Occasionally there can be a delay before the information is incorporated. *See* Viscusi & Hersch, *supra* note 13, at 222 (finding a delay of 5 days before an effect was felt by agent orange litigation).

[34] To the extent the story was first published over the weekend, the next Monday was treated as the event date, with the prior Friday defined as the day before.

[35] *See* A. Craig MacKinlay, *Event Studies in Economics and Finance*, 35 J. OF ECON. LIT. 13, 14-15 (1997) (suggesting a three-day event period); Bhagat & Romano, *supra* note 13, at 11-12 (discussing defining the event period); Sanjai Bhagat, John Bizjak & Jeffrey L. Coles, *The Shareholder Wealth Implications of Corporate Lawsuits*, 27 FINANCIAL MGT. 5 15 (1998) (using two-day event period); Wallace N. Davidson, Dan Worrell & Louis T. W. Cheng, *The Effectiveness of OSHA Penalties: A Stock-Market Based Test*, 33 INDUSTRIAL RELATIONS 283, 290 (1994) (using a three-day event period); Mark S. Johnson, et al., *Stock Price Regulation in the Meat Packing Industry*, 45 J. OF AGRIC. ECON. 31, 34 (1994) (using three-day event window).

This study relies on the dummy variable technique and uses ordinary least squares (OLS) regression analysis.[36]

The event period provides the means to identify whether the filing or settlement impacts a firm's stock price during the two-day event period with the expectation that the impact will be negative. While a simplistic assessment can be made by comparing the stock price the day the announcement was made with the price several days earlier, this assessment may ascribe a correlation to the event when the change in the stock price is actually the result of an overall market change, or a continuation of a firm's stock price trajectory. Therefore, to isolate the effect of the event, it is necessary to calculate what are defined as abnormal returns, the returns that would not otherwise be expected based on past or future patterns.[37] There are various ways to calculate the expected return, one of which is based on the progression of a firm's stock price, while the more common technique relies on market trends.[38] This study relies on a market model by measuring a stock's past performance against the general market return. In other words, the model captures the expected returns as measured against the changes in the broad market, and I rely on the Standard and Poor's 500 Index as a general market indicator.

Two aspects of the market model bear mentioning. First, the model assumes a linear relation between the stock price and the market measure, so that if the S&P 500 goes up 100 points it is possible to predict the corresponding expected return of the particular stock. Second, the market model provides an imperfect measure since it will rarely offer a strong prediction of a particular stock price, a limitation that will be discussed further below.[39] The expected returns are calculated by using a standard market parameter of the 120 days prior to the event and 45 days after the announcement day period to provide a statistical estimate of the

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[36] *See* CAMPBELL, *supra* note 14 at 158; Prince and Rubin, *supra* note 13 at 51-52.
[37] *See* Fama, *supra* note 33, at 1601-02 (discussing role of abnormal returns).
[38] *See* MacKinlay, *supra* note 35, at 14-15.
[39] *See infra* p.24.

normal return that would have been expected had the event not occurred. The actual return is then compared to the expected return to provide the abnormal return.

1. The Results.

This statistical analysis requires a four-step process, which is described in detail in Appendix Three. As indicated in Table One [tables are in separate file and table one would go about here], the analysis found that there was no significant effect on stock prices from either the filing of a lawsuit or the announcement of a settlement, and these findings held true regardless of the nature of the suit or the magnitude of the settlement. There was, however, some variation among the individual lawsuits, and seven of the individual equations produced statistically significant results at the .10 level. Four of the filings – those against Albertson's, CBS, MetLife and Microsoft – had statistically significant effects on the stock prices, although these four cases display no obvious pattern. For example, two of the cases involved sex discrimination allegations, while two involved race discrimination. To the extent a pattern exists, all of the cases were filed within the last two years, and three were filed within the last year. The fact that the recent cases had a significant effect on stock prices may be attributable to an increased awareness regarding the potential financial impact of the suits as a result of the recent string of high profile cases, such as Texaco and Coca-Cola. Nonetheless, there were ten other cases filed during the same time period that were not significant.

Table Two [place near here] indicates a similar lack of aggregate significance in the settlement cases, and notably the size of the settlement was not related to whether the case had a significant effect. For example, the $120 million settlement agreement entered into by Interstate Brands (the makers of Wonder Bread) had no greater effect on the company's stock price than the $8 million settlement agreed to by AlliedSignal. Three of the individual settlements produced statistically significant results: the Texaco settlement involving race discrimination, a $33 million agreement involving Winn-Dixie that included allegations of both race and sex discrimination, and a race discrimination resolution entered into by Morgan Stanley that did not include any monetary award. Of these, only the Texaco settlement had a negative effect on the firm's stock price, while the other two agreements positively affected the price.

2. Explaining the Statistical Analysis.

The above findings cast doubt on several of the reigning myths regarding employment discrimination litigation. Indeed, for many years it has been argued that the costs of employment discrimination lawsuits are devastating to corporations and therefore should be limited so as to reduce the harm the suits produce.[40] Yet, based on the data analyzed here, there is no indication that firms suffer a significant loss of shareholder value as a result of the filing of a lawsuit; indeed, the filing of a lawsuit appears to be of little direct interest to investors. This is not because investors are unconcerned about the costs of the lawsuits, but as discussed in more detail below, because the potential costs are too insignificant to prompt investment decisions. Moreover, given that, even with the settlements, the loss to firm value does not generally exceed the costs of the lawsuit, there appears to be little reputational damage that results from being accused of discrimination. As detailed in the next section, firms often react quickly to reduce possible reputational damage that might arise from the lawsuits, and often do so effectively, and their swift actions may limit collateral damage from the suits.[41]

The absence of significance from the filing of a lawsuit may not seem unusual because a filing sends no particular message to investors other than that a firm will incur legal costs. The filing of a lawsuit does not indicate that a firm is actually discriminating, or that it will be found liable and many lawsuits terminate shortly after they are filed, often without any

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[40] *See generally* WALTER K. OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMER. WORKPLACE (1997); RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGST. EMPLOYMENT DISCRIMINATION LAW (1992); PHILLIP HOWARD, THE DEATH OF COMMON SENSE 134(1994).
[41] *See infra* sec. III.A.

relief at all. This is not, however, true of the majority of cases tracked in this suit.[42] While a number of cases are still pending, and some have undoubtedly been resolved without any attendant publicity, the vast majority of cases that were resolved resulted in significant relief for the plaintiff class. Based on this sample, the success rate of class action employment litigation appears to exceed the rate for employment discrimination cases more generally.[43] This is likely attributable to the costs and difficulties of filing, and litigating, class action cases, perhaps evidenced by the fact that only a handful of law firms regularly file discrimination class actions, and one law firm in particular is responsible for a disproportionate number of suits.[44] It also appears that investors do not anticipate that the filing of a lawsuit will result in litigation fees sufficiently large to adversely impact the firm. This may be true either because the fees are not expected to be particularly high given the size of the firm or because the fees are treated as an operating cost that has already been factored into the stock price. Somewhat contrary to common perceptions, the assumption that litigation costs will be relatively modest appears to be supported by the realities of the litigation,. For example, in the hotly contested litigation involving Home Depot, a case that settled on the eve of trial, the defendant's fees were estimated to have totaled $5 million.[45] These fees are not insignificant but in the context of a firm the size of Home Depot, they are not especially consequential either.

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[42] Of the cases in this study, in only the Nordstrom's case was the dismissal reported in the news. *See* Sylvia Wieland Nogaki, *Nordstrom Bias Suit Dropped*, CHI. TRIBUNE, Nov. 15, 1992, at C14.

[43] Employment discrimination cases have long had success rates lower than other classes of civil claims. *See* Theodore Eisenberg, *Litigation Models & Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1578 (1989) (documenting a success rate of 22% for employment discrimination cases). In a recent comprehensive analysis of trial and appellate outcomes, Professors Clermont and Eisenberg concluded, "Job discrimination plaintiffs are one of the least successful classes of plaintiffs at the trial-court level, in that they fare worse at trial than almost any other category of civil case." Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, unpublished manuscript at 11, forthcoming in the ILLINOIS LAW REVIEW (2002).

[44] The law firm is now called Saperstein Goldstein Demchak & Bellar, and is discussed in more detail in section III.B. Of the suits tracked in this study, the Saperstein firm was involved in Home Depot, Denny's, Shoney's, State Farm, Publix, Lucky's, Albertson's, Safeway, and Southern California Edison.

[45] *See Facing Hammer, Home Depot Decides to Deal*, AMER. LAWYER, Nov. 1997, at 38 (noting that Home Depot spent $5 million in legal fees prior to trial).

The fact that the settlements had no significant effect on the stock price may seem more puzzling but can also be explained in a number of ways. First, it is important to highlight a limitation on a study of this nature where only limited controls are imposed to measure the movement of a stock price. Although I have used standard event studies methodology, the statistical model does not always offer a substantial explanation of an expected return to a stock price, in large part because it is often difficult to predict stock price movements. What this study measures is whether a stock price moves differently from what was expected but given that stock price movements often belie our expectations it can be difficult to accurately predict expected returns.

Another reason a firm's stock price may not be affected by the settlement is that the stock market may have been anticipating a larger monetary award than was ultimately obtained.[46] For example, in the case of Coca-Cola, to date the largest and the most recent class action settlement, it is possible that the market was expecting a judgment in excess of the actual reported award of $192.5 million, particularly since the Texaco case had only recently received so much attention and Coca-Cola was enmeshed in a difficult public relations battle involving the negative implications of the lawsuit.[47]

It also seems clear that the damages – even at this level – are simply too small to affect corporations the size of Coca-Cola, Texaco or Home Depot, or most of the other firms involved in this study. For example, the $104 million settlement agreed to by Home Depot amounted to two weeks' pretax profit.[48] Table Three [place about here] provides a representative representative sampling of the relation of the settlement to the firm's

[46] *See* Kathleen Engelmann & Bradford Cornell, *supra* note 13, at 393 (when settlements are lower than expected firm value may increase); Prince and Rubin, *supra* note 13, at 19 (noting that positive returns from settlements may indicate investors were expecting higher monetary relief).
[47] *See* Davan Maharaj, *Coca-Cola to Settle Racial Bias Lawsuit: Soft Drink Giant Agrees to Pay $192.5 Million Over Allegations It Treats Blacks Unfairly*, L.A. TIMES, November 17, 2000, at A1.
[48] *See* CHRIS ROUSH, INSIDE HOME DEPOT: HOW ONE COMPANY REVOLUTIONIZED AN INDUSTRY THROUGH THE RELENTLESS PURSUIT OF GROWTH 78 (1999).

capitalization. Outside of the case involving Shoney's, the remaining settlements all fell below 3.5% of a firm's capitalization, with both the Home Depot and Coca-Cola falling below one percent. Previous studies have found that the size of the firm positively effects results so that the lawsuits have less of an impact on large firms,[49] and all of the firms included in the sample were large firms.

It is also possible, for both the filings and the settlements, that information had leaked into the market prior to the official event, thus allowing investors to adjust their expectations prior to the actual announcements. There is even the possibility that substantial insider trading may have affected stock prices before the official announcements.[50] While it remains possible that information leaked out into the market before the news was reported, there is no empirical evidence to support the theory, and it seems more likely that the events did not have a significant effect on prices rather than that substantial insider trading occurred.

The fact that neither the filings nor the settlements has a significant effect on stock prices suggests that there is no market penalty associated with being accused of discrimination, or from having reached a negotiated settlement in a discrimination suit. It would certainly be possible to imagine that investors would disinvest from discriminatory firms, but there is little evidence to suggest that investors shun firms that have been accused of discrimination or settled discrimination cases.[51] The fact that discrimination suits do not extract significant value from firms, while perhaps contrary to common perceptions, may be expected once we realize that social investing remains a very small part of the investment world, and even

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[49] *See* Sanjai Bhagat, et al., *The Shareholder Wealth Implications of Corporate Lawsuits*, 27 FINANCIAL MGT. 5, 25 (1998).

[50] Insider trading has been shown to move stock prices, often significantly. *See* Lisa K. Meulbroek, *An Empirical Analysis of Illegal Insider Trading*, 47 J. OF FINANCE 1661 (1992). Less clear is how insider trading is recognized by the market, though there does seem to be evidence that it is recognized, perhaps by its volume. *See id.* at 1693-95.

[51] The one exception, discussed in the next section, is the case against Texaco that involved widely publicized tapes that appeared to include racial epithets. When the story first broke, there was widespread selling, but the disinvestment proved only temporary, and most of the lost value was restored within a month of the initial allegations. *See infra* text accompanying notes 87-89

within the realm of social investors employment practices generally do not factor into the investment decision.[52]

In addition to the monetary costs of the suits, firms are undoubtedly concerned with the potential reputational costs of the lawsuits, but here there appears to be little cost outside of the unusual case that receives high publicity typically for overt forms of racial discrimination.[53] Indeed, based on past studies of lawsuits in other areas, it appears that employment discrimination lawsuits have less stigma attached to them than other kinds of lawsuits, such as product liability claims. One study involving product recalls found a significant effect on firm value that exceeded the direct costs of the recall,[54] and other studies have likewise found that the value lost as a result of interfirm corporate lawsuits often exceeds the costs of the lawsuit, largely because of the reforms companies may need to make as a result of the litigation.[55] However, because discrimination claims rarely lead to substantial corporate reform, most investors will not be concerned with the fact that a firm has been accused of discrimination other than as it relates to the potential costs of that discrimination.

Based on the statistical analysis, it appears that neither the filing nor the settlement of a lawsuit significantly affects a firm's stock price. Later in this article I will suggest some of the implications of the study relating to the likelihood that discrimination litigation will serve as an adequate deterrent against discrimination and to the prospects that the

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[52] *See* LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 167-68 (2001) (discussing socially responsible investing.) TIAA-CREF, the largest pension fund in the country with many participants who ought to be sympathetic to social investing, reports that its social investment account totals $4.4 billion while its stock accounts are valued at $87.5 billion. *See* www.tiaa-cref.org/charts *(visited July 1, 2002). Many social investment funds do not screen for labor practices.*

[53] This has occurred in a handful of cases over the last few years, including Texaco and Denny's discussed in the next section, as well as Shoney's, Mitsubishi and to a lesser extent Coca-Cola.

[54] *See* Gregg Jarrell & Sam Peltzman, *The Impact of Product Recalls on the Wealth of Sellers,* 93 J. OF POLITCAL ECON. 512 (1985).

[55] *See* Sanjai Bhagat, et al., *The Costs of Inefficient Bargaining and Financial Distress: Evidence from Corporate Lawsuits*, 35 J. OF FINANCIAL ECON. 221, 229 (1994) ("Our results indicate that plaintiffs can and do damage defendants through litigation, but that plaintiffs gain far less than defendants lose."); David M. Cutler & Lawrence H. Summers, *The Costs of Conflict Resolution and Financial Distress: Evidence from the Texaco-Pennzoil Litigation*, 19 RAND J. OF ECON. 157, 164 (1988) (finding that the lawsuit jointly cost shareholders $1 billion).

market will eradicate discriminatory firms, as has long been argued by law and economics scholars.[56] But before doing so, I want to discuss three case studies to determine what effect employment discrimination class actions have within firms.

III. Do the Lawsuits Produce Meaningful Change?

Three Case Studies

The last section of this article sought to determine how, or whether, the class action litigation affects stock prices of firms named as defendants. Stock prices, however, provide only one measure of the potential impact of a lawsuit, and in this section I will present three case studies to explore how the lawsuits affect the internal company practices, including what changes the firms made as a result of the settlement agreements. This analysis inevitably provides only a limited insight into the company's response to the lawsuit because it does not take into account whether the corporate culture has changed, other than as measured in numerical changes in personnel, purchasing agreements and other tangible actions. Measuring changes in corporate culture is a difficult task that requires extensive observation both before and after the lawsuits, something that is generally infeasible other than by the company itself – though its own biases often preclude an honest assessment of just how much things have actually changed.[57] Nevertheless, the case studies provide significant insight into what changes the lawsuits prompted, and also provide three distinct models for how companies respond to the suits, what I label the public relations model, the recalcitrance model and the reform model.

A. Texaco: The Public Relations Model.

1. The Lawsuit and the Tapes.

[56] *See* section IV *infra*.
[57] This part of the study is based on available public information, primarily from court decisions and journalist accounts, including several book-length treatments. For a variety of reasons, I decided not to rely on interviews, although I have spoken with a number of attorneys who have been involved in the cases and those conversations have likely influenced some of my thinking.

Although the case against Texaco is perhaps now the most famous employment discrimination case to arise in the last decade, the controversy began in a much quieter fashion. The suit was originally filed in 1994 by two African-American employees who sought class action status for their salary and promotion claims, and when filed the suit received virtually no national attention.[58] At the time of the suit, Texaco was the fourth largest United States oil company with 19,000 employees, of whom approximately 23% were African Americans, a percentage that placed Texaco roughly in the middle of its oil company peers.[59] Texaco also claimed that 19.4% of its executive level employees were minorities, a figure that was disputed by the plaintiffs, and after investigating the company's practices both the Equal Employment Opportunity Commission and the Department of Labor found Texaco's promotional policies deficient.[60]

The case, which was initiated by a law firm that had not handled a civil rights case in twenty years, was largely statistical in nature, involving both claims of disparate treatment and disparate impact.[61] From the evidence that is available, it appears the claims with the greatest chance for success were based on the disparate impact theory, though it is difficult to say more than that because during the two years the case was active most of the litigation involved discovery disputes and no class had been certified prior to the settlement.[62] It is

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58 *See* Alison Frankel, *Tale of the Tapes*, THE AMER. LAWYER 64, 68 (Mar. 1997) ("Before the tapes surfaced, the Texaco race discrimination case had received a small amount of press coverage . . .").

59 *See* David Ivanovich ,M. Sixel & Chris Woodyard, *Oil Industry Struggling With Diversity*, HOUSTON CHRON., Nov. 11, 1996, at A1 ("Texaco's record for hiring and promoting minorities . . . is about average when compared with other major oil companies . . .").

60 The Department of Labor had conducted two investigations and in both found Texaco's promotion policies deficient. *See* Kurt Eichenwald, *The Two Faces of Texaco*, N.Y.TIMES, Nov. 10, 1996, at C1, C6 (discussing Department of Labor reviews that found "wide disparities between the promotion rates of whites and nonwhites at Texaco").

61 In a decision awarding attorneys fees, the district court summarized the case as follows: "[T]he amended complaint charged that . . . Texaco had by certain employment policies and practices, engaged in conduct that had a disparate impact upon and abridged the rights of salaried African-American employees of Texaco in promotions, compensation, and the terms and conditions of their employment, including training and job assignments." Roberts v. Texaco, 979 F.Supp. 185, 189 (S.D.N.Y. 1997). The statistical portion of the case was based on a disparate impact claim, which likewise formed the basis for the class allegations. *See* Frankel, *supra* note 58, at 67 (noting that "the plaintiffs lawyers tried to show the court that the reason for the disparate impact was racial discrimination.").

62 *See id.* (noting that a class certification hearing was scheduled for December 6, 1996).

significant that the strongest claims involved disparate impact allegations because such claims are tried before a judge, rather than a jury, and are limited to equitable relief rather than damages.[63] Based on an account by one of the plaintiffs, during the mediation and prior to the revelation of the tapes, the plaintiffs' statistical expert valued the case at between $10-30 million.[64] Other reports have suggested that the plaintiffs estimated their salary claim to be worth $71 million in backpay.[65] The suit became bogged down by a lengthy and decidedly unproductive government-supported mediation when the case took a dramatic turn that had little to do with its underlying merits.[66]

On November 4, 1996, *The New York Times* published a story based on a transcript of a secretly tape recorded meeting attended by management officials that included what appeared to be racial epithets, as well as evidence indicating an intent on the part of Texaco officials to destroy documents that had been requested by the plaintiffs in the case.[67] The tapes were made by Texaco executive Richard Lundwell, ostensibly to aid him in preparing minutes of the meeting, and were turned over to the plaintiffs by Lundwell after he was involuntarily retired by the company.[68] The plaintiffs' attorneys in turn leaked the transcripts to the New York

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[63] See 42 U.S.C. § 2000e.

[64] *See* BARI-ELLEN ROBERTS, ROBERTS VS. TEXACO: A TRUE STORY OF RACE AND CORPORATE AMERICA 232 (1998). The author quotes one of the plaintiff's attorneys, in preparing for the mediation, as saying, "We think Texaco ought to pay ten million dollars in back wages to the black employees it has been discriminating against for the past five years and another ten million dollars to compensate. Throw in attorneys' fees and other odds and ends and it comes to thirty million dollars . . . how's that sound."

[65] *See* Frankel, *supra* note 58, at 67 ("[T]he plantiffs' statistician concluded in his expert witness report that Texaco's African-Americans were paid $71 million less than comparable nonminority employees . . .").

[66] Based on Roberts' book, until the tapes were disclosed, there did not appear to be any particular hope that the case would be resolved short of either summary judgment or trial, as the parties remained engaged in vicious litigation. ROBERTS, *supra* note 64 at188-245.

[67] *See* Kurt Eichenwald, *Texaco Executives, On Tape Discussed Impeding a Bias Suit*, N.Y.TIMES, Nov. 4, 1996, at A1. The article stated that on the tapes "executives are heard referring to black employees as "black jelly beans" and "niggers". *Id.* The "black jelly beans" apparently was borrowed from a metaphor used in diversity training, and an enhanced version of the tape indicated that the racial epithet had not been used but instead had been a reference to St. Nicolas. *See* note 76 *supra*.

[68] *Id.* Mr. Lundwell initially sought to trade the tapes to the plaintiffs' attorney in exchange for their representation of him in an age discrimination suit against his former employer. The plaintiff attorney declined to represent Lundwell but did refer him to an attorney, and once Lundwell had retained an attorney, he turned the tapes over to the plaintiffs in the *Roberts* case. For the most comprehensive report of the tapes incident see Alison Frankel, *supra* note 58, at 64.

Times, which ran a story about the tapes on its front page, and the reaction to the tapes was both immediate and dramatic. On the day the news was reported, Texaco's stock price dropped 3.2% on the New York Stock Exchange.[69] While the stock price quickly stabilized thereafter, the direct economic impact of the newly disclosed tape recordings was a drop in the value of the stock of approximately $1 billion.[70] Several large public investors also reacted negatively to the revelation of the tapes, and a number of other agencies threatened to divest their investments.[71] Shortly after the New York Times story broke, Jesse Jackson announced that his organization, the Rainbow PUSH Action Network, would buy Texaco stock in order to gain a voice in the company, and would likewise initiate a study of the affirmative action policies of other companies that had directors in common with Texaco, such as Gillette and Campbell Soup.[72] Many outraged Texaco customers contacted the company's chairman directly, vowing to destroy their Texaco credit cards,[73] and expressing their intent to stop doing business with the company.[74] This action was echoed by local and national efforts to organize protests and boycotts, and a number of prominent civil rights leaders urged consumers to boycott Texaco and to sell its stock.[75]

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[69] Kurt Eichenwald, *US. Inquiring Into Texaco's Actions in Suit,* N.Y. TIMES, Nov. 5, 1996, at D1.

[70] Alexander Cockburn, *Oil's Sweet Music; Racial Discrimination Lawsuit Against Texaco,* THE NATION, Dec. 9, 1996, at 9.

[71] The Philadelphia comptroller's city-pension board unanimously voted to sell all of its Texaco stock, totaling $5.6 million in value,and a Texas legislator called on his state to sell nearly $250 million of Texaco stock held by the state's retirement funds. *See* Lauren R. Rublin, *The Trader: Philadelphia Dumps Its Texaco Stock,* BARRON'S, Nov.25, 1996, at MW4-MW5; Sally Goll Beatty, *Texaco 's Image-Repair Effort Draws Fire,* WALL ST. J. Nov. 27, 1996, atB2. New York state Comptroller, H. Carl McCall, took the "wait and see" approach, reluctant to act too impetuously to sell the state's Common Retirement Fund's shares, valued at more than $130 million. *See* Demetrius Patterson, *Pressure on Texaco Continues,* CHI. SUN-TIMES, Nov. 10, 1996, at 2.

[72] Steven A. Holmes, *Size of Texaco Discrimination Settlement Could Encourage More Lawsuits,* N.Y. TIMES, Nov. 17, 1996, at 120. It appears that, to date, the study has not been completed and none of those companies has been sued for racial discrimination.

[73] *See* Allanna Sullivan, *Texaco Punishes Officials Over Racist Epithets,* WALL ST. J., Nov. 7, 1996, at A2.

[74] *See* Kurt Eichenwald, *Texaco Racial Scandal Claims Its First Executive Casualties,* N.Y. TIMES, Nov. 7, 1996, at Dl.

[75] For example, a group of San Diego clergy and business leaders comprised of executives from local banks, as well as ministers and rabbis, called for Texaco customers to cut their Texaco credit cards, and for a national boycott of Texaco products. *See* Kurt Eichenwald, *N.A.A.C.P. Wants US. Inquiry Into Texaco,* N.Y. TIMES, Nov. 8, 1996, at D16 (discussing planned boycotts).

A week after the initial story broke, the New York Times reported that an enhanced version of the tape recording indicated that no racial epithet had been used in the conversation, although the allegations of document tampering remained.[76] In a masterful bit of public relations, the plaintiffs' attorneys declared that the new version of the tapes did not change matters, and one day later major civil rights groups called for a national boycott, demanding that Texaco settle the lawsuit quickly, and establish an effective affirmative action plan to address its racist culture.[77] The threat of a national boycott prompted another sell-off of Texaco's stock, which declined 2% ($1.875) the day the boycott was announced.[78] The timing of the controversy surrounding the tapes added an additional sense of urgency to the protests, as California's anti-affirmative action Proposition 209 had been ratified by the voters only two weeks earlier and Texaco was quickly seen as an important test case for preserving corporate affirmative action.[79]

In what has now become a textbook reaction to negative litigation-related news, Texaco's chief executive officer, Peter Bijur reacted quickly and swiftly to defuse the public outrage that followed the disclosure of the tapes. Bijur, who had only been at the helm for several months when the news first broke, immediately condemned the acts of the managers that had been reported on the tape, fired two of them, and stripped two other retirees of their pension benefits.[80] He also appointed a prominent New York attorney to investigate the allegations

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[76] *See* Kurt Eichenwald, *Investigation Finds No Evidence of Slur on Texaco Tapes*, N.Y.TIMES, at A1, Nov. 11, 1996. Originally the tapes were reported to include a reference by the company's former treasurer to minority employees as "niggers", while the ehnanced version suggested that the comment actually referred to the soiling of Saint "Nicholas." *Id.* It is worth noting that the original version of the tapes were played widely on television and radio, and most listeners believed the word used was the racial epithet, as was also the case when Texaco's Chairman originally heard the tape. *Id.* The Texaco officials were later acquitted on criminal charges of obstruction of justice relating to the document destruction allegations. *See* Adam Bryant, *2 In Texaco Case Found Not Guilty*, N.Y.TIMES, May 13, 1998, at A1.

[77] *See* Kurt Eichenwald, *Calls Issued for Boycott of Texaco: Rights Leaders Press Company on Bias Case,* N.Y.TIMES, Nov. 13, 1996, at Dl.

[78] *See id.*

[79] *See* Kurt Eichenwald, *For Texaco, An Unsought Role on a Big Stage*, N.Y.TIMES, Nov. 14, 1996, at D1.

[80] *See* Kurt Eichenwald, *The First Casualties in Scandal at Texaco*, N.Y.TIMES, Nov. 7, 1996, at D1.

raised by the tapes, a former esteemed African-American judge, Leon Higginbotham, to investigate the corporate culture, and declared that the company would take additional actions to ensure that Texaco became a model employer.[81] On November 11, 1996, Texaco formally announced it was entering into settlement discussions, which had been stalled before the revelation of the tapes,[82] and on that day Texaco's stock gained $1.375[83] indicating shareholders viewed the potential settlement as softening the total financial impact the case might have on Texaco's future. As noted earlier, those gains were all but eliminated by the announcement of the boycott, though the stock rebounded the following day based on news reports that the settlement was progressing. Even though the tapes proved far less incriminating than originally anticipated, the pressure on the company remained intense and its potential liability for the lawsuit was now estimated to exceed $500 million.[84] Reports now indicated that Texaco had lagged behind its peers in hiring and promoting of African Americans,[85] and it was clear that Texaco was fast becoming a poster child for racism in corporate America.[86]

Several days later, on November 15, 1996, Texaco settled the lawsuit for an amount that was estimated to total $176.1 million, a record setting agreement that caused an additional significant drop in the stock price of nearly 3%.[87] Yet, continuing its schizophrenic ride, as reflected in Figure One the stock quickly recovered half of the lost value the next day and by November 25, the stock was trading at a price that was nearly 4% higher than its pre-tape level. An important industry journal later observed, "Five months after Texaco Inc. was plunged

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[81] *See id.*

[82] *See* Allanna Sullivan, *Texaco is Trying to Reach a Settlement in 1994 Racial-Discrimination Lawsuit,* WALL ST. J., Nov. 11, 1996, at A3.

[83] *Texaco Seeks to Settle: Stock Up,* N.Y. TIMES, Nov. 12, 1996, at D22.

[84] *See* Sullivan, *supra* note 82, at A3.

[85] *See id.* In 1995, only 3.75% of Texaco's officials and managers were black, compared to at least 6% at Amoco Corp., Chevron Corp., Exxon Corp., and Mobil Corp.

[86] *See* Kurt Eichenwald, *Calls Issued for Boycott of Texaco,* N.Y. TIMES, Nov. 13, 1996, at Dl.

[87] *See Texaco Stock Skids After Settlement Terms Disclosed,* N.Y. TIMES, Nov. 19, 1996, at D4. Texaco Inc. shares fell by $2.75, or 2.7 percent.

into its worse-ever public relations disaster . . . it appears to have emerged relatively unscathed. Between early November – when news of damaging evidence in a race discrimination suit broke – and the end of March, Texaco's stock skyrocketed 10% as oil prices slid 11%."[88] By the middle of 1997, less than a year after the tapes were revealed, Texaco's stock price reached an all-time high.[89]

The settlement agreement included a $115 million settlement fund to compensate the class members' monetary claims, attorneys fees and costs, and to cover the costs of administering the agreement. Texaco also agreed to increase the salaries of all class members by 11.34%, in addition to whatever salary increase the individual was entitled to under Texaco's normal review procedures, a process that was estimated to cost the company an additional $22 million.[90]

In addition to the direct monetary terms, the company agreed to establish a court-ordered Diversity Task Force to evaluate, revise, and develop the company's employment policies and practices to ensure fair hiring and promotion of minority workers.[91] The Task Force would be comprised of seven members, three appointed by the plaintiffs, three by Texaco, with the Chair being jointly selected by the two parties. The Task Force was intended to act as an ongoing oversight committee with a five-year term and was estimated to add an additional $35 million to the settlement.[92] As discussed in more detail below, the Task Force was seen as both an integral and innovative part of the settlement agreement, and is now becoming a standard feature in many of the large class action resolutions.[93] When the various aspects of the

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[88] *See* Courtney Chubb, *Texaco Outlook Shines Despite Race Problems*, 47 OIL DAILY 1, 1 (April 7, 1997).
[89] *See* Adam Bryant, *How Much Has Texaco Changed?* NEW YORK TIMES, Nov. 2, 1997, at B1.
[90] *See* Roberts v. Texaco, 979 F. Supp. at 191-92 & n.6.
[91] *See* Sullivan, *supra* note 82, at A3.
[92] Kurt Eichenwald, *Texaco to Make Record Payout in Bias Lawsuit,* N.Y. Times, Nov. 16, at 12.
[93] Both Mitsubishi and Coca-Cola have similar groups with many of the same individuals serving on two or more of the Task Forces.

settlement were added together, the settlement was valued at $170 million. While the settlement amount was unquestionably large, the amounts were to be paid out over a five-year period, and the company's 1996 revenue alone was $30 billion.[94] It is estimated that members of the plaintiff class averaged $63,000 as part of the settlement, and the lead plaintiffs received substantially higher awards for their participation in the case.[95] A little known fact about the settlement is that a substantial portion was covered by insurance.[96]

As a demonstration of its commitment to repairing its image, Texaco also agreed to implement changes that went beyond the terms of the settlement agreement. Texaco committed itself to increasing its minority employees by the year 2000 to 29 percent of the firm's total from its 1996 level of 23 percent, and to increase its employment of African Americans from 9 to 13%.[97] The firm also pledged to increase the promotion of women and minorities throughout the firm, and to increase its spending with Minority and Women Owned Businesses to $200 million a year from its previous annual level of $135 million.[98] To ensure the goals were met, the company agreed to tie a portion of managers' bonuses to meeting diversity goals, and also enrolled all of its employees in diversity training.[99] Texaco also established scholarship programs for minorities and women interested in engineering, increased its recruiting of women and minorities, and became the principal sponsor of Universoul Big Top Circus, the nation's only circus owned by African Americans.[100]

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94 *See Texaco to Pay $176.1 Million in Bias Suit,* Wall St. J.,Nov. 18, 1996, at A3.

95 *See Texaco Discrimination Settlement Endorsed*, N.Y.TIMES, May 26, 1997, at D6 (noting that the awards exceeded $63,000 on average for 1,348 salaried employees).

96 *See* Stephanie D. Esters, *Texaco's $115 Settlement of a Racial Discrimination Suit Will Have a Major Impact on Risk Managers and Insurers Worldwide*, NATIONAL UNDERWRITER AND PROPERTY CASUALTY J., at 1 (Dec. 6, 1996) ("Jim Sword, a Texaco representative, said the company would not discuss the details of its insurance coverage for the settlement, but said 'we feel we are adequately covered.'").

97 *See* Kurt Eichenwald, *Texaco Plans Wide Program for Minorities*, N.Y.TIMES, Dec. 19, 1996, at D3.

98 *Texaco Diversity plan Is Endorsed by Heads of Activist Groups,* WALL ST. J., Dec.19, 1996, at B11.

99 Kurt Eichenwald, *Texaco Plans Wide Program for Minorities: Rights Leaders Praise Deal and Drop Boycott,* N.Y. Times, Dec. 19, 1996, at Dl.

100 Adam Bryant, *How Much Has Texaco Changed?,* N.Y. Times, Nov. 2, 1997, at B1.

Attorneys' fees form a critical, and often controversial, part of any settlement agreement, and the Texaco case was no exception. The plaintiffs attorneys sought a fee award of 25% of the $115 settlement fund, or a total of more than $28 million.[101] Based on their detailed filings, the plaintiffs actual fees and expenses totaled just over $4 million with an expectation that they would spend an additional $700,000 administering the settlement, so the plaintiffs attorneys initially sought a fee award that was nearly six times their actual fees and costs.[102] The district court ultimately awarded $19.1 million in fees, or 5.5 times the actual fees, as well as another $1 million to be used for future services relating to the decree.[103]

Although the results of the lawsuit were undeniably impressive, the fee award, by any measure, was extraordinary, particularly given that most courts, at the direction of the Supreme Court, have severely limited the availability of fee enhancements in civil rights cases.[104] One of the interesting aspects of the fee award, which is not uncommon in class action settlements, is that there was no party to contest the application for fees. The fee award came directly out of the settlement fund, and therefore was of little interest to the defendants, and the plaintiff class was certainly in an awkward position to challenge the fees of the attorneys who had brought them such a significant settlement. Even so, as a percentage of the damage award, 16.5%, the fee award was substantially below (in fact, exactly half) the one-third contingency that remains common among plaintiff attorneys, and was also less than is common in other class action areas.[105]

2. Texaco's Progress.

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101 Roberts v. Texaco, 979 F. Supp. at 193.

102 The Court noted that the plaintiffs fees, "on the basis of current hourly rates", was $3.46 million, and the plaintiffs had expended $778,137.34 in costs. *See* Roberts v. Texaco, 979 F. Supp. at 194 & n.12.

103 Roberts v. Texaco, 979 F. Supp. at 197.

104 *See* City of Burlington v. Dague, 505 U.S. 557 (1992) (holding that a fee enhancement to reflect the contingent nature of the representation was impermissible).

105 *See* Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 285 (1998) ("One third is the 'standard' contingency fee figure.")

Although the company's settlement, and additional commitments, received widespread news coverage, its implementation of the planned changes has gone virtually unexamined. In this section, I will explore the fruits of the settlement, including changes Texaco has made in response to the lawsuit. I will suggest that much of the company's implementation involves a carefully structured public relations campaign that obscures how limited the company's changes have actually been – changes that have been implemented with little to no oversight. Moreover, although the plaintiff class clearly has benefited from the suit, others who were not parties to the suit – women, minority contractors and the diversity industry – have benefited at least as much, and in some instances far more than the plaintiff class.

Table Four [place about here], which is based on the reports issued by the Diversity Task Force ("Task Force"), indicates the percentages of female and minority employees, new hires and promotions. Between 1997 and 2000, the percentage of minority employees, which includes minority group members other than African Americans, increased from 20.3% to 22.4% of the total, although minorities represented 44.0% of Texaco's new hires in 1999.[106] African Americans constituted 10.0% of the employees in 1999, an increase from 9.1% in 1996 but below the modest goal that had been established by the company.[107] Although minorities received nearly 25% of the promotions in 1997, and 21.4% in 1998, the number of minority executives increased only 2% from 8.5% to 10.4%, and in 1998 the company failed to meet the executive level goal it had established, though it exceeded the goal the following year.

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[106] It is worth noting that this percentage falls below the 23% level Texaco claimed during the litigation.
[107] *See* Third Annual Report of the Equality Task Force for the Year Ending June 30, 2000, Exh. 3.

Women generally fared much better, accounting for nearly 50% of the new hires,[108] and 57.6% of the promotions in 1999, though the number of female executives increased by less than 1%, to 8.5% in 1998. In the year 2000, Texaco's efforts at diversifying its workforce stalled, as the percentage of new hires and promotions declined across the board as did the percentage of employees and executives. With one year remaining on the settlement agreement, Texaco has failed to meet any of its numerical goals and remains substantially behind most of the original goals it had set for itself.

An important aspect of the underlying case involved salary discrepencies for African-American employees, and part of the settlement agreement required Texaco to analyze its salary record to identify employees who were deserving of adjustments based on established objective criteria. In 1997, Texaco made 52 salary adjustments, among nearly 7,500 salaries that were reviewed, but nearly half of the adjustments went to white men and only three of the adjustments went to African-American employees.[109] The Task Force saw this as a sign that "salary-related issues are relatively limited at Texaco, and the adverse impact of salary-related issues is not disproportionately concentrated among minorities."[110] The Report failed to note, however, that the salary claim was a core component of the plaintiff's class action allegations.

As noted earlier, outside of the confines of the settlement agreement, Texaco developed a Minority and Women's Business Development Program ("MWBE") to increase its purchases and affiliations with women and minorities. In its annual reports, the Task Force has

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[108] Although women and minorities constituted a substantial portion of the new hires, both groups had higher separation rates than their white counterparts, and women left the firm at a significantly higher rate than their workplace representation. The First Task Force Report explained: "At the end of 1997 the percentage of voluntary separations of women was notably higher than their percentage representation in the Texaco workforce, namely 49.3% v. 34.4%." First Annual Report of the Equality Task Force for the Year Ending June 30, 1998, at 14. The separation rate for African-American employees was 13.0% compared to their 9.9% representation in the workforce. *Id.*

[109] *See* First Annual Report, at 8. Subsequent salary adjustments have been of similar size, though the Task Force has ceased reporting the racial or gender breakdown of those who received the adjustments. *See* Fourth Annual Report of the Equality Task Force for the Year Ending June 30, 2001, at 44.

[110] *Id.*

reported Texaco's expenditures in an inconsistent fashion, which makes it difficult to perform an accurate analysis. Nevertheless, Texaco's MWBE initiative appears to have been successful in channeling millions of dollars to women and minority-owned businesses and certainly the most successful aspect of Texaco's reforms. In 1998, Texaco spent a total of $230.2 million with MWBEs,[111] and in 1999, 8.8% of Texaco's discretionary expenditures went to MWBES for a total of $188 million.[112] This level of expenditures placed Texaco in the top quartile of Fortune 500 firms that participated in a purchasing study, and was nearly double the average expenditure of survey participants.[113] Women owned firms, however, received nearly twice as many contract funds as African-American owned companies.[114]

In addition to these tangible goals, the company also instituted many qualitative changes. Pursuant to the settlement agreement, the company instituted mandatory diversity training for all of its employees, with periodic refresher training, and the company also instituted formal mentoring programs, as well as an ombusman, more aggressive recruiting and seemingly dozens of task forces to address a wide range of workplace issues. The company also implemented basic management techniques such as formal job posting, which had previously been done on a more haphazard basis, along with more formal job descriptions and performance evaluations. Texaco, partly to meet its diversity plan obligations and partly to improve public relations, also, hired UniWorld Group, a black-owned advertising agency, to create ads that would boost the company's image among minorities, with an account valued at $25 million.[115]

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[111] *See* Second Annual Report, at 9.
[112] *See* Third Annual Report, at 15.
[113] *See id.*, at 15. The Survey was the 1999 Center for Advanced Purchasing Studies (CAPS) survey.
[114] *See* Third Annual Report, at 15. In 1999, African-American owned firms received $37.1 million, while women-owned firms obtained contracts valued at $89.8 million.
[115] Sally Goll Beatty, *Texaco Hires Black Agency to Create Ads,* Wall St. J., Nov. 21, 1996, at A3.

As previously mentioned, a cornerstone of the settlement involved the creation of the Diversity Task Force to oversee the implementation of the decree. The Task Force was widely heralded at the time, and has been copied in a number of other settlement agreements.[116] At the same time, it is often difficult to determine where the Task Force's loyalties or responsibilities lie, or what the Task Force has actually accomplished. For example, the annual reports issued pursuant to the Texaco decree could easily have been written by Texaco's public relations department. In assessing the company's hiring practices, the monitors continually praise Texaco even though the company repeatedly falls short of its modest goals. The following excerpt from the Second Annual reports provides a flavor of the nature of the reports:

> [T]he overall percentage of minorities in the workforce increased from 20.3% to 21.1% during 1998. This 0.8% point change is short of the 1.4% growth originally planned, but indicates that the Company made progress in 1998 despite the downturn in business and the overall workforce reduction . . . The percentage of women declined from 26.7% to 26.0% in 1998 . . . The decline in the percentage of women stemmed from the impact of reductions among service departments . . . that traditionally employ higher percentages of women than other components of Texaco.[117]

The last sentence appears particularly glaring to an experienced employment attorney because one would certainly want to know why the reductions had occurred more heavily in female-dominated job categories. Although there may be a valid explanation, the decline in female representation certainly merited a closer analysis. This statement is by no means an isolated incident, as each diversity report is replete with similar statements and excuses

[116] One of the plaintiffs' attorneys stated that "he believed the creation of a task force to oversee the company's employee relations programs was the most important aspect of the settlement." Sharon Walsh, *Texaco Settles Bias Suit: $176 Million Payment is Largest Ever*, WASH. POST, Nov. 16, 1996, at A1. A number of employer-oriented publications have urged the creation of such committees to provide internal company oversight. *See* Timothy S. Bland & Robert D. Hall, *Do the Math: Class Action Lawsuits*, 46 HRMAGAZINE 121, June 1, 2001.
[117] *See* Second Annual Report p. 34.

for Texaco's failure to meet its modest goals.[118] Moreover, after four years, the Task Force has yet to make a single substantial suggestion for how Texaco might change its practices but instead has opted to embrace whatever changes Texaco has adopted on its own accord.[119]

Beyond the monetary relief, which was substantial, it is difficult to conclude that Texaco has made much progress in reforming its culture, particularly when the focus is on its African-American employees rather than female employees or minority suppliers. Equally clear, once the monetary settlement was reached, the case was of little interest to the American public, either in the form of the media[120] or investors, or the attorneys who brought the case. Instead the attorneys turned the case over to a salaried Task Force that by all appearances works for Texaco rather than the plaintiffs. As I will discuss in more detail later, this model where what is important to the case is the money that changes hands rather than the structural reforms, has transformed civil rights class action litigation into something more akin to torts or consumer class actions, and has largely sapped the cases of their public nature.

B. Home Depot: The Recalcitrance Model.

If Texaco represents the public relations model of class action discrimination litigation, the cases against Home Depot provide a distinctly different model, one that I label the recalcitrance model. In this model, the company refuses to acknowledge any problems or potential liability even while agreeing to make substantial changes and doling out large sums of

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118 For example, the Task Force explains the company's failure to meet its modest goal of 10.4% African-American employees in 2000 as follows: "It has apparently become difficult to retain employees who have been with the Company only a few months or a few years due to uncertainty about the merger with Chevron and a "full employment" job market among college-educated professionals. In this regard, Texaco's successful activist approach to diversifying its workforce makes it particularly vulnerable to minority losses." Fourth Annual Report, Sec. XI, at 82-83.

119 In its Third Annual Report, the Task Force did suggest that Texaco extend the diversity training to supervisors, which it did during the following year. *See id.* at 76.

120 Since the case settled, only two articles have appeared in major publications. *See* Adam Bryant, *How Much Has Texaco Changed?* N.Y. TIMES, Nov. 21, 1997, at C1 (an early assessment of Texaco's efforts); Sherwood Ross, *Texaco Pumping Up its Diversity*, NEWSDAY, Dec. 28, 1998, at C2 (discussing Texaco's diversity efforts).

money in settlement.[121] A key component of this model is that the settlement largely ends the matter, as the company, and the plaintiffs, ignore the underlying allegations and prospects for change once the money has exchanged hands. An important difference with the Texaco-style case is that there is no pretense of a follow-up, whereas Texaco has devoted considerable effort and expense to create the appearance of transformation. The Home Depot case also differs from the Texaco litigation in that it never received anywhere near the national attention that was heaped on Texaco, as it was devoid of any sensational allegations but instead involved classic allegations of stereotypical sex discrimination. This allowed Home Depot to lay below the radar throughout the litigation, and as a result the case had no effect on the company's stock price even on a temporary basis.

1. The Case.

Home Depot is now the largest retailing chain of home improvement stores in the world, and during the 1990s was one of the fastest growing retailers in the United States. In March 1994, a sex discrimination class action lawsuit was filed against the company's Western Division, which included 17,000 female employees in 150 stores located in ten western states. The case, which also sought class action status on behalf of as many as 200,000 failed applicants, was filed in federal court in San Francisco and drew one of the few federal judges with plaintiff's class action experience.[122]

The magnitude of the case was compounded by the presence of the attorneys representing the plaintiff class. Indeed, perhaps the most significant fact of the case was that it

[121] Other cases have been premised on a similar model. For example, Lucky Store's, on which the Home Depot lawsuit was largely based, settled a sex discrimination case for $107 million in 1994 but today refuses to discuss its progress on female hiring or promotions. *See* Stuart Silverstein, *In Supermarkets Executive Department, A Lack of Variety*, L.A. TIMES, May 2, 1999, at C1.

[122] *See* Max Boot, *For Plaintiffs' Lawyers, There's No Place Like Home Depot*, WALL ST. J., Feb. 12, 1997, at A17 (noting that Judge Illston had been "a class-action lawyer who worked on cases with one of the [plaintiff's counsel]).

was brought by the law firm of Saperstein Goldstein, Demchak and Baller, the unquestioned champion of class action employment discrimination litigation. The Saperstein law firm has litigated more employment discrimination class action cases than any other firm in the country. The firm is known not only for the volume of its litigation but also for the success of its settlements, including record-breaking agreements with State Farm Insurance Company, and the race discrimination case against Denny's discussed in the next section. The firm has produced settlements of one hundred million dollars in a number of other cases, including a series of cases against grocery store chains on which the Home Depot case was patterned.[123] The firm's experience provides a sharp contrast to the attorneys who handled the Texaco case who had limited experience in employment discrimination class actions, and their litigation styles also proved quite different. While not beyond relying on the media, the Saperstein firm seems content to allow its cases to stay out of the media, as evidenced by the Home Depot case which never received front page status.

The case against Home Depot was a classic case of sex discrimination, with an equally time-tested defense. The primary allegation was that women were consigned to cashier positions, rather than being allowed to work on the sales floor.[124] Unlike the sales associates positions, the cashier positions rarely led to promotional opportunities, despite Home Depot's avowed philosophy of promoting from within. According to the plaintiff's experts, seventy percent of cashiers were women, while seventy percent of the salesforce were men, and 94% of

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[123] The law firm brought and successfully resolved cases against Albertsons, Lucky Stores, Publix and Safeway, most of which were premised on the notion that women were generally consigned to insignificant jobs in positions such as the delicatessen or bakery. The law firm has been profiled in a number of articles. *See, e.g.*, Benjamin A. Holden, *Doing Well: A Law Firm Shows Civil Rights Can Be A Lucrative Business*, WALL ST. J., June 10, 1993, at A1; Russell Mitchell, *The SWAT Team of Bias Litigation*, BUS. WK., Jan. 23, 1995, at 88.

[124] In the preliminary statement of the complaint, the plaintiffs stated: "In general, Home Depot reserves the most desirable work assignments and positions, and the training necessary to achieve them and to advance within the company, for males, including its male employees." *See* Frank v. Home Depot, No. 95-2182 WHO, Class Action Complaint for Injunctive and Declaratory Relief and Damages, at ¶ 2, p.2.

the store managers in the Western Division were men.[125] There were also allegations of discrimination in pay, training and harassment, but the core theory was that Home Depot did not believe women were sufficiently knowledgeable, or conveyed the proper image, to work on the sales floor. This was a theory borrowed directly from Saperstein's successful litigation against grocery stores where the companies routinely assigned women to the bakery department, rather than other departments such as produce or meat from which promotions were made.[126]

Just as the plaintiffs stated a classic case of sex discrimination, the defendants responded with a classic defense. The company sought to explain the workforce disparities by arguing that women were not interested in working on the sales floor, that it typically hired women to be cashiers because that is the job they applied for and the jobs for which they had previous experience.[127] Home Depot also claimed that it preferred to hire employees with construction trades experience in which there were very few women.[128] These are common defenses in sex discrimination claims, borrowing extensively from a well-known class action case from the 1980s against Sears, in which the company successfully argued that the lack of women in commission jobs was due to their lack of interest.[129]

Another potentially larger case was filed in Louisiana by a different set of attorneys. The Louisiana suit involved 22,000 female employees in 310 Home Depot stores east

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125 *See* Chris Roush, *Focus on Discrimination Suit, Both Sides Confident*, ATLANTA J. & CONST., Mar. 4, 1997, at 8F.

126 *See id.*

127 *See* Nicole Harris, *A Woman's Place is at the Cash Register*, BUS. WK., June 30, 1997, at 89; Rousch, *supra* note 125, at 8F.

128 *See* Allen R. Myerson, *Home Depot Pays $87.5 Million for Not Promoting Women*, N.Y. TIMES, Sept. 20, 1997, at A7.

129 *See* EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988). A more recent variant of this argument involved the litigation over the famed restaurant Joe's Stone Crab's refusal to hire women for its dining room staff, which the restaurant unsuccessfully claimed was due to women's lack of interest in the high-paying jobs. *See* EEOC v. Joe's Stone Crab, 220 F.3d 1263 (11th Cir. 2000). For an excellent discussion of the lack of interest defense see Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

of the Mississippi and attracted the attention of the Equal Employment Opportunity Commission, which sought to intervene in the case.[130] Despite the size of the case and the presence of the EEOC, the Louisiana case always paled in significance to the California case, and was ultimately settled for a fraction of the cost.[131]

Both cases were based principally on statistical analyses but because of the nature of sex discrimination the cases could be pursued on a theory of intentional discrimination. The plaintiffs' central contention was that women were intentionally consigned to deadend jobs because they were women, the kind of claim that had formed the basis of suits going back to the early years of Title VII. In this type of case, the statistics, such as the fact that 70% of women worked as cashiers, are used as evidence of the company's intent to assign women to particular undesirable jobs.[132] The attorneys also put together strong anecdotal evidence, particularly from one of the named plaintiffs who had been assigned to a cash register despite her prior experience in a lumberyard. Nevertheless, the core of the case depended on seven expert witnesses and extensive statistical analysis.[133] The plaintiffs also included claims of disparate impact discrimination but the suits centered on the intentional discrimination claims, thus raising the prospect of damages that could total $300,000 per plaintiff. Together the suits presented Home Depot with a potential liability of more than $100 billion.

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[130] *See* Oscar Suriz & Barbara Martinez, *EEOC to Join Suit Against Home Depot Alleging Bias Against Female Workers*, WALL ST. J., Mar. 25, 1997, at A3.

[131] In discussing the California case, the company's general counsel noted, "We spared no expense. It was the biggest case we ever had. Nothing here [in Atlanta, Home Dept's headquarters] was as important as what was happening in California." CHRIS ROUSH, INSIDE HOME DEPOT: HOW ONE COMPANY REVOLUTIONIZED AN INDUSTRY THROUGH THE RELENTLESS PURSUIT OF GROWTH 71 (1999).

[132] *See* EEOC v. Joe's Stone Crab, 220 F.3d 1263 (11th Cir. 2000) (discussing the theories)

[133] Both sides pulled out no stops when it came to hiring experts. The plaintiffs' experts included Drs. Susan Fiske and William Bielby, two of the best known experts on the nature of sex discrimination, as well as a statistician, a labor economist, an organizational psychologist, an expert in survey research, and an expert on organizational diversity. The defendants lined up an equally formidable roster of experts: Nobel Economist Gary Becker was assisted by two of the most famous labor economists, Edward Lazear and Sherwin Rosen, as well as an additional labor economist (in case they need a foursome for a game of bridge, I suppose), as well as the most renown defendant's counterpart to Dr. Fiske, Dr. Barbara Gutek, and three others. *See* Butler v. Home Depot, C.A. 94-4335 SI, Proposed Consent Decree, at 8-9.

Given the potential liability, one might expect Home Depot's stock price to have suffered, but throughout the litigation Home Depot's stock price continued its decade-long ascent. When the California case was filed, Home Depot's stock price declined but the loss was recovered the following day.[134] In its annual reports, Home Depot mentioned the suit only after it settled the case, and did so only in relation to the cost of the settlement.[135] One reporter noted, "With tens of millions likely at stake, Wall Street hasn't paid much attention to the case."[136]

Just three days before trial, and after a two-day mandatory mediation with an experienced defense attorney, the case settled.[137] The terms of the settlement included $65 million to the plaintiff class, with an additional $22.5 million for attorneys fees, or 25.7% of the settlement amount. The 6,569 members of the class who filed claims averaged recoveries of $9,683.[138] Although during the litigation, the applicant class was estimated to include as many as 200,000 individuals, only 336 applicant class-members were determined to have submitted valid claims.[139] The company also agreed to spend an additional $17 million to settle three other pending lawsuits, including the case that had been filed in Louisiana. To cover the costs of the suit, the company took a one-time pretax charge of $104 million, which reduced its earnings by

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[134] The suit was announced on September 20, 1994 and the stock price fell $1.25 that day. On the following day, the price rose $1.625. *See* Tom Walker, *Market Shares of Home Depot Rebound*, ATLANTA J. & CONST., Dec. 22, 1994, at E1.

[135] *See* Home Depot Annual Report 1997, at Note 9.

[136] *See* Roush, *supra* note 125, at 8F.

[137] Although it is difficult to form an opinion based on two isolated cases, it is worth noting that the mediations in Home Depot and Texaco were as different as the cases themselves. The portrayal of the new age federal mediator who worked on the Texaco case for months to no avail by one of the plaintiffs is both hilarious and a bit frightening given how much was at stake and his obvious ineffectiveness. *See* ROBERTS, *supra* note 64, at 147-49. In contrast, the mediator in the Home Depot case was respected by both sides and was able to fashion a settlement by getting the company to focus on its long-term business interests. *See* ROUSCH, *supra* note 131, at 76-77.

[138] *See* Joint Report to the Court Regarding the Status of the Implementation of the Consent Decree and the Distribution of the Settlement Fund, Butler v. Home Depot, C-94-4335, at 2.

[139] *Id.*

8 cents per share.[140] The settlement had no apparent effect on the stock price; on the first day of trading after the settlement was announced, Home Depot's shares gained 12.5 cents to reach $53.75 per share.

At the time of the settlement, the company had devoted approximately $5 million on its defense.[141] Assuming the plaintiffs' attorneys had incurred similar expenses, they received a substantial premium for their work, one that was quite similar to the enhancement provided in the Texaco case. One important difference, however, was that the fees in the Home Depot litigation were specified as part of the settlement, and were valued separately from the class settlement funds.

2. The Aftermath.

Another distinct contrast with the Texaco litigation, is that the essence of the Home Depot settlement was money. The agreement did not provide for any specified jobs for class members, nor did it require any specific goals but instead took the unusual step of allowing Home Depot to establish the goals it would seek to meet based on criteria set forth in the decree.[142] No Diversity Task Force was created, instead one of Home Depot's Board Members, an African-American female, was given the responsibility of overseeing the company's implementation of the settlement agreement.[143] Home Depot has also been reluctant to provide any information regarding the changes it has made, and the initial progress report required under

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140 *See* Jacqueline Bueno, *Home Depot's Agreement to Settle Suit Could Cut 3rd Quarter Earnings by 21%*, WALL ST. J., Sept. 22, 1997, at B18.
141 *See* text accompanying note 45, *supra*.
142 *See* Butler v. Home Depot, Consent Decree, ¶ XIII, D2, Civil No. 94-4335 SI (ND Cal. 1998). Essentially the benchmark was a typical applicant flow benchmark where the company agreed to hire female sales associates consistent with their representation in the qualified pool of applicants. *Id.* at 41. This does not, of course, account for the depressed pool of applicants that likely resulted from Home Depot's past performance.
143 *See* Cheryl Ann Lambert, *Corporate Boards Take on Bigger Role*, NAT'L HOME CENTER NEWS, April 13, 1998, at 38 ("Home Depot tapped its only African-American member, Dr. Johnetta Cole, to supervise implementation of the company's new hiring and promotions policies following the settlement of a class-action discrimination lawsuit."). Dr. Cole, who was Home Depot's first African-American Board Member, was appointed in 1995, one year after the class action suits were filed. *Id.*

the terms of the consent was filed under seal.[144] In contrast, Texaco's Diversity Task Force Reports are readily-available on their website.[145]

Based on the limited progress reports, as well as information Home Depot has made available in the form of a Social Responsibility Report, it appears that women have made small gains within the company's employment structure since the suit was settled. Companywide, the percentage of women employed at Home Depot did not increase at all between 1996-99, remaining at 35% every year.[146] The percentage of women working as Sales Associates in the Western Division, in contrast, increased from 16% to 22% between 1996 and March 2000, a 37.5% increase.[147] A similar increase was registered companywide, where the percentage of female Sales Associates rose from 14% to 20%.[148] The Joint Report filed with the Court also indicates that women accounted for 37% of the Sales Associates who were hired from an internal pool, while only 19% of those who were hired from an external pool were women.[149] But the report provides no comparative statistics to past practices, nor does it provide any indication of how these percentages translate to actual jobs or relate to the percentage of female applicants. Indeed, the report, which totals one and a half pages, is totally unilluminating, noting only that, "These percentages are several times higher than the percentage of women in these positions before the Consent Decree was approved."[150] However, it appears that these figures fall well short of the company's own benchmarks.

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144 A copy of the report is on file with the author.
145 The reports can be found at www.chevrontexaco.com/archive/diversity.
146 *See* 1999 Social Responsibility Report, available at http://homedepot.com/HDUS/EN_US/compinfo/community/social_responsibility.
147 *See* Second Joint Report to the Court Regarding the Status of the Implementation of the Consent Decree, Butler v. Home Depot, C-94-4335 SI, at 2.
148 *Id.*
149 *Id.*
150 *Id.* at 3.

According to the parties, the primary innovation the lawsuit has produced is that Home Depot now posts its jobs companywide, and also has created an in store-system that allows existing employees and applicants to bid for new jobs.[151] The system replaces what had been a decentralized process that allowed store managers to steer applicants to particular jobs, though managers continue to make the final selections based on a list of qualified applicants.[152] The company also instituted a process that requires managers to interview at least three candidates for every position, a system that has been in place for government hiring for at least forty years.[153] While the system may be an improvement over the company's past practices, it can hardly be defined as innovative. As was the case with Texaco, one significant result of the lawsuit is that the plaintiff class forged superior, but common, management techniques on a company that was steeped in inefficient old habits. The company, however, has maintained that it was planning to overhaul its practices even without the lawsuit, and contends that it simply did what it was planning to do, though within a slightly earlier timeframe.[154]

In a remarkable end to the litigation, the parties recently jointly moved to terminate the consent decree a full eighteen months early. The five page document supporting the motion offers only summary statistical information on the most recent six month period, and provides no indication of how women have fared overall in either sales positions or

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[151] The system is described in detail in Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 512-13 (2001) and Cora Daniels, *To Hire a Lumber Expert, Click Here*, FORTUNE, April 3, 2000, at 267.

[152] *Id.* at 513.

[153] The "rule of three", which requires employers to interview three candidates for every position, has been standard procedure for government employment for many years. *See, e.g.*, Lerna v. Bolger, 689 F.2d 589 (5th Cir. 1982) ("Pursuant to the 'rule of three' Gilbert was require to interview at least three applicants."); Sarabia v. Toledo Police Patrolman's Assoc., 601 F.2d 914, 915 (6th Cir. 1979) ("The Toledo Division of Police has traditionally followed the "rule of three" which requires that civil service commission certify the names of the three candidates standing highest on the eligibility list for each position to be filled.").

[154] One report noted that a few months before the settlement, "Home Depot had begun designing a computerized job application system and objective tests for applicants at its stores . . ." *See Facing Hammer, Home Depot Decides to Deal*, AMER. LAWYER, Nov. 1997, at 38. It is certainly possible that the lawsuit prompted these changes but it seems equally clear that the changes did not originate with the plaintiff class or its attorneys.

promotions.[155] Perhaps most revealing, the report acknowledges that Home Depot had failed to meet its benchmarks, which the parties sought to explain by noting the "dynamic nature of the qualified pool."[156] Despite these obvious limitations, the Court approved the motion shortly after it was filed.[157]

Although there are similarities with the Texaco case, the differences are far more pronounced. Home Depot has provided extremely limited information on its progress, and maintains that it never had any need for improvement. Nor has the company sought any recognition as a best place for Women to Work, though Fortune Magazine continues to list the company as one of the most admired retailers in the country.[158] This is in part due to the limited attention the lawsuit brought, which meant that Home Depot had less of a need to repair its public image than was the case for Texaco. It may also have something to do with the difference in the underlying basis for the suit. While there is a clear societal consensus against race discrimination, and no company wants to be labeled as racist, we have far less of a consensus regarding sex discrimination, particularly when that discrimination is based on common stereotypes, as was the case for Home Depot.[159] Women suing to gain access to the lumberyard

[155] *See* Joint Notice of Motion and Motion to Terminate Consent Decree, Butler vs. Home Depot, No. C-94-4335 SI, filed June 18, 2002 (on file with the author). The report notes that "For the most recent reporting period, from September 17, 2001 through March 17, 2002, 32% of the Home Depot associates registered in the AQP for sales positions were women, while 39.3% of the associates placed in sales positions were women. For the same period, 17.5% of the internal applicants for department supervisor in the AQP were female, while 23.8% of the persons selected to be department supervisors were female. While 19.9% of the AQP for assistant store manager were women, 26.7% of the people selected were female." *Id.* at 4. The report defines the AQP as the "Adjusted Qualified Pool," which reflects unspecified adjustments to the actual applicant pool. *Id.*

[156] *Id.* at 5.

[157] *See* Bloomberg News, *Hiring Supervision Lifted,* L.A. TIMES, June 25, 2002, at C4 (noting decree was lifted more than a year early).

[158] *See* Matthew Boyle, *America's Most Admired Companies*, FORTUNE, Mar. 4, 2002, at 70 (ranking Home Depot first in its industry and 8th overall).

[159] *See* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?* 61 LA L. REV. 555, 569 (2001) ("Despite the fact that two-income families now comprise the majority of American families, as a society we remain ambivalent over the role of working women.").

feels very different from a case based on intentional race discrimination, particularly when that discrimination includes racial epithets.

C. Denny's: The Reform Model.

The final case study is not an employment discrimination case but rather involves a number of lawsuits brought pursuant to the federal public accommodations statute, known as Title II.[160] Although the allegations concerned discrimination in service, the reforms put in place by Denny's replicate the aspirations of the employment discrimination suits already discussed. And indeed, as analyzed in detail below, Denny's provides the best example of what I call the "reform model," as the company implemented wide-ranging and meaningful changes in response to a series of high-profile lawsuits surrounding its discriminatory service policies. At the same time, as was also true of the Texaco case, many of the most meaningful changes occurred outside of the context of the $54 million agreements that ended the class action litigation and instead arose as a result of an agreement with a national Civil Rights group that was intended to reshape its business practices. The cases against Denny's, thus provide, some insight into the way actual reform can be accomplished.

1. The Cases.

The allegations against Denny's originally arose in 1991 when a number of African-American college students in Northern California, returning from a local NAACP conference, alleged that they were required to pay a cover charge and to prepay for their meals late at night, while white customers were able to eat without either a cover charge or prepayment.[161] This allegation received little national attention, though it did provoke a Justice Department investigation that ultimately unearthed more than 4,300 complaints nationwide.[162] Well-known

[160] 42 U.S.C. § 2000a. Editorial note: To the extent editors would prefer to have an employment discrimination case, I can readily substitute a case study of Shoney's. I have used Denny's because it is more familiar and for all intents and purposes proceeded like an employment case.
[161] *See* United States v. TW Services, Inc., 1993 U.S. Dist. LEXIS 7882, 7883 (N.D. Cal. 1993).
[162] *Justice Department to Test Chain Denny's Vows to Avoid Bias,* CLEVELAND PLAIN DEALER, May 5, 1994, at 6C.

civil rights firms, including the Saperstein firm, undertook representation of the class action in California and sought class members through various publication notices. The Justice Department, which has no authority under the public accommodations statute to seek monetary relief, entered into a consent decree with Denny's in April 1993 that called for a variety of reforms and nondiscriminatory pledges.[163]

On the very same day the Justice Department decree was entered, six African-American Secret Service officers – dressed in their uniforms and on their way to guard President Clinton at the Naval Academy – were forced to wait to order at a Denny's in Anapolis, Maryland while the white officers traveling with them were served rapidly, including second helpings. The African-American officers were not served before they had to leave for their detail.[164] This case attracted national headlines and thrust Denny's firmly into the limelight as a prime example of how racism remained alive and well in corporate America. From there, the allegations mounted, including claims of discrimination by a federal judge and his wife, as well as a children's choir named after Martin Luther King, Jr. that was refused sit-down service at a Virginia restaurant. The Maryland case was transformed into a nationwide class action for claims that arose outside of California and was led by the Washington Lawyers' Committee for Civil Rights, assisted by a prominent Washington law firm. By June 1994, 15 major public accommodations race-bias suits had been filed against Denny's, including the two class-action suits described above.[165]

These allegations came at a precarious financial juncture for Denny's, whose parent company was straddled with huge debt accumulated from a leveraged buy-out that had been fashionable in the late 80s.[166] At the time of the lawsuit, Denny's was the largest family-dining chain in the country, serving more than one million customers a year at 1,400 restaurants,

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[163] *See* United States v. TW Services, Inc., 1993 U.S. Dist. LEXIS 7882 (N.D. Ca. 1993). The decree required training, compliance testing, the creation of a civil rights monitor and the inclusion of minorities in company advertisements.

[164] *See* JIM ADAMSON, THE DENNY'S STORY: HOW A COMPANY IN CRISIS RESURRECTED ITS GOOD NAME 8 (2000) (describing the incident).

[165] *See* Benjamin A. Holden, *Denny's Chain Settles Suits By Minorities,* WALL ST. J., May 24, 1994, at A3.

[166] *See* Faye Rice, *Denny's Changes Its Spots,* FORTUNE, May 13, 1996, at 133 et seq.

including one third that were franchise-owned. In addition to its flagship Denny's chain, the parent company owned a number of other restaurant chains, including Hardees, El Pollo Loco, Coco's and Carrow's, most of which were struggling financially. Denny's was, in fact, the company's most profitable restaurant business, bringing in 39% of the company's income. In 1993, customer traffic at Denny's fell 4.1% largely as a result of the racial discrimination allegations lodged against the company.[167] That same year, Denny's parent, Flagstar, reported a staggering loss of $1.72 billion, or $40.93 a share, on revenue of $3.97 billion.[168] Given its severe financial troubles, it is difficult to assess the effect the lawsuits may have had on the company's stock price, and indeed, the stock price appears not to have been affected by either the filings, or the settlement, of the lawsuits.[169]

Two other important facts contributed to Denny's desire to resolve the suits and reform its image. Perhaps the most critical fact was that Denny's Chairman, Jerry Richardson, a former football star in the 1950s, was seeking to establish a new NFL franchise in Charlotte, North Carolina, and the bias allegations were seen as a threat to his efforts.[170] Additionally, the lawsuits arose during the Rodney King trials, a time when the country was acutely aware of the persistence of a racial divide many had wished away years earlier. As a result, the company moved quickly to stem the damage from the mountain of allegations and did so on a number of fronts.

Rather than settling the cases, the company's first move was to begin negotiating an agreement with the National Association for the Advancement of Colored People ("NAACP"),

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[167] *See* Rice, *supra* note 166, at 133 (Denny's operating income fell 30% in 1993, the year of the worst racial incidents).
[168] *See* George White, *Flagstar to Sell or Close as Many as 180 Denny's and El Pollo Locos*, L.A. TIMES, Jan. 25, 1994, at D1.
[169] One newspaper analyst concluded, "The negative publicity hasn't hurt Denny's revenues or Flagstar's stock price, which has strengthened in recent months and is currently trading in the $11-$12 range on the Nasdaq." Jim Clarke, *Denny's Takes Steps to Overcome Racism*, ST. PETERSBURG TIMES, Oct. 18, 1993, at 8.
[170] *See* Benjamin A. Holden, *Parent of Denny's Restaurants, NAACP Agree on Plan to Boost Minorities Role*, WALL ST. J., July 1, 1993, at A3 (noting that the discrimination suits had "greatly damaged Mr. Richardson's chances" to obtain a football franchise).

that would conspicuously and tangibly promote minority interests. The NAACP was not a party to any of the lawsuits but for a decade had encouraged corporations to enter into voluntary "Fair Share" agreements as a way of demonstrating a company's commitment to diversity.[171] Negotiations over the NAACP Fair Share agreement began shortly after the original complaints were filed and nearly 18 months before they were finally settled.[172] There was, in fact, some sense among the parties to the lawsuits that Denny's sought to use the Fair Share agreement, along with the nonmonetary Justice Department consent decree, to fend off further settlement negotiations.[173]

The terms of the NAACP Fair Share agreement ("NAACP Pact"), signed on July 1, 1993, surpassed all of the previous 65 agreements the NAACP had negotiated.[174] The NAACP Pact was said to be worth more than $1 billion to minority businesses and interests, and established specific goals and time frames, for the company to meet.[175] As part of the agreement, Flagstar promised to maintain employment of African Americans at the then current level of 20% or higher; to double the number of minority-owned restaurants by 1997, to hire 325 more African-American restaurant and corporate managers earning annual salaries in excess of $42,000, and to increase purchases from minority-owned firms from 2% to 12% of its discretionary budget by the year 2000.[176] At the time of the agreement, only 54 of Denny's 1,485 (3.7%) restaurants were minority-owned, and only one of those was owned by an African

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171 *See* ADAMSON, *supra* note 164, at 56.
172 *See* Paul W. Valentine, *Denny's Signs Agreement With NAACP, Estimated $1 Billion Pact to Increase Minority .10/35,* WASH. POST, July 2, 1993, at Al.
173 *See* Holden, *supra* note 170, at A3 (explaining that plaintiffs' attorney John Relman "was skeptical of the agreement.").
174 *See* Andrea Adelson, *Denny s Parent Vows Larger Role for Blacks,* N.Y. Times, July 2, 1993, at D2. NAACP director Benjamin F. Chavis Jr. observed, "In my 30 years in the civil rights movement, I've never seen the commitments made by this CEO [Flagstar's Jim Adamson] today."
175 Valentine, *supra* note 172, at Al.
176 *See* Sam Fulwood III, *Denny's Signs Pact Assuring Minority Hires,* L.A. TIMES, July 2, 1993, at Dl. Under the agreement, the 325 new management positions will come with average annual salaries of $42,000; and Flagstar will spend 10% of its marketing budget with minority-owned media, 12% of its purchasing budget with minority firms, and 15% of its professional services— such as banking, accounting, and legal services— with minority firms. *See* Rice, *supra* note 166, at 133 (Flagstar had only 2 minority-owned firms among its network of some 20 suppliers in 1992).

American.[177] A less savory part of the agreement was the NAACP's explicit support for Jerry Richardson's bid to obtain an NFL franchise.[178] As will be detailed shortly, Denny's has met or exceeded all of the goals established in the Fair Share agreement, including the acquisition of an NFL franchise.

While the company was negotiating the Fair Share pact, the litigation was proceeding and the evidence was mounting, including evidence that discrimination against African Americans had been known, tolerated and perhaps encouraged by the corporate office.[179] Nevertheless, the truth of the allegations began to fade in importance as Denny's quickly became the nation's icon of racial bigotry, an image that was likely to further erode its financial condition given that members of minority groups made up approximately ten percent of its customer base, accounting for more than $150 million in annual revenue.[180]

Shortly after the Fair Share agreement was signed, the company moved to settle the lawsuits, focusing on the class action cases that had drawn the most attention. On May 23, 1994, after a federal judge had consolidated several of the cases, the two class actions, and one other complaint, were settled for a total of $54.4 million, the highest settlement ever obtained in a public accommodations case.[181] The settlement included $34.8 million for the California case,

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[177] *See New Recipe for Denny's*, L.A. TIMES, July 3, 1993, at B7.

[178] *See* Fulwood III, *supra* note 176, at D1 (after signing the agreement "NAACP officials announced their support for Richardson's efforts to win a National Football League expansion franchise for the Charlotte Panthers.").

[179] *See* Stephen Labaton, *Denny's Gets a Bill for the Side Orders of Bigotry,* N.Y. TIMES, May 29, 1994, at D4. Lawyers for the black customers in the class action suit said that the evidence they began to uncover before settlement talks ended the brief discovery period included: (1) that corporate headquarters ignored frequent customer complaints; (2) sworn testimony describing instances in which managers taught restaurant operators how to discourage black customers, and employees were given "strategies" to avoid "blackouts"; (3) some former managers were told about a company policy requiring that certain customers pay cover charges or pre-pay their meals in advance; (4) in Delaware and Pennsylvania Denny's, managers kept logs that described when too many black customers came in; (5) employees were told to seat blacks where they could not easily be seen by other customers and away from exits because they had a tendency to walk out without paying; (6) testimony from a former assistant manager in San Jose, California who said she got the clear impression that the district manager was being pressured by his supervisor to control and limit black clientele. *See id.*

[180] *See* Stephen Labaton, *Denny's Restaurants to Pay $54 Million in Race Bias Suits*, N.Y. TIMES, May 25, 1994, at A1 ("Some executives said they feared the publicity had begun to discourage blacks, who represent 10 percent of the chain's customers.").

[181] *See* Jeff Leeds, *Denny's Restaurants Settle Bias Suits for $54 Million*, L.A. TIMES, May 25, 1994, at A1.

including $6.8 million (19.5%) in attorneys' fees, while the nationwide class-action filed by the six secret service agents received a monetary award of $19.6 million, including $1.9 million (9.6%) in attorneys' fees.[182] When the settlements were distributed approximately a year later, more than 290,000 individuals received checks for either $177.71 or $132.28, depending on which case they were part of.[183]

The consent decrees, along with the separate decree entered into with the Justice Department, concentrated on the public accommodations' aspect of the cases, and required a variety of non-discrimination language and training, as well as a requirement that thirty-percent of Denny's promotional materials include individuals who were identifiably non-white.[184] The decrees also required the creation of an Office of the Civil Rights Monitor ("OCRM") to serve as the legal entity responsible for ensuring that Denny's complied with the consent decree. The OCRM was empowered to send testers into Denny's restaurants to monitor for discriminatory behavior in violation of the consent decree, to receive and act on all complaints concerning behavior at Denny's from anywhere in the country, and to have the authority to require Denny's to cooperate in any of OCRM's discretionary investigations.[185]

2. Denny's Reform Efforts.

The company moved quickly to comply with the terms of the agreements, and to repair its broken image. In 1994, Flagstar made 124 new minority hires in management and executive positions — 103 of which were African American — and named its first African-American member to its board of directors, as well as its first African-American executive, the Vice

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[182] *Id.* at A8.

[183] *See Denny's Paying Office Bias Suits*, DALLAS MORNING NEWS, Dec. 12, 1995 at 17D. The $177.71 checks were distributed to members of the California class, whereas the $132.28 checks went to members of the nationwide class. *Id.*

[184] 25% of persons in these ads and promotional materials had to be specifically African American. The decrees also required Denny's to compute the number of seconds that non-white faces appeared on the screen, with the additional proviso that 25% of the time that any face appeared on screen had to principally feature African Americans as employees or customers.

[185] *See* ADAMSON, *supra* note 164, at 52-3. The consent decree originally entered into with the Justice Department contained most of the same terms, adding little new other than the monetary relief. However, the scope of the private suits greatly expanded the jurisdiction of the Civil Rights Monitor.

President for Human Resources. Denny's increased the African Americans in its management ranks by 56% over the previous year, and by the end of 1994, 13% of its employees were African American. Flagstar also entered into new contracts with 19 minority suppliers, including 14 black-owned firms, representing $21.3 million worth of business a year, equivalent to 3.5% of the corporation's purchases. The company negotiated a number of Denny's franchise agreements that would ultimately result in seven new black owners operating 32 restaurants, although by the end of the year the company had actually closed its only African-American-owned franchise.[186] The company also exceeded its goal of $100,000 in charitable contributions to civil rights groups, and established a pilot program at South Seattle Community college to provide training for minority students in a culinary-arts program.[187]

In 1995, Denny's increased its percentage of African-American managers and executives from 7 to 12%, and its minority contracts increased five-fold over 1993 levels to $50 million.[188] The same year, Denny's initiated a diversity training program for all of its 50,000 Denny's employees to be completed within one year, and sought to improve its image through a $5 million series of television and print advertisements intended to convey a message welcoming back their African-American clientele. Along the same lines, the company became a primary sponsor for Soul Train, contributing $500,000 for its 25th anniversary television special,[189] as well as the Harlem Globetrotter basketball team.[190] Flagstar also announced a major leadership

[186] *See* Ann LoLordo, *Denny's Improving Slowly on Minority Relations,* BALTIMORE SUN, Sept. 20, 1994, at A1. While the Fair Share agreement arranged for the NAACP and minority organizations to help the company recruit new hires and suppliers for the corporation, the company won most of the contracts through their own efforts and persistence.

[187] *See* Aly Colon, *Denny's Acts on Pledge Against Bias — SSCC is Site of Pilot Program,* SEATTLE TIMES, Aug. 17, 1994, at Dl.

[188] *See Denny's Begins New Era; Settlement Payout Closes Discrimination Chapter,* L.A. TIMES, Dec. 11, 1995, at C8.

[189] Del Jones, *Serving a New Image, Denny's Strives to Eliminate Racist Elements,* U.S.A. Today, Nov. 2, 1995, at lA.

[190] *See* Roger Thurow, *Bouncing Back: A Sports Icon Regains Its Following By Using the Moves of the Past*, WALL STREET J., Jan. 21, 1998, at A1 (noting that "Denny's . . . began promoting the Globetrotters three years ago.").

change, as Jerry Richardson resigned as Chairman of the corporation to devote all of his time to the ownership of his new football franchise, the Charlotte Panthers.[191]

Richardson was replaced by Jim Adamson, who has been widely acclaimed for moving the company forward on diversity issues. His motto was simple and repeated wherever he went, "If you discriminate, I will fire you." To make good on his promise, the company began to include provisions in its franchisee contracts that provided for termination if the franchisee "put the [Denny's] brand at risk." By November 2, 1995, Denny's had dropped a California franchisee for customer discrimination, and had also fired a number of its managers, including the manager of the restaurant that had denied service to the Secret Service agents.[192] In contrast to the stick of termination, Adamson provided a carrot to Denny's management by tying 20% of Denny's managers' bonuses to the reduction in the number of discrimination complaints the company received.[193]

In 1996, Denny's secured additional franchise agreements, bringing the total of African-American owned frachises to 27, out of 653 franchises nationwide (4.1%).[194] At the close of 1996, minority-purchasing contracts exceeded $80 million — an eight- fold increase since 1993.[195] As a result of Denny's progress, the NAACP named Jim Adamson its 1996 "CEO of the Year."[196] The award, however, was perhaps bittersweet as it arrived while the company was in the midst of its most dire financial straits, including a Chapter 11 filing for bankruptcy protection and reorganization under the name Advantica.[197]

Despite its financial difficulties, Denny's remained steadfast in its commitment to meeting the terms of the Fair Share agreement. In 1998, when Fortune magazine published its

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191 *See Flagstar Chief Quits Restaurant Chain to Focus Full Time on New NFL Team*, ATLANTA J. & CONST., May 3, 1995, at 1F.

192 *See* Jones, *supra* note 189, at 8A.

193 *Id.*

194 *See* Harris, *supra* note 176, at 166. See also *Denny's Philosophy, Diversity Initiatives* (visited October 21, 2001) <http://www.dennys.com/who/philosophy main.html>.

195 *Denny's Contributes $625,000 to United Negro Fund,* PR Newswire, Jan. 16, 1997.

196 *Denny's Philosophy, Diversity Initiatives* (visited October 21, 2001) <http://www.dennys.com/who/philosophy main.html>.

197 *See* Anne Faircloth, *Guess Who's Coining to Denny's,* Fortune, Aug. 3, 1998, at 108.

first list of the "Best 50 Companies for Asians, Blacks, and Hispanics," to work, Advantica placed second – a remarkable turnaround from just five years earlier when Denny's had been the national symbol of corporate racism. [198] At the time of the report, nearly 33.3% of Advantica officers and managers were minorities, and 35% of the 748 Denny's franchises nationwide were minority-owned, of which 109 franchises, or 14.5%, were African-American owned.[199] Yet, the diversity initiatives were not enough to salvage the company's financial condition, and in the middle of a a booming stock market, Advantica's stock price dropped 69%.[200] The company dropped to sixth on the Fortune list in 1999, but by 2000 it had climbed to the top of the list, where it remained in 2001.[201] It is worth noting that, despite its efforts, Texaco has never made the Fortune list.

The company's continued transfomation can be seen in the latest statistics. Four of its eleven board of directors are minorities, as are 31.1% of its officials and managers and 48.0% of its employees, with the largest share consisting of Latinos who make up about a third of the workforce while African Americans comprise 11%.[202] Approximately 19% of the company's contracts for services went to minority-owned businesses,[203] and 37% of all Denny's franchise restaurants are now owned by minority franchisees,[204]<http://www.dennys.com/who/philosophymain.html>. Collectively, 102 minority franchisees owned 321 Denny's restaurants; 123 of these were owned by African Americans. with 123 of these franchises owned by African Americans. Two companies, however, own a majority of those franchises.[205]

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198 *Id.*.
199 Pamela Yip, *Olajuwon Group Buys Denny's in 12 States,* HOUSTON CHRONICLE, Mar. 28, 1998, at I.
200 John H. Christy, *The Forbes 500s: Wall Street,* FORBES, Apr. 21, 1997, at 286.
201 *See* Christine Y. Chen, et al., *America's 50 Best Companies for Minorities/Diversity Leaders*, FORTUNE MAGAZINE, July 10, 2000, at 180; Fabiana Esposito, *America's 50 Best Companies for Minorities*, FORTUNE MAGAZINE, July 9, 2001, at 114.
202 Esposito, *supra* note 201, at 118.
203 *See* Toni Heinzl, *Denny's Embraces Diversity Discrimination Lawsuits Triggered a Transformation at the Restaurant Chain,* OMAHA WORLD-HERALD, Nov. 16, 1999, at 9.
204 *Denny's Philosophy, Diversity initiatives* (visited October 21, 2001).
205 Toni Heinzl, *supra* note 203, at 9; Pamela Yip, *Olajuwon Group Buys Denny's in 12 States*, HOUSTON CHRONICLE, Mar. 28, 1998, at A1; Jay Matthews, *Denny's Says Black Firm Will Own 47 Outlets*, Wash. Post, Nov. 9, 1994, at B1.

All of these figures exceed the goals originally established by the Fair Share agreement, and have garnered the company a bevy of awards beyond the recognition from Fortune magazine.[206]

The story, however, does not yet have a happy ending, as Denny's continues to struggle financially and has not been able to shake its tattered image. Despite record sales of more than $2 billion, the company was recently delisted by the Over-the-Counter exchange where it had previously traded, and now trades for about $1 on the Over-the-Counter Bulletin Board.[207] Nor has the company's transformation stemmed the tide of lawsuits, as Denny's remains plagued by suits alleging discriminatory service, including a high-profile lawsuit filed by Syracuse University students that, although ultimately dismissed, generated a new round of adverse publicity.[208] It would certainly be too much to suggest that the company's diversity efforts caused, or even contributed, to its financial slide, but it appears that, at least in this instance, although diversity may have been good for business it has not been good enough.

IV. THE BENEFITS AND EFFECTS OF CLASS ACTION LITIGATION.

The case studies together with the statistical study offer important insights into how class action employment discrimination has changed, particularly over the last decade as the litigation has become more like a common tort and less like a traditional civil rights action. As discussed in more detail below, this is perhaps most evident in the relief that is now commonly afforded the plaintiff class, where monetary damages, often at minimal levels when calculated on an individual basis, constitute the primary, and frequently the only, relief intended to compensate for past discrimination. The lawsuits rarely require corporations to modify their existing practices, and whatever changes occur tend to be a product of the corporation's own interests,

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206 For example, Working Women's Magazine has ranked Advantica as the 8th best place for women to work in the country. *Denny's Philosophy, Diversity Initiatives* (visited October 21, 2001) <http://www.dennys.com/who/philosophymain.html>.

207 Advantica now trades under the ticker "DINE" and current prices can be accessed on yahoo.finance.com. Advantica has sold off many of its poorer performing chains and has substantially increased the number of stores that are franchise-owned. *See* Advantica 2000 Annual Report at 2-3.

208 *See* Lizardo v. Denny's Inc., 270 F.3d 94 (2d Cir. 2001) (upholding dismissal of Syracuse civil rights suit); Laroche v. Denny's Inc., 62 F. Supp. 2d 1375 (S.D. Fla. 1999) (finding that Denny's engaged in discrimination when it told a group of African-American correctional officers that it was out of food).

often driven by public relations concerns rather than the requirements of a consent decree. This is likely one reason why neither the lawsuits nor the settlements tend to affect shareholder value in any meaningful way.

Even though the nature of the litigation has substantially changed, this study suggests that the nature of discrimination identified in the subset of class action cases studied here has surprisingly stayed much the same. At least with respect to systemic discrimination challenged by class action litigation, the kind of discrimination that is most likely to catch th\e public eye remains overt racial discrimination, along the lines of Texaco and Denny's, the kind of discrimination that resembles old line discrimination that we would like to believe is part of our past rather than our present. The gender discrimination cases evince a similar pattern by continuing to focus on discriminatory assignments of women to undesirable jobs based on stereotypical perceptions of their interests, the very kind of discrimination that has been at the heart of sex discrimination litigation for the past thirty years.[209]

These insights raise an important question regarding the social utility of the class action litigation. Discrimination litigation has always had the twin purposes of remedying past discrimination while deterring future discrimination, and in this section I will explore both of these issues by analyzing the effect the lawsuits have had on corporations and on the plaintiff classes, as well as the role played by the other actors in the process, namely the attorneys, the new diversity task forces and the government. I will suggest that the turn to large damage awards as the primary remedial tool has diminished both the public nature and the efficacy of the litigation. In the last section, I will discuss some possible reforms that might return a public

[209] The case against Sears, on which many of these cases were based, initially began in 1973. *See* ALICE KESSLER-HARRIS, IN THE PURSUIT OF EQUITY: WOMEN, MEN AND THE QUEST FOR ECONOMIC CITIZENSHIP IN THE TWENTIETH CENTURY 292 (2001). For some early discussions of the role sex-stereotyping and sex segregation had on women's opportunities see FRANCINE D. BLAU, EQUAL PAY IN THE OFFICE 100 (1978) ("Predominantly female occupations may be characterized by fewer possibilities for promotion and more numerous ports of entry than comparable male jobs . . . "); CYNTHIA FUCHS EPSTEIN, WOMAN'S PLACE: OPTIONS AND LIMITS IN PROFESSIONAL CAREERS 152-66 (1970) (sex typing in occupations); *Ruth Bader Ginsburg, Sex Equality and the Constitution*, 52 TULANE L. REV. 451 (1978) (describing role sex stereotypes in development of Supreme Court jurisprudence).

interest dimension to the class action litigation with an eye toward serving the underlying purposes of the law. These reforms will include raising the damages to increase the deterrent effect of antidiscrimination litigation and providing a monitoring function to ensure that the settlement serves the interests of the class and is implemented faithfully.

A. The Plaintiffs: Do they Come Out Ahead?

The benefits that accrue to the plaintiff class comprise an important measure of the effect of class action litigation. The basic remedial principle underlying Title VII has always been to place the injured party in the position she would have been in absent the discrimination.[210] Prior to the passage of the Civil Rights Act of 1991, when damages were not available for claims filed under Title VII, successful class action plaintiffs were typically afforded some monetary relief in the form of their lost wages, as well as other injunctive relief designed to alter the employer's discriminatory practices.[211] Many of the pre-1991 Act cases involved discriminatory tests, so often the settlements required the employer to design new tests that had less of a discriminatory impact.[212] The remedial relief might also provide a preference to victims of discrimination in future hiring or promotions, so as to place them in the position they would have been in had they not been discriminated against, and goals and timetables were also common in settlement agreements.[213] In these cases, relief was generally reserved to individuals who could establish a valid claim of discrimination based on a defined procedure. Determining who was eligible for

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[210] *See* Ford Motor Co. v. EEOC, 458 U.S. 219, 232 (1982) (Title VII "aims 'to make the victims of unlawful discrimination whole' by restoring them . . . to a position where they would have been were it not for the unlawful discrimination."); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (describing make-whole remedy).

[211] For a discussion of the remedies that were traditionally available see Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457 (1992).

[212] See, e.g., Firefighters Institute for Racial Equality v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980) (invalidating promotional examination); Freeman v. City of Philadelphia, 751 F. Supp. 509, 512 (E.D. Pa. 1990) ("The Consent Order obligates the City to solicit and evaluate proposals for a new police officer recruit exam which minimizes adverse impact on nonwhites . . .").

[213] *See, e.g.*, Donaghy v. City of Omaha, 933 F.2d 1448 (8th Cir. 1991) (discussing hiring goals of 1980 consent decree); Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615 (9th Cir. 1982) (promotions goals and timetables); United States v. Alexandria, 614 F.2d 1358, 1368 (5th Cir. 1980)(requiring jobs performance goals); Kirkland v. N.Y. State Dept. of Corrections, 711 F.2d 1117 (2d Cir. 1983) (providing race conscious promotional relief)..

the relief has always been a burdensome task, and at least with respect to monetary relief, the burden on the party seeking relief has often been minimal, such as establishing that he or she had applied during a particular time period and was not disqualified from the position for some nondiscriminatory reason. The standards, however, were often more stringent for obtaining a job or promotion.[214]

1. Structural Reforms in the Post-Civil Rights Act of 1991 Era.

The post-Civil Rights Act of 1991 cases have a distinctly different focus. Monetary relief now forms the core of the remedial package, and beyond the monetary relief there is little attempt to remedy past discrimination. This is true of the cases studied earlier: neither Texaco nor Home Depot offered any specific jobs to members of the plaintiff class nor did either case require any particular changes in the employers' practices.[215] Instead, the companies themselves, and in Texaco under the auspices of its Diversity Task Force, were charged with studying their practices to determine what changes were necessary. In both cases, the companies ultimately hired more women and minorities but there was no effort to offer jobs to those who might have been discriminated against in the past, nor was there any specific effort to make up for the past years of discriminatory hiring or promotions. At most the companies appeared to stop discriminating without remedying, other than through monetary relief, their past discrimination.[216] Other lawsuits demonstrate similar characteristics. The case against Coca-Cola is modeled on the Texaco litigation, and no specific changes in the corporation's practices

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[214] *See, e.g.*, Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721 (9th Cir. 1992), cert. denied, 507 U.S. 1004 (1993) (allowing banding of scores for promotional relief); Ass'n Against Discrimination v. City of Bridgeport, 720 F.2d 69 (2d Cir. 1983) (discussing relation between back pay and job relief); United States v. City of Chicago, 549 F.2d 415, 435-38 (7th Cir. 1977) (establishing promotional quotas for police department).

[215] The Home Depot Decree required the development of the new hiring process described earlier. *See* text accompanying notes 151-52 But given that Home Depot was developing the program at the time of the settlement, it is more accurate to state that the decree required the company to implement the plan it was developing.

[216] As noted earlier, Home Depot agreed to hire women as sales associates proportionate to their representation in the qualified pool of applicants. *See* note 142 *supra*. This remedy, however, would only protect against future discrimination by requiring nondiscriminatory hiring but it does not compensate for the years when Home Depot had been discriminating. In order to remedy that discrimination, Home Depot should be required to hire at levels that exceed current applicant levels.

were required under the terms of the consent decree.[217] The extensive litigation against grocery store chains, all of which were initiated by the firm that was primarily responsible for the Home Depot case, did not require any specific changes in employment practices, and indeed, the companies have typically refused to provide any information about their employment practices, or workforce statistics, even after the case settled.

The two cases in which reform did occur — Shoney's and State Farm — were both filed before the enactment of the Civil Rights Act of 1991, and the Shoney's case was initially prosecuted by a non-profit public interest group, the NAACP Legal Defense and Education Fund.[218] The State Farm case, which for many years was the largest employment discrimination settlement, resulted in large monetary awards to class members of approximately $190,000 and also required that at least fifty percent of new agents had to be women.[219]

This shift in remedial focus from structural change to monetary relief highlights one of the central ways in which employment discrimination class action litigation has become just another tort. In the analogous tort area of products liability, money damages are the primary remedy for past injury and defendants are not required by the terms of the settlement to change their practices, nor does the plaintiff have an ongoing monitoring role once the lawsuit has ended.[220] Whatever changes the company implements are self-initiated to limit its exposure to additional lawsuits, and it is the cost of additional accidents or injuries that provides the incentive to alter corporate practices. This also means that, like accidents, discrimination has now become part of the cost of doing business, and as a society, it appears that we no longer

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[217] *See* Abdallah v. Coca-Cola, 133 F. Supp. 1364, 1372-75 (N.D. Ga. 2001) (summarizing programmatic relief). The only programmatic relief that appeared mandatory was diversity training. *Id.*

[218] *See* Al Kamen, *Shoney's Faces Suit on Hiring*, WASH. POST, April 15, 1989, at F1 (noting that the suit was filed by the NAACP LDF).

[219] *See* Philip Hager, *State Farm to Pay Women $157 Million for Job Bias*, L.A. TIMES, April 29, 1992, at A1 ("Under the settlement, the 814 women are to receive an average of $193,000 ". . . and "50% of the new agents hired in California over a 10-year period . . . were to be women.").

[220] *See* Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 428 (1999) (noting that injunctive relief and consent decrees are not used in mass tort settlements); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 919-30 (1996) (discussing the structure of mass tort settlements).

desire to eradicate discrimination but instead have placed a price on discrimination that effectively assumes discrimination will persist.[221] Although the change has largely gone unnoticed, this represents a sea change in the way we think about discrimination, and is, in many ways, consistent with Derrick Bell's emphasis on the permanence of discrimination.[222]

2. Monetary Relief.

Assessing the effect of the shift in remedial focus, requires analyzing the monetary relief that is provided to plaintiffs as part of the settlements. Even though as a society we may not want to condone the persistence of discrimination, in our imperfect world we may accept a tradeoff between structural reforms and monetary relief if that tradeoff provides the best prospects for antidiscrimination enforcement, particularly if the monetary relief is substantial. Many plaintiffs would undoubtedly prefer money damages to the prospect of a job or a promotion, especially when they have already located alternative employment.

All of the cases discussed in this study, including those in the statistical study, settled for substantial financial amounts — awards that generally far exceed what had been obtained prior to the enactment of the new damage provisions as part of the Civil Rights Act of 1991. But the amounts that are reported by the parties are often misleading in that they represent the defendants' maximum possible exposure, typically spread across a multi-year timeframe and often exceed what the defendant will actually pay out. When the settlement amounts are reported, they generally include the money that will be distributed to the plaintiff class, as well as attorneys' fees, third-party expenditures on diversity efforts and minority suppliers, and other potential costs that may never be realized, such as the potential costs of raising salaries should a study determine that past practices in setting salaries were discriminatory.

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[221] In the distinction drawn by Robert Cooter, the new era of litigation emphasizes prices rather than sanctions, where prices increase with the amount of external harm caused by the act and sanctions are instead tied to the actor's state of mind. *See* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1537-38 (1984).

[222] *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

As set forth in Table 5 below [place near here], the recent Coca-Cola settlement illustrates how settlement amounts can be inflated to overrepresent its value to the plaintiff class. The Coca-Cola settlement was routinely reported to be worth $192.5 million.[223] Of that amount, $58.7 million was set aside for compensatory damages, which were defined as compensating emotional distress, hostile environment discrimination and other non-wage discrimination.[224] There is also a $24.1 million back pay fund to compensate for lost wages due to discriminatory policies, some of which would be paid in stock options.[225] The remaining monetary amounts were less well defined. The ten million dollar Promotional Achievement fund would be awarded to those African Americans promoted over the next ten years into positions where African Americans had been previously underutilized.[226] A pay equity fund in the amount of $43.5 million, nearly twice the size of the back pay fund, would be paid out over ten years to remedy pay disparities that were identified by statistical experts. The amount of the pay equity fund was an estimate, and the amounts actually distributed could be far lower, as occurred in the Texaco case.[227] The total defined in the settlement approved by the court amounts to $156 million, and the remaining $36 million was dedicated to various diversity initiatives, many of which the company likely would have implemented even without the settlement. This was especially true in the case of Coca-Cola, which even prior to the lawsuit had contributed millions of dollars to African-American groups and had a strong reputation within the civil rights community.[228] The attorneys' fees accounted for an additional $20.6 million, or 20% of the total funds dedicated for compensation to the plaintiff class and the attorneys. While this amount is again considerably

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[223] *See, e.g.*, *Coca-Cola Agrees to Pay $192.5 Million, Make HR Policy Changes to Settle Lawsuit*, DAILY LABOR RPTR., Nov. 11, 2000, at AA1; Betsy McKay, *Coca-Cola Agrees to Settle Racial Discrimination Suit for $192 Million*, WALL ST. J., Nov. 16, 2000, at A3; Henry Unger, *Coke to Settle Racial Suit With $192.5 Million Deal*, ATLANTA J. & CONST., Nov. 17, 2000, at 1A.

[224] *See* Ingram v. Coca-Cola, 200 F.R.D. 685, 694 n.11 (N.D. Ga. 2001).

[225] *Id.*

[226] *Id.*

[227] *See* text accompanying notes 109-10.

[228] In one news report, Congressman John Lewis, himself a veteran of the civil rights movement, was quoted as saying, "The reason Atlanta is Atlanta today, and Birmingham is Birmingham and Little Rock is Little Rock, is to a large degree because of the leadership of Coca-Cola." Nikhil Deagun, *A Race Bias Case Tests Coke*, WALL ST. J., May 18, 1999, at B1.

lower than the standard one-third contigency, the Coca-Cola case was settled within a year of the initial filing and no substantial motions were ever filed.[229] By the attorneys' own estimates, the fee award was between three and four times their actual fees.[230] As a percentage of the total settlement, only about 43% of the amount would go directly to the plaintiffs, with another $53.5 million, or 28%, contingent on future events.

Even when broken down by its components, the Coca-Cola settlement provided substantial payoffs to the plaintiffs, which in this instance amounted to an average payment estimated to be $38,000 per class member.[231] While the average payments are often based on estimates of the potential class size, they provide one of the best measures of the benefits that ultimately redound to class members. Table Six [place near here] provides a representative sampling of settlements based on the various amounts that were distributed to the individual class members, and the attorneys. The "Amount for Class" category includes only those payments designated for the class, excluding attorneys fees, payments on diversity initiatives, and possible payments to class members that were contingent on future events. The average payments are based on reported estimates for non-class representatives and vary widely from a high of $63,000 in the Texaco case to a low of $840 in the sex discrimination case involving Publix Markets.[232] Only two of the cases provided an average payment in excess of $20,000 and the median award was $9,683 obtained in the Home Depot case. In many of the cases, the class representatives received far higher payments, including as much as $300,000 in the Coca-Cola litigation.[233]

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[229] There were, however, a number of significant discovery disputes. *See* Abdallah v. Coca-Cola Co., 186 F.R.D. 672 (N.D. GA 1999) (dispute regarding interviews of prospective class members); Abdallah v. Coca-Cola Co., No. 1:98CV3679-RWS, 1999 WL 527740 (N.D. Ga. 1999) (motion for protective order).

[230] Ingram v. Coca-Cola, 200 F.R.D. 685, 696 (N.D. GA 2001) ("Counsel estimate that the time expended results in a lodestar amount for this case of between $5.2 and $6 million.").

[231] *See* Henry Unger, *Coca-Cola Soon to Mail Class Action Checks*, ATLANTA J. & CONST., July 12, 2001, at 1E (estimating the average check at $38,000).

[232] *See* Allen Myerson, *supra* note 2, at A8 ("The women will divide $63.5 million, generally receiving from $70 to $840, depending on their experience at Publix . . . ").

[233] *See* Betsy McKay, *Coca-Cola Agrees to Settle Bias Suit for $192.5 Million*, WALL STREET J., Nov. 17, 2000, at A3 ("The four plaintiffs who filed the lawsuit . . . will receive an award of no more than $300,000 each . . .").

Given that these lawsuits primarily produce monetary relief for class members, a substantial question exists as to whether these payouts render the cases socially valuable or whether they should be seen as modest wealth transfers between the defendants and the plaintiffs and their attorneys. Professor Bill Rubenstein has recently suggested that class action litigation has become less adversarial and more transactional in nature, with the transaction involving the sale of the plaintiffs' rights to sue.[234] Employment discrimination class actions provide additional support for his thesis, with the important caveat that in addition to buying the plaintiffs' right to sue, the defendants are also required to cease their discriminatory practices, at least to the extent those practices can be identified.

Table Six (place near here) also provides information on the attorneys' fees obtained in the cases, including the percentage of the total amounts paid to the class and the attorneys. Without question, the attorneys for the plaintiff classes receive a substantial portion of the wealth transfer. Yet, even though the fees tend to be extremely high in absolute terms, as a percentage of the recovery most of the awards fall well within the accepted range of 20-30% for class action litigation,[235] and all but two fall well below the standard one-third contingency fee. It is interesting that the two smallest damage awards produced the two highest fee awards as a percentage of the recovery, perhaps suggesting that attorneys seek a minimum fee independent of the underlying monetary awards.

3. Diversity Initiatives.

In the new era of employment discrimination litigation, neither monetary relief nor structural reform exhausts the terms of the agreements. Rather, as part of the settlements,

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[234] *See* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 419 (2001) ("The core premise of the transactional model is that complex multiparty litigation resembles a transaction more than it resembles a conventional adversarial lawsuit. What is bought and sold are rights-to-sue.").

[235] *See* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAINS 78 (2000) ("The most widely cited standard [for fees in class actions] is 25-30%."; Russ M. Herman, *Percentage-of-Benefit Fee Awards in Common Fund Cases*, 74 TULANE L. REV. 2033, 2038 n.51 (2000) (noting that most common fee is 20-30% of class action settlement fund). One study estimated that attorneys' fees in securities class actions average 26.8% of the settlement fund. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 573 (1991).

employers now commonly engage in a variety of diversity initiatives, ranging from increasing their commitments to minority suppliers to diversity training for their employees. Companies have also agreed to contribute funds to colleges or other public interest groups, and sponsored minority groups such as the Harlem Globetrotters or a black circus.[236] Virtually every settlement now requires some form of diversity initiative, and these efforts can add significantly to the cost of the settlement. This was certainly true for the Texaco and Denny's litigations where the companies directed millions of dollars to women and minority suppliers, and likewise comprised a substantial portion of the total settlement amount in the cases involving Coca-Cola and Shoney's. In a recent settlement involving the Boeing Company, the amount the company agreed to devote to unspecified affirmative action efforts was nearly half as large as the amount dedicated to the class.[237]

These diversity initiatives raise a number of troubling concerns, not the least of which is their value to the plaintiff class. Diversity training is now commonplace in corporate America and it is quite likely that the costs attributed to the settlement for diversity training are simply costs the employer would have incurred even if it had not been sued. It is estimated that more than seventy percent of large corporations have initiated diversity training in the last decade,[238] and most of those that have not yet instituted some form of training are expected to do so in the near future. Even though diversity training is now a standard business practice, its benefits remain largely speculative, as there has been sparse empirical evidence to document its value.[239]

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[236] *See supra* text accompanying notes 189-90.

[237] The settlement involving Boeing provided for $6.65 million to class members and $3.65 million for diversity efforts. *See Settlement is Approved in Boeing Bias Lawsuit*, N.Y. TIMES, Oct. 10, 1999, at C20.

[238] See ELIZABETH LASCH-QUINN, RACE EXPERTS: HOW RACIAL ETIQUETTE SENSITIVITY TRAINING AND NEW AGE THERAPY HIJACKED THE CIVIL RIGHTS REVOLUTION 163 (2001) (estimating that 70% of Fortune 500 companies adopted diversity training by 1995).

[239] Professor Susan Bisom-Rapp recently reviewed the existing literature and concluded that there was little support for the beneficial effects of diversity training. *See* 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. OF EMP. AND LABOR L. 1 (2001). Professor Bisom-Rapp concludes, "The empirical and anecdotal evidence discussed in the last section renders the legal profession's reflexive and undiscerning endorsement of anti-discrimination training highly suspect. While the desire to find a "quick fix" for the problem of employment discrimination is understandable, that educational efforts positively affect entrenched bias is a hypothesis that has yet to be proven." *Id.* at 44. *See also* Mark Bendick, Jr., Mary Lou Egan & Suzanne M. Lofhjelm, *Workforce*

The diversity industry itself, an unregulated amorphous collection of groups, has come under sharp criticism for the lack of validation for its programs.[240] At a minimum, it seems safe to conclude that diversity training is a poor substitute for structural reform.

No doubt the popularity of diversity initiatives in settlement agreements is attributable to the benefits they provide to employers rather than employees. This is particularly true of the third-party transfer payments. While the employees may gain some value from the increased use of minority suppliers or advertisers, the promotion of a circus or a basketball team, the employers use these efforts as important public relations tools. This is not to suggest that these expenditures are undesirable, only that they should not be counted as an unqualified benefit to the plaintiff class, especially if the money that is distributed to third parties could have been available to the plaintiffs.

B. Corporations and Class Action Litigation.

Even if the benefits to the plaintiff class are modest, class action litigation may still be socially beneficial to the extent it alters corporate practices to prevent and eradicate discrimination. This may occur in several distinct ways – through reforms the suits prompt, through the market reaction by investors, or by deterring employers from discriminatory practices. As already touched on, and discussed in more detail below, the fact that the lawsuits do not significantly affect shareholder value suggests they have a limited deterrent effect. Other factors, such as the presence of insurance and the apparent random quality of the lawsuits, likewise suggest that the litigation will offer limited prospects for deterrence. This section will explore what this study tells us about the effect the lawsuits have had on corporations, and about

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Diversity Training: From Anti-Discrimination Compliance to Organ. Development, 24 HUMAN RESOURCE PLANNING 10, 12 (2001) (identifying only two studies designed to measure the efficacy of diversity training).

[240] For two extensive critiques of the industry see LASCH-QUINN, *supra* note 238, FREDERICK R. LYNCH, THE DIVERSITY MACHINE: THE DRIVE TO CHANGE THE WHITE MALE WORKPLACE (1997). Although these critiques are hardly models of objectivity, their descriptions of the evolution of the diversity industry are valuable and expose its lack of a theoretical foundation.

the continuing presence of discrimination.

1. The Nature of Discrimination and its Reform.

Before analyzing the deterrent effects of the lawsuits, it is worth exploring what these lawsuits reveal about the nature of contemporary discrimination because understanding the nature of that discrimination will enable us to better define the effect the litigation has had over the last several decades. One of the surprising conclusions of this study is just how little has changed. While institutional discrimination has unquestionably receded in the last two decades, the cases discussed in this study all involve allegations of discrimination that implicate policies that resemble those of an earlier era, whether those policies involve overt racial animus or sex-stereotyping. Indeed, all of the cases that have received widespread attention in the last decade have involved allegations of overt claims of intentional discrimination.

Both Texaco and Denny's, as well as the case against Shoney's, involved classic cases of overt racial discrimination, complete with racial epithets, code words, and the Ku Klux Klan. Not coincidentally, the cases against Denny's and Texaco, and to a lesser extent Shoney's, are the only cases that captured any sustained national attention during the last decade, and they did so based on what appeared to be evidence of discrimination from a bygone era – racial epithets on a secretly recorded tape and the refusal to serve black secret service agents attired in their dress uniforms.[241] The case against Shoney's involved explicit directives from the company to keep African-American workers out of the dining room, as well as allegations that the Chief Executive Officer at one time supported the Ku Klux Klan and offered to match his employees' contributions to that organization.[242] Both Shoney's and Denny's, as well as many of the other

241 *See* text accompanying notes 67-69 (Texaco) and 164 (Denny's), *supra*.

242 It was reported that Shoney's former Chairman, Raymond L. Danner, had once offered to match any employee's contributions to the Ku Klux Klan. *See* Ronald Smothers, *$105 Million Poorer Now, Chain Mends Race Policies*, N.Y. TIMES, Jan. 31, 1993, at A16.

companies discussed in this study, were headquartered in the South, which gave the cases an additional tie to the segregation-era cases.[243]

As noted previously, Denny's and Shoney's are two companies that have gone to great lengths to actually change their cultures, and Texaco has also gone to considerable length to change its image. One lesson to be drawn from these cases is that allegations of race discrimination, particularly those steeped in intentional discriminatory practices, still resonate far more than any other claim of discrimination. Indeed, our social norms have turned so strongly against overt acts of racial discrimination that their effect persists even after the allegations turn out not to be true, as in the Texaco case where the company settled even after the tapes were found not be as racially charged as originally assumed.[244] The case against Coca-Cola provides another example of a company reacting quickly to the public perception that it was riddled with racially discriminatory practices.[245] Yet, these efforts are not always successful. Despite its substantial reform efforts, Denny's has been unable to shake its stained image and for much of the public continues to be deeply associated with its past discriminatory actions.[246]

The sex discrimination cases provide a sharp contrast to the continued salience of race discrimination. Home Depot, and here one can substitute any of the similar sex discrimination cases against the grocery industry, never garnered much attention, never faced a boycott of its stores, and as a result, made only the changes it was previously planning to implement leaving it difficult to conclude that the company has transformed its male-dominated culture at all.

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[243] Denny's was headquarted in South Carolina, while Shoney's was headquarted in Tennessee. In addition, Home Depot and Coca-Cola were both headquarted in Atlanta, Winn Dixie and Publix in Florida, Wal-Mart in Arkansas, and Texaco had substantial operations in Texas.

[244] *See supra* text accompanying note 77.

[245] *See* Davan Maharaj, *Coca-Cola to Settle Racial Bias Lawsuit: Soft Drink Giant Agrees to Pay $192.5 Million Over Allegations it Treats Blacks Unfairly,* L.A. TIMES, Nov. 17, 2000, at A1.

[246] In one recent case, the Sixth Circuit Court of Appeals effectively took judicial notice of Denny's past history, noting, "Defendant's past history of discriminatory conduct, both to its minority patrons and employees alike, is well known in the jurisprudence and public forums." Logan v. Denny's Inc, 259 F.3d 558, 577 (6th Cir. 2001). The court's reference to Denny's history elicited a stern rebuke from a dissenting judge, "Even more disturbing . . . is the majority opinion's reference to articles from the news media and the purported litigation history of Denny's restaurant to increase the burden upon defendants . . ." *Id.* at 582.

Evidence from the series of lawsuits involving grocery stores also indicates that the industry has remained resilient to change, as women continue to be seriously underrepresented at the management level and two studies recently identified the grocery industry as leading industry for discrimination against women.[247]

The fact that so many of the cases filed during the last decade have involved traditional claims of intentional discrimination is contrary to the prevailing view on the nature of contemporary discrimination. There has long been an assumption that overt forms of discrimination have been displaced by more subtle forms, what have been aptly described as "second-order" discrimination.[248] This may be true of individual cases of discrimination, and may also be true of most forms of systemic discrimination, but the cases discussed in this study demonstrates that there remains a substantial level of overt intentional discrimination. The major class action cases that have arisen over the last decade are not about discriminatory promotion tests or practices, or even glass ceilings, but more often involve subjective employment practices that created distinct patterns of segregated jobs, largely based on traditional stereotypes regarding the abilities and interests of women and minorities.[249] For the

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[247] *See* Stuart Silverstein, *In Supermarkets' Executive Department A Lack of Variety,* L.A. TIMES, May 2, 1999, at C1. It also appears that in general the grocery stores have not been hurt despite the bevy of lawsuits aimed at the industry. For one analysis see Michael Sasso, *Discrimination Lawsuits Haven't Deterred Shoppers*, THE LEDGER, Jan. 21, 2001, at E1 ("[I]n the three months following the settlement . . . Publix's sales were actually up about 9 percent from the same three months in 1996. Meanwhile, profits were up 22 percent over the same quarter in 1996.").

[248] *See* Sturm, *supra* note 151 at 468-74 (describing second generation discrimination). In the mid-1980s, Charles Lawrence wrote an influential article describing how racial discrimination was more commonly the product of unconscious forces rather than overt, animus-based discrimination. *See* Charles Lawrence, III., *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). In my own work, I have likewise described how discrimination has become more subtle in nature. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 290 (1997) ("Following the passage of the historic Civil Rights Acts in the mid-1960s, discrimination began to take on new and more subtle forms, and overt or blatant racial classifications gradually became the exception rather than the rule in legal challenges . . .").

[249] The cases involving supermarkets have all raised nearly identical claims. *See, e.g.*, Christine Blank, *Ingles Hit by Class-Action Sex Bias Suit*, SUPERMARKET NEWS, Mar. 9, 1998, at 4 ("The suit . . . allege[s] that women are relegated to cashier, clerk, deli, and bakery positions . . ."); Allen R. Myerson, *Supermarket Chain to Pay $81 Million to Settle Bias Suit*, N.Y.TIMES, Jan. 25, 1997, at A1 ("The discrimination suit was filed . . . by 12 women who said they were concentrated at the cash registers, while men sold and stocked the merchandise – positions with more potential for advancement."); Krysten Crawford, *Barnhart v. Safeway*, THE RECORDER, April 6, 1994, at 2 (the plaintiffs "alleged Safeway consistently overlooked women when making management promotions, assigned them to lower-paying jobs in the deli or bakery . . . "); Jane Gross, Big Grocery Chain Reaches Landmark Sex-Bias Accord, N.Y. Times, Dec. 17, 1993, at A1

most part, there was nothing subtle, or novel, about the discrimination alleged in any of these cases but instead they all raised familiar claims and arguments. As noted earlier, Texaco, Denny's and Shoney's all involved explicit claims of racial discrimination, and another case that grabbed national headlines involving Mitsubishi included explicit and pervasive sexual harassment. The case against Publix markets involved all of the classic forms of sex stereotyping ranging from women's lack of interest in working long hours to men's need for higher salaries to care for their families.[250]

At the same time, because none of the cases was tried, it is difficult to know whether the cases targeted actual patterns of discrimination, or at least what the law would define as unlawful discrimination. All of the cases identified statistical imbalances in the workforces, but a statistical imbalance by itself is rarely sufficient to establish a defendant's liability.[251] The three case studies provide mixed evidence of discrimination. In Texaco, the primary allegations involving salary and promotion discrimination were not substantiated based on the salary studies conducted under the terms of the settlement agreement and reinforced by the company's subsequent promotion patterns.[252] Home Depot appears to provide a stronger case of discrimination in its assignment policy, but this is also the kind of claim that courts have not been especially receptive to over the years, largely because of their own stereotypical biases

("The women said they were channeled into dead-end jobs, either working the cash registers or in the relatively new departments like bakeries and delicatessens . . .").

[250] For an extensive analysis of the Publix case see Anne Hull, *A Woman's Place*, ST. PETERSBURG TIMES, Feb. 2, 1997, at 1A.. The statistical basis for the promotional claims at issue in Publix was gathered by walking into the store to observe the pictures of the Managers and Assistant Managers that were hanging in the stores, more than ninety percent of whom were white men. *Id.* at 8A. The case included allegations of widespread harassment, overt statements of paying men more because of their family responsibilities, and many cases of women who were denied opportunities readily available to men. *See id.*

[251] Most of the cases were premised on a theory of intentional discrimination that resulted from a pattern or practice of discrimination. In these cases, statistics alone can be used to establish a prima facie case of discrimination, and statistics generally provide the substance of the claim. *See* Hazelwood Sch. Dist v. United States, 435 U.S. 299, 314 (1977) ("where gross disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination."). The defendant is then afforded an opportunity to either rebut the statistics or to offer an alternative explanation for the observed disparities. *See* id. at 318.

[252] *See* text accompanying notes 109-11 *supra*.

regarding jobs that are appropriate for women.[253] Yet, based on the plaintiffs' statistical evidence, it does seem that Home Depot engaged in a pattern of discriminatory conduct, and that such conduct remains a surprisingly prominent part of the corporate landscape, particularly with respect to what are treated as traditional male and female jobs. The case against Denny's was almost certainly the strongest of the cases studied here but because it focused on public accommodations rather than employment it is difficult to draw any conclusions regarding employment discrimination, other than to say that Denny's was unquestionably capable of substantially improving its record with respect to the hiring and promotion of minorities once it made a concerted effort. The Shoney's case, which in many ways parallels the case against Denny's also provides extensive evidence of systemic discrimination, in this instance by a corporation with a culture permeated by discriminatory tastes.[254]

It may be that the nature of these cases reveals more about class action litigation than they do about the nature of discrimination. One reason claims of overt discrimination continue to predominate among the large class actions is that these claims have a substantially higher probability of success than other forms of discrimination, which is a critical factor in attracting the profit-motivated attorneys who currently bring the large class action cases. In contrast, cases that involve subtle discrimination are far more difficult to prove, and often do not lend themselves to class action treatment because they involve complicated issues of proof that may be individualized. Claims premised solely on a disparate impact theory may also fail to attract profit-motivated attorneys because only equitable relief, typically in the form of back pay, is available in these cases.[255] Traditionally, requiring defendants to pay attorney's fees to successful plaintiffs was intended to create an incentive for attorneys to pursue civil rights cases,

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[253] I develop this argument in Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?* 61 LA. L. REV. 555, 568-69 (2001).

[254] *See* Lynne Duke, *Shoney's Bias Settlement Sends $105 Million Signal*, WASH. POST., Feb. 5, 1993, at A1 (noting that the company President "was so adamant about holding down the number of black employees that managers hid blacks 'from view' when he paid them visits . . .").

[255] 42 U.S.C. § 1981a(a) (permitting limited damages for "unlawful intentional discrimination" while specifically excluding "an employment practice that is unlawful because of its disparate impact.").

including those involving employment discrimination that may not otherwise be financially lucrative.[256] However, as we saw earlier, attorneys in class action cases are today routinely obtaining fee awards of three to five times their actual fees,[257] which suggests that the statutory fee provisions are unlikely to provide a comparable incentive.

What this means is that the difficult cases – those involving subtle discrimination or disparate impact claims – are candidates either for government prosecution or non-profit public-interest organizations, neither of which has been actively pursuing large class action claims over the last decade. During this time, the government's litigation behavior has been almost comically inept. For example, the EEOC sought to intervene in the Texaco litigation only after the tapes were revealed, and in fact, after the case was settled.[258] The agency never sought to intervene in the California Home Depot litigation, but instead sought intervention in the relatively dormant Louisiana litigation, and its intervention became moot when the case settled shortly after the California agreement was entered.[259] And while the Justice Department negotiated the first agreement with Denny's, the government ultimately played no significant role in transforming the company other than to insist on the creation of the Office of the Civil Rights Monitor. Even in cases where the government was an active party, such as the case against Publix Markets, it was always a secondary player that performed a limited role in the litigation.[260] As discussed below, the government's failure to play an effective role has contributed to the lack of public accountability among the current class action litigation.

2. *The Deterrence Hypothesis: Do the Lawsuits Deter Discrimination?*

[256] *See* Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 27-32 (1996) (discussing incentives for private attorneys).
[257] *See* text accompanying notes 103 and 141 *supra*.
[258] *See* Kurt Eichenwald, *Agency Seeks a Role in Texaco Case*, N.Y. TIMES, Nov. 21, 1995, at D4 ("A Federal agency asked yesterday to be allowed to intervene in a discrimination suit settled last week by Texaco . . .").
[259] *See* Kathleen Grimsley, *Home Depot Settles Gender Bias Lawsuits*, WASH. POST, Sept. 20, 1997, at D1 (noting that EEOC sought to intervene in New Orleans case).
[260] There is an important exception. Although the case was begun by private attorneys, the sexual harassment litigation against Mitsubishi was driven by the EEOC, which also required more extensive reforms, and a court-appointed Task Force, than have been required in many of the other cases.

This study also raises an important question of whether our current system creates adequate incentives to deter discrimination within the workplace. Although deterrence is one of the central purposes of antidiscrimination law, for a variety of reasons it is ultimately difficult to determine whether any form of litigation serves as an adequate deterrent. One important limitation is that no system can attain perfect deterrence, if by perfect deterrence we mean that all discriminators, but only discriminators, are deterred by the law. Rather, for any legal system designed to deter socially undesirable conduct there will inevitably be either over or underdeterrence, and as a matter of social policy, it will be necessary to choose between these imperfect alternatives.[261]

In the context of antidiscrimination law, the choice may seem easy insofar as there is no strong claim for a system that underdeters. Discrimination serves no positive social purpose, and our national commitment has always been to eliminate rather than to reduce discrimination. In this respect, we plainly ought to prefer overdeterrence to underdeterrence, and we may even conclude that maximum deterrence would be optimal deterrrence.[262] And yet, while we may theoretically maintain a desire to eliminate discrimination at any cost, we know and expect employers to make cost calculations in establishing their levels of care. We would not expect, for example, a firm to overhaul its hiring practices if the cost of doing so would exceed the firm's potential liability, and as a result the costs of compliance are inevitably taken into account in a firm's profit-maximizing decisions.

A system that overdeters is not without its problems. To the extent that the antidiscrimination litigation punish employers that are not engaging in discrimination, firms may become overly cautious in their employment practices, which may manifest itself in various

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[261] *See, e.g.*, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1262 (2001) ("Perfect deterrence generally will not be achieved because, among other factors, some actors may regard the probability of capture as very low, may not find the prospect of punishment very distasteful, or may act in the heat of the moment to pursue a higher perceived gain."). For a general discussion on levels of deterrence see Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421 (1998).

[262] *See* Michael Selmi, *Old Whine, New Bottle: A Response to Professor Wax*, 74 IND. L.J. 1233, 1248 (1999) (arguing that as a society we should prefer over to underdetterence).

ways. In some cases, employers may be hesitant to hire African Americans or women so as to avoid class action suits based on their employment practices.[263] Alternatively, employers may engage in quota hiring as a way of avoiding suits, as has long been alleged by opponents of affirmative action,[264] and they may also engage in inefficient employment practices by placing a value on the avoidance of lawsuits ahead of other company interests. This may be particularly true for mid-level managers who may suffer repercussions for the very visible lawsuits but not for the less visible reduction in productivity that may result from emphasizing the avoidance of litigation.

This overview demonstrates some of the difficulties in identifying an optimal deterrence system but there remains the question whether the current system provides for socially desirable levels of deterrence. In its most basic formulation, deterrence is a function of the probability of detection and the likely penalty, which includes the prospect of the firm being held liable.[265] As a practical matter, this theoretical construct is of limited utility because an essential element of the equation is invariably missing. Although the probability of detection is routinely discussed as if it were measurable, the actuality is the likelihood of detection is never known because we

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[263] *See* Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513, 519 (1987) (suggesting Title VII makes hiring black workers more costly). This should only occur to the extent an employer fears suits regarding its treatment of employees more than it fears suits over its hiring practices, but the evidence seems to warrant precisely this perspective. For many years, suits involving hiring practices have paled in importance to those involving treatment of employees. *See* John J. Donohue, III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015-21 (1991). Indeed, the vast majority of the cases included in the statistical analyses involved allegations of discriminatory treatment of employees rather than applicants, and the Home Depot case likewise suggests that even successful claims of applicants are likely to have substantially lower settlement value than those involving treatment of employees.

[264] *See* PAUL CRAIG ROBERTS & LAWRENCE M. STRATTON, THE NEW COLOR LINE: HOW QUOTAS AND PRIVILEGE DESTROY DEMOCRACY 163-70 (1995). For an excellent refutation of this argument see Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Imapct Hiring Does Not Induce Quota Hiring*, 74 TEX. L. REV. 1487 (1996).

[265] *See, e.g.*, James D. Cox, *Private Litigation and the Deterrence of Corporate Misconduct*, 60 LAW & CONTEMP. PROB. 1, 3 (1997) ("Central variables to this [deterrence] equation are the size of the fine and the joint probabilities of detection, prosecution, and conviction for the violation."). The literature on deterrence is extensive. For a recent sampling see Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 MICH. L. REV. 2185 (1999) (reexamining the need for a damage multiplier when detection is less than perfect); Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998) (discussing the role of punitive damages in deterring conduct); Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?* 29 J. OF LEGAL STUD. 237 (2000) (finding that punitive damages are not dependent on the probability of detection)

do not know how many firms escape detection. This problem is compounded by the present study which fails to shed light on whether the lawsuits target actual discrimination, so not only is there no way to quantify the number of firms that escape detection but we do not know how many of the targeted firms were actually engaging in discriminatory conduct. This, too, may limit the law's deterrent effects. When lawsuits do not target actual discrimination, employers may determine that their efforts to prevent discrimination will go unrewarded and would therefore be wasteful. If a suit is as likely regardless of whether the company actually discriminates, then there is little a company can do to stave off a lawsuit. As the authors of a study on class action litigation recently concluded: "[W]henever the justice system rewards litigation without regard to its legal or factual merit the deterrent potential of litigation is squandered."[266]

Even with these limitations, there is reason to believe that our current system is less than socially optimal. As noted earlier, class action cases still comprise an insignificant portion of the cases that are filed in any given year, amounting to only about seventy-five cases filed in federal court annually, a level that is down substantially from those of a decade earlier.[267] Based on the paucity of class action filings, the probability of detection appears to be extremely low,[268] and when combined with the fact that the lawsuits may be opportunistically targeted rather than designed to eradicate discrimination, it seems unlikely that firms face a serious deterrent threat based on the likelihood of detection. The uncertainty that pervades the process – both as to the

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[266] DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAINS 119 (2000).

[267] *See* note 22 *supra*.

[268] It may be that the limited number of suits reflects the limited presence of discrimination in contemporary labor markets. However, given that the lawsuits target statistical workforce imbalances, there is reason to expect a far larger universe of possible lawsuits. Existing data continue to demonstrate massive levels of segregation by race and gender, which are precisely the kind of data that ought to produce more class action lawsuits. On the persistence of workforce segregation see Francine D. Blau, *Trends in Well-Being of American Women 1970-1995*, 36 J. ECON. LIT. 112, 132 (1998) (discussing segregation levels for women) and GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 140-41 (2002) (discussing job-level segregation of African-American men).

likelihood of a suit and its merits – undoubtedly provides an additional limitation on the deterrent value of the litigation.[269]

Not only does the detection threat appear weak, but the probable penalty is also too low to serve as an effective deterrent, a fact that is confirmed by the statistical study. Any deterrent effect the suits might have should be evident in a loss of shareholder value; otherwise the suits will likely be treated as a cost of doing business. One reason the damages are too low is that current law caps the damages for an employment discrimination case filed under Title VII at a maximum of $300,000 per plaintiff for large companies with lower caps for smaller employers.[270] Employment discrimination cases are one of the very few classes of federal cases for which damages are capped and the caps have not been revised since they were first instituted more than a decade ago. Intentional claims of race discrimination can avoid the damage caps if they are filed under section 1981, though surprisingly few cases are brought pursuant to that statute.[271] In the class action area, this is partly due to the fact that most systemic discrimination claims include allegations based on a disparate impact theory, a theory that cannot be pursued under section 1981.[272]

By their nature, damages caps are arbitrary and have no necessary relation to the damage a company's discrimination is likely to cause either to the immediate victims or to society at large and almost certainly pose an additional restriction on the law's deterrent effect.[273] As noted earlier, at least for the companies studied in this article, the aggregate settlement amounts are also too small to provide meaningful deterrence. We saw earlier that the $100 million settlement with Home Depot amounted to two weeks of pretax profit, and the $54 settlement with Denny's

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269 *See* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance With Legal Standards*, 70 VA. L. REV. 965 (1984) (analyzing the impact of uncertainty on deterrence)..
270 *See* 42 U.S.C. § 1981a (2000).
271 *See* Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 45 (1996).
272 *See* General Building Contractors Ass'n v. PA, 458 U.S. 375, 383 (1982).
273 *See* DAN DEWEES, DAVID DUFF, MICHAEL TREBILCOCK, EXPLAINING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY 194 (1996) (arguing that damage caps imply underdettterence).

– a corporation that was on the brink of financial collapse – amounted to roughly 3% of its annual revenue, equivalent to about 10 days of revenue.[274]

The existence of insurance further complicates the firm's potential liability. Following the passage of the Civil Rights Act of 1991, insurance carriers began to offer Employment Practices Liability insurance ("EPLI") to cover the costs of discrimination claims.[275] While the policy coverages vary, many include punitive damages, as well as all other forms of monetary relief, and most large employers now carry the insurance.[276] The effect insurance may have on the law's deterrence function is a subject of considerable speculation, and one that is not unique to employment discrimination cases.[277] Even though the presence of insurance may suppress incentives to prevent discrimination, insurance carriers can play a preventive role through their underwriting practices and the various incentives they provide to the insured.[278] At the same time, it seems that the combination of limited damages, a low probability of detection, and the availability of insurance substantially mutes the litigation's deterrent effects.

There are, of course, non-monetary sanctions that could also serve to deter discrimination. In the discrimination area, it has long been assumed that the reprobation that

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[274] In 1993, Denny's revenues were $1.53 billion. *See* Stephen LaBaton, *Denny's Restaurants to Pay $54 Million in Race Bias Suits*, N.Y.TIMES, May 25, 1994, at A1.

[275] *See, e.g.*, Joan Gabel et al., *Evolving Conflict Between Standards for Employment Discrimination Liability and the Delegation of that Ability: Does Employment Practices Liability Insurance Offer Appropriate Risk Transference?* 4 U. PA. J. LAB. & EMP. L. 1, 28-31 (2001) (discussing evolution of policies); Francis J. Mootz, III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1, 55-57 (1997) (describing policies).

[276] It is estimated that approximately 30% of large corporations carry employment practices liability insurance. *See* Reed Abelson, *Surge in Bias Cases Punish Insurers, and Premiums Rise*, N.Y.TIMES, Jan. 9, 2002, at C1 (noting that "[r]oughly 30 percent of the companies surveyed in 1999 had some sort of employment practices liability coverage ."). It is not always easy to determine whether insurance was part of a settlement. Of the cases discussed in this study, Texaco and Lucky's have acknowledged insurance contributed to the settlement.

[277] *See, e.g.*, Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WISC. L. REV. 101 (examining insurance for punitive damages through interviews with attorneys); James D. Cox, *Private Litigation and the Deterrence of Corporate Misconduct*, 60 LAW & CONT. PROBS. 1, 16-18 (1997) (discussing effect of Director's and Officer's insurance on corporate conduct); Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313 (1990) (evaluating the effect of insurance in tort cases);.

[278] *See* Cox, *supra* note 277, at 16 ("[T]here is reason to believe that insurers, acting out of their own financial interest, have also complemented reasonable social interests by limiting their coverage to claims that are risks of the type that are both inherent to business organizations and pose no serious potential for moral hazard on the part of the insured.").

accompanies a finding of liability would provide a strong deterrent, and in a related fashion, society's moral condemnation that might attend accusations of discrimination may also provide additional incentives for managers to ensure that their practices conform to the requirements of the law. This study, however, cautions against relying on these non-monetary sanctions – moral condemnation seems to follow only explicit racial discrimination with less application to sex stereotyping or subtle forms of race or sex discrimination. As demonstrated by the statistical study in section two, unless the lawsuit involves overt claims of discrimination that can be treated as racist in nature, a company that is sued for discrimination, or settles litigation, does not appear to suffer any distinct reputational damage.[279] In this respect, despite the various legal developments regarding what constitutes discrimination, we remain steeped in a notion of discrimination that is animus-based, a definition that excludes much of what the law would define as discrimination.[280] Although many mangers will sincerely declare a desire to do the right thing, to use the colloquial phrase, their definition of what constitutes the right thing is quite often narrowly drawn, leaving monetary sanctions as the primary deterring force, limited as they may be.

3. Will the Market Drive Out Discrimination?

In addition to the deterrent value of the litigation, competitive market forces might also work to eradicate systemic labor market discrimination. In one of the most influential law and economic insights, Gary Becker posited that competitive labor markets should drive out discriminatory firms because discrimination is an inefficient labor practice that would create competitive disadvantages for the discriminating firms.[281] Labor market discrimination involves relying on characteristics that are unrelated to a firm's productivity concerns, and thus, over time, discriminatory firms would be priced out of the market by nondiscriminating firms that

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[279] *See* text accompanying notes 55-58 *supra*.
[280] *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 334-35 (1997) (discussing the ways in which our notions of discrimination remain steeped in a notion of animus-based discrimination).
[281] GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 43-45 (2d ed. 1971).

would have lower labor costs.[282] Because labor costs themselves are often difficult for investors to isolate,[283] a class action lawsuit alleging employment discrimination should provide a strong market signal that the firm is engaging in inefficient employment practices, the very kind of information that investors or competitors could and should exploit.[284] Moreover, given how infrequent class action suits remain, the filing of a lawsuit should provide a particularly powerful market signal.

And yet, as we saw through the statistical study, the lawsuits rarely have any significant effect on stock prices, a fact that casts doubt on Becker's strong hypothesis that the market will eliminate discriminatory firms. Becker's thesis, however, did not revolve around the filing of lawsuits but rather focused on the costs of discrimination, and it may be that those costs are reflected in lower stock prices even without the presence of a lawsuit. If this were the case, one would expect stock prices to increase after a settlement because a settlement would send a signal that the discriminatory practices that had depressed stock prices would be eliminated.[285] The data do not support this hypothesis with the exception of the two cases in which the settlement positively impacted stock prices.[286] As a result, the statistical study suggests there is no reason

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[282] *Id* at 43. Stewart Schwab makes the important observation even competitive markets may not drive out discrimination. As he explains, "[M]arkets cater to tastes . . . [and] it seems wrong to say, in general, that competitive markets will drive out a taste. Rather, markets drive out tastes that people are not willing to pay for, and markets sustain tastes where value exceeds costs." Stewart J. Schwab, *Employment Discrimination*, in 3 ENCYCLOPEDIA OF LAW & ECONOMICS, sec. 31, at 576 (2000).

[283] *See* PAUL OSTERMAN, SECURING PROSPERITY 36 (1999) (noting that the stock market traditionally undervalues soft investments in people).

[284] Although Becker's thesis has been the subject of considerable criticism and controversy, it remains the dominant theory regarding the economics of discrimination in economics, law and sociology. *See, e.g.*, ROBERT MAX JACKSON, DESTINED FOR EQUALITY: THE INEVITABLE RISE OF WOMEN'S STATUS 86-90 (1998) (sociological study); George R. Boyer & Robert S. Smith, *The Development of the Neoclassical Tradtion in Labor Econ.*, 54 INDUS. & LABOR REL. REV. 199 (2001); Keith N. Hylton & Vincent D. Rougeau, *The Community Reinvestment Act: Questionable Premises and Perverse Incentives*, 18 ANN. REV. BANKING L. 163, 172-74 (1999); Jack F. Williams & Jack A. Chambless, *Title VII and the Reserve Clause: A Statistical Analysis of Salary Discrimination in Major League Baseball*, 52 U. MIAMI L. REV. 461, 509-10 (1998).

[285] *See* Joni Hersch, *Equal Employment Opportunity Law and Firm Profitability*, 26 J. OF HUMAN RESOURCES 140, 140 (1990) ("[I]f discrimination is perceived as inefficient, a settlement which revises the firm's current discriminatory practices may offset the decline in equity value, or even cause stock prices to rise.").

[286] *See supra* text at p. 20.

to believe that discriminatory firms will be driven from the market, or even that discriminatory practices will be eliminated.

I have so far been concentrating on the way in which the statistical study is inconsistent with Becker's thesis, but there is another interpretation of Becker's thesis that may find support in the data and case studies. Becker's thesis was originally premised on a definition of discrimination that involves explicit intentional discrimination based on animus – whites not wanting to hire African Americans because of their distaste or dislike for them.[287] Today, however, much of the existing labor market discrimination occurs in less overt forms, and animus discrimination appears to account for only a small level of current labor market discrimination, notwithstanding the contrary evidence found within the class actions discussed in this study. Based on this evidence, as well as the reaction to the Texaco tapes and the overt discriminatory policies of Denny's, one might conclude that Becker's thesis has largely proved correct, at least with respect to animus-based discrimination much of which has been driven from the market. When systemic animus-based discrimination does appear today, the reaction is both strong and swift, as most evident in the sharp stock price decline Texaco suffered after the tapes were first revealed.[288] This is not to suggest that competitive market pressures were responsible for driving out animus-based discrimination, as Becker predicted. Rather, it seems more likely that our social norms regarding discrimination have substantially evolved and this change in norms best explains the relative paucity of systemic animus-based discrimination, and the societal reaction when it does appear.[289] This may also explain why we do not see a similar

[287] BECKER, *supra* note 281, at 40.
[288] *See* text accompanying notes 68-71 (discussing Texaco). As described in the Denny's case study, it is more difficult to isolate the effect the lawsuits had on the stock price of Denny's corporate parent, although business clearly suffered as a result of the adverse publicity the lawsuits generated. *See* text accompanying note 178 *supra*.
[289] It is here important to distinguish between systemic and individual animus-based discrimination. While systemic animus-based discrimination no longer substantially affects the workplace, individual acts of animus-based discrimination certainly do persist, and can cumulate to significant levels.

reaction for the sex discrimination suits: our social norms have not been transformed to the same extent and we remain strikingly ambivalent about women's presence in the workplace.[290]

In contrast to Becker's emphasis on the inefficiency of discrimination, others have argued that some forms of discrimination may be efficient and would likely persist until a lawsuit was filed to end the practice. For example, discrimination that is intended to satisfy customer expectations or demand can be efficient so long as the gain in customer satisfaction exceeds the loss due to inefficient labor practices.[291] Under some circumstances, employees may also prefer, and work better in, a homogenous workplace either because interests will more likely be aligned or because some employees may gain status by having a workplace that is structured along race or gender lines. Richard McAdams, for example, has suggested that white workers gain status at the expense of black workers when black workers are assigned to the least desirable jobs,[292] and Richard Epstein has argued that homogeneous workforces are often more productive than a diverse workforce.[293]

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[290] For a recent thorough analysis of the ambiguity regarding women's role in the marketplace see JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000).

[291] *See* Schwab, *supra* note 283, at 578 ("Perhaps a more important explanation for long-run discrimination is that profit-maximizing employers in competitive markets will cater to the discriminatory tastes of employers or customers."). For a recent study exploring the relation between customer discrimination and firm profits see Harry J. Holzer & Keith R. Ihlanfeldt, *Customer Discrimination and Employment Outcomes for Minority Workers*, 63 QUARTERLY J. OF ECON. 835 (1998). The authors of the study found a strong correlation between the race of the customers and employees, particularly with respect to African Americans. *Id.* at 862.

[292] *See* Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination,* 108 HARV. L. REV. 1003 (1995).

[293] Richard Epstein asserts that homogenous workplaces can produce a more harmonious collective life based on such small details as "the music played in the workplace, the food that is brought in for lunch, the holidays on which the business is closed down, the banter around the coffeepot, the places chosen for firm outings . . ." RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 68 (1992). Epstein, however, presents no empirical evidence to substantiate the likelihood that a homogenous workplace will produce greater benefits than a diverse workplace, or that even where conflicts arise over these issues that they cannot be worked out amicably and at low cost. This is an issue on which there appears to be limited and conflicting empirical data. In a review of the existing literature, two authors concluded, "Diversity [in the workplace] thus appears to be a double-edged sword, increasing the opportunity for creativity as well as the likelihood that group members will be dissatisfied and fail to interrelate with the group." Francis J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 ACADEMY OF MGT. RVW. 402, 403 (1996).

The case studies provide some support for the notion that the firms' discriminatory practices may have been consistent with either customer or employee preferences. It is conceivable, for example, that Home Depot structured its assignment system based on the preferences of its customers, assuming that men, or even women, might prefer to receive advice on the sales floor from men.[294] The policies instituted by Denny's and Shoney's could also plausibly be explained by customer preferences to the extent white customers may have preferred not to eat with or be waited on by African Americans. That said, it is important to emphasize that the corporations never justified their policies based on customer, or employee, preference[295] and there is no evidence to indicate that the policies were designed to satisfy those preferences. At most, the policies appeared to be based on the presumed preferences of customers, which were almost certainly consistent with the preferences of the owners who instituted the discriminatory policies.[296]

C. Reforming the Process.

The picture I have been painting of class action discrimination may seem unduly negative, but I want to emphasize that this is an instance where the evidence is clearly mixed. Class action litigation has brought jobs and monetary relief to thousands of individuals, has reformed practices and has likely ended or significantly altered discriminatory practices. These are all socially desirable outcomes and by themselves may justify the costs of the current system. Those costs, however, are not insubstantial, as measured by the limited benefits that actually

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294 According to the company, its customers are evenly split between men and women. *See* Jacqueline Bueno, *Home Depot is Going to Court to Fight Sex Discrimination Suit*, WALL ST. J., Sept. 19, 1997, at B5 ("Home Depot . . . estimates its customer base is evenly split between men and women."). It seems more difficult to explain the grocery store cases where women constitute the vast majority of shoppers.

295 A likely reason the company's did not rely on customer preference is that courts have consistently rejected customer preference as a legitimate justification for discriminatory policies. *See, e.g.,* EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263 (11th Cir. 2000) (restaurant's male-only waiters to create European ambience treated as intentional discrimination claim); Wilson v. Southwest Airlines, 517 F. Supp. 292 (N.D. Tex. 1981) (rejecting airlines policy of only hiring women as flight attendants based on notions of customer preference).

296 Shoney's Chief Executive Officer, Raymond Danner, frequently offered customer preferences as a rationale for its policies, but it was clear that the policies were designed primarily to satisfy his own preferences. *See* STEVE WATKINS, THE BLACK O: RACISM AND REDEMPTION IN AN AMERICAN CORPORATE EMPIRE 108, 171-72 (1997) (describing the policies as "Danner's Laws).

accrue to class members, the emphasis on diversity programs and other reform efforts that primarily serve public relations purposes rather than structural reform, the limited deterrent effects of the lawsuits, the lack of any accountability and oversight, as well as the extraordinary fees obtained by attorneys. Given all of the existing constraints, the current system may still be, on balance, the best system we can reasonably expect, though I believe some reforms could better align the system with its fundamental purposes while increasing its accountability. I will concentrate on two important reforms: increasing the damages that are available in employment discrimination lawsuits, and restoring the public accountability of the litigation.

1. Higher Damages Should be Available.

The current litigation regime fails to adequately deter discrimination, in part because the damages are too low to make a significant difference to large firms and one possible reform would be to substantially change the remedies that are available for employment discrimination. This might be accomplished in three different ways. First, the damage caps might be raised, perhaps from a maximum of $300,000 to $500,000, or some equivalent figure. Second, the damage caps could be eliminated, and third, the statute could be altered so that it more closely replicated the antitrust enforcement scheme in which treble damages are available.

At a minimum, the existing damage caps should be raised, if for no other reason than to take account of inflation, which has substantially eroded the statute's deterrent effect over the last decade. By itself, however, this reform seems too limited, and would accomplish little more than to return the statute to the force it held earlier in the decade, where it did not seem to serve as an adequate deterrent for the reasons discussed earlier. The statute's deterrence value would be enhanced far more successfully if the damage caps were removed altogether. In this way, defendants would be required to bear the full and actual costs of their discrimination, which has always been seen as a critical feature of any system designed to deter misconduct.[297] In addition to removing the caps, there is a substantial argument that a serious commitment to deterring

[297] *See* Polinsky & Shavell, *supra* note 266, at 874-75.

discrimination might require the availability of treble damages, such as are available for successful antitrust prosecutions.[298] Rather than adopting treble damages, one might borrow the remedial scheme applicable in age discrimination cases, which provides for a doubling of the back pay award for established wilful violations.[299]

A treble or double damage provision serves two purposes that are as applicable in the employment discrimination context as they are for antitrust prosecutions. First, the provision confers a stronger deterrent than would otherwise exist, and second, it helps attract attorneys who will ultimately receive a portion of any successful prosecution. Antitrust cases are notoriously complex and difficult to prosecute, and studies have found that the treble damage provision has, in fact, increased prosecutions.[300] Applying treble damages would surely have a similar effect in the employment discrimination area, though as discussed below, that is not necessarily reason alone to justify increasing the damage levels.

In addition to possibly enhancing the deterrence value, providing for treble damages would also convey an important expressive message. There has recently been a renewed interest among scholars in the expressive element of law, what are defined as the messages and the values conveyed by our legal structure.[301] Providing treble damages for employment discrimination would send a message of moral outrage toward the persistence of discrimination that as a society we often proclaim but fail to support with tangible policy initiatives. The

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298 *See* 15 U.S.C. § 1 (2000).

299 The Age Discrimination Act borrows the remedial scheme from the Fair Labor Standards Act, which allows for liquidated damages in the amount equal to the back pay loss in the case of wilful violations. *See* 29 U.S.C. § 626(b) (2001) (applying 29 U.S.C. § 216 (2000) of the FLSA).

300 For several discussions regarding the effect of antitrust enforcement see William Breit & Kenneth G. Elzina, *Private Antitrust Enforcement: The New Learning*, 28 J. L. & ECON. 405 (1985) (suggesting that private parties overenforce antitrust laws); Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1010 (1986) (noting that private enforcement outnumbers government cases 6-1).

301 *See, e.g.*, Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 597-606 (1998) (developing economic theory of expressive law); David A. Dana, *Rethinking the Puzzle of Escalating Penalties for Repeat Offenders*, 110 YALE L.J. 733, 777-780 (2001) (discussing expressive element of law in the context of environmental penalties); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000); Cass R. Sunstein, *On the Expressive Function of the Law*, 144 U. PA. L. REV. 2021 (1996) (discussing expressive function).

existing damage caps provide a far more limited message by placing a price on discrimination – a price that seems far too low either to deter most employers or to adequately compensate for the social harm that results from persistent and pervasive discrimination. Nor do the current limits convey an adequate societal condemnation of discrimination, but instead they suggest that discrimination should be treated as a controllable cost of doing business, which, is what discrimination has largely become.

Increasing the damages available for employment discrimination so as to increase the deterrent value of antidiscrimination litigation is likely to be met with two immediate objections, though they arise from apposite perspectives. Those who desire more deterrence may be skeptical about the effect removing the caps or providing for treble damages might have, given the limited influence even large damage awards currently have on firms. As evident in both the Texaco and Home Depot cases, the settlement amounts were well below the theoretical outer limits of their potential liability, as measured by the number of class members and the possible damage awards, and it is far from clear that raising those outer limits will substantially deter a greater amount of discrimination. Nevertheless, the prospect of greater damages should provide some stronger incentive for a firm to prevent discrimination, though it is difficult to say how much, and this is may be a sufficiently important social goal, one that merits altering the existing damage regime.

A more forceful objection will arise from those who are skeptical about the need for greater deterrence. There is, it seems, no existing societal consensus that discrimination remains a prevalent feature of the labor market, and indeed, one of the most striking findings of this study was the absence of any such concern in the media reports. For this study, I read hundreds of newspaper and magazine articles, and outside of the sensational allegations involving overt race and sex discrimination, no story suggested that the increase in litigation or the resulting massive settlements were a sign that the firms were, in fact, engaging in discrimination. The stories invariably discussed the cases in statistical terms and likewise described the settlements as business decisions that were not necessarily tied to a need for serious reform. No story mentioned the fact that discriminatory business practices were inefficient and therefore harmful to the underlying business, other than with the limited exceptions of the cases involving Denny's and Shoney's, and to a lesser extent Texaco, which were seen as potentially discouraging minority customers.[302] While the lawsuits were not necessarily defined as frivolous, nor were they seen as rooting out discriminatory practices. Instead the lawsuits were typically treated as transfers of wealth, with the transfers to attorneys always playing a prominent role in the media portrayals.[303]

These issues touch on a fundamental paradox raised by this study: although the existing damage regime appears inadequate to deter discrimination, increasing the damages may increase litigation without actually deterring additional discrimination. Ultimately, resolving this conundrum through legislative reform will require considerably more information — and a stronger societal consensus — regarding the persistence of discrimination than currently exists. Nevertheless, there seems little reason to limit the damages available in discrimination suits, and lifting the damage caps will at least require companies to concentrate on the actual cost of discrimination rather than the artificial limits that are currently imposed.

2. Restoring Public Accountability to Class Action Litigation.

One of the most troubling aspects of this study is the lack of oversight for the class action settlements involving employment discrimination. The cases discussed in this article were all brought and developed by private parties -- as is true for the vast majority of class action lawsuits filed in the last decade.[304] As noted earlier, the government occasionally seeks to join a

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[302] *See* Calvin Sims, *Giving Denny's a Menu for Change*, N.Y. TIMES, Jan. 1, 1994, at A43 (noting that the decline in traffic at Dennys' restaurants was due in part to the lawsuits).
[303] *See, e.g.*, Stephanie Armour, *Bias Suits Put Spotlight on Workplace Diversity: Critics Site Lucrative Fees, Advocates Say Cases Bring Progress*, USA TODAY, Jan. 10, 2001, at 1B; David Segal, *Lawyers Stake Claim on Bias Lawsuits: With More Cases in Litigation, Firms Cash in on a Billable-Hour Bonanza*, WASH. POST, Jan. 27, 1997, at A1.
[304] For example, of the 85 class action employment discrimination cases filed in 1998, the government brought only one. *See* Administrative Office of the Courts, Judicial Business of the Courts 1998, at Table X-5.

lawsuit, as it did in the Texaco and Shoneys' litigations, but outside of the Mitsubishi case, the government has not played a significant role in either the litigation or the subsequent monitoring of any of the cases. But without a government presence, there appears to be no substantive monitoring at all.

Diversity task forces have become one of the primary means of implementing and enforcing settlement agreements, but these task forces provide little meaningful oversight. The task forces rarely object to any of the company's proposals or their reported progress. Rather, as indicated in the Texaco discussion, the task forces quickly become an arm of the company, amounting to little more than a public relations cheerleader that conveys a false picture of independence and review.[305] The lack of independence is likely due to the task force's dependence on the company for access to information and its fees, and although the task force may provide its report to the court, the plaintiffs' attorneys and any government agency that was involved in the case, there appears to be no independent oversight of any kind by any of the interested parties. Indeed, the task forces are designed to remove any obligation on the parties to monitor the consent decree.

And like the diversity industry that the Task Forces resemble, the monitoring business is fast becoming a lucrative enterprise for a small group of individuals, many of whom cycle through the various corporate monitoring groups.[306] The current task forces are comprised substantially of former government officials from the Clinton and Bush administrations who now make their living touting the accomplishments of former defendants.[307] These high-profile

[305] *See supra* text accompanying notes 115-19.

[306] It is estimated that the members of the Texaco Task Force receive annual compensation of $75,000, while the Chair receives $125,000. *See* Henry Unger, *Judge Instructs Coke Task Force*, ATLANTA J. & CONST., Aug. 22, 2001, at 3D ("[In the Texaco case] the head of the task force has been paid $125,000 a year, while other members have received $75,000 each.").

[307] For example, Deval Patrick, the former head of the Civil Rights Division for the Department of Justice, recently resigned his position as general counsel for Texaco, a stint he entered after having served as the head of Texaco's Diversity Task Force, to move to Coca-Cola where he oversees the implementation of its new diversity initiatives. Patrick was replaced on the Texaco Diversity Task Force by Thomas Williamson, the former Labor Department Solicitor in the Clinton Administration and now a partner at a prominent Washington Law Firm. Clinton's former Labor Secretary, Alexis Herman, was named to oversee Coca-Cola's Diversity Task Force, a group that includes two other former Clinton Department officials. *See* Unger, *supra* note 306 at 3D (noting that the former head of the EEOC and Assistant Attorney General for

individuals provide unquestionably positive public relations for the companies but it is less clear that they provide any meaningful oversight. Based on my research, there has not been a single issue or objection raised by either a diversity task force or one of the plaintiff attorneys in any of the litigation discussed earlier.[308]

The situation is considerably worse in those cases that do not implement diversity task forces. In their litigation, the Saperstein law firm has not required the creation of diversity task forces, and in fact, requires very little reporting from its defendants at all. 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.[309] Progress reports were filed under seal in the Shoney's case, and no information was ever made available in the State Farm litigation. Despite the lack of public reporting, the earlier cases involving Shoney's and State Farm did result in meaningful reform, while the later cases brought by the firm, including all of the grocery store cases, seem to have resulted in far less tangible, if any, benefits from revised employment practices.[310] This may have to do with the changes in the law that made damages available, changes in personnel in the law firm, or other factors, but the change seems unmistakable. Indeed, there is some danger that employment discrimination class actions are becoming more like the much maligned consumer class actions – coupons have already been used as part of a settlement involving Winn-Dixie,[311] stock options covered some of the damages in Coca-Cola, and in the last few years attorneys who had previously specialized in personal

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Civil Rights were on the Task Force). Lynn Martin, labor secretary in the first Bush Administration, played a prominent role in Mitsubishi's reform efforts.

[308] The exception is Mitsubishi, where the Task force made a number of suggestions to the company and seemed far less an arm of the company than has been the case for the Texaco Task Force. *See* Final Report to the Parties and the Court, EEOC v. Mitsubishi Motor Manuf. (on file with the author).

[309] *See* text accompany note 149 *supra*.

[310] *See* Stuart Silverstein, *In Supermarkets' Executive Department, A Lack of Variety*, L.A. TIMES, May 2, 1999, at C1 (analyzing the lack of women or minorities at management levels in supermarket industry).

[311] *See* Mark Albright, *Judge to Review Winn-Dixie Suit Deal*, ST. PETERSBURG TIMES, July 27, 1999, at 1E ("A substantial slice of Winn-Dixie's settlement, $6.2 million, will be paid not in cash but in coupons offering 10 percent discounts on goods at Winn-Dixie stores.")

injury litigation and securities fraud have gravitated towards employment discrimination cases.[312]

The current situation marks a dramatic change from the past when class action employment discrimination litigation was thought to represent one of the hallmarks of public law litigation brought by cause lawyers who were primarily interested in pursuing justice rather than profit.[313] The recent cases reject this model in favor of a purely private dispute resolution system that is principally about money. In other words, discrimination claims are now just another form of tort where the principle objective is to recover money rather than to reform the corporation through ongoing monitoring. This is perhaps most evident in the case against Home Depot where the company steadfastly refused to provide meaningful information to the public and the plaintiffs' attorneys moved to vacate the decree earlier even though Home Depot had not met the goals it had established for itself. Similarly, recall that in the Texaco case, none of the primary beneficiaries (women and suppliers) of Texaco's reform initiatives were parties to the lawsuit. African Americans, including African-American suppliers, have gained little from the Texaco litigation other than the initial substantial monetary recoveries.[314]

An important reason the cases do not produce more change is that they lack any public accountability, which contradicts the original and continuing purposes of class action litigation. With one exception, which proved to be temporary, judges have routinely signed off on the

[312] As noted earlier, some of the attorneys who brought the Texaco case made their name in consumer class actions, and attorneys who previously specialized in personal injury and securities fraud have recently become involved in discrimination class actions. *See* Betsy McKay, *Aggressive Lawyer Joins Race Lawsuit Against Coca-Cola*, WALL ST. J., April 17, 2000, at B34 (noting that plaintiffs' attorney Will Gary who "doesn't generally handle employment discrimination cases" had joined the lawsuit); Jess Bravin, *Lawyers Noted for Investor Class Actions Ally With Employment and Bias Specialists*, WALL ST. J., Oct. 13, 2000, at B6 ("Milberg, Weiss, Bershad, Hynes and Lerach a law firm best known for its securities class action practice, is pushing into the growth area of employment law . . . in bringing discrimination suits."). Not everyone sees the turn to personal injury lawyers as a negative development. *See* Anne Bloom, *Taking on Goliath: Why Personal Injury Litigation May Represent the Future of Transnational Cause Lawyering*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 110, 115 (A. Sarat & S. Sheingold eds. 2001) (suggesting that personal injury attorneys may have much to offer because of their resources and risk-taking orientation).

[313] *See, e.g.*, JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 140-49 (1978) (describing law reform efforts through employment discrimination litigation) and sources cited in note 6 *supra*.

[314] *See* text accompanying notes 112-14, *supra*.

settlement agreements proposed by the parties without engaging in any serious inquiry, and typically no independent judicial decision is produced at the time the settlements are approved.[315] Increasingly courts are appointing mediators to fashion settlements, as occurred in a number of high profile cases including the Home Depot litigation, which diminishes the likelihood that a court will conduct meaningful review to the extent the mediator is seen as acting on behalf of the court. Perhaps an ideal enforcement system would combine high damage awards to plaintiffs with a financial incentive to attorneys that was sufficient to attract competent counsel without luring those whose interests were primarily financial in nature. This may, however, be an impossible equilibrium to create, but there are clearly some reforms that could restore public accountability to the process sand thereby ensure that antidiscrimination litigation serves the goal of preventing and remedying discrimination.

First, rather than establishing Diversity Task Forces that report directly to the company, a court should appoint an independent monitor to oversee implementation of the consent decree. This is the model that had previously been used for discrimination suits and was successfully employed in the Mitsubishi litigation, which relied on a court-appointed three-person task force that effectively reviewed the company's employment practices.[316] In this schema, the monitor is seen as an arm of the court rather than an arm of the company, and is far more likely to engage in independent assessment than a group that has been appointed, and is directly compensated, by the company itself. The court might also establish an independent monitor, or perhaps a magistrate, to provide a serious review of the terms of the settlement, although the rules of civil procedure already provide the court with such responsibility and it is not clear how much will be gained by asking someone else to do the court's job.[317] For a variety of reasons, a court is in a

[315] *See supra* note 28.
[316] *See supra* note 261.
[317] Judith Resnik has suggested that a court-appointed monitor might be required to be present during class action settlement negotiations, in large part to ensure that attorney's fees are not discussed until after settlement on the claim is reached. *See* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2181 (2000). Charles Silver and Lynn Baker contend that attorneys representing a class should be treated as a trustee or a guardian, but acknowledge that they do not always perform their tasks consistent with their fiduciary duties. *See* Charles Silver and Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs'*

distinctly inferior position to actively oversee the implementation of the agreement,[318] and an independent monitor or trustee may provide some reasonable certainty that the goals of the decree will actually be sought and possibly attained. The Monitor should be paid on an hourly basis by a fee determined by the court so as to provide an adequate incentive for the monitor to oversee the process and for the defendants to provide meaningful and expeditious reform. Similar suggestions have been made to curb the abuses seen in other forms of class actions, particularly mass torts,[319] which again highlights the evolution of employment discrimination class action from civil rights claims with public overtones to private tort-like litigation.

Additionally, a court should not permit settlements that provide for attorneys fees out of a common settlement fund, nor should the court allow the parties to negotiate a fee at the time they negotiate the settlement for the class members.[320] Fee negotiations should not be conducted until after the class settlement is obtained, and the monetary amounts for the claim fund and attorney's fees should always be kept separate and distinct. [321] Allowing the attorneys to petition a court for a part of the settlement fund, as was done in the Texaco case, places the attorneys in

Counsel in Allocating Settlement Proceeds, 84 VA. L. REV. 1465, 1509 (1998).

[318] Given their docket pressures and their lack of access to the information the attorneys have compiled, courts are unlikely to fail to approve a settlement absent clear evidence of abuse, and are even less likely to become involved in the implementation of the agreement. *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1053 (2002) ("For a variety of systemic and case-specific reasons, courts are loathe to reject proposed settlements in class action litigation."); Silver and Baker, *supra* note –, at 1515 (noting that courts typically require clear abuse before they reject a settlement). Courts appear even more reluctant to disrupt settlements in discrimination cases because, unlike other class action attorneys, the plaintiff attorneys in discrimination claims have the air of protecting the public interest, and thus there has been little occasion to challenge their judgment.

[319] On calls for increased monitoring of class action settlements see Richard Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 948-52 (1996) (calling for hard look review of settlements); Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONT. PROBS. 137, 148-52 (2001) (arguing for more rigorous review of settlements); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 248 (1983) (calling for institutionalizing a monitoring role at the settlement stage).

[320] The role of attorneys' fees in class action litigation is widely recognized as both critically important to ensuring adequate representation and deeply troubling. For a recent discussion of proposals to regulate attorneys' fees see Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 S.CT. RVW. 337, 386-89.

[321] At one time, this was the rule of the Third Circuit. *See* Prandini v. National Tea Co., 557 F.2d 1015, 1017 (3rd Cir. 1977), a decision that was implicitly overturned by the Supreme Court decision in Evans v. Jeff D., 475 U.S. 717, 765 (1986). *See* Ashley v. Atlantic Richfield Co., 794 F.2d 128, 137-38 (3rd Cir. 1986). For a discussion of the rule and the pertinent cases see Resnik, *supra* note 317, at 2179-81.

an adversarial position to their clients without any interested party available to defend the client's interests. Even better, but far less practical, the question of attorneys' fees would not be negotiated until after the settlement was approved. A defendant, however, is unlikely to agree to such an approach because it does not provide the finality a defendant typically seeks through the settling of a class action claim.[322]

An alternative method of compensating the attorneys would be for courts to return to the lode-star approach that governs most individual claims of employment discrimination. Under a lodestar approach, an attorney is compensated for the actual time she devotes to a case based on a reasonable hourly rate.[323] Applying a lodestar approach would almost certainly depress the supply of profit-motivated attorneys but in doing so it would likely leave too few attorneys available to bring the class action cases, particularly considering the low filing levels that still prevail despite the tremendous increase in damages and publicity the class action cases have received in the last few years. The lodestar approach also brings its own set of undesirable incentives, including divorcing the attorney from the value of the settlement and an increased emphasis on overlitigating cases. These limitations have caused courts to abandon the lodestar approach in other class action areas,[324] and there is no reason to believe the approach would prove substantially more successful for employment discrimination claims. Instead, courts should carefully scrutinize fee claims, and rely on the lodestar method as a check on the reasonableness of the fee request.[325]

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[322] My own experience negotiating class action settlements is that defendants typically care far less about who gets the money than they do about how much money they have to pay out.

[323] For a recent discussion and comparison of the lodestar method with the percentage of recovery method see Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 657-59 (2001).

[324] *See* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 05, 827 (1997) ("Basically, all courts except the Florida Supreme Court . . . have abandoned the failed lodestar experiment."). The statute aimed at curbing some of the abuses of securities litigation requires that attorneys be paid from a common settlement fund. See 15 U.S.C. § 78u-4(a)(6) (2000).

[325] This is increasingly the practice in securities litigation, where the statute restricts attorneys to a percentage of the recovery. *See* Fisch, *supra* note 323, at 661 ("Courts are increasingly evaluating the reasonableness of their fee calculations by sing the percentage of recovery method and then cross-checking their results with the lodestar method.").

It is important to emphasize that none of the attorneys involved in the cases discussed previously appeared to engage in collusive activity or put their own interests ahead of their clients. Rather, what is troubling, is the lack of public accountability and the seeming lack of real progress on the terms of the decrees, despite what the parties often represent to the court and the public. It is worth noting here that the courts have never played a substantial role in employment discrimination settlements. With few exceptions, fairness hearings have always been designed to create a record rather than to determine the actual fairness of an agreement, and indeed, they are rarely eventful or even attended by dissident class members.[326] Yet, when employment discrimination cases were treated as involving public rather than purely private interests, particularly when the cases were brought by non-profit civil rights organizations or the government, the filing of the settlement agreement often marked the beginning of the proceedings rather than the end, as these attorneys carefully reviewed the defendants' progress to ensure that the terms of the agreement were being fulfilled. Contempt proceedings, or less formal objections, were common, and the fruit of this litigation was often changing an employer's employment practices and securing jobs or promotions for class members rather than the size of the settlement fund. Today the success of the private class action litigation is measured solely by the size of the monetary pie with little attention devoted to securing actual reform. Perhaps this is a worthy tradeoff, and it is certainly what is to be expected from profit-motivated attorneys who have an interest in securing a return on their investment. Unless there is money to be earned from the monitoring of the settlement agreement, we should not expect profit-motivated attorneys to engage in substantial active monitoring, particularly when the lawyers are paid in advance for their monitoring activity, as was done in the Home Depot litigation.[327]

[326] Some of the recent cases have drawn objectors, but the court has invariably overruled the objections. *See* Ingram v. Coca-Cola, 200 F.R.D. 685, 691 (N.D. Ga. 2001) (overruling objections).
[327] *See* text accompanying note 137, *supra*.

One additional reform that might help restore public accountability to the process would be to craft a role for the government in monitoring class action settlements. For example, the EEOC might be appointed by a court, or through intervention, to oversee the implementation of consent decrees and afforded a right to challenge a corporation's actions or failure to meet the terms of the decree. Alternatively, a non-profit agency such as the NAACP Legal Defense Fund could be appointed to serve this role as an active monitor without any financial interests tied to the litigation. This initiative could be funded by proceeds from the settlement, and would be one way of providing an independent and disinterested voice to ensure that the terms of the settlement agreement were fulfilled.[328] In this respect, the government or a non-profit agency would simply replace the private diversity task force as the overseer of the settlements. Even if the EEOC were not afforded a role in the formation of the settlement, its role in the enforcement of the decree may encourage the parties to work toward an acceptable and stronger agreement.

V. CONCLUSION

This study has sought to measure the effect of class action employment discrimination lawsuits on firms and plaintiffs by conducting a statistical study and developing three particular case studies. The statistical study demonstrates that shareholder value is not typically affected by either the filing or the settlement of the lawsuits, and this finding holds true regardless of the nature of the lawsuit or the size of the settlement. This finding also suggests that there is no significant penalty for either engaging or being accused of discrimination, and if we want to provide a stronger form of deterrence, it will be necessary to make higher damage awards available for employment discrimination suits. The case studies highlight additional limitations of seeking to further changes through litigation. In many cases, it appears that employment

[328] In a different context, Alon Klement has recently made the intriguing suggestion that monitors should be afforded a financial stake in the outcome of the case. *See* Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25 (2002). The difficulty with this suggestion, particularly in the employment discrimination setting where monetary relief should only be one aspect of the remedy provided, is that it would likely replicate the existing problems by adding what would, in effect, be another attorney to divide the settlement fund.

discrimination litigation has become a private affair that is largely about money and public relations, and rarely concerns itself with implementing broad institutional reform. It also seems that it is only those cases that include sensational allegations, generally involving racial epithets or blatant discrimination, that can capture the national attention, and under these circumstances, it is possible that a company, such as Denny's will seek to transform itself, but these instances are infrequent, as is the prospect of corporate reform arising from private class action litigation . All of this suggests that neither the harm nor the benefits of the private class action litigation is substantial. Instead the cases are primarily about transfers of wealth, transfers that often are channeled to entities other than the parties to the suit, but transfers that are too inconsequential to affect corporate balance sheets.

The reforms suggested here, increasing damages while also imposing a monitoring function over the settlements, are limited in nature and would offer modest improvements without the prospect of transforming the litigation regime. This study's primary value is descriptive in nature, and suggests that we may want to reconsider our underlying assumptions about class action discrimination litigation. Most importantly, we should not rely on the litigation to eliminate or deter discrimination but instead should see it in a more limited light, as a process of wealth transfers with a substantial public relations dimension that, on occasion, can lead to substantial change to the extent a firm finds it in its interests to reform its employment practices. In this respect, the litigation has become just another form of tort, which reflects our declining national commitment to eradicate discrimination – discrimination that based on this study remains a significant presence in the labor market.

TABLE ONE
CLASS ACTION FILINGS, Nov. 1991-Aug. 2001

	Class Action Filings	Dummy Variable Coefficient	Standard Error of Coefficient	t Statistic	P_value	Cumulative Prediction Error
1	AA	0.0218	0.0175	1.2435	0.2154	0.0435
2	**ABS**	**0.0383**	**0.0138**	**2.7761**	**0.0061**	**0.0766**
3	ABS_92	_0.0041	0.0760	_0.0541	0.9569	_0.0082
4	C_FEB97	0.0161	0.0435	0.3702	0.7117	0.0322
5	**CBS_VIA**	**_0.0316**	**0.0177**	**_1.7825**	**0.0765**	**_0.0632**
6	CC_INITIAL	_0.0156	0.0162	_0.9668	0.3351	_0.0313
7	DAL	_0.0094	0.0164	_0.5752	0.5660	_0.0188
8	F_JUN93	_0.0022	0.0113	_0.1954	0.8453	_0.0044
9	FTU	_0.0064	0.0073	_0.8811	0.3795	_0.0129
10	GE_FEB97	0.0028	0.0065	0.4298	0.6679	0.0056
11	GPE	0.0075	0.0183	0.4130	0.6802	0.0151
12	HD	_0.0062	0.0430	_0.1439	0.8858	_0.0124
13	IBC_APR00	0.0239	0.0211	1.1343	0.2583	0.0478
14	KO_APR99	_0.0114	0.0119	_0.9524	0.3423	_0.0227
15	KO_JUN00	0.0226	0.0191	1.1849	0.2377	0.0452
16	LMT_RACE	0.0024	0.0217	0.1111	0.9117	0.0048
17	JWN_APR92	_0.0007	0.0184	_0.0383	0.9695	_0.0014
18	MCDONNELL	_0.0075	0.0130	_0.5771	0.5646	_0.0150
19	**MET**	**_0.0321**	**0.0186**	**_1.7298**	**0.0855**	**_0.0643**
20	MLM_MAY94	_0.0210	0.0144	_1.4636	0.1452	_0.0420
21	MRK_JAN99	_0.0028	0.0105	_0.2656	0.7909	_0.0056
22	MS_JAN97	0.0423	0.0318	1.3312	0.1850	0.0847
23	**MSFT_JAN01**	**0.0356**	**0.0209**	**1.7034**	**0.0904**	**0.0713**
24	MSFT_OCT00	_0.0145	0.0204	_0.7080	0.4800	_0.0289
25	PEP_SEP94	0.0014	0.0104	0.1312	0.8958	0.0027
26	POM	_0.0007	0.0067	_0.1026	0.9184	_0.0014
27	TX_MAR94	0.0004	0.0063	0.0632	0.9497	0.0008
28	TX_MAR00	_0.0165	0.0153	_1.0754	0.2838	_0.0329
29	TX_FEB97	0.0060	0.0098	0.6168	0.5382	0.0121
30	UA	0.0018	0.0177	0.1012	0.9195	0.0036
31	WEN_APR94	_0.0039	0.0087	_0.4449	0.6570	_0.0077
32	WMT	0.0076	0.0136	0.5567	0.5785	0.0152
33	XRX	0.0035	0.0484	0.0724	0.9423	0.0070
	Cases in bold are significant at 10%.					
	Cumulative Average Prediction Error (CAPE) =	0.0029	CAPE test statistic = SUM(t_Stat)/sqrt(N)		0.1125	

TABLE TWO
CLASS ACTION SETTLEMENTS

November 1991 to August 2001

	Class Action Settlements	Dummy Variable Coefficient	Standard Error of Coefficient	t Statistic	P_value	Cumulative Prediction Error (CPE)
1	AB	_0.0178	0.0345	_0.5155	0.6069	_0.0356
2	ABS_92	_0.0028	0.0112	_0.2476	0.8048	_0.0056
3	ASC	0.0150	0.0096	1.5522	0.1225	0.0299
4	AXP_AUG92	_0.0012	0.0179	_0.0691	0.9450	_0.0025
5	ALD_NOV99	_0.0018	0.0096	_0.1893	0.8501	_0.0036
6	BA_DOL	0.0109	0.0141	0.7745	0.4397	0.0218
7	BA_JAN99	0.0167	0.0186	0.8996	0.3696	0.0335
8	CBS_VIA	_0.0047	0.0208	_0.2243	0.8228	_0.0093
9	CHV_NOV96	0.0023	0.0076	0.3085	0.7581	0.0047
10	EIX_OCT96	_0.0036	0.0087	_0.4185	0.6761	_0.0073
11	FTU	0.0063	0.0078	0.8114	0.4183	0.0127
12	HD	_0.0046	0.0085	_0.5365	0.5923	_0.0091
13	IBC	_0.0193	0.0222	_0.8699	0.3856	_0.0387
14	KO	0.0100	0.0165	0.6057	0.5456	0.0200
15	LMT_AGE	_0.0011	0.0082	_0.1378	0.8906	_0.0023
16	MER_FEB00	_0.0141	0.0189	_0.7434	0.4583	_0.0281
17	MER_MAY98	_0.0035	0.0152	_0.2295	0.8188	_0.0070
18	**MWD**	**0.0346**	**0.0195**	**1.7732**	**0.0780**	**0.0691**
19	MD_J JUL 98	_0.0016	0.0143	_0.1118	0.9111	_0.0032
20	NSC	_0.0105	0.0181	_0.5813	0.5618	_0.0210
21	PZL_NOV98	_0.0057	0.0161	_0.3515	0.7257	_0.0113
22	SHOY	_0.0236	0.0186	_1.2689	0.2063	_0.0472
23	SWY	0.0004	0.0147	0.0250	0.9801	0.0007
24	**TX_NOV96**	**_0.0219**	**0.0083**	**_2.6448**	**0.0090**	**_0.0439**
25	**WIN_JUL99**	**0.0214**	**0.0111**	**1.9310**	**0.0552**	**0.0428**
26	WXS_FEB95	0.0071	0.0108	0.6511	0.5159	0.0141
	Cases in bold are significant at 10%.					
Cumulative Average Prediction Error (CAPE) =		_0.0010	CAPE test statistic = SUM(t_Stat)/sqrt(N)		0.037767 4	

Table Three
Size of Judgment as Percentage of Firm Capitalization

Company Name	Settle. Amt. (millions)	Firm Capital. (millions)	Percent.
American Stores	$107.00	$3,077.73	3.48%
First Union	$58.50	$25,536.99	0.23%
Home Depot	$104.00	$11,478.85	0.91%
Interstate Bakeries	$28.30	$1,066.50	2.65%
Coca-Cola	$192.50	$140,643.07	0.14%
Lockheed Martin	$183.00	$8,610.78	2.13%
Shoney's	$134.00	$903.37	14.83%

TABLE FOUR
TEXACO PROGRESS SINCE SETTLEMENT

Category	1997	1998	1999	2000
Minority Workers	20.3	21.1	22.4	23.2
Female Workers	26.7	26.0	26.6	27.2
Minority & Female Execs	15.0	18.9	20.0	19.8
Minority Execs.	8.5	10.4	10.5	10.1
New Minority Hires	na	37.7	44.4	33.4
New Female Hires	na	40.4	49.4	40.6
Minority Promotions	24.9	21.4	28.8	24.9
Female Promotions	43.6	38.7	57.6	39.4

Table Five
Coca-Cola Settlement

Item	Amt. (mil)
Compensatory Damages	$58.7
Back Pay Fund	$23.7
Promotional Achieve. Fund	$10.0
Salary Equity Adjustments	$43.5
Diversity Initiatives	$36.0
Attorney's Fees	$20.6
Total	$192.5

Source: Ingraham v. Coca-Cola

Table Six
Class Action Settlement Distributions

Case	Amount for class (millions)	Ave. Amt.	Atty's Fees (millions)
Texaco	$117.10	$63,000	$20.1 (14.6%)
Shoney's	105.00	4,850	$29.0 (21.6%)
Coca-Cola	83.00	38,000	$20.7 (29.0%)
Home Depot	65.00	9,683	$22.5 (25.7%)
Publix	63.00	840	$18.0 (22.2%)
Lucky Stores	60.50	5,000	$13.8 (18.6%)
Edison Int'l	11.25	4,700	7.0 (38.4%)
Boeing	7.30	14,280	$4.0 (35.4%)

Source: Public sources, newspapers, court opinions.

APPENDIX ONE
CLASS ACTION DEFENDANTS

Company Name	Type of Suit	Date
American Airlines (AA)	Sex	04/23/01
Albertson's (ABS)	Race	04/25/01
Albertson's (ABS)	Sex/N.O.	05/28/92
Citibank (C)	Race	02/19/97
CBS-Viacom (CBS-VIA)	Sex	02/28/00
Circuit City (CC)	Race	10/31/95
Delta Airlines (DAL)	Race	01/01/01
Ford (F)	Race	06/10/93
First Union (FTU)	Race/Age	05/13/94
General Electric (GE)	Age	02/20/97
Georgia Power Co. (GPE)	Race	07/28/00
Home Depot (HD)	Sex	12/20/94
Interstate Bakeries (IBC)	Race	04/19/00
Coca-Cola (KO)	Race	04/23/00
Coca-Cola (KO)	Race	06/15/00
Lockheed Martin (LMT)	Race	05/10/00
Nordstrom (JWN)	Race	04/22/92
Boeing (MD)	Sex	01/08/98
MetLife (MET)	Sex	03/04/01
Martin-Marietta (MLM)	Age	05/31/94
Merck & Co. (MRK)	Race	01/29/99
Morgan Stanley (MS)	Race	01/13/97
Microsoft (MSFT)	Race	01/03/01
Microsoft (MSFT)	Race/Sex	10/05/00
Pizza Hut (Pep)	N.O.	09/27/94
Potomac Electric (POM)	Race	11/30/92
Texaco (TX)	Race	03/23/94
Texaco (TX)	Race	03/10/00
Texaco (TX)	Race	02/05/97
United Airlines (UA)	Sex	05/18/99
Wendy's (WEN)	Race	04/15/94
Walmart (WMT)	Sex	06/19/01
Xerox (XRX)	Race	05/09/01

APPENDIX TWO
CLASS ACTION SETTLEMENTS

Company Name	Type of Suit	Date	Amount (millions)
Astra (AB)	Sex	02/05/98	$10.00
Albertsons (ABS)	Sex/N.O.	11/23/93	$29.50
American Exp. (AXP)	Age	08/28/92	$35.00
Allied Signal (ALD)	Age	11/11/99	$8.00
Boeing (BA)	Race	01/22/99	$15.00
CBS	Sex	10/26/00	$8.00
Chevron (CHV)	Sex	11/07/96	$7.40
Edison Intl. (EIX)	Race	10/02/96	$11.30
First Union (FTU)	Age	10/23/97	$58.50
Home Depot (HD)	Sex	09/19/97	$104.00
Interstate Bakeries (IBC)	Race	08/01/00 08/03/00	$120.00
Coca-Cola (KO)	Race	11/16/00	$192.00
Lockheed (LMT)	Age	04/14/97	$183.00
Merrill Lynch (MER)	Sex	02/01/00	$20.00
Merrill Lynch (MER)	Sex	06/05/00	$0.00
Boeing (MD)	Race	07/08/98	$28.00
Norfolk Southern (NSC)	Race	01/10/01	$28.00
Penzoil (PZL)	Race	11/12/98	$6.75
Shoneys (SHOY)	Race	01/28/93	$134.00
Safeway (SWY)	Sex	04/01/94	$7.50
Winn-Dixie (WIN)	Race/Sex	04/01/94	$33.00
West Pt. Stevens (WXS)	Race	7/19/99	$20.00

APPENDIX THREE

EVENT STUDY EQUATIONS

First, the return (R) of the stock is calculated for the event period by using the following equation

(1) $R_{kt} = (P_{kt}/P_{kt-1})-1$
where R_{kt} = daily rate of return for firm k at time t
P_{kt} = daily closing stock price of firm k at time t

Second, the return of the stock is measured against the expected return based on the aggregate market indicator, as indicated in the following equation:

(2) $R_{kt} = \alpha_k + \beta_k D_t + \beta_k MKT_t + \epsilon_{kt}$
R_{kt} = daily rate of return for firm k at time t
α_k = constant term
MKT_t = daily rate of return for market portfolio at time t
D_t = event dummy variable, equals 1 during event period, 0 otherwise
ϵ_{kt} = error term for daily rate of return for firm k at time t

Third, a cumulative predicton error (CPE) is calculated to take into account the multiple-day event period:

(3) $CPE_k = \beta_k * L$
β_k = coefficient of D, dummy variable, for firm k
L = number of days in event period.

Fourth, a cumulative average prediction error (CAPE) is calculated, which averages the CPEs of the individual stocks

(4) $CAPE = \sum CPE_k/\sqrt{n}$
CPE_k = CPE for firm k
n = number of firms within category (ie. filings or settlements)