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Clearing Civil Procedural Hurdles in the Quest for Justice

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I. INTRODUCTION

Is there a crisis in the legal profession for civil litigants challenging systemic discrimination and other corporate misconduct? While it may not have reached epidemic proportions, plaintiffs are facing greater challenges bringing civil rights and consumer cases because of procedural hurdles in the civil litigation system. The Federal Rules of Civil Procedure are neutral, and therefore the interpretation and application of those rules strikes us as fair. However, upon further examination, it becomes clear that procedural mechanisms can act as barriers to justice, as hurdles that deny due process if they are too high to clear. This is the potential crisis that may be looming on the horizon.

There are three areas in which this is taking place. First, claimants are facing a tougher time getting access to the federal courts because the criteria for a complaint to survive dismissal have become more difficult. It is harder to get your foot in the courthouse door. Second, plaintiffs who want to bring their case with others as a class action are finding this more challenging. Clearing this procedural hurdle is important because for many employees and consumers—with little resources and small claims—being able to act collectively is the only effective way of challenging systemic discrimination or companywide misconduct. There is strength in numbers. Third, more every-day Americans are being forced to have an arbitrator, rather than a judge, resolve their disputes through mandatory arbitration agreements in form contracts. Having access to a judge and the civil litigation process provides important procedural protections and features not available in arbitration. Therefore, it is important that parties entering agreements to arbitrate truly understand and consent to such arrangements.

Each of these procedural hurdles presents an access to justice issue and alone would present a formidable challenge for plaintiffs. But the

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confluence of them threatens to make these procedural hurdles insurmountable; indeed, signals the beginning of a crisis in the legal profession.

II. PLEADING YOUR CASE TO GET INTO COURT[1]

For over half a century, federal courts have opened their doors to all plaintiffs who could craft a complaint that provided basic notice to the defendant of their claims. This threshold, called "notice pleading," was established by the Supreme Court in *Conley v. Gibson*[2]—a civil rights case brought by African-American railway workers challenging their union for failing to fairly represent their interests without regard to race. This seminal case established the rule that a complaint should only be dismissed if the plaintiff could "prove no set of facts in support of his claim that would entitle him to relief."[3] This made it easy for plaintiffs to initiate a lawsuit because the system was designed to test the merits of plaintiffs' cases later on, once both sides had the chance to collect evidence through the discovery process and use other pre-trial procedures. It was important not to let procedural gamesmanship bar ordinary people from seeking justice and relief through the courts.

Anchored in these principles, the Supreme Court consistently rejected efforts by the lower courts to raise the pleading standard in civil rights cases.[4] The Court remained steadfast in enforcing *Conley's* "no set of facts" standard, only requiring plaintiffs to set forth a "short and plain statement of the claim" that would give the defendant notice, as stated in Rule 8 of the Federal Rules of Civil Procedure.[5] It was important to give civil rights complainants, like everyone else, their day in court and let their cases be decided on the merits.

After more than fifty years, however, this generous pleading standard upon which courts had historically relied came to an abrupt halt. In *Bell Atlantic Corp. v. Twombly*,[6] an antitrust class action by consumers against Internet and telephone service providers, the Supreme Court "retired"

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1. This Section is based on a prior issue publication: Suzette M. Malveaux, *Salvaging Civil Rights Claims: How Plausibility Discovery Can Help Restore Federal Court Access After* Twombly *and* Iqbal, AM. CONST. SOC'Y FOR LAW AND POL'Y ISSUE BRIEF (Nov. 2010), *available at* http://www.acslaw.org/sites/default/files/Malveaux%20issue%20brief%20%20Fed%20Access%20afte%20Twombly.pdf.

2. Conley v. Gibson, 355 U.S. 41 (1957).

3. *Id*. at 45-46.

4. *See, e.g*., Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510-514 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

5. *See Conley*, 355 U.S. at 45-47; FED. R. CIV. P. 8(a)(2).

6. Bell Atl. Corp. v. Twombly, 550 U.S. 554 (2007).

Conley's permissive "no set of facts" language.[7] Instead of requiring plaintiffs to put forth facts showing their claims were *possible*, they now had to put forth facts showing their claims were *plausible*.[8] In *Ashcroft v. Iqbal*,[9] a constitutional civil rights case by Javaid Iqbal against top government officials, the Court clarified that the new standard applies to all civil actions, including discrimination claims.[10] And the way a judge would determine if something is plausible would be to use his "judicial experience and common sense."[11]

Today, all plaintiffs must clear this higher hurdle to get into federal court. The Federal Rules of Civil Procedure, which govern civil actions in federal court, apply to all cases in the same manner, regardless of the substantive right being pursued. In other words, the rules are *trans-substantive*. But surviving this new bar may be particularly formidable for civil rights plaintiffs. One of the problems with the higher pleadings bar is the harsher impact it may have on plaintiffs challenging discrimination. Intentional discrimination claims, in particular, are more vulnerable to dismissal following *Twombly* and *Iqbal* for numerous reasons.

First, a plaintiff alleging intentional discrimination in her complaint often tells a story whose facts are consistent with both legal and illegal behavior; it could go either way. This is not surprising because at the very beginning of a lawsuit plaintiffs can only put forward information that they were able to gather through their own diligent investigation. No one has had a chance to engage in the formal discovery process, where the parties are compelled to turn over important information to the other side. But under the new pleading standard, plaintiffs must allege facts "plausibly suggesting (not merely consistent with)" illegal conduct.[12]

This makes it tricky for civil rights claims to survive dismissal. If a plaintiff alleges intentional discrimination, she ultimately has to prove that the defendant's adverse action was *because* of some impermissible factor; the plaintiff has to prove what *motivated* the defendant. But a defendant's conduct can suggest a discriminatory motive or a purely innocent one—indistinguishable from each other at the early pleading stage. For example, an applicant may not have been hired because of her gender (i.e., an illegitimate reason) or her poor qualifications (i.e., a legitimate reason).

7. *Id*. 550 U.S. at 562-63.
8. *Id*. at 557-63.
9. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).
10. *Id*. at 1953.
11. *Id*. at 1950 (citing Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007)).
12. *Twombly*, 550 U.S. at 557.

Until there has been some discovery, the facts available to the plaintiff may be consistent with both theories.

This was true in *Iqbal*. Javaid Iqbal was detained and held on various charges immediately following the 9/11 terrorist attacks because of his designation as a person of "high interest."[13] Iqbal, a Pakistani who ultimately pled guilty to criminal charges and served his time, alleged that he had been mistreated by federal officials while in a special, maximum security unit, in violation of his constitutional rights.[14] In particular, he contended that former Attorney General John Ashcroft and FBI Director Robert Mueller designated him a person of "high interest" and subjected him to harsh conditions of confinement on account of his race, religion, or national origin in violation of the First and Fifth Amendments.[15] His complaint alleged that these constitutional violations were a matter of policy for which Ashcroft and Mueller were personally responsible.[16] Iqbal's factual allegations were consistent with both illegal and legal conduct.[17] The facts could explain invidious discrimination on the one hand, or legitimate anti-terrorism activity on the other.[18] At the pleading stage, without the benefit of discovery, it was too early to tell.[19]

Second, the new plausibility test—determined by "judicial experience and common sense"—is so subjective that it fails to give judges enough guidance on how to determine if a complaint should be dismissed.[20] Based on differences among judges, one judge may dismiss a complaint while another concludes that it survives, solely because of the way each judge applies his or her "judicial experience and common sense." This is bound to create unpredictability, lack of uniformity, and confusion.

For example, studies indicate that there are significant differences in perception among racial groups over the existence and pervasiveness of race discrimination.[21] With the election of Barack Obama, the first African-

13. *Iqbal*, 129 S. Ct. at 1942-44.
14. *Id*. at 1942-1945.
15. *Id*. at 1944.
16. *Id*.
17. *Id*. at 1959-60 (Souter, J., dissenting).
18. *Iqbal*, 129 S. Ct. at 1949-52 (majority opinion).
19. *Id*. at 1953-54.
20. *See id*. at 1950.
21. *See* Kevin Sack & Janet Elder, *Appendix, The New York Times Poll on Race: Optimistic Outlook But Enduring Racial Division*, *in* HOW RACE IS LIVED IN AMERICA: PULLING TOGETHER, PULLING APART 385 (2001) (forty-four percent of African-Americans believe they are treated less fairly than whites in the workplace, while seventy-three percent of whites believe African-Americans are treated fairly); Gary Langer & Peyton M. Craighill, *Fewer Call Racism a Major Problem Though Discrimination Remains*, ABC NEWS, Jan. 18, 2009, *available at* http://abcnews.go.com/PollingUnit/Politics/story?id=6674407&page=1 ("[African-Americans] remain twice as likely as whites to call racism a big problem (44 percent vs. 22 percent), and only half as likely to say African-Americans have achieved

American President, there has been a particularly acute focus on whether American society has become "post-racial."[22] Following this historic election, many Americans have concluded that race discrimination is no longer a significant issue.[23] Consequently, some judges, like many other Americans, may operate from the presumption that race discrimination is a thing of the past. This perception may lead to a judge concluding that, based on the facts before him, intentional discrimination is implausible, especially in light of other alternative explanations available. Without a suitable legal standard in which to anchor the plausibility determination, judges are vulnerable to the perception that their decisions are based on factors outside of the law. This excessive subjectivity can result in different outcomes depending not on the facts but on who the judge is.

In *Iqbal* itself, the Supreme Court concluded that the factual allegations, taken as true, *were* consistent with intentional illegal discrimination.[24] The arrest and detention of thousands of Arab Muslim men as part of the FBI's post-9/11 terrorism investigation could mean that Ashcroft and Mueller intentionally designated such detainees as persons of "high interest" on the grounds of race, religion, or national origin.[25] But a more benign reason could explain the same conduct: i.e., Ashcroft and Mueller instituted a legitimate anti-terrorism policy that happened to have a disparate impact on Arab Muslim men because of the connection between the 9/11 attack and its

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equality."); K.A. DIXON ET AL., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 8 (2002), *available at* http://www.heldrich.rutgers.edu/sites/default/files/content/A_Workplace_Divided.pdf (finding that African-American employees are five times more likely than their white counterparts to believe that African-Americans are the most likely victims of discrimination; fifty percent of African-American employees believe employment practices are fair, in comparison to ninety percent of their white counterparts).

22. *See* Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1024 (2010).

23. *See id*. at 1066-67 ("Partly through colorblindness and partly through the accumulated weight of cultural beliefs and historical practices, most Americans accept that major American institutions are race-neutral and that these institutions produce vast racial disparities"); *see also Debate on Race Emerges as Obama's Policies Take Shape* (PBS television broadcast Sept. 16, 2009), *available at* http://www.pbs.org/newshour/bb/politics/july-dec09/rage_09-16.html. (In a discussion among columnists and academics with Gwen Ifill, Democratic pollster Cornell Belcher concluded: "We're two very different countries racially, where right now you have a majority of whites who, frankly, do think we're post-racial because they think African-Americans have the same advantages as they do, while African-Americans do not. And you have a large swath of whites right now who are just as likely to see reverse discrimination as an issue as classic discrimination"); *but see* The Associated Press, *Ex-President Sees Racism in Outburst*, N.Y. TIMES, Sept. 16, 2009, at A14 (attributing Joe Wilson's outburst during President Obama's health care speech as "based on racism" and noting that "[t]here is an inherent feeling among many in this country that an African-American should not be president"); Jeffrey M. Jones, *Majority of Americans Say Racism Against Blacks Widespread*, GALLUP, Aug. 4, 2008, *available at* http://www.gallup.com/poll/109258/Majority-Americans-Say-Racism-Against-Blacks-Widespread.aspx.

24. *Iqbal*, 129 S. Ct. at 1951 ("Taken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin.").

25. *Id*.

perpetrators.[26] In comparing the plaintiff's intentional discrimination theory to the defendants' more innocent one, the Court rejected the plaintiff's as implausible on the grounds that it was less likely.[27] But a court is not supposed to weigh the relative merits of alternative theories at the pleading stage before both parties have had an opportunity to collect evidence to prove their case. These kinds of judgment calls are to be made by a jury after everyone has had a chance to gather evidence and make their case.

Finally, discriminatory intent is often difficult, if not impossible, to unearth before the parties have had some discovery. One reason for this is that discrimination has become more subtle and institutional. It can be harder to detect because it is less overt and transparent; instead it takes the form of stereotypes and unconscious bias.

Another reason it is hard for plaintiffs to unearth discrimination is because of the unequal access the parties have to evidence. In the absence of discovery, it is particularly difficult for civil rights claims to survive dismissal when plaintiffs cannot get access to information that is exclusively in the defendant's possession, such as defendant's intent or institutional practices. This unequal access to information—informational inequality—between the parties is unfair. A good illustration of this was found in *Ledbetter v. Goodyear Tire & Rubber Co.*[28] There, the plaintiff, Lilly Ledbetter, brought suit against her employer, Goodyear, well after the statute of limitations had expired because she was not aware of her employer's initial discriminatory decision to pay her less than her male colleagues.[29] Not surprisingly, like so many employees, she was not privy to the fact that she was being systematically underpaid[30]—an inequity that did not escape Congress.[31] Other informational inequities include a plaintiff beaten up by a police officer who is unable to know the officer's identity to survive a section 1983 claim and an African-American couple steered by a real estate agent to predominantly Black neighborhoods who are unable to know the agent's motive to survive a Fair Housing Act claim. In numerous ways, ordinary people are at a significant disadvantage when challenging the misconduct of employers, corporations, and other institutions because of this informational inequality.

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26. *Id*.

27. *Id*.

28. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 641-42 (2007) (holding plaintiff's claim was barred because of the statute of limitations).

29. *Id*. at 621-24.

30. *Id*. at 650-51 (Ginsberg, J., dissenting).

31. The effect of this holding was ultimately reversed by the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 and 42 U.S.C.).

Plaintiffs are caught in a Catch-22. They must put facts in their complaint to nudge their claim from possible to plausible. Often the only way to get such facts is through discovery. But the court will not permit discovery unless the plaintiffs provide the very facts they cannot discover. Thus, plaintiffs' complaints die on the vine not because they lack merit, but because plaintiffs do not have the same access to information that the defendant does. By raising the pleading bar to plausibility, the Supreme Court has created an untenable situation for plaintiffs challenging discrimination where there is informational inequality.

The fact that civil rights cases run the risk of being dismissed more often in federal courts is a major problem. This risk undermines civil rights enforcement and compromises deterrence. Pursuant to the legislative scheme of various civil rights statutes, everyday people are empowered to act as private attorneys general to enforce the law. The federal courts, in particular, have historically been a forum civil rights plaintiffs have relied on for justice. Where the legislative and executive branches have been unwilling or unable to enforce civil rights, the judicial branch has stepped in to play a vital role.

Defendants are more likely to file motions to dismiss for failure to state a claim, post-*Twombly* and *Iqbal*.[32] Moreover, examples of civil rights cases that would not have otherwise been dismissed but for *Twombly* and *Iqbal* have appeared across the country.[33] Empirical studies on *Twombly* and *Iqbal*'s impact on the dismissal rate of civil rights cases, however, have been mixed. A number of scholars have found that the more rigorous

32. Joe S. Cecil et al., *Motions to Dismiss for Failure to State a Claim After Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CENTER 8 (Mar. 2011), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf.

33. *See* Joshua Civin & Debo P. Adegbile, *Restoring Access to Justice: The Impact of Iqbal and Twombly on Federal Civil Rights Litigation*, AM. CONST. SOC'Y FOR LAW AND POL'Y ISSUE BRIEF 9-10 (Sept. 2010), *available at* http://www.acslaw.org/sites/defaultfiles/Civin_Adegbile_Iqbal_Twombly.pdf; Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 86 n.137 (2010) (citing examples) [hereinafter *Front Loading*]. *See, e.g.*, Diaz-Martinez v. Miami-Dade County, No. 07-20914-CIV, 2009 WL 2970468, at *9 (S.D. Fla. Sept. 10, 2009) (relying on *Twombly*, the court dismissed the section 1983 claim for conspiracy to deprive plaintiff of his civil rights on grounds that allegations of parallel constitutional violations alone did not suggest an agreement between police defendants, and discovery was not appropriate); Dorsey v. Ga. Dep't of State Rd. & Tollway Auth. SRTA, No. 1:09-CV-1182-TWT, 2009 WL 2477565, at *5–7 (N.D. Ga. Aug. 10, 2009) (dismissing § 1983 hostile work environment claim and others on grounds that plausibility standard under *Twombly* was not met under Rule 12(c) motion on the pleadings); Ibrahim v. Dep't of Homeland Sec., No. C 06-00545 WHA, 2009 WL 2246194, at *8–10 (N.D. Cal. July 27, 2009) (dismissing claims of discrimination on basis of national origin, religious beliefs, and other constitutional violations because plaintiff did not show discriminatory purpose under *Iqbal*); Kyle v. Holinka, No. 09-cv-90-slc, 2009 WL 1867671, at *1–3 (W.D. Wis. June 29, 2009) (dismissing equal protection claims brought by prisoners against prison officials for alleged racial segregation).

pleading standard is resulting in a greater dismissal rate for such cases.[34] The Federal Judicial Center, on the other hand, has not, at a statistically significant level.[35] Practitioners reveal that they have changed their pleadings practices when possible to accommodate the more rigorous pleading standard,[36] while others have been chilled or discouraged from bringing potentially meritorious cases altogether.[37]

The tougher pleading standard also undermines one of the most fundamental rights upon which the American legal system is based—the right to be heard. The Supreme Court has long recognized the importance of this value, as expressed in the Constitution: "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns[.]"[38] Depriving someone of access to the court system undermines fundamental notions of fairness and due process that are the cornerstones of our legal system. Moreover, denying plaintiffs access to the courts undermines the well-established preference that cases be decided on the merits rather than on procedural grounds. Whenever possible, the merits should not be subordinated to procedural technicalities.

Finally, the plausibility pleading standard's potentially detrimental impact on civil rights claims and claimants may lead individuals to call into question the legitimacy of the legal system. Where some victims of

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34. *See* Kendall W. Hannon, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1838 (2008) ("[A] Twombly civil rights action was 39.6% more likely to be dismissed than a random case in the set."); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (dismissal orders in civil rights cases increased from 53% to 56% to 60%, two years before *Twombly*, two years after *Twombly*, and immediately following *Iqbal* respectively); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1030, 1041–42 (2009) (2% increase in dismissal rate of employment discrimination cases post-*Twombly*).

35. *See* Cecil, et al., *supra* note 32, at vii (finding "no increase in the rate of grants of motions to dismiss without leave to amend in civil rights cases and employment discrimination cases[.]").

36. *See* Emery G. Lee III & Thomas E. Willging, *Attorney Satisfaction with the Federal Rules of Civil Procedure: Report to the Judicial Conference Advisory Committee on Civil Rules* 12 (Mar. 2010), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf [hereinafter LEE & WILLGING, SATISFACTION] (Seventy percent of plaintiffs' attorneys who had filed an employment discrimination case since *Twombly* indicated that they had changed the way they structured complaints, and ninety-four percent of those attorneys shared that they included more factual allegations in the complaint post-*Twombly* and *Iqbal*).

37. *See* Civin & Adegbile, *supra* note 33, at 9.

38. Truax v. Corrigan, 257 U.S. 312, 332 (1921); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 666 (2d ed. 1988) ("[T]here is *intrinsic* value in the due process right to be heard" because "[w]hatever its outcome, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her[.]").

injustice are selectively excluded and denied the law's benefits, they may view the legal system as illegitimate and unworthy of respect.

In response to these problems, numerous scholars, practitioners, and advocacy groups have generated a variety of innovative and promising potential solutions. They include legislation that would turn the clock back to the notice pleading standard,[39] amendments to the Federal Rules, and various other approaches. [40] Many are collecting data and studying the issue, including the Federal Judicial Center, the Civil Rules Advisory Committee, and various academics.[41] These efforts to construct a permanent, institutional fix to the pleadings problem are laudable and important work.

Even some courts are dialing back from what initially seemed a rigid pleadings approach and bleak picture for the viability of civil rights cases. More specifically, some federal courts of appeals are emphasizing a flexible, context-specific approach whose leniency is dependent on the circumstances.[42] Some are permitting pleading "upon information and belief" when appropriate, and liberally granting leave to amend.[43]

The Supreme Court itself recently reminded litigants of the relative ease with which pleadings can be brought in *Skinner v. Switzer*,[44] citing pre-*Twombly* and *Iqbal* case law. Unfortunately, not much can be read into *Skinner*. While *Skinner* reiterates Rule 8's requirement that only a short and plain statement of a claim is necessary, and reminds the lower courts that a plaintiff need not pin down his precise legal theory at the pleadings stage or give an "exposition of his legal argument," the Court still requires that plaintiff set forth a *plausible* claim.[45]

More recently, in *Matrixx Initiatives, Inc. v. Siracusano*,[46] the Supreme Court unanimously affirmed the Ninth Circuit's reversal of a securities fraud class action dismissed at the pleading stage.[47] However, the Court's

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39. Open Access to Courts Act, H.R. 4115, 111th Cong. (2009); Notice Pleading Restoration Act, S. 1504, 111th Cong. (2009).

40. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 95-105 (2010) (comparing rulemaking and legislative options).

41. *See, e.g.*, Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011) (providing empirical data challenging assumptions regarding benefits and costs of the heightened pleading standard).

42. *See* Cecil, et al., *supra* note 32, at 2-3.

43. *Id*.; Memorandum from Andrea Kuperman on a Review of Case Law Applying Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal to Civil Rules Comm. and Standing Rules Comm. 4-5, 35 (July 26, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal_memo_072610.pdf.

44. Skinner v. Switzer, 131 S. Ct. 1289, 1296 (2011).

45. *Id.*

46. 131 S. Ct. 1309 (2011).

47. *Id*. at 1313-14.

holding that plaintiffs adequately pled the elements of materiality and scienter—while good for investors alleging violations of section 10(b) of the Securities and Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5—is too specific to offer any broad pleadings lessons.[48] In *Matrixx*, the Court concluded that plaintiffs adequately stated a claim for securities fraud under the federal securities laws, based on the pharmaceutical company's failure to disclose reports of adverse events of its nasal spray Zicam to investors.[49] Even though the reports did not disclose a statistically significant number of adverse events—that was not necessary for investors to consider the reports "material."[50] Applying *Twombly* and *Iqbal*'s plausibility standard, the Court concluded that plaintiffs had alleged facts plausibly suggesting that reasonable investors would have considered the reports material to their investment decisions, and that *Matrixx* acted with the requisite state of mind to defraud investors.[51] Although relying on *Twombly* and *Iqbal*'s plausibility paradigm, the Court required plaintiffs to plead with greater factual particularity because their claims were brought under the Private Securities Litigation Reform Act.[52] Thus, *Matrixx*'s general applicability may be limited.

The various efforts being made for private actors to maintain court access are constructive and should continue. However, in the absence of a change in the Federal Rules or Congressional action—which may be months if not years away—it is imperative that civil rights litigators figure out how they can use the tools currently available to them to fight for access to the courts and continued enforcement of the civil rights statutes. So what can be done in the meantime? One such alternative is "plausibility discovery."[53] Plausibility discovery is limited, targeted discovery made available to the parties at the pleading stage in response to a defendant's Rule 12(b)(6) motion to dismiss on the grounds that a plaintiff's claims are implausible.[54] Plaintiffs should consider requesting plausibility discovery and courts should consider granting it where there is informational asymmetry between the parties. Adapting discovery in this way would level the playing field for civil rights claimants and ensure that the trans-substantive application of the Rules does not work an injustice against civil

48. *See id*. at 1322, 1325.
49. *Id*. at 1314.
50. *Id*. at 1319-20.
51. *Id*. at 1322-25.
52. *Id*. at 1324.
53. *See* Malveaux, *Front Loading*, *supra* note 33, at 65.
54. *See* Malveaux, *Front Loading*, *supra* note 33, at 65.

rights claims. Plausibility discovery is gaining some traction,[55] thereby offering hope to those just trying to get through the courthouse door.

III. CLEARING THE CLASS ACTION HURDLE

Assuming a case survives dismissal, the next procedural hurdle an employee may face is whether she can bring her case with others as a class action. Clearing this procedural hurdle is important because, for many employees and consumers, being able to act collectively is the only effective way of challenging systemic discrimination or companywide misconduct.

For numerous reasons, the class action mechanism cannot otherwise be matched. As an initial matter, an employer can more easily mask discrimination when challenged on an individual basis than on a class-wide basis. For example, statements from management, corporate documents, and companywide statistics can unearth trends and powerful evidence of a larger problem. Consequently, plaintiffs in class actions can craft remedies and injunctive relief far greater in scope than in an individual case. Such evidence also puts others on notice of potential deceptive practices of which they may not have been aware. Moreover, the class action enables individuals to pool their resources, which allows them to share litigation risks and burdens, and more easily retain counsel for small value claims. In the absence of aggregate litigation, an employee may also be too fearful of retaliation to challenge her employer; the class action creates a more level playing field between an employer and employee. If the plaintiffs successfully prove a pattern or practice of discrimination, the burden of proof shifts in favor of the plaintiffs in a Title VII class action. Each class member enjoys a rebuttable presumption that she was the victim of the discrimination, subject to the employer's ability to prove otherwise.

Furthermore, private class actions bolster enforcement by government agencies—such as the Equal Employment Opportunity Commission ("EEOC") and others—who may be financially or politically hampered in bringing pattern or practice cases. Congress has explicitly recognized this enforcement function for Title VII and other claims.[56] Additionally, potential class-wide liability encourages companies to voluntarily comply with the law and deters future misconduct. Finally, the class action

55. *See, e.g.*, Swanson v. Citibank, N.A., 614 F.3d 400, 412 (7th Cir. 2010) (Posner, J., dissenting) ("If the plaintiff shows that he can't conduct an even minimally adequate investigation without limited discovery, the judge presumably can allow that discovery, meanwhile deferring ruling on the defendant's motion to dismiss.") (citations omitted); Miller, *supra* note 40, at 109 n.422.

56. Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971) ("Congress provided, in Title VII of the Civil Rights Act of 1964, for class actions for enforcement of provisions of the Act [.]").

mechanism provides an efficient means of resolving similar individual claims all in one lawsuit—relieving the federal courts of repetitive individual litigation and providing defendants with global peace. In sum, this procedural device plays an important and unique role in the civil justice system.

Although aggregate litigation offers enumerable benefits, it is not without its detractors. Such mammoth litigation, while rare, has caused others—particularly those in the business community—to criticize its power. More specifically, given the tremendous risk of financial exposure class actions create, defendants argue that certification is akin to blackmail and makes the pressure to settle irresistible. Critics argue that unrelated individual cases are inappropriately lumped together in one case, making it impossible for companies to adequately defend themselves against individual claims.[57] Not only are class actions unpopular with companies, they may also be for some plaintiffs. Plaintiffs with very strong claims may do better bringing their cases individually, and enjoy a process that is faster and more inclusive. The perception that class members gain little from coupon and other class settlements, while plaintiffs' lawyers garner significant fees, became so prevalent that Congress enacted the Class Action Fairness Act ("CAFA") in 2005 to provide more rigorous checks and balances.[58] CAFA also liberalized federal jurisdiction for class actions, in response to complaints that some state courts ("judicial hellholes") did not exercise sufficient rigor when deciding class certification.[59] This has resulted in an increase in class actions in federal court based on diversity of citizenship.[60] In sum, class action critics have pushed back—with various

57. *See, e.g.*, Brief of DRI—The Voice of the Defense Bar as Amicus Curiae in Support of Petitioner, Wal-Mart Stores, Inc. v. Dukes, at 7-9, 14, 17, 19, 131 S. Ct. 2541 (2011) (No. 10-277) (Jan. 27, 2011); Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner, at 4, 6, 16-19, 21-22, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277) (Jan. 2011).

58. *See* Class Action Fairness Act, Pub. L. No. 102-2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.). Congress also enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which, among other things, gave judges the authority to select large institutional investors, rather than individual investors, and plaintiffs' counsel to represent a class in a federal securities fraud class action. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.A.). In 1998, the federal class action rule itself was amended to codify the regulation of attorneys' fees (Rule 23(h)) and selection of class counsel (Rule 23(g)). *See* FED. R. CIV. P. 23.

59. *See generally* EMERY G. LEE III & THOMAS E. WILLGING, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CENTER (Apr. 2008), *available at* www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf.

60. *See* Kenneth Jost, *Class Action Lawsuits*, CQ RESEARCHER, May 13, 2010 at 448; *see also* LEE & WILLGING, *supra* note 59.

degrees of success—on the class action, seeing it as a flawed and misused procedural device.

A particularly serious challenge to employees attempting to curb systemic discrimination is whether they can seek monetary relief, as well as injunctive relief, in a class action brought under Rule 23(b)(2)—the class action rule often used in civil rights cases. The Supreme Court is wrestling with this very question now[61] in *Dukes v. Wal-Mart Stores, Inc.*[62]—a case involving up to 1.5 million women alleging nationwide pay and promotions gender discrimination at Wal-Mart.[63]

Like many employees who challenge companywide discrimination, the plaintiffs in *Dukes* brought their case as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure.[64] Rule 23(b)(2) allows a class action where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]"[65] Because everyone is challenging the same companywide policy or general practice, the court permits named plaintiffs to represent the larger group.[66] Additionally, because everyone shares the same primary goal—which is to stop the discrimination—the lawyers are not required to send out notice to the class members or give them an opportunity to opt out of the case. While normally one's interest cannot be represented without giving one's consent, this mandatory class action is permitted because of the cohesiveness and homogeneity of the class. Not surprisingly, this is exactly the type of class action that is very popular for civil rights cases.[67] In fact, the rule was designed for this type of case, as indicated by the drafters in 1966.[68] As would be expected, the plaintiffs in *Dukes* sought an injunction to stop Wal-Mart's alleged discriminatory policy and a declaration that the company's conduct was illegal.[69]

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61. The case was decided as this article was going to press. This article is based on remarks made on March 20, 2011, at the 34th Annual Law Review Symposium, "Crisis in the Legal Profession," Carhart Program in Legal Ethics.

62. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 795 (Dec. 6, 2010) (No. 10-277).

63. *See id*. at 578 n.3.

64. *Id*. at 577; *see also* FED. R. CIV. P. 23(b).

65. FED. R. CIV. P. 23(b)(2).

66. *Dukes*, 603 F.3d at 613-14. In addition, in order for a case to be certified as a class action in federal court, all of the criteria of Rule 23(a) must be met. Rule 23(a) requires numerosity, commonality, typicality and adequacy of representation. In addition to the four Rule 23(a) criteria, every class action must meet one of the Rule 23(b)(2) criteria. *See* FED. R. CIV. P. 23. In *Dukes*, the Ninth Circuit certified the class action under Rule 23(b)(2), so the issue is whether this was proper.

67. *See* FED. R. CIV. P. 23(b)(2) advisory committee's note.

68. FED. R. CIV. P. 23 (amended 1966).

69. *Dukes*, 603 F. 3d at 577.

One of the questions at issue in *Dukes*, however, is the significance of plaintiffs seeking monetary relief under Rule 23(b)(2).[70] Plaintiffs sought two types of monetary relief: back pay and punitive damages.[71] Back pay includes lost wages and salary, benefits and other monetary benefits lost due to discrimination. Back pay is designed to put a victim of discrimination back in his or her rightful place, to make the person whole. Back pay can easily be calculated using a formula based on an employer's personnel data. Punitive damages are awarded to plaintiffs for particularly serious situations; i.e. when a defendant has carried out discrimination with "malice or reckless indifference to the federally protected rights of an aggrieved individual."[72] The focus of punitive damages is on the defendant's conduct; punitive damages are meant to punish the defendant and deter from future misconduct. Notably, the *Dukes* plaintiffs chose not to pursue compensatory damages, which compensate individuals for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses"[73] resulting from discrimination.[74] Such damages often need to be determined through hearings on an individualized basis.

The question before the Supreme Court is whether any monetary relief is permitted under Rule 23(b)(2), and if so, under what circumstances. The answer to the first question is yes. Although the rule is silent about monetary relief—it does not say whether such relief is prohibited or allowed—the Rule's drafters (the Civil Rules Advisory Committee) make clear that they did not intend to ban all forms of monetary relief, but only a subset—damages that are exclusive or predominant.[75] The drafters contemplated that some monetary relief would be permitted for this mandatory class action, so long as the monetary relief did not predominate over the injunctive relief sought.[76] Not surprisingly, all of the courts of appeals that have addressed this question came to the same conclusion.[77] Relying on the Advisory Committee's notes, they have all concluded that non-predominant monetary relief is available—which makes this proposition well-settled law.[78]

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70. *Id*. at 616-17.
71. *Id*. at 577.
72. 42 U.S.C. § 1981a(b)(1) (2011) (enacted in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1073 (1991)).
73. *Id.* § 1981a(b)(3).
74. *See Dukes*, 603 F. 3d at 577.
75. *See* FED. R. CIV. P. 23(b)(2) advisory committee's note.
76. *See id*.
77. *See Dukes*, 603 F. 3d at 619.
78. *See id*.

So the fundamental question left is under what circumstances monetary relief is available under the rule. This depends largely on what type of monetary relief is sought because the courts deal with petitions for Rule 23(b)(2) certification differently on this ground. For example, courts have historically permitted back pay in Rule 23(b)(2) class actions to enforce Title VII of the Civil Rights Act.[79] This is because back pay is usually considered equitable relief; back pay stems from a class-wide liability finding and from the injunctive and declaratory relief sought. As an equitable remedy, back pay is awarded by a judge, not a jury. The courts have favored back pay in Rule 23(b)(2) class actions for decades as part of Title VII's broad remedial scheme.[80] Back pay has been essential to Title VII's statutory goals of eradicating systemic discrimination, making discrimination victims whole, and deterring future misconduct. Many courts—including those with some of the toughest class certification standards (such as the Fifth Circuit)—have concluded that an "award of back pay, as *one element of the equitable remedy*, conflicts in no way with the limitations of Rule 23(b)(2)."[81] The Supreme Court has also concluded that back pay is so important that there is presumption in its favor.[82]

Moreover, because back pay awards in the Title VII context can involve relatively uncomplicated factual determinations, comprise few individualized issues, and be calculated on a class-wide basis, this type of monetary relief has been regularly certified under Rule 23(b)(2).[83] For example, using an employer's own personnel data and statistics, back pay may be calculated for each class member based on a formula that approximates over time what salary an employee would have received but for an employer's discrimination. Because back pay lends itself to common proof, it does not jeopardize the cohesiveness of the class.

Unlike back pay, courts have treated requests for monetary damages (compensatory and punitive) very differently. Damages are permitted in a Rule 23(b)(2) class action only if they do not predominate over the injunctive and declaratory relief sought.[84] The courts are more careful about

79. *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998).
80. *See id*. at 415.
81. *Id*. at 415 (citing Pettway v. American Cast Iron Pipe Co. 494 F.2d 211, 257 (5th Cir. 1974)).
82. *Id*. at 409.
83. *See id*. at 414.
84. *See* FED. R. CIV. P. 23(b)(2). Prior to 1991, employees had limited recourse under Title VII. They could pursue only equitable relief, such as injunctions, declarations, reinstatement, back pay and front pay. The Civil Rights Act of 1991 amended the Civil Rights Act of 1964 to enhance enforcement and expand remedies. More specifically, it provided compensatory and punitive damages, and attendant jury trials, in cases alleging intentional discrimination under Title VII. *See* Jost, *Class Action Lawsuits*, *supra* note 60, at 443.

monetary damages under the rule because of the risk that class members' interests may diverge.[85] Without notice or an opportunity to opt out of a Rule 23(b)(2) class action, class members' interests must be aligned so as to provide them due process. But the cohesiveness that justifies a mandatory class action arguably starts to break down when, after a class-wide liability finding, class members seek individual damages awards. It follows that monetary awards involving complicated, highly individualized assessments or hearings would go against class certification.

Because of the risk that monetary damages present to the cohesiveness of a Rule 23(b)(2) class, courts uniformly apply a predominance test to ensure that the class action remains primarily focused on group-wide injury and relief.[86] Consequently, the real dispute among the federal courts of appeals has been over how to determine when monetary relief predominates over injunctive and declaratory relief. The circuits have come up with three different tests: the Fifth Circuit's incidental test established in *Allison v. Citgo Petroleum Corp.*,[87] the Second Circuit's ad hoc balancing test established in *Robinson v. Metro-North Railroad Co.*,[88] and the Ninth Circuit's objective effects test established in *Dukes*.[89] The Supreme Court may take the opportunity presented in *Dukes* to endorse one of these approaches or fashion its own—thereby providing much needed guidance on the critical question of what circumstances justify mandatory class certification involving monetary relief.

So what are the implications of the *Dukes* case and what access-to-justice issues does it present for employees and other civil rights litigants? The potential impact of the case stems not so much from the size of the *Dukes* class[90] as from the very survival of certain types of class actions in areas as varied as employment, securities, anti-trust, and products liability.

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85. *See Allison*, 151 F.3d at 412-13.

86. *Dukes*, 603 F.3d at 593 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997).

87. 151 F.3d 402.

88. 267 F.3d 147.

89. 603 F.3d 571.

90. *See Dukes*, 603 F.3d at 578 n.3. The size of the class (up to as many as 1.5 million women) is of course relevant to class certification issues under Rule 23(a), and manageability under Rule 23(b)(3) (an alternative certification that entitles class members to notice and the right to opt out, so long as the common issues predominate and a class action is superior to other dispute resolution mechanisms). At issue before the Court in *Dukes* is whether there is a common question of law or fact between the named plaintiffs and the class members sufficient for the case to be a class action. The plaintiffs contend that women are disproportionately denied promotions and are underpaid for comparable work in comparison to their male colleagues because of a corporate culture that gives store managers undue discretion when making employment decisions. The lawsuit is premised on the theory that excessive subjectivity enabled improper gender stereotyping to permeate the company, resulting in an illegal pattern or practice of discrimination. Wal-Mart contends that there is no companywide discrimination and that there is not sufficient commonality among the class members to bring the case as a class action.

At issue is whether it will become more difficult for plaintiffs who seek monetary relief for systemic misconduct to bring a class action. This is important because for many employees, consumers and others, a class action is their own meaningful access to the courts. If the standard for class certification is too hard to meet, this compromises plaintiffs' ability to eradicate systemic discrimination, to be made whole, and to deter future misconduct.[91] Moreover, class actions are important to the civil justice system for the substantial time and cost savings they provide the court and parties, along with numerous other advantages as discussed above. The *Dukes* case has the potential of redefining the terms on which this critical procedural device is available.

While *Dukes* promises to clarify the standards for class certification (at least in the employment discrimination area), *Smith v. Baye*r *Corp*.[92] aims to establish the preclusive effect of a federal class certification ruling.[93] More specifically, before the Supreme Court is the question of whether putative class members may get another bite at the apple in state court if a federal court denies class certification first.[94] In *Smith*, the Eighth Circuit held that a federal court that denied class certification could preclude a similar state court suit brought by individuals who would have been members of the federal class action, but did not actually file the federal case.[95] The Supreme Court will have to balance two important competing interests: protecting the sovereignty and judgments of different court systems on the one hand and regulating forum shopping for class certification on the other.[96] Should the Supreme Court heighten the class certification standard in federal court under *Dukes* and then punctuate that with preclusive effect

91. Even if plaintiffs are able to seek certification under Rule 23(b)(3), rather than Rule 23(b)(2), this may offer cold comfort because of the former's much harder certification standard not historically used in Title VII cases. Under Rule 23(b)(3), plaintiffs would have to show that common questions predominate and that a class action is superior to all other methods for resolving the dispute. The rule also requires plaintiffs to provide notice to the class and an opportunity to opt out. These greater costs and burdens may prevent those with small claims and resources from bringing potentially meritorious systemic civil rights cases altogether. *See* FED. R. CIV. P. 23(b)(3).

92. Smith v. Bayer Corp., 593 F.3d 716 (8th Cir. Minn. 2010), *cert. granted*, 131 S. Ct. 61 (Sept. 28, 2010) (No. 09-1205).

93. The case was decided as this article was going to press. This article is based on remarks made on March 20, 2011, at the 34th Annual Law Review Symposium, "Crisis in the Legal Profession," Carhart Program in Legal Ethics.

94. *See id*.

95. *Id*. at 724.

96. The Court wrestled with a similar state sovereignty issue in Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010) (holding that a state law which prohibited class actions in lawsuits seeking penalties or statutory minimum damages conflicted with Rule 23, and therefore did not apply to a case filed in federal court sitting in diversity).

in *Smith*, plaintiffs will have an even harder time challenging systemic corporate misconduct.

Employees like Betty Dukes in the Wal-Mart case, are already struggling to successfully bring class actions challenging unfair employment practices. A number of courts of appeals are raising the bar—requiring plaintiffs to prove each element of Rule 23 by a "preponderance of the evidence," [97] rather than by "some showing."[98] Employment discrimination class actions, already rare in federal court,[99] may become even rarer.

IV. GETTING ACCESS TO A JUDGE

Last but not least, another procedural hurdle an employee may confront is whether he will be permitted to have his case heard by a judge or be forced to use an arbitrator. There has been a significant increase in arbitration agreements that require everyday Americans to give up their right to have a judge rather than an arbitrator resolve their case, in the event that there is a dispute. Such pre-dispute agreements, offered on a take-or-leave it basis, have proliferated in employment and consumer contracts of all kinds. While the lower courts have been divided over whether such contracts of adhesion are enforceable according to their specific terms, the Supreme Court has promoted the enforceability of arbitration agreements in various contexts.[100] The trend over the last several decades has been to defer to arbitration whenever possible.

Given that arbitration is simply another forum a complainant may use to resolve a dispute, why is deference to pre-dispute mandatory arbitration agreements an access to justice issue? It is because the court system and

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97. Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co, 597 F.3d 330, 338 (5th Cir. 2010). In *Erica P. John Fund, Inc. v. Halliburton Co*., the Supreme Court is considering the propriety of requiring plaintiffs to prove at the class certification stage that a defendant's misstatements caused the losses claimed by investors in a securities fraud class action. The Fifth Circuit has taken the unique position that it does—a particularly severe approach. *See* Erica P. John Fund, Inc. v. Halliburton Co., 2011 U.S. LEXIS 4181 (2011).

98. *Erica P. John Fund, Inc. v. Halliburton Co*. was decided as this article was going to press. This article is based on remarks made on March 20, 2011, at the 34th Annual Law Review Symposium, "Crisis in the Legal Profession," Carhart Program in Legal Ethics.

99. Jost, *Class Action Lawsuits*, *supra* note 60, at 448 ("[C]lass certification [was] granted in only 10 of 33 employment discrimination cases filed as class actions under the federal civil rights law from 2008 through 2010.").

100. *See* Suzette M. Malveaux, *Is it the "Real Thing"? How Coke's One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration*, 2009 J. DISP. RESOL. 77, 83 (2009) ("The Court has endorsed the use of arbitration in just about every kind of civil dispute over which a court could have jurisdiction. The Court has interpreted the FAA as expressing a strong preference for the private resolution of claims brought to enforce rights in areas as varied as securities, antitrust, consumer protection and civil rights."); *Id.* (citing cases).

arbitration have very different features, which may impact not only the process but the outcome of a case. Like the federal civil litigation system, arbitration has important advantages and disadvantages of which individuals should be aware. For example, in comparison to the court system, arbitration may be relatively fast, inexpensive, convenient, confidential, flexible, and informal. It may lead to more lucrative outcomes. The cost of these advantages, however, is high. Arbitration denies the parties the right to a jury trial, binding precedents, and robust appellate review. Discovery, remedies, and written opinions may be limited; costs may be high, depending on an arbitrator's time and fees expended; and procedural protections may be sacrificed for expediency.

Because the benefits of arbitration come with a price, it is important that parties entering agreements to arbitrate understand and consent to such arrangements. Mandatory arbitration can be very positive when it is the product of knowing, consensual agreements between the parties. For example, the Supreme Court's deference to the enforceability of arbitration agreements in the collective bargaining context makes sense because unions and employers negotiate with each other as equally sophisticated, powerful repeat players. However, the problem arises when the players have unequal bargaining power and information. For example, consumers and employees who want a cell phone, bank account, mortgage, or job have no real opportunity to cross out an arbitration clause that appears in a standard, form contract. These are take-it-or-leave-it deals, where the notions of negotiation and consent start to fall apart.

One of the most troubling features of modern arbitration agreements is the class action ban. An increasing number of arbitration agreements state that if an individual has a dispute in the future, he is prohibited from bringing his grievance as a collective or class action. The standardization of class action bans has received mixed reviews from the courts. Relying on various rationales, some federal and state courts of appeals have held such bans unenforceable, especially in consumer contracts involving small value claims, while others have not. Recently the Supreme Court, in *AT&T Mobility LLC v. Concepcion*,[101] weighed in on the enforceability of arbitration agreements with embedded class action waivers. *AT&T Mobility* merges two concerns: making sure that the class action device and the civil justice system are available when appropriate.[102] As such, the decision firmly sets the stage in which access to justice issues predominate.

101. 131 S. Ct. 1740 (2011).
102. *See* generally *id*.

In *AT&T Mobility*, the Court was tasked with determining whether the Federal Arbitration Act ("FAA") preempted California's judicial rule that classified certain class action bans in arbitration agreements as unconscionable.[103] More broadly, could a state condition the enforceability of an arbitration agreement on the availability of a class action?[104] The Court, in a 5-4 split, held that the FAA pre-empted California's law.[105]

Consumers, Vincent and Liza Concepcion, purchased cell phone service from AT&T Mobility in response to an advertisement stating they would receive "free" phones.[106] To their surprise, the Concepcions were charged sales tax on the value of the "free" phones.[107] Consequently, the couple filed a complaint in federal court in California.[108] The complaint was consolidated with a putative class action, alleging that the company had, *inter alia*, engaged in false advertising and fraud.[109] AT&T Mobility moved to compel the Concepcions to arbitrate their claims pursuant to an arbitration clause in their wireless service agreement.[110] The agreement, although consumer-friendly in many ways, required them to resolve all disputes through arbitration and banned class actions.[111] The federal district court denied the motion to compel arbitration on the grounds that the class action waiver was unconscionable and therefore, unenforceable under California law.[112] The Ninth Circuit affirmed, and held that the FAA did not preempt California law.[113] In California, a class action ban is unenforceable if the case involves a consumer contract of adhesion, a dispute over small amounts of damages, and an allegation that the party with greater bargaining power tried to deliberately cheat lots of consumers out of small monetary sums (i.e. the "*Discover Bank*" rule).[114] In California, if a class action waiver meets the *Discover Ban*k criteria, the agreement is unconscionable because it functions as an exculpatory clause—effectively immunizing companies from complying with

103. *Id*. at 1746.
104. *Id*. at 1744.
105. *Id*. at 1756.
106. *AT&T Mobility LLC*, 131 S. Ct. at 1744.
107. *Id*.
108. *Id*.
109. *Id*.
110. *Id*. at 1744-45.
111. *AT&T Mobility LLC*, 131 S. Ct. at 1744.
112. *Id*. at 1745
113. *Id*.
114. *See id*. at 1745-46 (quoting Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

California's consumer laws.[115] The Supreme Court granted certiorari to determine if the FAA preempted California's unconscionability rule.[116]

The Supreme Court concluded that while California's *Discover Bank* rule did not conflict outright with the FAA, the rule as applied impermissibly disfavored arbitration.[117] Therefore, the FAA preempted the state's rule.[118] Section 2 of the FAA states that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[119] The statute is meant to protect arbitration agreements from discrimination and to place them on equal footing with other contracts. The FAA requires courts to enforce arbitration agreements according to their terms and to protect the freedom to contract. The statute reflects a "liberal federal policy favoring arbitration."[120] While the final clause of Section 2 (*i.e.* the "savings clause") permits an arbitration agreement to be invalidated, this is only on limited grounds, such as generally applicable contract defenses like fraud, duress and unconscionability.[121]

The Court's description of the FAA's underlying purpose in *AT&T Mobility* largely tracks precedents that have developed over the last couple of decades. However, in concluding that the FAA preempts California's unconscionability law, the Court goes even further, requiring arbitration agreements to be enforced "according to their terms so as to *facilitate streamlined proceedings*."[122] With this overlay, the Court concluded that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[123] Building on the "fundamental" distinctions between individual and class arbitration identified in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,[124] the Court held that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."[125]

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115. *See id*. at 1746-48.
116. *AT&T Mobility LLC*, 131 S. Ct. at 1745.
117. *See id*. at 1746-53.
118. *Id*. at 1756.
119. 9 U.S.C. § 2 (2011).
120. *AT&T Mobility*, 131 S. Ct. at 1745 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
121. *Id.* at 1746; *see also* 9 U.S.C. § 2.
122. *AT&T Mobility*, 131 S. Ct. at 1748 (emphasis added).
123. *Id.*
124. 130 S. Ct. 1758, 1776 (2010) (holding that parties cannot be compelled to class arbitration under the FAA where they have not agreed to do so).
125. *AT&T Mobility*, 131 S. Ct. at 1750-51.

Despite years of successful class arbitrations by the American Arbitration Association ("AAA"), the admitted importance of class actions for small-dollar claims, and the application of *Discover Bank*'s rule to litigation and arbitration, *AT&T Mobility* prohibited a state from requiring the procedure's availability. More specifically, the Court concluded that California's law was inconsistent with, and was thus preempted by, the FAA on three grounds: (1) a class action is incompatible with arbitration because the former "sacrifices the principle advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment[,]" (2) "class arbitration *requires* procedural formality[,]" and (3) class arbitration is unacceptably risky for defendants.[126] While parties admittedly have the freedom to contract and select whatever features they would like in their dispute resolution system; the courts, however, are bound to honor those expectations to the extent that the parties agree to a system that no longer resembles arbitration as envisioned by the FAA, which is a system that cannot be required by state law.[127]

Not only is *AT&T Mobility* unique in its emphasis on linking FAA preemption to whether the arbitration agreement facilitates streamlined proceedings, the opinion is unique in its approach to federalism. The majority—Justices known to protect federalism and to defer to states' rights (Justices Scalia, Roberts, Kennedy, Alito, with Justice Thomas concurring)[128]—concluded that the unconscionability law in California is pre-empted by the FAA. By contrast, the dissent—Justices Breyer, Ginsburg, Sotomayor and Kagan—champions a state's right to prohibit class action bans under an unconscionability doctrine that applies to all contracts.[129] This switch in rhetoric suggests a significant schism in the Court over the importance of aggregate litigation.

The Court's decision erects another significant procedural hurdle that employees, consumers, and others will have to clear in order to bring meritorious claims. In light of *AT&T Mobility*, companies are even more likely to insert class action bans in their pre-dispute, mandatory arbitration agreements. This means that more Davids in the world will go up against Goliaths alone. To the extent that those with small claims and resources are

126. *Id.* at 1751-52.

127. *Id.* at 1752-53.

128. *Id*. at 1746. Justice Thomas concurred with the judgment on different grounds. In an effort to remain consistent with his views on implied preemption, as expressed in Wyeth v. Levine, his concurrence in *AT&T Mobility* relies on a unique interpretation of the FAA's text. *See id*. at 1753-56 (Thomas J., concurring); Wyeth v. Levine, 555 U.S. 555 (2009).

129. *AT&T Mobility*, 131 S. Ct. at 1756-61 (Breyer, J., dissenting).

unlikely to challenge powerful corporations on their own, class arbitration bans will function as exculpatory clauses. Where arbitration agreements are relatively consumer and employee-friendly, individuals may enjoy being compensated for individual wrongs. But where a systemic, companywide problem occurs, a class action ban will shield a business from accounting for widespread misconduct.[130] And in the event that the relevant government agency cannot fill the gap left by the lack of private enforcement, the most egregious wrongdoing will be protected. Sheltering corporate misconduct and guaranteeing procedural and cost advantages were not the fundamental purposes Congress had in mind when enacting the FAA. Instead, equalizing arbitration agreements with other contracts and ensuring judicial enforcement were the statute's goals.[131]

The Supreme Court's latest deference to federal arbitration is likely to spur renewed interest in the Arbitration Fairness Act and other legislation designed to curb mandatory, pre-dispute arbitration agreements in consumer and employment adhesion contracts. Given the Court's emphasis on the importance of consent to arbitration terms—such as the availability of class actions—it would seem especially important to ensure that parties knowingly and meaningfully enter into arbitration agreements. With consent as the linchpin to binding arbitration agreements, it makes sense to focus on whether this is actually happening. Consumers and employees can only enjoy the freedom to contract if they select a binding dispute resolution system that reflects knowledge and consent. In the absence of these attributes, arbitration agreements would be elevated above other contracts, in direct contravention of the FAA.[132]

V. CONCLUSION

In sum, it is easy to overlook how civil procedural rules, interpretations, and trends pose access to justice problems. Neutral rules and their application can seem innocuous, if not boring. However, it is important to recognize how and when procedural hurdles become too high—denying litigants access not only to the court system, class actions, and judges, but ultimately to justice itself. When this occurs, there is indeed a crisis in the legal profession.

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130. *See, e.g.*, Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

131. *See* 9 U.S.C.A. §1 (editor's notes).

132. *AT&T Mobility* applies only to arbitration under the FAA, not to arbitration agreements in state court. State courts may still apply state law unconscionability doctrine in state court.