This consolidated Update includes developments since publication of the fourth edition, consolidating material presented in the last two Updates with developments since the 2006 Update.

**Taylor v. Sturgell handout:** Along with this Update, you should be receiving a copy of the handout we have prepared on the Supreme Court's decision in Taylor v. Sturgell, which rejected the virtual representation ground for binding nonparties. We believe that this material should be substituted for pp. 787-803 at the beginning of Chp. VIII.

**Fifth edition:** For any who are interested, we are intending to bring out a fifth edition for use in Fall 2010. With regard to that new edition, we are delighted to announce that we will be joined by a new co-author, Professor Howard Erichson of Fordham Law School.

### CHP. I: THE NATURE OF COMPLEX LITIGATION

For a measure of the current importance of complex litigation, consider Tidmarsh, Pound's Century, and Ours, 81 Notre Dame L. Rev. 513, 565 (2006): "[C]omplex litigation is pervasive in our society, touching the lives of millions of citizens each year and restructuring major governmental and private institutions."

But according to some reports, one abiding source of complex litigation may be abating. Frankel, Asbestos "Industry" in Decline, S.F. Recorder, July 5, 2006, at 1, reports that there is "a growing consensus that the litigation hurricane has passed." Asbestos cases in San Francisco Superior Court, for example, dropped by more than a third between 2002 and 2005. The Manville Personal Injury Settlement Trust, which in 2004 implemented new standards that slashed compensation for the unimpaired, saw new U.S. claims drop from 93,760 in 2003 to 16,600 in 2005. A defense side lawyer is quoted as saying that "We're not seeing junk cases anymore. . . . The litigation has become totally manageable by both the judiciary and the defendants." It should be noted that some defense side lawyers vehemently disagreed and said that the crisis had not abated.

### B. THE AGGREGATION DEBATE

Garrett, Aggregation in Criminal Law, 95 Calif. L. Rev. 383 (2007), urges that more aggregation be used in criminal cases to provide combined resolution of procedural issues (e.g., whether a given lab routinely flubs DNA analysis or whether a given search program violates the Fourth Amendment). The argument is that the necessary separateness of trial need not prevent such combination for other purposes, and that combination would sometimes have benefits for the parties and the judicial system.

### CHP. II: JOINDER AND STRUCTURE OF SUIT

#### IN A UNITARY FEDERAL FORUM

### A. PERMISSIVE PARTY JOINDER

Regarding Mosely v. G.M. (p. 24), teachers might note the Supreme Court's ruling on different issues in *Sprint/United Mgt. Co. v. Mendelsohn*, 128 S.Ct. 1140 (2008). In that age discrimination case, plaintiff sought to prove her case by offering evidence of alleged age
discrimination by supervisors other than hers. The district court excluded the evidence under Fed. R. Evid. 401 and 403, and the court of appeals reversed on the theory that the district court had adopted a per se rule against receiving evidence about discriminatory actions by anyone but plaintiff's direct supervisor. The Supreme Court disagreed with the court of appeals, concluding that the Rule 403 determination whether to admit the evidence regarding other supervisors should generally be left to the district judge. The relevance of this decision is to raise questions about whether one can really say that the unhappy episodes of different employees really arise from the same transaction or series of transactions under Rule 20. At some point, our opposition to "character" evidence would cause us to conclude that such evidence should be excluded.

Grant v. Salem, 226 F.R.D. 1 (D.D.C. 2004), illustrates the problems of joinder in suits based on a medical procedure. Three patients sued a doctor, claiming that he was negligent in performing a certain type of bypass procedure, and also that the ongoing care they received from this doctor and others at his university hospital was negligent. Defendants moved to sever. Plaintiffs pointed out that their surgeries were each performed to the same specifications, and that there would be overlapping expert testimony even though their medical histories were not identical. Acknowledging that the trials would involve some overlapping expert testimony, the court concluded that the facts and circumstances of each plaintiff's claim varied to an extent that justified separation.

Regarding the problem of causation in toxic tort cases (p. 44 n.4), Hansen, DNA Poised to Show Its Civil Side, ABA J., March 2008, at 18. A new test measuring the release of proteins known as cytokines may be able to determine whether a given person has been harmed by exposure to a toxic substance. The test has already been used in some workers' compensation cases in California by mutual agreement of the parties. Although the test could not show how or where a plaintiff had been so exposed, it may be able to demonstrate that a plaintiff's condition, such as cancer, did not result from exposure to a given toxic substance.

B. COMPULSORY PARTY JOINDER

Equal Employment Oppor. Comm'n v. Peabody Western Coal Co., 400 F.3d 774 (9th Cir. 2005), provides an interesting contrast to Eldredge v. Carpenters 46 County Northern California Counties JATC (p. 45), not the least because it might indicate an interfamilial disagreement about the application of Rule 19. In the Peabody case, the EEOC asserted that Peabody engaged in improper discrimination by preferring members of the Navajo Nation over Hopi and other job applicants for jobs at a coal mine it operates on the Navajo and Hopi reservations. Peabody has a lease for the mines with the Navajo Nation that requires it to give preference to Navajo job applicants, and if the lease terms are violated the Navajo Nation can cancel the lease. The district court dismissed for failure to join the Navajo Nation, noting that under Title VII the EEOC has no claim against the Nation because Indian tribes are excluded from the statutory definition of "employer." (An issue of sovereign immunity might arise with regard to the Navajo Nation, but because the EEOC is an agency of the U.S. government, that was not an obstacle to its joinder in this case.)

The Ninth Circuit, speaking through Judge William Fletcher (a former civil procedure professor) held that joinder of the Navajo Nation was "necessary for the 'sole purpose' of effecting complete relief between the parties." Id. at 783. It quoted the district court in Eldredge, which it said provided a "succinct statement of this purpose" when it explained that "[b]y definition, parties to be joined under Rule 19 are those against whom no relief has formally been sought but who are so situated as a practical matter as to impair either the effectiveness of relief or their own or present parties' ability to protect their interests." See id. The decision does
not mention that this district court decision was reversed by a panel of the Ninth Circuit speaking through Judge Betty Fletcher, mother of Judge William Fletcher (the case on p. 45).

In Peabody Western Coal Co., the court quotes another Ninth Circuit case for the proposition that "a person may be joined as a party [under Rule 19(b)] for the sole purpose of making it possible to accord complete relief between those who are already parties, even though no present party asserts a grievance against such person." Id. at 781. And it recognizes that the Fifth Circuit held that "it is implicit in Rule 19(a) itself that before a party . . . will be joined as a defendant the plaintiff must have a cause of action against it." Id. at 782, citing Vieux Carre Prop. Owners v. Brown, 875 F.2d 453, 457 (5th Cir. 1989). Nonetheless, it felt joinder "desirable," noting (id. at 779) that "[i]f understood in its ordinary sense, 'necessary' is too strong a word, for it is still possible under Rule 19(b) for the case to proceed without the joinder of the so-called 'necessary' absentee." It explained (id. at 780):

Rule 19(a) is "concerned with consummate rather than partial or hollow relief as to those already parties, and with precluding multiple lawsuits on the same cause of action." * * * [T]he Nation is a signatory to lease provisions that the plaintiff challenges under Title VII. The EEOC seeks declaratory, injunctive, and monetary relief. If the EEOC is victorious in its suit against Peabody, monetary damages for the charging parties can be awarded without the Nation's participation. But declaratory and injunctive relief could be incomplete unless the Nation is bound by res judicata. The judgment will not bind the Navajo Nation in the sense that it will directly order the nation to perform, or refrain from performing, certain acts. But it will preclude the Nation from bringing a collateral challenge to the judgment. If the EEOC is victorious in this suit but the Nation has not been joined, the Nation could possibly initiate further action to enforce the employment preference against Peabody even though that preference would have been held illegal in this litigation. Peabody would then be * * * "between the proverbial rock and a hard place -- comply with the injunction prohibiting the hiring preference policy or comply with the lease requiring it."

Although the Ninth Circuit's ruling in Eldredge can be distinguished on the ground that it found that the nonparties had "ceded" their authority over the apprenticeship program to the JATC, it still seems to point in a different direction.

THE RULE 19(b) DETERMINATION

In Republic of the Philippines v. Pimentel, 128 S.Ct. 2180 (2008), the Court dealt with the application of Rule 19(b). The case arose out of the tangled litigation morass following the presidency of Ferdinand Marcos in the Philippines. The immediate action was an interpleader suit brought by Merrill Lynch to determine ownership of a Merrill Lynch account worth $35 million that was opened by a company created by Marcos. The interpleader action was filed at the urging of Judge Manuel Real, who had been presiding over a class action brought by victims of Marcos against the Marcos estate, which resulted in a judgment for nearly $2 billion against the estate. The class plaintiffs wanted to execute against the Merrill Lynch account, and Judge Real prodded Merrill Lynch into filing the interpleader action to determine whether it could do so.

The problem was that the Republic of the Philippines and a Commission it had established after Marcos fled the country to reclaim looted assets both asserted that the Merrill Lynch account assets were looted property of the Republic and, under Phillipine law, belonged to it. These claims had been the subject of proceedings in a court in the Philippines since 1991.
So the Republic and the Commission were -- as all conceded -- Rule 19(a) required parties. But they could not be joined over their objections because they were protected by sovereign immunity. Hence the question whether dismissal was warranted under Rule 19(b). The Ninth Circuit ruled that dismissal was not required because the nonparties' claims -- although not frivolous -- would almost certainly be barred under the New York statute of limitations, and therefore constituted unimportant considerations in comparison to the interests of the class action plaintiffs in enforcing their judgment.

The Supreme Court held that this was wrong, placing great emphasis on Rule 19(b)(1) and the nature and importance of sovereign immunity protections. It recognized that "the determination whether to proceed will turn on factors that are case specific," id. at 2188, and that therefore there should be "some degree of deference to the district court." Id. at 2189. It also observed that the restyled rule avoids the term "indispensable" party because it had "an unforgiving connotation that did not fit easily with a system that permits actions to proceed even when some persons who otherwise should be parties to the action cannot be joined." Id. at 2188-89. And it began with the premise that "the considerations set forth in subdivision (b) are nonexclusive," emphasizing further that the rule is "based on equitable considerations." Id. at 2188.

Applying Rule 19(b)(1) to this case, however, required that the interpleader action be dismissed. The lower courts' discounting of the absent parties' claims implicated the very concerns that the sovereign immunity doctrine was designed to protect against -- the determination of the validity of claims by or against such entities in our courts. The Court recognized that "Rule 19 cannot be applied in a vacuum, and it may require some preliminary assessment of the merits of certain claims." Id. at 2191. Thus, if those claims are frivolous, the court could disregard them. But in this instance the absent parties' claims were not frivolous, and the lower courts failed to "accord proper weight to the compelling claim of sovereign immunity." Id. at 2192. "Dismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity." Id. at 2194.

In Merrill Lynch v. ENC Corp., 446 F.3d 1019 (9th Cir. 2006), Judge Noonan reflected on the meaning of "equity and good conscience" in Rule 19(b) (id. at 1024-25):

The phrase "equity and good conscience" in our judicial usage is coterminous with the early opinions of the United States Supreme Court. Undoubtedly in its earlier usage, equity bought to mind a fairness sought by the chancery courts that transcended statutory law and "good conscience" referred to an interior moral arbiter regarded as the voice of God. As the phrase has become domesticated and invoked in modern times, the distinction of its two elements has blurred, and it has a secular rather than a religious cast. Still, its unique appearance in Rule 19 of the Federal Rules of Civil Procedure emphasizes the flexibility that a judge may find necessary in order to achieve fairness and the moral weighing that should attend the judge's choice of solutions, a choice to be marked by "mercy and practicality."

C. INTERVENTION

For a contrast to Planned Parenthood v. Citizens for Community Action (p. 64), consider Providence Baptist Church v. Hillandale Committee, 425 F.3d 309 (6th Cir. 2005). Plaintiff there, a church with a large predominantly African-American congregation, wished to build a new church to replace its facility in Cleveland. It located 68 acres in Euclid, a town of about
52,000 some 12 miles from downtown Cleveland, on which it wanted to build a new church and a single-family home development, but it needed a zoning change for this purpose. The city council passed ordinances to rezone the property, but a referendum petition was submitted that caused the zoning change to be placed on the ballot in an upcoming election, thus stalling the zoning change. Plaintiff then sued the city, claiming that, by frustrating its plans, the zoning code violated the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq. Some time later, an organization called the Hillandale Committee moved to intervene, describing itself as the committee that circulated the referendum petitions and citing its interest in opposing the rezoning and in enabling the voters to vote on the referendum. Thereafter the voters did vote to reject the re-zoning ordinances. The court then denied the motion to intervene, and plaintiff and the city settled the litigation with a consent judgment stipulating that the city's zoning code was unconstitutional as applied to plaintiff's property.

The Hillandale Committee appealed both the denial of its intervention and the acceptance of the consent decree. The appellate court questioned the committee's claim to have circulated the referendum petition, but accepting that contention arguendo regarded its interest only as protecting the results of the referendum. Since the referendum petition itself took no position on the merits of the referendum, the Committee "had no interest in the outcome of the election or in any negotiations between Euclid and Providence after the election was held." Id. at 317. Moreover, because "[i]t is possible to have standing to intervene in a lawsuit, but not have Article III standing to bring an independent appeal," the court could not object on appeal to the acceptance of the consent judgment. Because its "interest in protecting the results of the referendum is not sufficiently particularized to satisfy the requirement of a substantial interest for intervention purposes, then it is clear that the alleged 'injury in fact' is not of 'such a personal stake' as to permit a finding that Hillandale Committee has standing to challenge the entry of the consent judgment." Id. at 318. For a careful examination of these issues, see Steinman, Irregulars: The Appellate Rights of Persons who are not Full-Fledged Parties, 39 Ga. L. Rev. 411 (2005).

For a contrast to Grutter v. Bollinger (p. 68), consider Coalition to Defend Affirmative Action v. Granholm, 501 F.3d 775 (6th Cir. 2007). After the Supreme Court upheld the use of race by the Michigan Law School, a ballot initiative forbidding use of race, ethnicity, or gender in making admissions decisions was passed by the voters. During the campaign, both the University and the Governor opposed the measure. After the voters adopted it, plaintiff sued to enjoin its enforcement, claiming that it violated the Constitution. The named defendants were the Governor and the University. The organization that circulated the initiative petition sought to intervene as an additional defendant, as did a white male student who said he intended to seek admission to the Michigan Law School. Both proposed intervenors argued that, having opposed the ballot proposition, the Governor and University could not be trusted to defend it in court. Before a ruling on this motion to intervene, however, the Michigan Attorney General was allowed to intervene on the defense side. The Attorney General had supported the initiative during the election campaign. The court found that the organization that supported the ballot measure did not have a sufficient interest to intervene of right because support during the campaign was not sufficient. The prospective law student, however, did have a sufficient interest. Regarding the adequacy of representation of the intervenors interests by the Attorney General, the court found him adequate even though his office was also representing the Governor in the litigation. A divided court of appeals affirmed, concluding that the intervenors held only "a general ideological interest . . . a generic interest shared by the entire Michigan citizenry." Id. at 782. The organization's involvement in pursuing adoption of the law did not make a difference: "[A]n organization involved in the process leading to the adoption of a challenged law does not have a substantial legal interest in the subject matter of the a lawsuit challenging
the legality of that already-enacted law, unless the challenged law regulates the organization or its members." Id. at 781.

Regarding standing to intervene (p. 69 n.4), San Juan County v. U.S., 503 F.3d 1168 (10th Cir. 2006), aligns the court with the others (2d, 5th, 6th, 9th, and 11th Circuits) that have held that independent standing is not required. See id. at 1203-06. By the court's count, the Seventh, Eighth, and D.C. Circuits go the other way. The court also takes a nuanced approach to the rights of an intervenor (id. at 1189):

If the applicant is granted intervention because of an interest that may be injured by the litigation, it does not follow that intervention must extend to matters not affecting that interest; and just because no party will adequately represent one particular interest of the applicant does not mean that the applicant must be allowed to participate in the litigation of other matters concerning which its interests are adequately represented.

How should this approach be applied in U.S. v. Reserve Mining Co. (p. 73)?

For a contrast to Keith v. Daley (p. 70 n.5), consider California ex rel. Bill Lockyer v. United States, 450 F.3d 436 (9th Cir. 2006), holding that anti-abortion health care providers had a sufficient interest to intervene in a lawsuit brought by California claiming that the Weldon Amendment to a federal appropriations bill was unconstitutional. The Weldon Amendment threatens to withhold federal money from any state that, like California, requires doctors to provide abortion-related services in emergency situations. "Congress passed the Weldon Amendment precisely to keep doctors who have moral qualms about performing abortions from being put to the hard choice of acting in conformity with their beliefs, or risking imprisonment or loss of professional livelihood." Id. at 441. This interest, put forward by the intervenors, was sufficient to support intervention.

CHP. III: DISPOSITION OF DUPLICATIVE AND RELATED LITIGATION

A. MULTIPLE PROCEEDINGS IN FEDERAL COURT

1. Stay Orders or Injunctions Against Prosecution of Suits in Other Federal Courts

Patent and trade secret disputes often involve reliance on the first-filed rule, which can be complicated by the frequent use of "cease and desist letters," by which a patent holder demands that another cease alleged violations of the patent or trade secret rights. For example, in Koresko v. Nationwide Life Ins. Co., 403 F.Supp.2d 394 (E.D. Pa. 2005), plaintiffs made both patent infringement and trade secret claims. But defendant had earlier filed a similar action at its home in Ohio, seeking a declaratory judgment that plaintiffs' trade secret claims were unjustified and that it had not misappropriated or infringed plaintiffs' trade secrets or pending patent application. Plaintiffs argued that the first-filed rule should not apply because defendant's suit sought a declaratory judgment, and because it was filed during the pendency of plaintiff's cease-and-desist letter. Although an earlier decision had concluded that "a second-filing party may have a strong case that the initial filing was improper if the first-filing party initiated its suit within the response period provided in a recent cease-and-desist letter," FMC Corp. v. AMVAC Chem. Corp., 379 F.Supp.2d 733, 744 (E.D. Pa. 2005), the court found that reasoning inapplicable (id. at 403):

Here, [plaintiffs'] demand letter of June 15, 2005, contained a large financial demand, a
short time-frame for resolution, and a threat of litigation. The letter was sent in response to a communication from [defendant’s] counsel that [defendant] was beginning an assessment of the situation and [plaintiffs’] claim of misappropriation. Under these circumstances, the party at the receiving end of a financial ultimatum is not required to unilaterally disarm and allow the party asserting the demand to control the choice of forum. This is particularly so, given that [defendants’s] choice of forum is reasonable and will not unduly vex or burden plaintiffs’ ability to litigate this matter. [Defendant] filed its declaratory judgment action in the Southern District of Ohio, where [defendant] has its principal place of business and where the contested events regarding the disclosure of plaintiffs’ alleged trade secrets took place.

Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535 (6th Cir. 2007), illustrates the limits of the first filed rule. In 2002, plaintiff entered an agreement with defendant under which defendant was to be its franchisee for performing restoration dry cleaning services (to undo the effects on fabric of smoke from fires and like causes) in six counties in Ohio. The agreement had a noncompete clause under which defendant agreed not to provide such services in the area covered by its franchise for two years after termination. In 2006, plaintiff terminated the agreement on the ground that defendant was not making payments due under its terms. When it learned that defendant was continuing to provide restoration dry cleaning services in the covered area, plaintiff wrote to defendant threatening legal action unless defendant adhered to the noncompete provision. Defendant promptly filed a declaratory judgment action against plaintiff in state court in Ohio, which defendant removed to federal court in Ohio. Plaintiff then filed this action in federal court in Michigan, asserting breach of the agreement and seeking enforcement of the noncompete provision. Because the franchise agreement had a forum selection clause directing that any action be brought in Michigan, plaintiff moved to dismiss the Ohio suit, and the Ohio federal court eventually granted that motion. Before that ruling, however, plaintiff sought a preliminary injunction from the Michigan court against defendant’s continued provision of dry cleaning services in Ohio, and the district court denied that motion, concluding that the franchise agreement was ambiguous and that plaintiff had not shown that it was likely to prevail on the merits. Plaintiff appealed.

The court of appeals reversed, concluding that the agreement was not ambiguous, and that plaintiff had proven its entitlement to a preliminary injunction. Because the district court had also relied on the first-filed rule with regard to the Ohio action (which had not been dismissed at the time the Michigan court ruled), the court of appeals addressed that rule as well (id. at 552):

The Ohio action filed by Defendants was the very kind of anticipatory suit which should not have been given deference under the first-to-file rule. As the Ohio district judge recognized when it dismissed the action, the forum selection clause in the franchise agreement clearly mandated that the parties dispute be resolved in a Michigan, rather than an Ohio, forum. By filing in Ohio courts, Defendants were attempting to forum shop as well as preempt resolution of the parties’ dispute by the proper forum. Thus, the Ohio action was not entitled to any deference under the first-to-file rule.

2. **Pretrial Consolidation**

Regarding mass tort consolidated trials (p. 126 n.6), much of the action has been in state court. Jackson, Consolidation Reversals, Nat. L.J., Oct. 11, 2004, at 13, reports on several recent reversals of trial court orders that cases be tried together: In re Van Waters & Rogers, Inc., 2004 WL 1966021 (Tex. S.Ct., Sept. 3, 2004); Scott v. Janssen Pharmaceutica, Inc., 876 So.2d 306
(Miss. 2004); Janssen Pharmaceutica, Inc. v. Armond, 866 So.2d 1092 (Miss. 2004). He concludes: "As these recent cases demonstrate, before a consolidated trial of mass torts claims can occur, courts must carefully scrutinize the effect that consolidation will have on the jury's ability to weigh the evidence fairly. Particularly when causation is a key issue or when the tort is otherwise not mature, consolidation may be an abuse of discretion that appellate courts increasingly are going out of their way to correct."

3. **Transfer to a More Convenient Forum**

Although significant, the pendency of related litigation in the proposed transferee forum is not dispositive. For example, in Samsung Electronics Co. v. Rambus, Inc., 386 F.Supp.2d 708 (E.D. Va. 2005), defendant sought transfer to the Northern District of California, where several cases involving the patents in suit were also pending. Although recognizing that this consideration would "weigh heavily" in favor of transfer, the court declined to transfer in light of the "unique record in this case" resulting from the fact that the Virginia court had already conducted a patent infringement trial involving four patents in suit. Because the Virginia court "has expended enormous judicial resources and has become quite familiar with the issues presented," the result of a transfer "would be to frustrate, rather than further, the interests of justice by requiring another court to do what already has been done here." Id. at 722-23.

4. **Dismissal for Forum non Conveniens**

In In re Vioxx Products Liability Litigation, 448 F.Supp.2d 741 (E.D. La. 2006), the court granted defendant Merck's motion to dismiss class actions on behalf of foreign users of the product. The court had before it some 5,700 suits consolidated by the JPML, including eleven filed on behalf of classes of foreign citizens from England, Australia, Italy, France, South Africa, Canada, Germany, Israel, New Zealand, the Netherlands, and Poland. Another suit purported to represent all citizens of Europe who used Vioxx, and one proposed a class of every Vioxx user in the world. The motion to dismiss was narrowed to the class claims on behalf of citizens of France and Italy. The court noted that both French and Italian courts would permit individual actions, and that both have some sort of collective action mechanisms. The fact that the collective action mechanisms differ from American versions was not a ground for finding them inadequate. The fact that both countries had loser pays fee-shifting rules and prohibitions on contingency-fee arrangements similarly did not show that they were inadequate. For these foreign plaintiffs, there should be no deference to the choice of forum, and the plaintiffs' argument that Merck controlled the production and distribution of the product from the U.S. was rebutted by Merck. Meanwhile, information about the treatment provided by prescribing doctors in France and Italy was relevant and not available in this country.

Regarding the delays in the courts of India (p. 141 n.7), consider Usha (India), Ltd. v. Honeywell Intern., Inc., 421 F.3d 129 (2d Cir. 2005), in which the Second Circuit was presented with an argument that the district court improperly dismissed in favor of litigation in India. Plaintiffs objected that in the New Delhi High Court it would take ten to fifteen years to adjudicate the dispute. Defendants responded by pointing to new procedural rules in that court they said would permit resolution in two to three years. Agreeing that adjudication in India would in the abstract be preferable, the court of appeals modified the district court's order of dismissal to permit plaintiff to move to reinstate the action in 18 to 24 months, at which time defendants could defeat the motion to reinstate only by showing that plaintiffs had not promptly and vigorously pursued relief in India or that the claims would likely be resolved with reasonable dispatch in the courts of India.
In *Norex Petroleum Ltd. v. Access Industries, Inc.*, 416 F.3d 146 (2d Cir. 2005), the Second Circuit vacated a decision that dismissed in favor of litigation in Russia. In part, it concluded that there were legitimate justifications for plaintiff's decision to sue in New York, even though it appeared that less savory forum shopping motives also played a role. For example, there was no other forum in which plaintiff could obtain jurisdiction over all the defendants. The principal difficulty with the district court's decision, however, was its indifference to the possibility that plaintiff would be denied a hearing now due to a ruling in an earlier Russian litigation in which it did not take part. The appellate court held that this sort of obstacle in a foreign court system meant that it offered no current alternative remedy (Id. at 159):

We here clarify that a case cannot be dismissed on grounds of *forum non conveniens* unless there is presently available to the plaintiff an alternative forum that will permit it to litigate the subject matter of the dispute. It may well be that a plaintiff that is precluded from litigating a matter in a foreign jurisdiction because of an adverse prior judgment by its courts will not be able to pursue the claim further in the United States, but the reason for dismissal in such circumstances is our recognition of the foreign judgment in the interest of international comity, not *forum non conveniens*.

5. Transfer Under Multidistrict Litigation Procedures

For an overall review of the activities of the Multidistrict Panel, see the symposium forthcoming in the Tulane Law Review. Among the pieces in the symposium are Marcus, Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power, 82 Tulane L. Rev. ___ (2008), and Sherman, The MDL Model for Resolving Complex Litigation if a Class Action is not Possible, 82 Tulane L. Rev. ___ (2008).

On the basic question who benefits from JPML treatment, consider Frankel: It's All Over, Amer. Lawyer, Dec. 2006, at 108: "The debate should now be over: The MDL process has proved to be more of a boon to defendants than plaintiffs, thanks to several rulings by MDL judges aggressively policing the mass torts transferred to their courtrooms." Without regard to that, however, In In re Zyprexa Products Liability Litig., 238 F.R.D. 539 (E.D.N.Y. 2006), Judge Jack Weinstein suggests that the JPML model should be used more aggressively (id. at 542):

It may be useful for Congress to consider expanding the Class Action Fairness Act from class actions to at least some national MDL, non-Rule 23, aggregate actions. As use of the class action device to aggregate claims has become more difficult, MDL consolidation has increased in importance as a means of achieving final, global resolution of mass national disputes.

The Panel's consolidation decisions can have a decidedly personal cast. For example, in In re Bextra and Celebrex Marketing Sales Practices Litig., 391 F.Supp.2d 1377 (J.P.M.L. 2005), the Panel decided to consolidate litigation involving two different drugs even though there was no geographical focal point of the litigation. Instead, it looked for a judge it regarded as well suited to handling the task (id. at 1379):

Given the geographic dispersal of constituent actions and potential tag-along actions, no district stands out as the geographical focal point for this nationwide docket. Thus we have searched for a transferee judge with the time and experience to steer this complex litigation on a proper course. By centralizing this litigation in the Northern District of California before Judge Charles R. Breyer, we are assigning this litigation to a jurist experienced in complex multidistrict litigation and sitting in a district with the capacity to
handle this litigation.

Multidistrict proceedings can produce additional complexities for already complex cases. For example, in U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc., 444 F.3d 462 (6th Cir. 2006), the court held that although the judge in the District of Columbia presiding over the multidistrict proceeding had authority to rule on a dispute about discovery pursuant to a subpoena served on HCA, a nonparty in Tennessee, the appeal of that ruling should be to the Sixth Circuit, which has authority to rule on appeals from judgments in district court in Tennessee. The underlying problem was that the parties had, under a protective order, been using a sort of "quick peek" document production technique under which plaintiff's counsel initially reviewed documents made available and marked those they wanted copied, and the producing parties then reviewed those documents for privilege. After such a review, HCA withheld two letters that had been marked for copying by plaintiff's lawyers. HCA sought to have the dispute resolved by a district judge in Tennessee, but was unsuccessful, and the D.C. judge then ruled against it (under D.C. Circuit precedent that called for finding a privilege waiver very easily). HCA then appealed to the Sixth Circuit, which held it had jurisdiction over the appeal because the D.C. judge had "acted as a judge of the Tennessee district court when he issued the order compelling HCCA to return the inadvertently disclosed documents." Id. at 469. But the court nevertheless held that it had no jurisdiction to review this discovery order because it was interlocutory (a problem that would have prevented review in the D.C. Circuit also), and that HCA should have refused to comply with the order and be held in contempt to obtain review before final judgment. One judge disagreed that contempt should be the only route for appellate review, but also felt that the district court's ruling was correct.

In re Wilson, 451 F.3d 161 (3d Cir. 2006), illustrates the breadth of the notion "consolidated" pretrial proceeding under § 1407. This petition for a writ of mandate arose out of the ongoing Diet Drug litigation, in which several thousand individual plaintiffs' cases were transferred to Philadelphia by a JPML order in 1997. The MDL court established a comprehensive schedule for discovery, including some relating to individual issues. One upshot of this activity in Philadelphia was a class action settlement. See In re Diet Drugs, p. 391. Thousands of class members opted out of that settlement and filed suits, and all the federal court cases were transferred to Philadelphia by the J.P.M.L. Although the Philadelphia district court began recommending that the Panel remand some of the individual cases it had, the total number swelled to more than 30,000. Petitioners in this case, who had individual claims, argued that the increase in volume of cases immobilized the district court's program of recommending remand, and that all common discovery had been completed so that remand should be required under the statute. But the district court and the Panel refused thus to dissolve the MDL proceedings and remand, noting in part that the individual discovery raised familiar issues, and that policing the effect of the class action settlement on claims of class members who had opted out presented recurring issues. The Plaintiffs' Management Committee opposed petitioners' motion. Repeated requests by the objecting plaintiffs brought repeated refusals to remand. In addition, it was argued that the adoption of a "new settlement program" in the MDL court was a further reason to continue with proceedings in that court. These refusals prompted a petition to the Third Circuit for a writ of mandamus.

The Third Circuit denied the petition. Although it agreed that petitioners had no other adequate means for raising their concerns on appeal, it rejected their argument that the statute required remand because the consolidated pretrial proceedings were completed. Although the individual discovery proceedings were "pretrial," petitioners argued, they were not "coordinated or consolidated" because they were individual to specific cases. The Third Circuit disagreed. "[T]he test is not whether proceedings on issues common to all cases have concluded; it is
whether the issues overlap, either with MDL cases that have already concluded or those currently pending. In addition, the overlapping issues do not necessarily need to touch the petitioners' particular cases." Id. at 170. Moreover, the district court's new settlement program supported continuing the MDL process. "Given its familiarity with the diet-drug litigation, the MDL court was, as the JPML concluded, best positioned to aid the discussions between the plaintiffs and Wyeth." Id. at 171. Even though the district judge was not actively involved in this settlement program, the settlement process benefitted from the district judge's willingness to stay individual cases before it to permit settlement discussions.

Regarding transfer when there are overlapping class actions (p. 152 n.3), see In re High Sulfur Content Gasoline Products Liability Litig., 344 F.Supp.2d 755 (J.P.M.L. 2004), in which the Panel placed special emphasis on avoiding inconsistent rulings with respect to class certification as a ground for transfer. According to D. Herr, Multidistrict Litigation Manual § 5.25 at 119 (2005), "if there are conflicting or potentially conflicting class claims in the litigation, transfer is likely regardless of the presence or absence of other factors that would otherwise favor or militate against transfer."

Regarding the continuing power of the transferor court to rule on motions pending entry of a final transfer order (p. 153 n. 5), Illinois Municipal Retirement Fund v. Citigroup, Inc., 391 F.3d 844 (7th Cir. 2004), upholds the Panel's rule that until a formal order of transfer is entered the transferor court has full authority to rule on a motion to remand, even though this was a tag-along case and the transferee court had already rejected the legal argument plaintiffs made in support of the motion to remand. The case grew out of the WorldCom failure, and the resulting jurisdictional morass resulting from the filing of WorldCom's bankruptcy petition and of suits against others (like Citigroup) that had dealings with the company. In this case, a district court in Illinois remanded a suit brought initially in Illinois state court and removed. Earlier, the Panel had transferred all such WorldCom litigation to Judge Cote in the S.D.N.Y., and Judge Cote had denied a remand motion making the same argument made by the plaintiff in the Illinois court. But the Illinois judge disagreed with Judge Cote and remanded the case even though a conditional transfer order had already been entered because the case was a tag-along action.

Defendants appealed. The Seventh Circuit first held that it did have jurisdiction over the appeal despite 28 U.S.C § 1447(d) (which generally forbids appellate review of an order remanding a case) to determine whether the district court had exceeded its statutory duty in remanding. But Panel Rule 1.5 says that the entry of a conditional transfer order for a tag-along case "does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court." Defendants argued that the Panel's rule contradicted the statute and was invalid because the statute says that pretrial proceedings shall be conducted by the transferee judge, and because allowing the transferor to act after a conditional transfer order has been entered creates a risk of discordant pretrial rulings. The court rejected these arguments because the transfer order was not final, and because a federal court always has the obligation to examine its jurisdiction. It cautioned, however, that it was not deciding whether non-jurisdictional motions (e.g., a motion to dismiss under Rule 12(b)(6)) should be treated the same way.

Confronting what might be deemed an issue after Lexecon, Inc. v. Milberg Weiss (p. 160 n.4), In re African-American Slave Descendants Litigation, 471 F.3d 754 (7th Cir. 2006), ruled that a transferee judge could decide a motion to dismiss:

The duty to conduct the pretrial proceedings in a multidistrict litigation entails the transferee court's ruling on a host of pretrial motions, many of which, whether or not
formally dispositive, can shape the litigation decisively. There is no reason to exclude
from the court's authority rulings on motions to dismiss -- especially a motion to dismiss
on the ground that there is no federal jurisdiction.

Regarding law of the case (p. 163 n.7), see Williams v. The Thomson Corp., 383 F.3d
789 (8th Cir. 2004), in which plaintiff argued that a transferee court could not hold her claims
time-barred because a transferor judge transferred (under § 1404(a)) rather than dismissing. The
court rejected the argument on the ground that the doctrine only applies to final judgments, not
interlocutory orders. Contrast Shiavo ex rel. Schindler v. Schiavo, 403 F.3d 1289 (11th Cir.
2005), one of the offshoots of the controversy over continuing life-sustaining nutritional care for
Terry Schiavo. Schiavo's parents sued her husband, seeking a TRO requiring restoration of the
feeding tube. After the district court denied their motion and the Eleventh Circuit affirmed that
order, plaintiffs amended and again sought a TRO. When the district court again denied their
motions, they appealed again. This time, the appellate court invoked law of the case, ruling that
it precluded reexamination of the findings of fact or conclusions of law made in the earlier
appeal proceeding.

Regarding circuit conflicts (p. 163 n.9), in In re MTBE Products Liability Litigation, 241
F.R.D. 435 (S.D.N.Y. 2007), the court held that class certification decisions must be made in
accord with the Rule 23 interpretations of the transferor circuit. Judge Scheindlin reasoned that
"whether to certify a class under Rule 23 is not merely a pretrial issue." Id. at 439. In particular,
under Amchem Products, Inc. v. Windsor (p. 373),
"the requirements of Rule 23(b)(3) must always be satisfied for purposes of the trial regardless
of whether a jury will consider the case because the parties have settled." Id. at 440. Since class
certification is "inherently enmeshed with considerations of a trial," "whether to certify a class
involves issues pertaining to state substantive law." Id. at 440-41. This reasoning might be
debated; in this case, it may be crucial that the claims are for contamination of land in different
localities. Contrast an alleged nationwide conspiracy to fix prices; in such a situation it would
not seem that a transferee court would have to worry about the Rule 23 jurisprudence of any
transferor court.

Finally, we call attention to the proposed $4.08 billion settlement of VIOXX litigation,
which depended to some extent on the coordination afforded by multidistrict transfer and might
offer a model that could sometimes supplant class-action settlements. Federal-court cases were
transferred by the Panel to the E.D. L.a., while many cases in New Jersey (home of defendant)
were concentrated before a single judge there, and a California state-court judge had many
consolidated VIOXX cases. Together the two state-court judges and the MDL judge interacted
to confect a settlement that would become effective only if 85% of plaintiffs opted into it.
Although no class certification was involved, the net result might be said to resemble a class
settlement. For one discussion, see Tesoriero & Koppel, VIOXX Settlement Plan Heads for Key
Deadlines, Wall St.J., Jan. 10, 2008, at B1. Among the controversial provisions of the deal is
one that calls for plaintiff lawyers to urge their clients to accept the settlement, and to decline to
continue representing them if they don't accept the deal.

B. DUAL STATE-FEDERAL PROCEEDINGS

1. Federal Court's Decline of Jurisdiction or Grant of a Stay Order

   a. Traditional Abstention (Pullman and Burford)

      The Supreme Court qualified England abstention in San Remo Hotel, L.P. v. City and
County of San Francisco, 125 S.Ct. 2491 (2005). That case arose from a conflict between petitioners and the city about operation of the hotel as a "tourist" hotel rather than a "residential" hotel. The city, anxious to preserve low-cost residential hotel rooms, had classified the hotel as residential (seemingly due to a mistaken form filed with the city), and insisted that petitioners pay more than $500,000 in fees to convert to tourist operations. After suing the city in federal court claiming an unconstitutional taking, petitioners obtained a stay under Pullman for state court litigation, in part because their federal claims might not be ripe until after a state-court ruling on just compensation. In so abstaining, the Ninth Circuit said that petitioners could reserve their federal claims. Although they said they were doing so, petitioners also "phrased their state claims in language that sounded in the rules and standards established by this Court's takings jurisprudence." Id. at 2498. After they lost in the California courts, petitioners returned to federal court to proceed with the case in which Pullman abstention had been employed. The district court held that petitioners were barred for proceeding by the state-court ruling that rejected their taking arguments.

The Supreme Court held that preclusion applied despite the attempted reservation. It explained that "typical" England reservation involved interpretation of a state statute; "the purpose of abstention is not to afford state courts an opportunity to adjudicate an issue that is functionally identical to the federal question." Id. at 2502. Thus, the party invoking the reservation must take pains to avoid broadening the scope of the state court's review beyond decision of the state-law question. Although petitioners could have litigated whether it was right in the first place to classify their hotel as "residential," an antecedent issue, they could not litigate the federal issues in state court and then return to litigate them again in federal court.

b. Equitable Abstention Under Younger v. Harris

Regarding the Rooker-Feldman doctrine (p. 183 n.6), the Supreme Court held in Exxon Mobil Corp. v. Saudi Basic Industries Corp., 125 S.Ct. 1517 (2005), that this doctrine is applicable only in the limited situation in which "the losing party in state court filed suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment." Id. at 1526. In this case, there was parallel litigation between the parties in state and federal court, and the lower federal court held that federal-court jurisdiction was extinguished by the Rooker-Feldman doctrine upon entry of judgment in the state court case. The Supreme Court ruled that "[w]here there is parallel state and federal litigation, Rooker-Feldman is not triggered simply by the entry of judgment in state court." Id. It did note that abstention might be justified under Colorado River, Younger v. Harris, Burford, or Pullman. Id. at 1526-27. But in the case before it the problem was one of preclusion, which "is not a jurisdictional matter." Id. at 1527.

In Lance v. Dennis, 126 S.Ct. 1198 (2006), the Court confirmed the narrow reading of the Rooker-Feldman doctrine that it announced the previous Term in Exxon Mobil Corp. v. Saudi Basic Indus. Corp., supra. The district court had held that the federal-court plaintiffs (challenging a redistricting plan) were barred because they were "in privity" with a litigant in the earlier state-court litigation. The Court held that preclusion was not the proper guideline (id. at 1202):

The District Court erroneously conflated preclusion law with Rooker-Feldman. Whatever the impact of privity principles on preclusion rules, Rooker-Feldman is not simply preclusion by another name. The doctrine applies only in "limited circumstances," Exxon Mobil at 291, where a party in effect seeks to take an appeal of an unfavorable state-court decision to a lower federal court. The Rooker-Feldman doctrine
do not bar actions by nonparties to the earlier state-court judgment simply because, for purposes of preclusion law, they could be considered in privity with a party to the judgment.

c. Stay of Federal Suit in Interests of "Wise Judicial Administration"

In *Tyrer v. City of South Beloit*, 456 F.3d 744 (7th Cir. 2006), the court upheld abstention. Plaintiff had a dispute with defendant city about compliance of his house with various building requirements that led the city to issue an order for demolition of the house. Plaintiff responded with a suit in state court claiming that the demolition order deprived him of due process, and after some proceedings the state court issued an order calling for demolition. Demolition was completed, but plaintiff appealed that order to the state appellate court. He also filed a suit in federal court, claiming that the demolition was itself a violation of his due process rights. The district court abstained, and the court of appeals affirmed. Although plaintiff claimed the issues raised in the federal suit were different, a comparison of the pleadings in the two cases showed that identical issues were being litigated. Moreover, extraordinary circumstances justified the federal court's abstention. The state-court case had been ongoing for more than four years, and had been decided at the trial court level on cross-motions for summary judgment that led to an appeal. "[A]llowing the two suits to proceed concurrently would waste the parties' resources, risk duplicative rulings and reward a strategic gamesmanship that has no part in a dual system of federal and state courts." Id. at 756. Plaintiff's assertions that the state courts had proven inhospitable to his claims did not warrant disregard of these factors.

*Rivera-Feliciano v. Acevedo-Vila*, 438 F.3d 50 (1st Cir. 2006), presents a pot pourri of abstention issues. The suit was bought by prisoners in the Puerto Rico prison system who had been participating in a program (instituted to deal with overcrowding) that permitted some prisoners to be released from prison, before the end of their sentences, wearing electronic surveillance anklets and subject to strict supervision. After this program had been in effect for about six years, the legislature passed a law forbidding those convicted of certain crimes from participating in the program. That led to litigation in the Puerto Rico courts challenging the change in operation of the release program on grounds that it constituted ex post facto legislation and on various grounds under Puerto Rico law. Later, seemingly after a change in administration, the prison system took a new position that anyone already in the program who had been convicted for committing certain crimes would be returned to prison. That prompted these plaintiffs to sue in federal court, and the district court issued a preliminary injunction against returning them to prison.

The First Circuit held that the district court should have abstained under *Pullman* because "there are a number of unresolved issues of Puerto Rico administrative and statutory law which will inevitably shape the nature of the federal claims." Id. at 60. In addition, "arguments virtually identical to those presented here had been presented to the courts of Puerto Rico even before this suit was filed, and these are now pending before the Supreme Court of Puerto Rico," making *Colorado River* abstention appropriate. Id. at 61-62. The court held that abstention was proper even though the state-court litigants challenging the change in prison operations had not filed an *England* reservation. See id. at 63. Nonetheless, the court also held that because the standard of review of an order granting a preliminary injunction is abuse of discretion the injunction should stand. In doing so, it expressed considerable uneasiness about addressing the preliminary injunction issue of probability of success on the merits without intruding into the issues its abstention ruling said should in the first instance be resolved by the Puerto Rico courts.

In *Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328 (11th Cir. 2005), the court
offered a series of criteria for determining whether a federal court should proceed with a declaratory judgment action even though the issues are presented in a state-court suit seeking monetary relief from the federal-court plaintiff (see p. 189 n.6): (1) the strength of the state's interest in having the issues decided in state courts; (2) whether the federal judgment would settle the controversy; (3) whether the federal action would "serve a useful purpose in clarifying the legal relations at issue"; (4) whether it appears the federal suit was filed as part of "a race for res judicata"; (5) whether continuation of the federal case would cause friction with the state courts; (6) whether an alternative remedy is more effective; (7) whether the underlying factual issues are important to an informed resolution of the case; (8) whether the state court is in a better position to evaluate those factual issues; and (9) whether there is a close nexus between the underlying issues and state law and/or public policy. Id. at 1331. The court explained that the list of factors was "neither absolute nor is any one factor controlling; these are merely guideposts in furtherance of the Supreme Court's admonitions in Brillhart and Wilton. In the case before it, the appellate court upheld the district judge's decision to abstain.

3. All Writs Act as Authority for Federal Court Orders Relating to State-Court Suits

Burr & Forman v. Blair, 470 F.3d 1019 (11th Cir. 2006), presented questions about what is "necessary in aid of jurisdiction" in connection with a federal court's determination of attorney fee awards in connection with settlement of a mass toxic contamination action before the federal judge. Collaborating law firms representing groups of plaintiffs in toxic contamination litigation entered into an agreement providing for sharing of fees. As agreed among counsel, one law firm then filed suit in federal court on behalf of 3,000 plaintiffs, and this suit was terminated by the entry of a final judgment incorporating the parties' settlement agreement. Pursuant to the judgment, the lawyers who filed the case were to be awarded attorney's fees from a settlement trust fund administered by a settlement administrator under the district court's jurisdiction. At that point the other lawyers who had the sharing agreement with the lawyers who filed the suit asked for assurances regarding receipt of their share of the fee award and were rebuffed.

The rebuffed lawyers then filed a breach of contract suit against counsel of record in the federal suit, seeking 40% of the attorney's fees. When counsel of record in the federal case asked the federal judge to direct that they be paid the full fees, the federal judge issued an order directing the state-court plaintiffs to show cause why they should be entitled to a portion of the fees. The state-court plaintiffs contested the federal judge's authority over them on the ground they had never appeared in the federal case. The judge rejected their argument and concluded that he had authority because he had retained jurisdiction over the settlement trust fund. He then ruled that the contractual claim to a share of the fees was invalid, and ordered disbursal of the entire amount to counsel of record. The state-court plaintiffs appealed this order and, when they also persisted in their state-court litigation, the district judge enjoined them from doing so.

The court of appeals held that the injunction exceeded the federal judge's authority. The court rejected the argument that the federal judge was somehow exercising in rem authority over the trust fund resulting from the settlement of the federal suit because the state-court breach of contract suit was "a quintessential in personam proceeding." Id. at 1032. Plaintiffs' state-court suit did not contest ownership of the federal-court res, but rather sought damages for failure to share as provided in the contract. Neither was the injunction necessary to the federal court's administration of a complex settlement because the state-court suit did not seek to impose a lien on the funds under the federal judge's supervision. "It seeks damages, not funds on deposit in the [federal court]." Id. at 1033. Although an analogy to proceedings in rem had developed in school desegregation cases, these cases "represent the outermost limits of the exception," and it would not permit the injunction in this case. Id. at 1029.
Retirement Systems of Alabama v. J.P. Morgan Chase & Co., 386 F.3d 419 (2d Cir. 2004), a piece of WorldCom fallout litigation, involved an order by the MDL transferee judge in the S.D.N.Y. to postpone a trial scheduled in an Alabama state court until after completion of the class action trial in her court in New York. The state-court action was filed more than two months after the first class action was filed in the MDL proceedings, alleging claims under Alabama law and federal securities law. Defendants tried to remove, but the Alabama federal court remanded. In New York, the federal judge entered an order on the scheduling of the cases before her, and defendants sought to have the Alabama court adopt that order or, alternatively, to schedule trial after the federal trial. The Alabama court refused and set the case for trial before the federal-court trial. The federal district court then enjoined the Alabama court from proceeding to trial, saying that proceeding to trial in Alabama would inevitably delay the class action trial in federal court. It also enjoined the state court from ruling on a summary judgment motion because that ruling might lead to time-consuming proceedings in federal court to determine the preclusive effect of the state-court ruling. The federal judge said that the date for the class action trial "would be held hostage to the Alabama Action, and this Court's ability to control the schedule of this complex, multi-district securities litigation will be hamstrung."

The Second Circuit held that the federal judge's order was not permissible under the Anti-Injunction Act because the injunction was not necessary in aid of the federal court's jurisdiction. It emphasized that the Supreme Court has never held that a federal court could enjoin a state-court in personam action. Although In re Baldwin-United (p. 199) upheld an injunction, that case turned on the fact that settlements had been arranged with many defendants and the state-court proceedings threatened to disrupt the settlement activities in federal court. In this case, there was no prospect of a prompt settlement of the federal litigation. But even if that had been demonstrated, the court of appeals continued, it would not justify stopping the trial of the state-court case.

The basic problem was that the potential disruption of the federal proceedings did not amount to interference with its jurisdiction. "Baldwin-United did not hold that multidistrict class actions are, in general, to be deemed virtual in rem proceedings." Id. at 429. A federal court has no valid interest in being the first court to hold a trial on the merits, and it may not issue an injunction to avoid having to address issues of collateral estoppel. And even protecting the federal court's trial schedule does not suffice (id. at 430):

Defendants' position -- that a district court, in multidistrict class action litigation that is nearing trial, may enjoin related state proceedings to avoid delay -- is flawed because it does not admit of principled limits. Any time parallel state and federal actions are proceeding against the same defendant, it is conceivable that occurrences in the state action will cause delay in the federal action, by provoking motion practice in federal court regarding the effects of state-court rulings, or simply by diverting the attention of the defendant. Such a rule would in effect create an additional exception to the Anti-Injunction Act for circumstances where a federal court finds it convenient to enjoin related state proceedings."

CHP. IV: CLASS ACTIONS

For a thorough examination of the background of Rule 23 as it has evolved since the inception in 1938, see Rabiej, The Making of Class Action Rule 23 -- What Were We Thinking?, 24 Miss. Col. L. Rev. 323 (2005). Rabiej is Chief of the Rules Committee Support Office, and this article draws not only on his experience through the rules process but also on the files of
meetings of the Advisory Committee on Civil Rules. The article contains such things as a blow-by-blow description of the tussle between John Frank (a member of the Committee) and Benjamin Kaplan (the Reporter) about Rule 23(b)(3) during the drafting of the 1966 amendments. See id. at 334-36.

As in the past (see p. 221), there are again reports of the imminent demise of the class action. Gilles, Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373 (2005), argues that the fading of the mass tort class action and the ascendency of the collective action waiver in a range of contractual arrangements will together kill off the class action except in securities fraud cases. Even there, the author forecasts, there may soon be room for finding that the prospective plaintiff is bound by a collective action waiver. Because "[i]t seems inevitable that more and more companies will come to understand that class action exposure is largely optional under current doctrine," id. at 425, they will act to avoid that exposure. Yet recent reports from the Federal Judicial Center have found an increase in the frequency of federal class-action filings since 2000.

Securities class-action filings did drop to the lowest level in nine years in 2005, according to reports from those who monitor such cases, but the dollar value of the cases filed has increased a great deal. See Oberthur, By the Numbers: Fewer Securities Class Actions, Bigger Payouts, S.F. Daily Journal, June 7, 2006, at 1. The explanation given for the increase in dollar value of settlements is that economic damages in some major stock declines have been very large, and that lead plaintiffs are now often institutional investors such as pension funds and unions that push hard for big settlements and are unwilling to accept a quick buck. One reason offered for the decline in filings is that the economy has been strong in recent years; filings are generally higher in recessionary times. In 2006, securities class action filings fell off further, some saying that Sarbanes-Oxley had caused companies to exercise greater care in reporting their financial results. See Koppel, Legal Bear: Stock Class-Actions Fall, Wall St. J., Jan. 2, 2007, at C3.; Grundfest, The Class-Action Market, Wall St. J., Feb. 7, 2007, at A15. Others cautioned, however, that the annual drop seemed cyclical, meaning that the level of filings will rise again. See MacLean, Class Action Decline in '06 May Not be a Trend, Nat. L.J., Jan. 8, 2007, at 6. In 2006, Jack Coffee said that securities fraud class actions have been "the 800-pound gorilla that dominates and overshadows other forms of class actions." Coffee, Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1539 (2006).

More generally, mass tort filings reportedly declined, and some said that the future of both mass torts and class actions was uncertain. See Davies, Wall St. J., Aug. 26, 2006, at 1. At the same time, in Europe litigation reforms are making possible cases that resemble American class actions. See Geier, Europe a Wary Step Closer to Class Actions, Nat. L.J., Dec. 4, 2006, at 1.

Besides the effect of the Class Action Fairness Act, other developments may affect the attractiveness of state courts for class-action plaintiffs. For example, in Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801 (Ill. 2005), the court confronted a $1.2 billion judgment against State Farm in a nationwide class action asserting that State Farm's insistence on use of replacement parts from alternative suppliers (not the original manufacturer) violated Illinois consumer fraud and deceptive business practices laws. The Illinois Supreme Court held that class certification was improper, emphasizing the need to determine whether the issues are really common before certifying a class, often involving scrutiny of a proposed trial plan. The court also held that the Illinois Consumer Fraud Act was not meant to apply to transactions outside the state.
Regarding an upsurge in some types of class actions, Norton, Costco Latest in Wave of Gender Bias Suits, S.F. Recorder, Aug. 18, 2004, at 1, reports that some expect there will be "a new 10-year wave of gender-based class action suits." The stimulus for the story was the massive suit against Wal-Mart that was certified by a district judge in San Francisco (a certification later affirmed by the Ninth Circuit, see below regarding Chp. IV.B.4). Lawyers interviewed for the story more generally noted an increase in employment discrimination class actions.

For analysis of class action practice in other countries, see Gidi, Class Actions in Comparative Perspective (2006), and Mulheron, The Class Action in Common Law Legal Systems (2004).

A. ETHICAL CONSIDERATIONS IN CLASS ACTION PRACTICE

Regarding the possible misalignment of interests between the class members and class counsel (p. 229 n.6), consider Note, Risk-Preference Asymmetries in Class Action Litigation, 119 Harv. L. Rev. 587 (2005). This piece uses prospect theory's insights on whether people will be risk-seeking or risk averse to conclude that in mass tort litigation with a low probability of success on liability the client attitude will be risk-seeking, while the client attitude is reversed when the probability of success is high. Plaintiff attorneys, however, may be risk-neutral (having multiple cases), which might mean that assigning them more control would achieve desirable results by protecting against the risk-seeking or aversion attitudes of their clients.

As a follow-up on the reported $800,000 for lead plaintiffs in a racial bias suit against Texaco (p. 230 n.7), note that a special master appointed by the court actually determined that two of the named plaintiffs who had initiated the suit would receive incentive awards of $85,000 and $50,000. See Roberts v. Texaco, Inc., 979 F.Supp.2d 185 (S.D.N.Y. 1997). The awards to these two named plaintiffs were justified partly on the ground that they had endured adverse consequences for initiating the lawsuit. Three other plaintiffs got incentive awards of $25,000 each, and one got an award of $2,500.

B. PREREQUISITES TO A CLASS ACTION

1. Adequate Definition of the Class

Plaintiff in Oshana v. Coca-Cola Co., 472 F.3d 506 (7th Cir. 2006), claimed that defendant violated the Illinois Consumer Fraud and Deceptive Practices Act by advertizing that the only sweetener in Diet Coke is aspartame even though Diet Coke sold in soda fountains (as opposed to grocery stores) is partly sweetened by saccharin. Noting that a claim under the Illinois Act required reliance and actual harm due to the alleged deception, the court found the class definition inadequate (id. at 514):

Membership in Oshana's proposed class required only the purchase of a fountain Diet Coke from March 12, 1999, forward. Such a class could include millions who were not deceived and thus have no grievance under the IFCA. Some people may have bought fountain Diet Coke because it contained saccharin, and some people may have bought fountain Diet Coke even though it had saccharin. Countless members of Oshana's putative class could not show any damage, let alone damage proximately caused by Coke's alleged deception.
Regarding the "fail safe" class (p. 240 n.4), consider Genebacher v. Centurytel Fiber Co., 244 F.R.D. 485 (C.D. Ill. 2007), a proposed class action on behalf of landowners against a fiber optic cable company for trespass when it installed cable across their lands. Plaintiffs contended that defendant had no valid easement to install the cable, and their class definition specified that class members were landowners whose land was not subject to an easement for such cable. The court found the class definition unsatisfactory (id. at 488):

The proposed class is limited to those property owners and former owners, of property that is not subject to an easement for installation and maintenance of fiber optic telecommunication cable, who did not consent to DTI's or LightCore's installation and maintenance of the Network. If LightCore proves that (1) a particular parcel is subject to a valid easement, or (2) the property owner of a particular parcel consented to LightCore's use of that parcel, then LightCore should be entitled to a judgment in its favor with respect to the owners of that particular parcel. The court, however, could not enter judgment against that particular owner because the owner would no longer fit within the class definition. This type of class definition is called a "fail safe" class because the class definition precludes the possibility of an adverse judgment against class members; the class members either win or are no in the class.

2. Numerosity

For rulings that the class members are not too numerous to prevent joinder, see Pruitt v. City of Chicago, 472 F.3d 925 (7th Cir. 2006) (upholding district court's refusal to certify and noting that "sometimes 'even' 40 plaintiffs would be unmanageable, but plaintiffs do not contend that is one of those occasions"); Treviso v. Adams, 455 F.3d 1155 (10th Cir. 2006) (finding that joinder was practicable in suit with 84 putative class members). Compare Jackson v. Danberg, 240 F.R.D. 145 (D. Del. 2007), which grants class certification in an action challenging the state's methods for carrying out lethal injection executions on behalf of a class of 16 class members. Noting that "there is no rigid minimum number of class members necessary to warrant certification" and that "the numerosity requirement has been relaxed in cases like this where injunctive and declaratory relief is sought," the court certified the class.

3. Commonality

In In re First Alliance Mortge. Co., 471 F.3d 977, 990 (9th Cir. 2006), the Court commented that "this court has followed an approach that favors class treatment of fraud claims stemming from a 'common course of conduct.' See Blackie v. Barrack [casebook, p. 246]."

Use of the fraud on the market theory, however, is regularly challenged on the ground the particular market was not exhibiting efficiency. In re Initial Public Offering Securities Litig., 471 F.3d 24 (2d Cir. 2006), overturned class certification on the ground that "the Plaintiffs' own allegations as to how slow the market was to correct the alleged price inflation despite what they also allege was widespread knowledge of the scheme indicate the very antithesis of an efficient market." Id. at 43. In In re Polymedica Corp. Securities Litig., 432 F.3d 1 (1st Cir. 2005), the court addressed the question whether the market was sufficiently "efficient" to justify application of the fraud-on-the-market presumption and thereby avoid individualized inquiry into reliance (which would defeat class certification). Basic Industries v. Levinson said that the presumption could only operate when the market was "efficient." The district court held that plaintiffs had adequately shown it was by proving that market professionals generally considered most publically announced material statements. The Court of Appeals held that this was insufficient: "For application of the fraud on the market theory, we conclude that an efficient market is one in
which the market price of the stock fully reflects all publicly available information. Id. at 14. But this does not require proof that the market exhibits "fundamental value efficiency" -- that the values it provides for stocks accurately reflect the values of the firms involved. "[W]e do not suggest that stock price must accurately reflect the fundamental value of the stock." Id. at 16.

Regents of the University of Calif. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372 (5th Cir. 2007), displays another limitation on the fraud on the market theory. The appealing defendants were banks accused of assisting Enron Corporation activities that enabled Enron to book revenue at a time when it was actually incurring debt, making its financial condition appear much better than it was, leading to this shareholders class action. But the banks were not fiduciaries of the plaintiffs, and they did not file improper financial reports on Enron's behalf or engage in manipulative activities directly in the market for Enron securities. The court of appeals ruled that the banks' conduct was not conduct on which an efficient market could be presumed to rely, and that accordingly the Affiliated Ute presumption should not apply. "Market efficiency was not the sole condition that the Court in Basic [Indus. v. Levinson, casebook p. 254 n.2] required plaintiffs to prove existed to qualify for the classwide presumption; the defendant had to make public and material misrepresentations." Id. at 383. Because the banks did not have a fiduciary obligation to class members, their failure to make disclosures did not provide a basis for class certification.

In Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004), the court of appeals upheld a (b)(3) certification in an aggressive suit against HMOs. The case illustrates the magnifying power of the JPML as well as the relationship between the claims being asserted and the predominance determination. By the time this decision was made, this was "a case of almost all doctors versus almost all major health maintenance organizations." It had begun as separate cases against Humana and additional separate cases against other HMOs. But the Panel consolidated the Humana cases for pretrial preparation, and then added the suits against the other HMOs to that consolidated proceeding. After that combination by the panel, plaintiffs filed an amended complaint against all the defendants on behalf of a class of all medical doctors who had treated patients of any of them.

Plaintiffs claimed that the HMOs had collaborated in "a decades-long nefarious conspiracy to undermine the American health care system," id. at 1249, which the court labelled "a shadowy, mysterious 'Managed Case Enterprise.'" Id. at 1253. In particular, their goal was to curtail payments to doctors in violation of their promises of fair treatment. Plaintiffs claimed they thereby rendered themselves liable to the doctors under RICO. There was considerable diversity in the arrangements between doctors and HMOs. Some had contracts that provided a fee for services performed on a piecework basis, and others had contracts that paid for covered patients with less emphasis on services actually performed. Despite the variety of issues presented, the court distinguished its earlier rejection of discrimination class actions in Jackson v. Motel 6 and Rutstein v. Avis (casebook, p. 278 n.8):

Motel 6 and Rutstein were both cases in which individuals were seeking to litigate separate discrimination claims that arose from a variety of individual incidents together in the same class action simply because they alleged that the acts of discrimination occurred pursuant to corporate policies. In the instant case, however, the plaintiffs' RICO claims are not simply individual allegations of underpayments lumped together, and the allegation of an official corporate policy or conspiracy is not simply a piece of circumstantial evidence being used to support such individual underpayment claims. Instead, the very gravamen of the RICO claims is the "pattern of racketeering activities" and the existence of a national conspiracy to underpay doctors. These are not facts from
which jurors will be asked to infer the commission of wrongful acts against individual plaintiffs; these very facts constitute essential elements of each plaintiff's RICO claims. (Id. at 1257.)

The court held that state-law breach of contract class certification was not proper, however.

Erbsen, From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions, 58 Vand. L. Rev. 995 (2005), offers a broad attack on current certification standards, focusing particularity on the predominance requirement, which

requires elaborate efforts to answer a question that is not worth asking. ** Similarity among claims is an unhelpful concept when one thinks about the practical consequences of certifying a class and the procedural principles (such as finality, fidelity, and feasibility) to which class adjudication should conform. ** The predominance concept conflates the similarity and dissimilarity inquiries into a single balancing test, thus obscuring the practical and theoretical importance of dissimilarity standing alone. ** The ensuing weighing process is analogous to asking a starving person to balance the nutritional value of vitamins in his only potential food source against the negative effects of poison in the same food. Any sort of balancing would be pointless. A huge nutritional value would be irrelevant if the poison is fatal, and if the poison is not fatal then any amount of nutrition would justify consumption absent a superior alternative food source.

Id. at 1005. Instead, the focus should be on "resolvability." For example, "courts should certify class actions seeking damages only when the individual questions of law and fact that remain after resolution of common questions can be definitively resolved in a final judgment establishing the rights and responsibilities of the plaintiffs and defendants." Id. at 1033. Specifically, the author would replace the provision in current Rule 23(b)(3) that requires a finding of predominance with the following: "The court has a feasible plan to answer all disputed questions of law and fact that must be resolved before entering judgment for or against class members under the law governing each class members' claim and applicable defenses." Id. at 1081.

4. ** Typicality **

Dukes v. Wal-Mart, Inc., 509 F.3d 1168 (9th Cir. 2007), upheld class certification in the largest employment discrimination suit in U.S. history, an action alleging gender discrimination on behalf of a class of more than 1.5 million female employees of Wal-Mart.

In Deiter v. Microsoft Corp., 436 F.3d 461 (4th Cir. 2006), Judge Niemeyer (former chair of the Advisory Committee on Civil Rules) offered an explanation of the typicality requirement (id. at 466-67):

The typicality requirement goes to the heart of a representative party's ability to represent a class, particularly as it tends to merge with the commonality and adequacy-of-representation requirements. The representative party's interest in prosecuting his own case must simultaneously tend to advance the interests of the absent class members. For that essential reason, plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim. That is not to say that typicality requires that the plaintiff's claim and the claims of class members must be perfectly identical or perfectly aligned. But when the variation in claims strikes at the heart of the respective causes of action, we have
readily denied class certification.

For an example of application of the scrutiny *Falcon* (p. 267) requires in the securities fraud context, consider *Gariety v. Grant Thornton, LLP*, 368 F.3d 356 (4th Cir. 2004), in which the district court certified a class based on the fraud-on-the-market theory explored in Blackie v. Barrack (p. 246). The appellate court found that the district court was wrong because the judge did not adequately inquire into the plaintiffs’ assertion that there was an efficient market for the securities involved, a critical component of the fraud-on-the-market method of avoiding inquiry into individual reliance. Citing *Falcon*, the court explained (id. at 365):

If it were appropriate for a court simply to accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order, frustrating the district court's responsibilities for taking a "close look" at relevant matters, for conducting a "rigorous analysis" of such matters and for making 'findings' that the requirements of Rule 23 have been satisfied.

Similarly, in *Unger v. Amedisys, Inc.*, 401 F.3d 316 (5th Cir. 2005), the court held that the district court did not make a careful or demanding enough inquiry into the underlying facts when probing plaintiffs' argument that individual reliance need not be considered in making the predominance of common questions determination in a securities fraud case. It reasoned that *Castano* (p. 340) applies equally to securities fraud cases, and emphasized that Rule 23(b)(3) requires a court to "find," not merely assume, that common questions predominate. It also invoked *Amchem* (p. 373) for the proposition that the predominance requirement of Rule 23(b)(3) is "far more demanding" than the common question requirement of Rule 23(a)(2). In regard to whether there was an efficient market that would support an inference of widespread reliance, the majority invoked the degree of proof required in preliminary injunction hearings and on motions to dismiss for lack of personal jurisdiction. See id. at 323. Judge Dennis concurred with reversal on the ground the district court did not adequately challenge the plaintiffs' evidence, but dissented from invocation of the preliminary injunction or personal jurisdiction analogies.

Regarding *Jenson v. Eveleth Taconite Co.* (p. 277 n.6), note that the story behind the lawsuit became the focus of the movie *North Country* starring Charlize Theron, Frances McDormand, Sissy Spacek, and Woody Harrelson, which was released in Fall 2005.

5. **Representativeness**

For an example of an inappropriate class representative, consider *In re Sonus Networks, Inc. Securities Litig.*, 229 F.R.D. 339 (D. Mass. 2005), a proposed securities class action in which the sole class representative withdrew after it was revealed he had been convicted of selling cocaine and resisting arrest. In *Carpenter v. Boeing Co.*, 456 F.3d 1183 (10th Cir. 2006), the court ruled that it was proper to remove class representatives who demanded a "consultant's fee" of 15% of any attorney fees obtained by class counsel. Contrast *Benedict v. Altria Group, Inc.*, 241 F.R.D. 668 (D. Kan. 2007). In that suit claiming defendant cigarette manufacturers violated the state's consumer products act, the court concluded that the named plaintiff's prior convictions for felony theft, burglary, writing bad checks, and possession of drug paraphernalia did not disqualify her from acting as class representative "[T]he court seriously questions counsel's judgment call in nominating Ms. Brown as the sole class representative. But, at the end of the day, the court is unpersuaded that Ms. Brown's criminal history, as a matter of law, renders her an inadequate class representative." Id. at 674.
One might ask how defendants find out about the objections they could make to class representatives. Discovery is one way, but not the only one. Hirsch, Digging Into Client-Lawyer Links, S.F. Recorder, June 11, 2007, at 1, describes the routine practice of one defense lawyer to hire private investigators to probe pre-existing relationships between plaintiffs and their lawyers. In a case profiled in the story, involving proposed claims on behalf of some 77,000 California purchasers of air purifiers, this investigation showed that the class representative got involved by answering an ad in the San Francisco Bay Guardian, a weekly newspaper, and met the lawyer for the first time on the day before his deposition. For further discussion of this case, see Lattman, Firm's Choice of Plaintiff Gives Judge a Bad Reaction, Wall St.J., May 2, 2007, at B2.

For some, the aroma of a "professional" plaintiff may disqualify a person from serving as class representative, but not for all. In Murray v. GMAC Mortg. Corp., 434 F.3d 948 (7th Cir. 2006), a proposed class action under the Fair Credit Reporting Act, the district court cited that fact that the named plaintiff, her husband, and their children were participants in more than fifty suits asserting technical violations of the Act in denying class certification. Judge Easterbrook found this an unpersuasive reason for denying certification: "What the district judge did not explain, though, is why 'professional' is a dirty word. It implies experience, if not expertise. The district judge did not cite a single decision supporting the proposition that someone whose rights have been violated by 50 different persons may sue only a subset of the offenders." Id. at 954. Defendants also argued that plaintiff revealed her inadequacy by pursuing only statutory damages rather than full compensation for class members' injuries. The appellate court was unimpressed: "Unless a district court finds that personal injuries are large in relation to statutory damages, a representative plaintiff must be allowed to forgo claims for compensatory damages in order to achieve class certification." Id. at 953.

In Scott v. New York City Carpenters Pension Plan, 224 F.R.D. 353 (S.D.N.Y. 2004), held that class representatives were not adequate (id. at 356):

Both Scott and Spillers' alarming lack of familiarity with the suit, as well as little or nonexistent knowledge of their role as class representatives is manifest. Scott at his deposition stated that he did not know what allegations were contained in the complaint. He had not seen the complaint prior to his deposition [seventeen months after suit was filed]. He did not know for sure whether this was a class action suit. He did [not] know what a class representative was (or even that he was one). He had "not the slightest idea" of how many people are in the class. He had personally met with counsel only once in the three years prior to the deposition. *** So complete is Scott's abdication of his role to his attorney that Scott stated that he would leave every decision up to his attorney and never question his advice.

Regarding Cotchett v. Avis (p. 297 n.9), consider also Apple Computer, Inc. v. Superior Court (Cagney), 24 Cal.Rptr.3d 818 (Cal.App. 2005), holding that it is improper for an attorney in the firm representing the class to be class representative even though attorneys' fees in the case are expected to come directly from the defendant under a fee-shifting statute.

Regarding appointment of class counsel (p. 298 n.11), note that in Harrington v. City of Albuquerque, 222 F.R.D. 505 (D.N.M. 2004), the court reads the adoption of Rule 23(g) as removing consideration of attorneys from the class certification decision (id. at 515):

Formerly, the competency and conflicts of interest of the attorneys representing the party seeking class certification were factors to be evaluated in assessing whether the class
representatives would fairly and adequately represent the class for the purposes of Rule 23(a)(4). Under the amended Rule, class counsel must still establish that they will fairly and adequately represent the class, but the Court appoints class counsel only after the class has been certified. The obvious implication of the amendment is that establishing that class counsel will fairly and adequately represent the class members is no longer a prerequisite to class certification.

It is debatable whether the adoption of Rule 23(g) -- although it focuses and augments the evaluation of class counsel -- also means these issues are somehow divorced from the fundamental class certification decision. It is clear, for instance, that the court may not certify a class without appointing class counsel under Rule 23(g).

C. TYPES OF CLASS ACTIONS MAINTAINABLE

2. Rule 23(b)(1)(B) "Limited Fund" Class Actions

The Supreme Court held in Phillip Morris USA v. Williams, 127 S.Ct. 1057 (2007), that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation." Id. at 1063. This holding arguably weakens arguments that prospective punitive damage claims can justify Rule 23(b)(1)(B) treatment (see casebook p. 316 n.6) because it seems to forbid a punitive damage award to plaintiff no. 1 that takes account of the harm to plaintiffs no. 2 to 1,001. That would seemingly weaken arguments that no. 2 to 1,001 will be restricted in their punitive damages because of the award to no. 1.

In In re Simon II Litig., 407 F.3d 125 (2d Cir. 2005), may provide an illustration of the handling of punitive damages. The court overturned Judge Weinstein's certification of a nationwide punitive damages class in tobacco litigation, rejecting the district court's "limited punishment" theory. The premise of the theory is that there is a constitutional limit to the amount of punitive damages that can be imposed for a single course of conduct, and that this notion would apply to the allegation that the tobacco companies had engaged in a long campaign to deceive the public about the health risks of smoking. The Second Circuit found that the certification did not accord with Ortiz (p. 302) because the district court could not ascertain the limit and the sufficiency of the fund. Unlike situations in which the fund was limited to an existing res or the total of defendants' assets, the current case presented only a theoretical limit to the fund. Moreover, there was no way on the existing record to say that any number of punitive damage awards would exceed the constitutional limit. In particular, it would be necessary under the Supreme Court's State Farm v. Campbell decision (rendered after Judge Weinstein certified the class) to determine whether the aggregate awards bear a sufficient nexus to the actual and potential harm to the plaintiff class. This inquiry requires attention to the harm to the plaintiff class members.

3. Rule 23(b)(2) Classes

Correction: After the fourth edition went to press, there was a petition for rehearing in In re Monumental Life Ins. Co. (p. 318), and the Fifth Circuit issued an amended opinion (365 F.3d 408). The changes made did not much affect the majority opinion, although three footnotes included in the casebook were renumbered. Thus, footnote 18 on p. 322 should be 16, footnote 20 on p. 323 should be 18, and footnote 22 on p. 324 should be 20. Judge Clement's dissent, however, was more substantially changed to focus on what she called improper factfinding by
the majority in contravention of the proper standard of review. For purposes of examining Rule 23(b)(2), Judge Clements' original opinion (as excerpted in the casebook) is probably more instructive than the revised opinion. On that score, see McClain v. Lufkin Indus., Inc., 519 F.3d 264, 283 (5th Cir. 2008) (holding that district court properly declined to certify under Rule 23(b)(2) in employment discrimination case after determining that monetary relief predominated, and that the class representatives would be inadequate if they dropped their prayer for monetary relief to establish that nonmonetary claims predominated).

In Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311 (4th Cir. 2006), the court upheld denial of class certification in a situation somewhat analogous to In re Monumental Life Ins. Co. (p. 318). Plaintiffs sued on behalf of a class of 1.4 million African-American life insurance customers of defendant and its predecessor companies on the ground that it charged them higher premiums than white customers for the same coverage. Because defendant was no longer collecting premiums from customers for this type of "industry life insurance policies," the court concluded that plaintiff's argument they sought injunctive relief provided no basis for certification under Rule 23(b)(2), and that Monumental was distinguishable. Plaintiffs also sought restitution, but the court rejected the notion that other equitable remedies could be relied upon to justify certification under (b)(2). The rule would have said so if all that was required were an "equitable" remedy; "certification under Rule 23(b)(2) is improper when the predominant relief sought is not injunctive or declaratory, even if the relief is equitable in nature." Id. at 331. Moreover, restitution "can be a legal or an equitable remedy." Id. at 332.

In Reeb v. Ohio Dep't of Rehabilitation and Correction, 435 F.3d 639 (6th Cir. 2006), the Sixth Circuit joined the Fifth Circuit's view of Title VII claims in Allison v. Citgo Petroleum Co., (p. 326 n.1). "Title VII cases in which plaintiffs seek individual compensatory damages are not appropriately brought as class actions under Rule 23(b)(2) because such claims for monetary damages will always predominate over requested injunctive or declaratory relief." Id. at 641. Judge Keith dissented at length, arguing that the majority's view intruded on the flexibility district courts should have in managing class actions.

In Richards v. Delta Air Lines, Inc., 453 F.3d 525 (D.C. Cir. 2006), plaintiff sued on behalf of a class of about 3,000 Delta passengers who had lost luggage and not been fully compensated because Delta invoked the Warsaw Convention's limitations on liability for lost luggage. Plaintiff claimed that the Convention only applied if the airline recorded the weight of the luggage on the luggage tickets, which Delta did not do, and sought a declaratory judgment that the limitation therefore was not applicable and an injunction requiring Delta to process all these claims free of the limitation. The court held the case was not within (b)(2). "Though framed in terms of declaratory and injunctive relief, this class claim is for monetary damages. . . . No matter how [plaintiff] phrases it what she wants is a judicial decree directing Delta to pay the class members the damages each is due." Id. at 530-31.

Shook v. El Paso County, 356 F.3d 963 (10th Cir. 2004), resolved both the applicability of manageability considerations under Rule 23(b)(2) and the propriety of attention to Congressionally-imposed limitations on relief. Plaintiffs sought to represent a class of prisoners denied treatment for mental health problems. The district court refused certification, invoking the Prison Litigation Reform Act's provision that prospective relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." The appellate court held that the PLRA did not change the Rule 23 determination whether to certify, and that plaintiff sufficiently asserted a claim for some sort of declaratory or injunctive relief to satisfy Rule 23(b)(2). A majority of the panel also held that manageability could be considered in ruling on a Rule 23(b)(2) certification request (id. at 973-74):
On remand, it may well be that the factual and legal concerns leading the court to consider problems of identifying and managing the class support (a) a finding under Rule 23(a) that the class lacked sufficient commonality, typicality or adequacy of representation, (b) a finding under Rule 23(b)(2) that El Paso did not operate the prison "on grounds generally applicable" to the class, or (c) a finding that, notwithstanding the PLRA, efficiency or manageability considerations undermine the court's ability to provide injunctive relief to the class framed in the complaint.

Judge Tacha dissented from the majority's invitation to consider manageability, criticizing the majority's notion that the rule permits consideration of whatever the court deems pertinent to its "discretionary" class certification decision (id. at 975):

The majority's reading collapses the differences between a Rule 23(b)(1), (b)(2), and (b)(3) class, allowing a district court to consider any criteria under any of the subsections for any type of class. Such a reading is not in line with the structure of Rule 23(b) and is thus contrary to standard statutory construction.

Regarding (b)(2) treatment of medical monitoring claims (p. 329 n.8), in In re St. Jude Medical, Inc., 425 F.3d 1116 (8th Cir. 2005), the court noted that individual issues undermine cohesiveness and explained why certification was not appropriate in a suit involving synthetic heart valves (id. at 1122):

Every patient in the 17-state class who has ever been implanted with a mechanical heart valve already requires future medical monitoring as an ordinary part of his or her follow-up care. A patient who has been implanted with the Silzone valve may or may not require additional monitoring, and whether he or she does in an individualized inquiry depending on that patient's medical history, the condition of the patient's heart valves at the time of implantation, the patient's risk factors for heart valve complications, the patient's general health, the patient's personal choice, and other factors. The plaintiffs concede that the states recognizing medical monitoring claims as a separate cause of action have different elements triggering culpability.

Paz v. Brush Engineered Materials, Inc., 949 So.2d 1 (Miss. 2007), holds that Mississippi does not recognize a claim for medical monitoring due to mere exposure to a harmful substance without proof of current physical or emotional injury due to the exposure.

Grodsky, Genomics and Toxic Torts: Dismantling the Risk-Injury Divide, 59 Stan. L. Rev. 1671 (2007), draws on new breakthroughs in science, particularly genomic inquiry, to argue that the distinction between exposure and injury is increasingly indefensible as a perimeter for tort liability that bear on medical monitoring issues. "Indeed, we are entering an age of 'molecular epidemiology,' in which individual biological evidence of exposure, risk, and developing disease increasingly will supplement traditional, population-based estimates of exposure and disease risk." Id. at 1692. "As technology reveals intermediate events along the exposure-disease continuum, the argument for an intermediate legal remedy becomes ever more compelling. Certain asymptomatic conditions, though themselves not qualifying as fully compensable 'illness' or 'disease,' may nevertheless constitute risks or injuries meriting some form of legal recognition." Id. at 1711. For these intermediate purposes, "relief that is confined to reimbursement for actual checkups will serve as a deterrent to speculative or frivolous litigation." Id. at 1716. But if "cellular-level treatment" becomes possible, that may "call into question exactly where monitoring leaves off and compensatory remedies begin." Id. at 1726.
In re Rezulin Products Liability Lit., 224 F.R.D. 346 (S.D.N.Y. 2004), refuses to certify an action seeking medical monitoring on the ground that the class members' damages claims predominated over the claim for monitoring, and also that such monitoring would not be manageable. Compare Gates v. Rohm & Hass Co., 248 F.R.D. 434 (E.D. Pa. 2008) (certifying medical monitoring settlement class under Rule 23(b)(2) in case involving alleged discharge of toxics from manufacturing plant near town in which class members resided).

In In re Allstate Ins. Co., 400 F.3d 505 (7th Cir. 2005), the court somewhat muddied the waters distinguishing a (b)(2) from a (b)(3) action. Plaintiffs sought to represent a class of former employee agents of defendant. They claimed that defendant harassed them into quitting to avoid paying them severance benefits when it converted to independent contractor agents, all in violation of ERISA. The sought a declaration that, due to the harassment, they were entitled to the ERISA benefits. Because the benefits flowed directly from the violation, this was a case in which the monetary relief was incidental, but that fact did not automatically entitle plaintiffs to certification under (b)(2). Rather, there remained with regard to each of the more than 1,000 class members who had quit defendant's employ the question whether the harassment caused them to quit. So (b)(2) was not appropriate, Judge Posner concluded while citing Monumental (p. 318), although the case might be suitable for class treatment under (b)(3): "[W]hen, though the suit is declaratory relief, the effect of the declaration on individual class members will vary with their particular circumstances, they should be given notice of the class action so that they can decide whether they would be better off proceeding individually." Id. at 508.

On arguments that class certification is not needed when only nonmonetary relief is sought (see casebook, p. 327 n.3), see Note, There is Always a Need: The "Necessity Doctrine" and Class Certification Against Governmental Agencies, 103 Mich. L. Rev. 1018 (2005) (arguing that denial of certification is warranted only very rarely even when the defendant is a governmental agency due to the need for class certification to ensure fully effective relief).

4. Rule 23(b)(3) Classes

In In re Nassau County Strip Search Cases, 461 F.3d 219 (2d Cir. 2006), the court rejected the Fifth Circuit's view in Castano (casebook p. 340) and held that "a court may employ Rule 23(c)(4)(A) to certify a class on a particular issue even if the action as a whole does not satisfy Rule 23(b)(3)'s predominance requirement." Id. at 225.

In Turner v. Murphy Oil USA, Inc., 234 F.R.D. 597 (E.D. La. 2006), the court certified a class under Rule 23(b)(3) in suits resulting from an oil spill at defendant's facility caused by Hurricane Katrina. Class members were neighbors of the facility that were affected by the oil spill. The court found the central and predominant issue was the cause of the spill, and responsibility for it. Noting that a single substantive law would determine liability, the court was satisfied by plaintiff's proposed three-phase trial plan. See id. at 606.

Regarding asbestos litigation, profiled in Jenkins (p. 331), note that the crest of asbestos litigation may finally have arrived. Frankel, Asbestos "Industry" in Decline, S.F. Recorder, July 5, 2006, at 1, reports that there is "a growing consensus that the litigation hurricane has passed." Asbestos cases in San Francisco Superior Court, for example, dropped by more than a third between 2002 and 2005. The Manville Personal Injury Settlement Trust, which in 2004 implemented new standards that slashed compensation for the unimpaired, saw new U.S. claims drop from 93,760 in 2003 to 16,600 in 2005. A defense side lawyer is quoted as saying that "We're not seeing junk cases anymore. . . . The litigation has become totally manageable by both the judiciary and the defendants." It should be noted that some defense side lawyers vehemently
disagreed and said that the crisis had not abated. Meanwhile, for an explanation for the long period of growth in filings, consider Abelson, Testimony on Asbestos is Questioned, N.Y. Times, Aug. 6, 2004, reporting that an independent panel of doctors who reviewed nearly 500 chest X-rays that were submitted by plaintiffs' lawyers in asbestos lawsuits found that only a small fraction indicated possible asbestos-related lung damages. The doctors who read the X-rays originally, by way of contrast, found 96% to show possible damage. An editorial in the medical journal in which the study was published said that it raised questions about the integrity of radiology experts employed in such litigation.

5. Defendant Class Actions

For a contrast to defendant class actions that has some of the features of those devices but tries to remove some of the risks, consider Hamdani & Klement, The Class Defense, 93 Calif. L. Rev. 685 (2005). The authors react to an emerging pattern of seemingly abusive litigation by moneyed plaintiff enterprises that exploit the cost of defending to coerce settlements from large numbers of prospective defendants. One possible illustration is the outburst of suits by music industry companies against those who download music. The concern is that individual defendants will not be willing to pay the high costs of litigating even though they have valid defenses. The authors' solution is not a defendant class action, for "[a]s far as we know, there has been no case in which a defendant requested that she be certified as representative of a class of defendants." Id. at 710. Instead, the proposal is to permit defendants to take the initiative to consolidate their claims in court so as to amass a "stake" that would suffice to justify active litigation. This method responds to a "core thesis * * * that the fundamental justification for consolidating plaintiff claims applies with equal force to defendants." Id. at 689. The vehicle for accomplishing the desired results is a one-way pro-defendant fee-shifting rule under which plaintiff must pay the fee of the defendant attorneys if the defendants prevail or the case settles. Thus, the use of the device does not depend on plaintiff's decision to file a defendant class action, but aggregation initiated from the defense side by fee-seeking lawyers. The authors work through a number of ramifications, including a right to opt out. Among other things, the article concludes that non-mutual issue preclusion is not an adequate alternative because it does not provide a sufficient incentive for defendants to litigate. See id. at 736-38. See also Comment, BlackBerry Users Unite! Expanding the Consumer Class Action to Include a Class Defense, 116 Yale L.J. 217 (2006).

TIMING OF CLASS CERTIFICATION DECISIONS

In In re Initial Public Offering Securities Litig., 471 F.3d 24 (2d Cir. 2006), the court concludes that "careful examination of Eisen reveals that there is no basis for thinking that a specific Rule 23 requirement need not be fully established just because it concerns, or even overlaps with, an aspect of the merits." Id. at 33. The court embraces the approach in Szabo v. Bridgeport Machines, Inc. (casebook, pp. 369-70), and emphasizes that the proponent of certification must prove, and the court must conclude, that the requirements of Rule 23 are actually satisfied before certifying the class. This inquiry may involve assessing factual matters; "the ultimate issue as to each requirement is really a mixed question of fact and law." Id. at 40. Because the standard of review on a decision regarding class certification is abuse of discretion, "a district judge must be accorded considerable discretion to limit both discovery and the extent
of the hearing on Rule 23 requirements." Id. at 41.

The sequence of decision can lead to anomalies, as In Pruitt v. City of Chicago, 472 F.3d 925 (7th Cir. 2006), in which the district court first refused to certify the class, and later dismissed the individual claims as time-barred. Judge Esterbrook reacted somewhat incredulously to the appeal of the class certification order: "Plaintiffs' lead argument on appeal is that the district judge should have certified a class. Coming after plaintiffs have lost on the merits, that's problematic. Do they want to take all other employees down in flames with them? If so -- or if they just don't care about the risk -- then they have demonstrated inadequacy as other workers' representatives and rendered class certification impossible." Id. at 926.

The Supreme Court of California clarified its rules in the area in Fireside Bank v. Superior Court, 155 P.3d 268, 277 (Cal. 2007):

First, a defendant must actively preserve its protection against one-way intervention by objecting [to decision of the merits before resolution of class certification]. Second, plaintiffs should seek certification before moving for any resolution of the merits. Third, though trial courts generally have broad discretion to manage and order class affairs, in the absence of a defense waiver they should not resolve the merits in a putative class action case before class certification and notice issues absent a compelling justification for doing so.

In Heerwagen v. Clear Channel Communications, 435 F.3d 219 (2d Cir. 2006), the court affirmed denial of class certification despite the district judge's evaluative comments about the weight it accorded the views of the expert witnesses put on by plaintiff and defendants. The appellate court had earlier held in a discrimination case that a court had unduly intruded into the factual dispute about the merits by rejecting the views of plaintiffs' experts offered on class certification. In this antitrust case, it found that the monopolization issues that would bear on success on the merits were sufficiently distinct from the merits of the experts' testimony on predominance (id. at 232):

The finding that individual issues were likely to predominate did not depend on an assessment of the validity of plaintiff's claim or of the potential claims of other members of the putative class. Rather, the district court resolved an independent fact question concerning the expected forms of proof in light of the specific factual allegations contained in the amended complaint. Some overlap with the ultimate review of the merits is an acceptable collateral consequence of the "rigorous analysis" that courts must perform when determining whether Rule 23's requirements have been met, see Falcon [p. 267], so long as it does not stem from a forbidden preliminary inquiry into the merits, Eisen [pp. 368-69].

See also Bell v. Ascendant Solutions, Inc., 422 F.3d 307 (5th Cir. 2005) (district court properly denied class certification after excluding plaintiffs' expert evidence designed to show that defendant's stock traded in an "efficient" market). Compare Anderson v. Boeing Co., 222 F.R.D. 521 (N.D. Ok. 2004), in which the court ruled that an expert affidavit submitted in support of class certification is not subject to a Daubert challenge at the certification stage. Although Fed. R. Evid. 702 directs the court to act as a gatekeeper in evaluating the admissibility of expert testimony at trial, that standard does not apply at the class certification stage. The court is not authorized to inquire into the merits, and the standard on certification is only whether the expert's views "are so fatally flawed as to be inadmissible as a matter of law." Based on the expert's education, experience and his description of the methodology used, the court concluded
that his testimony would not be so fatally flawed as to be inadmissible as a matter of law in showing a gender-based disparity in treatment of employees.

D. SETTLEMENT CLASS ACTIONS

Smith v. Sprint Communications Co., 387 F.3d 612 (7th Cir. 2004), presents an interesting illustration of both the dynamics and difficulties of settlement class actions and the challenges of overlapping class actions (see section E). The litigation relates to the rights of landowners over whose property defendants used railroad rights of way to install a nationwide network of fiber-optic cables. The Seventh Circuit had already held that nationwide certification was not permissible for all landowners coast to coast, but the lawyers who engineered that case did not give up. Instead, they entered into settlement negotiations and proposed a settlement that would conclude the claims of all landowners. The district court was satisfied and enjoined all other litigations on behalf of class members. By that time, statewide class actions in Tennessee and Kansas had made good progress and were approaching trial. In Tennessee, where plaintiffs had already established liability for the taking of their property, plaintiffs expected awards more than ten times higher than what the nationwide settlement provided. Although the settlement agreement permitted adjustments for landowners from various states based on what the law of those states would allow in compensation, that provision did not afford "structural assurance of fair and adequate representation" as required by Amchem. "Law professors are no substitute for proper class representatives." Id. at 614. Accordingly, the majority held that the settlement should not have been approved.

Judge Cudahy dissented, emphasizing that the intrusion nationwide was part of a nationwide network, and that "to the extent uniformity in treatment of affected landowners can be achieved" that would be desirable. Id. at 615:

The state-by-state treatment favored by the majority is likely to produce a nightmare of complexity, the inequitable treatment of landowners in different states, and increased charges to telephone users everywhere. If a similar approach had been applied to the construction of the first transcontinental railroad, the Pony Express might still be galloping away.

He argued that the fact that class counsel in the nationwide case could not obtain certification of a litigation class did not preclude settling the case, and that the case was otherwise different from Amchem because the class was very cohesive. He thought that "the fact that the settlement agreement may require that law professors make adjustments in the settlement amount based on state law has practically no relevance to the issue whether class counsel is adequate." Id. at 617.

Redish & Kastanek, Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process, 73 U. Chi. L. Rev. 545 (2006), answers a question the Supreme Court did not address in Amchem -- whether a "prepack" settlement class action can properly be brought in a federal court. "[B]ecause by its nature it does not involve any live dispute between the parties that a federal court is being asked to resolve through litigation, and because from the outset of the proceeding the parties are in full accord as to how the claims should be disposed of, there is missing the adverseness between the parties that is a central element of Article III's case-or-controversy requirement. The settlement class action, in short, is inherently unconstitutional." Id. at 547. Notwithstanding that strong conclusion, the authors also conclude that in Amchem "the Supreme Court implicitly approved the concept of the settlement class as an alternative form of dispute resolution." Id. at 556. More generally, the authors find that consent decrees are also constitutionally impermissible. See id. at 569-70.
E. OVERLAPPING CLASS ACTIONS

In re Diet Drugs, 369 F.3d 293 (3d Cir. 2004), provides another chapter in the litigation profiled in the book (p. 391). This appeal addresses limitations on opt-out class members in pursuing punitive damages. The court recognizes the value of settlement in providing reasonable assurance of relief for class members and assurances of survival for defendant companies. The district court must apply the settlement "against the constant pressure of some settlement class members who, having obtained part of a loaf through agreement, now pursue alternative avenues to obtain additional slices." Id. at 297. This appeal arose when intermediate opt-out plaintiffs -- bound by limitations on punitive damage claims -- filed cases in state courts in Texas and Mississippi. The district court not only enjoined pursuit of punitive damages, but also forbade introducing evidence or argument regarding malicious, wanton or other similar conduct of defendants. Defendant claimed that plaintiffs' exhibit lists showed that they intended to "infect" the proceeding with appeals for punishment. A tension emerged between the right of the opt-out plaintiffs to offer evidence supporting tortious liability, and the prohibition on claims for punitive damages as such. Accordingly, the court upheld the injunction against making punitive damages claims, but also held that it was improper to intrude on the state courts' determinations whether certain proffered evidence would properly bear on other claims before those courts.

For a thorough examination of the difficulties that can result from back-end opt-outs, focusing on the Diet Drugs litigation, see Wasserman, The Curious Complications With Back-End Opt-Out Rights, 49 Will. & Mary L. Rev. 373 (2007).

In Bailey v. State Farm Fire & Cas. Co., 414 F.3d 1187 (10th Cir. 2005), plaintiff insured filed a class action against State Farm alleging that it intentionally under-adjusted claims by homeowners. The district court denied plaintiff's motion to certify a class and granted summary judgment against her. On appeal, the parties settled. But thereafter, others filed suits against State Farm making similar claims and also seeking class certification. In those cases, State Farm argued that the order denying class certification in Bailey prevented other judges from considering class certification. When other judges rejected that argument, State Farm asked the court in this case to issue an injunction barring other courts from addressing class certification in "related" suits. The district judge refused on grounds of comity, and State Farm appealed, arguing the judge had to issue the injunction under In re Bridgestone/Firestone (p. 404 n.9). Noting that its standard of review was abuse of discretion, the court of appeals affirmed. Conceding that many of the Seventh Circuit's principles in Bridgestone/Firestone were sound, it found no basis for concluding that refusing to issue an injunction constituted an abuse of discretion. In part, this was because the district judge "acted out of respect for the work already performed by the state court" which involved dealing with State Farm's arguments based on the impact of the district court's decision denying class certification. State Farm had occupied a significant amount of the state court's time before seeking injunctive relief in federal court.

As a qualification to the discussion of the Prudential Insurance litigation in note 8 on p. 404, it is worthwhile to note that the Third Circuit there may have been relying only on the "in aid of jurisdiction" and not also on the relitigation element of the Anti-Injunction Act. Whether such a limitation of the ruling there was wise can be debated.

F. CLASS ACTION REMEDIES

In McLaughlin v. American Tobacco Co., 522 F.3d 215 (2d Cir. 2008), the court reiterated its opposition (see p. 409) to fluid recovery theories. In this case, Judge Weinstein proposed to have a class of smokers prove defendant tobacco companies' "aggregate liability" to
create a fund from which individual class members could seek recovery based on specific claims. Although the court acknowledged that "the fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification," it held that the district court's proposed technique was improper as violating both the Rules Enabling Act and the Due Process Clause. "Roughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants' substantive right to pay damages reflective of their actual liability." Id. at 231.

In Masters v. Wilhemina Model Agency, Inc., 473 F.3d 423 (2d Cir. 2007), the court emphasized the latitude a district court has to allocate the residue from a settlement, and evinced uneasiness with routine dedication of the money to a favored charity. In that antitrust action, the settlement agreement provided that any funds left over after class members had been fully paid in accord with the settlement would be directed to charities. But the appellate court concluded that "a treble damages award did lie within the ambit of the District Court's discretion and should be considered on remand." Id. at 436. The court emphasized that the judge should put the unclaimed fund, to "its next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class." Id, quoting Newberg & Conte, Newberg on Class Actions. It also invoked the draft Principles of the Law of Aggregate Litigation, which urges that cy pres be limited to circumstances in which direct distribution to individual class members is not economically feasible. See also Liptak, Doling Out Other People's Money, N.Y. Times, Nov. 26, 2007, at A12 (describing uneasiness many judges feel about acting like foundations reviewing grant requests).

The Holocaust class action provides an illustration of the variety of interest groups that can pursue unclaimed class-action settlement funds. See, e.g., In re Holocaust Victim Assets Litig., 424 F.3d 158 (2d Cir. 2005) (district court did not err in allocating residual funds to needy Holocaust survivors rather than granting a homosexual rights group's proposal to distribute some funds to organizations geared towards combating harms similar to those inflicted by the Nazis on gay people); In re Holocaust Victim Assets Litig., 424 F.3d 169 (2d Cir. 2005) (district court did not abuse its discretion by allocating unclaimed settlement funds to needy Holocaust survivors rather than to a trust that would have provided grants to disability oriented organizations, as proposed by a disability rights advocacy group).

Class actions can make nominal damages add up. In Cummings v. Connell, 402 F.3d 936 (9th Cir. 2005), the issue was the extent of nominal damages for nonunion public employees who got inadequate notices regarding withholding from their checks for the union. The district court held that the $1 damages had to be paid only to the seven named plaintiffs, but the court of appeals ruled that all 37,000 class members should get something, although the precise amount might be open on remand.

G. PROBLEMS OF JURISDICTION AND CHOICE OF LAW

In Exxon Mobil Corp. v. Allapattah Services, Inc., 125 S.Ct. 2611 (2005), the Court resolved the question whether § 1367 overrules Zahn (see p. 429) by holding that it does. The 5-4 ruling interestingly featured Justice O'Connor (whose recusal had led to a 4-4 failure to resolve the question in In re Abbott Laboratories) in dissent. The majority found the language of the statute sufficiently clear to bar resort to legislative history or purpose. Justices Ginsburg and Stevens in dissent found the legislative history clear that Zahn was not to be overruled, and found sufficient ground in the statute to uphold the argument by Prof. Pfander (see p. 429) that § 1367(a) only applies to civil actions that altogether satisfy § 1332. The majority was not persuaded by Pfander's argument.
Andrews, The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness," 58 SMU L. Rev. 1313 (2005), focuses on a question suggested in n. 1 on p. 425 -- How can due process permit a state court to entertain within a class action a claim that it could not entertain in an individual suit against the defendant by the class member? Prof. Andrews investigates several possible arguments -- that there is specific jurisdiction based on the relationship between the absent class member's claims and the claims of local class members, that there is general jurisdiction over the defendant, that defendant's corporate registration provides a basis for general jurisdiction, and that nationwide class actions should be handled under some sort of special jurisdictional theory -- and finds them all wanting. In federal court, on the other hand, jurisdiction over nationwide class actions would be permissible. Ironically, then, the expansion of federal subject-matter jurisdiction effected by CAFA may be a solution to this personal jurisdiction problem.

Woolley, Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rules of Civil Procedure 23(b)(3), 2004 Mich. St. L. Rev. 799, argues that a state-law presumption that the law of the forum state should govern should, under Klaxon Co. v. Stentor Elec. Mfg. Co. be applied in federal class actions as in other cases in federal court. Although such a presumption can be overcome by a showing that the law in other states is different, it would seem to alter the burden of going forward from the notion that the proponent of class certification must make an affirmative showing about the content of the law of other states. On the other hand, one might argue that in developing such a choice-of-law rule for ordinary lawsuits, the state courts were not necessarily contemplating its application in a nationwide class action, which could mean that the federal courts would have an "Erie guess" about what rule the state courts would use in such a situation.

For an example of a court requiring an individual choice-of-law inquiry for each class member, consider In re St. Jude Medical, Inc., 425 F.3d 1116 (8th Cir. 2005). After consolidation by the Judicial Panel of suits from across the country claiming defects in heart valve implants manufactured by defendant, a Minnesota district court certified a nationwide class asserting claims under the Minnesota consumer protection statutes. The appellate court held that this was wrong "because the district court did not conduct a thorough conflicts-of-law analysis with respect to each plaintiff class member before applying Minnesota law," relying on the requirement in Shutts that such an analysis be applied. Id. at 1120. Relying on Bridgestone/Firestone (p. 429), the court concluded that state consumer protection laws vary considerably. The district court had disregarded the law of other states based on Minnesota law provisions saying that anyone injured by violation of its consumer protection statutes could sue for resulting injury, but the appellate court said that these state standing provisions did not apply to the due process choice-of-law issue.

Regarding solving choice-of-law problems, note that in Fournigault v. Independence One Mortg. Corp., 234 F.R.D. 641 (N.D. Ill. 2006), the court first denied a motion to certify a nationwide class, but later certified seven state-specific subclasses.

Some state courts are less concerned about choice of law then the federal courts ordinarily seem to be. In General Motors Corp. v. Bryant, ___ S.W.3d ___, 2008 WL 2447447 (Ark. 2008), for example, rejected a requirement that the court conduct a rigorous choice of law analysis before determining whether common questions predominate. It quoted one of its earlier decisions: "The mere fact that choice of law may be involved in the case of some claimants living in different states is not sufficient in and of itself to warrant a denial of class certification."

In re Ford Motor Co., 471 F.3d 1223 (11th Cir. 2006), shows an even more aggressive
use of the injunctive power than Bridgestone/Firestone (casebook p. 438 n.10), and the court of appeals held it improper. Plaintiffs were Ford dealers who sued Ford, claiming that its pricing violated its franchise agreements. They sought class certification for a class of franchised dealers, but the district court denied certification, in part on the ground that there were conflicts of interest within the class because the theory of liability was that Ford favored some dealers over others. Thereafter, another dealer (and member of the proposed class) filed a suit in Ohio state court, represented by the same lawyer as the federal plaintiffs and making very similar claims against Ford. The Ohio state court granted certification, rejecting the reasons given by the district judge in this case for refusing to certify. The federal plaintiffs then moved to dismiss the federal case without prejudice under Rule 41(a)(2), saying they would pursue their claims as unnamed class members in the Ohio state-court action. Ford responded by asking the federal judge to enjoin the prosecution of the Ohio case. The federal court denied the motion to dismiss without prejudice and enjoined all members of the putative national class in its case and their lawyer from prosecuting the Ohio state-court case.

The dealer who brought the Ohio case objected to the federal judge's exercise of jurisdiction over it. The appellate court agreed that "[t]he denial of class certification limited the court's in personam jurisdiction solely to the parties appearing before it." Id. at 1245. But this dealer had intervened in the federal case to oppose Ford's request for an injunction against its Ohio litigation, and thereby submitted to the court's jurisdiction. Turning to the propriety of the injunction, the court stressed the strict limitations on federal courts' injunctive power under the Anti-Injunction Act. The court acknowledged that it had recognized a "complex multistate litigation" exception to the Act, but only when the federal court had pending before it a case that would be disrupted by simultaneous litigation in state court. The present case did not involve a complex judgment crafted in federal court that would be disturbed by state-court litigation, however. The district court's order denying class certification on grounds of conflict made no indication of the finality or preclusive effect of the ruling, so the relitigation exception of the Act did not apply. So the court could not properly enjoin the Ohio plaintiff from proceeding with that case.

That left the district judge's authority to enjoin the plaintiffs before it from participating in the Ohio action as class members. Sensing that the district court thought that the parties before it were trying an end run around its certification ruling like the parties in Bridgestone/Firestone, the court of appeals holds that the Seventh Circuit's decision does not justify the injunction. There were no circumstances indicating that the participation of the federal plaintiffs in the state-court case would pose a threat to the conduct of the federal case. And because the class certification decision was not final, it could not be the basis for an injunction against future litigation activities of the federal-court plaintiffs.

THE CLASS ACTION FAIRNESS ACT

The Class Action Fairness Act significantly expands federal-court jurisdiction over state-law class actions. It adds a new 28 U.S.C. § 1332(d) that invokes minimum diversity whenever any member of a plaintiff class is a citizen of a state different from that of the defendant. There must be $5 million in controversy. However, overruling Snyder v. Harris (see p. 428) that did not permit aggregation of the claims of all class members to satisfy the amount-in-controversy requirement, the Act provides that the claims of all the class members can be aggregated to satisfy the $5 million requirement under CAFA. There must also be at least 100 class members. When these requirements are satisfied, plaintiff may initially file in federal court, and any defendant may remove to federal court even if the other defendants don't join in removal. The courts have held that a defendant who has removed a class action to federal court under CAFA
has the burden of proof as to these jurisdictional requirements. See Blockbuster Inc. v. Galeno, 472 F.3d 53 (2d Cir. 2006); Brill v. Countrywide Home Loans Inc., 427 F.3d 446 (7th Cir. 2005).

This new federal-court jurisdiction over class actions responds to concerns that in some instances state courts were entertaining class actions that adjudicated the rights of citizens of other states, sometimes under peculiar local law. Congress concluded that there was a substantial national interest in having such interstate cases in federal court. At the same time, the statute places limits on this jurisdiction to protect what Congress deemed legitimate state interests. There are three “carve-outs” to CAFA “minimal diversity” jurisdiction – the “home state,” “local controversy,” and “judicial discretion” exceptions. For the first two exceptions, at least 2/3 of the class members must be citizens of the state in which the class action is filed. For the “judicial discretion” exception, at least 1/3 to 2/3 of the class members must be from the forum state. See appendix for more detailed account of CAFA provisions.

Proving the citizenship of the class members is thus critical for class plaintiffs who seek to come under one of the exceptions and avoid federal court jurisdiction. Courts have held that the plaintiff who seeks remand to state court has the burden of proving all the requirements for an exception, including citizenship. Some courts have taken a particularly strict view of plaintiff’s burden of proof. Evans v. Walter Industries, Inc., 449 F.3d 1159 (11th Cir. 2006), was a class action against 18 in-state defendants who operated manufacturing facilities that released waste over an 85-year period in Anniston, Alabama. The court found that the plaintiffs had not met their burden of proving that 2/3 of the class were from Alabama. It found insufficient an affidavit by plaintiff’s attorney that of more than 10,000 class members she interviewed, 93.8% were Alabama residents, saying that it was not shown how the interviewees were selected.

A similarly harsh application of burden of proof prevented use of the "local controversy" exception in Musgrave v. Aluminum Company of America, 2006 WL 1994840 (S.D. Ind. 2006). In this action for polluting on behalf of former mine workers, adjoining landowners, and persons who worked or lived near the site, remand was denied on the ground that there was insufficient evidence of two-thirds citizenship even though the class was confined to those who lived within the immediate area of the mine, all of which was within the forum state.

In contrast, Preston v. Tenet Healthsystem Memorial Medical Center Inc., 485 F.3d 804 (5th Cir. 2007), was a class action against a hospital arising from deaths and injuries to patients after Hurricane Katrina. The district court found that evidence that 97% of the patients had listed Louisiana as their residence on intake, together with other evidence indicating no change in residence, was sufficient to satisfy the citizenship requirements of all three exceptions. However, in Weems v. Touro Infirmary, 485 F.3d 793 (5th Cir. 2007), a similar class action on behalf of patients of a different hospital who died or were injured in Katrina, evidence that of the 299 patients there when the hurricane hit, 242 had a Louisiana address was found insufficient. But note that citizenship must be determined as of the date of filing suit, and this suit was filed a year after Katrina when many New Orleans residents hadn't returned and there was uncertainty as to how many would return.

There are other requirements for each of the three exceptions, many of which were not terms of art and will require court determinations. The “home state” exception requires additionally that the “primary defendants” be citizens of the forum state. That term is not defined in the statute, although a 2003 Senate Committee Report’s focus on who are “real targets” and would incur most of the loss may provide guidance. Not many cases have addressed who is a “primary defendant.” Lao v. Wickes Furniture Company, 2006 WL 2879763 (C.D. Cal.
2006), found that California was the “principal place of business” of the defendant corporation which, although it operated furniture stores in five states, had substantial facilities in California.

The “local controversy” exception is a variation of the “home state” exception that relaxes the requirement that all primary defendants be citizens of the forum state. At least one defendant from whom “significant relief” is sought and whose conduct was a “significant basis” for the claims must be a citizen, or the “principal injuries” must have been incurred in the state and no other class actions asserting similar allegations against the same defendants can have been filed in the preceding five years. A few cases have dealt with the meaning of these requirements.

Robinson v. Cheetah Transportation, 2006 WL 468820 (W.D. La. 2006), determined that relief against an individual who is not likely to have substantial assets was not “significant.” This was a class action filed on behalf of all persons and businesses affected by the closure of a bridge that was struck by a tractor-trailer. The essentially in-state class sued the driver (who was alleged to be a citizen of the state where suit was filed), as well as the vehicle owner, the insurer, and a transportation company and railroad that were involved in the tractor-trailer operation (all of whom were non-citizens). On plaintiffs’ motion to remand, the court ruled that although the driver’s “alleged negligence may have substantially contributed to the class members’ damages,… it does not follow that the class members seek significant relief from him. With an amount in controversy of at least $5,000,000, the plaintiffs will seek most of that relief from those who are capable of paying it: the corporate defendants.”

If “significant relief” is not considered to be sought against an in-state truck driver who caused the accident but may be judgment proof, what about a large in-state company charged with polluting? Evans v. Walter Industries, Inc., 449 F.3d 1159 (5th Cir. 2006) (previously discussed for its strict view of plaintiff’s burden of proof as to citizenship), was a class action on behalf of people who lived in and around Anniston, Alabama against 18 manufacturing facilities for polluting over an 85-year period. It found the plaintiff had failed to show that an in-state company, U.S. Pipe, “played a significant role in the alleged contamination, as opposed to a lesser role, or even a minimal role.” U.S. Pipe had operated two plants, one which closed in 1951 and one which operated until 2003 but was south of the area occupied by most of the class members. Other defendants had operations much nearer, the court said, “suggesting that U.S. Pipe’s liability might not be significant compared to other defendants, and that the conduct of U.S. Pipe might not form a significant basis for the claims of the class.

The emphasis on comparing the relief sought from an in-state defendant with that of all the defendants was also evident in Kearns v. Ford Motor Company, 2005 WL 3967998 (C.D. Cal. 2005). The plaintiff brought a class action on behalf of persons who had purchased “Certified Pre-Owned” vehicles against the sponsor of the program, Ford, and a local Ford dealer and other in-state Ford dealers (named as Doe Defendants) for inflating the prices through misleading advertising and representations. Placing the burden of proof on the plaintiff, the court found that “the relief sought from Ford will dwarf the relief sought from each individual dealer.” Plaintiff argued that the relief sought against the named local dealer was “not inconsequential” since restitution and disgorgement of profits was sought. The court still found it not “significant” because it “must be measured with respect to that sought by the entire class.” There is no language in the statute to support such a comparison.

The third exception, “judicial discretion,” gives the district court discretion to decline to exercise jurisdiction based on a variety of considerations when more than one-third but fewer than two-thirds of the class members are citizens of the state in which the suit is filed.
To fit into one of the exceptions, plaintiffs may limit their classes to a single state or several states where at least 2/3 of the class members come from one state. In large states like California, New York, Texas and Florida, this strategy will not drain class actions of their clout. But plaintiffs who want to remain in state court will also need to sue a defendant who is local, which may often present a greater challenge. In any event, it is likely that even if some plaintiff attorneys can keep their cases in state court, in other states that will not prove possible.


Whether there was pervasive forum shopping between federal and state court in class actions before adoption of CAFA can be debated. Relying on a Federal Judicial Center survey of lawyers involved in closed cases completed before CAFA came into effect, researchers found little reason to expect there was widespread forum shopping:

Our data, however, lend little support to the view that state and federal courts differ greatly in how they resolve class actions. For example, state and federal courts were equally unlikely to certify cases filed as class actions. Both state and federal courts certified classes in fewer than one in four cases filed as class actions. Although state courts approved settlements awarding more money to the class than did federal courts, that difference was a product of the size of the class; individual class members on average were awarded more from settlements in federal courts than in state courts.

Willging & Wheatman, Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?, 81 Notre Dame L. Rev. 591, 599 (2006). Of more than 600 cases on which the researchers obtained information, for example, "[n]o judge rejected a class settlement." Id. at 605.

H. PREJUDGMENT NOTICE TO CLASS MEMBERS

Regarding the cost of identifying class members (p. 447 n.8), consider Tardiff v. Knox County, 226 F.R.D. 10 (D.Me. 2005), a class action regarding strip searches of detainees, in which the court resisted plaintiffs' arguments that defendant's inadequate record-keeping procedures made it unfair for them to have to identify class members at their own expense. Plaintiffs claimed that the defendant county failed to maintain records that the law required be maintained, and that this failure prevented identification of class members. The court recognized that the county's compliance with the requirement that the name and address of each person strip searched be entered in a log would have made the plaintiffs' task "infinitely simpler." Nonetheless, the judge found it premature to address any problems resulting from this failure to comply with a legal requirement. Instead, plaintiffs would be required to make a "reasonable effort" to identify class members from the materials available, and the court would evaluate those efforts and their results before proceeding further regarding making defendant pay.
I. INTERVENTION AND OPT-OUT

Rather than permitting opting out, a court might require class members to opt in to become part of the class. The Fair Labor Standards Act sets up such a procedure by statute for representative actions. In Kern v. Siemens Corp., 393 F.3d 120 (2d Cir. 2004), the district judge decided to adopt it by order. The suit grew out of a fire in a ski train in Austria that killed 155 people, of whom eight were Americans, ten were from Japan, and all the rest were from European countries (with Austria and Germany accounting for 129 of the victims). Various suits were filed in the U.S. and consolidated by the JPML before the district court. Plaintiffs sued on behalf of a class of heirs and representatives of the victims "who consent in being included as members of the class."

The court of appeals held that an opt-in class is not allowed under Rule 23, which was drafted with the opt-out feature on the assumption that class members are included unless they opt out. There is no authority for such an order in Rule 23. Moreover, even if there sometimes might be a ground for requiring opting in, in this case the district court seemed to provide for it only because plaintiffs so desired. "[W]e cannot envisage any circumstances when Rule 23 would authorize an 'opt-in' class in the liability stages of a litigation." Id. at 128. The district court tried to rely by analogy on the FLSA, but that is not comparable. Indeed, that statute shows that Congress can speak clearly when it wants to authorize an opt-in class, and underscores the contrary orientation of Rule 23, which was subject to Congressional approval in the Rules Enabling Act process. Moreover, the district court's invocation of "equitable powers" availed this order naught; Rule 23 is the exclusive route for forming a class action.

In Stone v. First Union Corp., 371 F.3d 1305 (11th Cir. 2004), the district court first certified, and then decertified, an opt-in class action under the ADEA, which prescribes an opt-in mechanism. By the time decertification occurred, 160 other employees had joined the suit. Then the 160 other employees moved to intervene of right and the district court denied their motions. It had decertified the class because the intervenors' claims were too dissimilar to the original plaintiff's claims, and reasoned that a ruling in her case would not impair their interests. But the appellate court saw the potential stare decisis effect as sufficient to constitute impairment of the intervenors' interests. They all alleged that the same policy of defendant had harmed them. As a result, one court's ruling on whether that policy violated the ADEA could harm them even though another court would not be bound to follow it. Moreover, the intervenors could "piggyback" on the named plaintiff's timely EEOC complaint and right to sue letter. On adequacy of representation, the appellate court noted that the district judge had already decided - - in decertifying the class -- that the named plaintiff was not an adequate representative for Rule 23 purposes of the other class members due to differences among the claims. This was sufficient for Rule 24 purposes as well.

In Gautreaux v. Chicago Housing Authority, 478 F.3d 845 (7th Cir. 2007), a long-running class action, the district court ruled in 1969 that defendant had engaged in race-based siting of public housing and entered an order appointing a Receiver for development of new housing in 1987. Various other orders followed in which the district court supervised public housing efforts to "revitalize" various neighborhoods. In 2005, a tenants' organization called the Central Advisory Council (CAC) sought to intervene in the case to offer an amendment to a 1996 revitalization order. When CAC was denied intervention and the order was not changed as it desired, it appealed. The court of appeals held that Devlin v. Scardeletti did not support CAC's contention that it could appeal. Even though CAC might represent some unnamed class members in some ways, it was not itself an unnamed class member. Moreover, there was no indication that the class representatives had conflicts of interest that precluded them from
representing the interests of CAC's members. Most important, however, was the fact that CAC was not -- like the class members in Devlin v. Scardeletti -- bound by the settlement. "Devlin therefore reflects a concern that, without an opportunity to appeal, unnamed class members will have no other recourse than to accept the terms of a settlement and to forfeit further pursuit of their claim. . . . Because CAC is not 'bound' by a final judgment, it does not qualify as a party to the litigation for purposes of appeal." Id. at 851-52.

J. STATUTES OF LIMITATIONS

In re Hanford Nuclear Reservation Litigation, 521 F.3d 1028 (9th Cir. 2008), presented the question whether an unnamed member of the class could file suit before class certification is decided and overcome a limitations objection on the ground that the filing of the class action had tolled the running of limitations. Many courts had ruled that tolling only works to protect the filing of separate actions after denial of class certification. See, e.g., Wyser-Pratte Mgmt. Co. v. Telxon, 413 F.3d 569 (6th Cir. 2005). The Ninth Circuit, however, concluded that "although the American Pipe doctrine protects plaintiffs from being forced to file suit before the certification decision, that doesn't mean that plaintiffs who file before certification are not entitled to tolling. They have a right to file at the time of their choosing and enying tolling would diminish their right." Id. at 1053.

In Yang v. Odom, 392 F.3d 97 (3d Cir. 2004), the court carried its decision in McKowan Lowe & Co. v. Jasmine, Ltd. (p. 468 n. 5) further to hold that tolling may be invoked in a second class action even though certification was earlier denied if the earlier denial was not on the ground that the claims asserted could not be pressed in the class-action format. In McKowan Lowe, the court had held that tolling could be invoked by an intervenor in the original class action who could cure the personal deficiencies of the original named plaintiff that prevented certification in the first place. That ruling corresponds to idea that the court should allow plaintiff counsel some time to find another class representative if the first one is inadequate (see p. 277 n.7). In this case, no such intervention was sought in the first case, which had denied certification based on the inadequacy of the class representatives. The Third Circuit recognized a universal rule of all the circuits that barred relitigating the propriety of class certification where the issue is the same in the later case -- presumably a position that should apply without regard to limitations problems -- but found this attitude inapplicable to most of the claims earlier rejected in the N.D. of Ga. in the denial of certification that gave rise to the problem. That being the case, it concluded that its ruling in McKowan Lowe & Co. would have allowed a second invocation of tolling had the new class representatives sought to intervene, and it saw no reason why the result should be different when they instead filed a new case. As the court noted, the Eleventh Circuit (where the earlier case was filed) flatly refuses a second toll under any circumstances, but this did not affect the Third Circuit's ruling. To the contrary, its rule would not allow piggybacking of class actions suits indefinitely. Rather, later putative class representatives could pursue certification "until a court has definitively determined that the claims are not suitable for class treatment. Where repeated tolling is implicated and the class appears unable to put forward an appropriate lead plaintiff, courts may reasonably conclude that the class itself fails Rule 23 analysis." Id. at 112.

Contrast Cliff v. Payco General American Creditors, Inc., 363 F.3d 1120 (11th Cir. 2004), dealing with relation back under Rule 15(c) of amendments that expand the class. The court held that a later amendment to expand a statewide Florida class into a national class does not relate back to the date of filing of the original statewide class complaint. The court recognized the Rule 15(c)(3) does not expressly address amendments to add plaintiffs, but that courts had extended the rule to include such amendments, looking to whether the defendant
would be unfairly prejudiced in maintaining a defense by relation back. The court held that, at the time the limitations period expired on the non-Florida claimants, defendant had only been placed on notice of the need to defend against claims of Florida class members, and that the district court did not clearly err in concluding that the original complaint did not provide defendant with adequate notice of the nationwide class. Id. at 1132.

For an argument that tolling should usually work to permit a second class action even though an earlier effort to certify has failed in another case, see Wasserman, Tolling: The American Pipe Tolling Rule and Successive Class Actions, 58 Fla. L. Rev. 803 (2006).

K. COMMUNICATIONS WITH UNNAMED MEMBERS OF CLASS

Barton v. United States District Court for the Central Dist. of Calif., 410 F.3d 1104 (9th Cir. 2005), addresses the application of the attorney-client privilege to the sorts of outreach lawyers can undertake for class actions using modern technology. As the court observed:

What is "new" about this case is attorneys trolling for clients on the internet and obtaining there the kind of detailed information from large numbers of people that used to be provided only when a potential client physically came into the lawyer's office. Two things had to happen to bring this about: the change in law in the 1970s that permitted attorney advertising, and the sufficiently widespread use of the internet, within the past five or ten years, that makes internet advertising worthwhile.

In this case, a law firm interested in asserted claims for users of Paxil posted a questionnaire on the Internet seeking information from "potential class members." But to submit the form, it was necessary to click a "yes" box that acknowledged that the questionnaire "does not constitute a request for legal advice and that I am not forming an attorney client relationship by submitting this information." The four plaintiffs involved in the litigation filled out and submitted these forms, as did thousands of other people. Eventually, the district court did not certify a class, and these four people continued their suit as individual clients of the law firm. As their cases were approaching trial, defendant demanded production of their answers to the questionnaire. The district court ordered production, rejecting plaintiffs' attorney-client privilege objection because the form said that the person submitting it was not forming an attorney-client relationship.

The court of appeals granted a writ of mandate holding that under California law (see Fed. R. Evid. 501) the disclaimer did not prevent the prospective clients from relying on confidentiality even though there was no existing attorney-client relationship. It recognized that the law firm had to have such a provision to protect itself against possible malpractice liability to all who submitted forms, and emphasized that although the form said there was not attorney-client relationship it was consistent with the firm maintaining confidentiality of answers. (Saying explicitly that confidentiality will be maintained might be a good idea, however.) And California law recognized the protected nature of such communications: "Potential clients must be able to tell their lawyers their private business without fear of disclosure, in order for their lawyers to obtain honest accounts on which they may base sound advice and skillful advocacy."

Note, Limiting Coercive Speech in Class Actions, 114 Yale L.J. 1953 (2005), argues that there should be prophylactic limitations on communication between the defendant and plaintiff class members when there is a "structurally coercive relationship" between them. Kleiner v. First National Bank (p. 473) might well be such a case.
The ABA issued Formal Opinion 07-445 (April 11, 2007), which offers the following view regarding the application of the Model Rules of Professional Conduct:

Before the class has been certified by a court, the lawyer for plaintiff will represent one or more persons with whom a client-lawyer relationship clearly has been established. As to persons who are potential members of a class if it is certified, however, no client-lawyer relationship has been established. A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired. If the client has neither a consensual relationship with a lawyer nor a legal substitute for consent, there is no representation. Therefore, putative class members are not represented parties for the purposes of the Model Rules prior to certification of the class and the expiration of the opt-out period.

Even after certification, the relationship between class counsel and unnamed members of the class is not exactly the same as that between a lawyer and an individual client. Thus, In Wyly v. Wilberg Weiss Bershad & Schulman, 850 N.Y.S.2d 14 (N.Y.App.Div. 2007), the court held that such a class member did not have an absolute right to obtain all counsel's files in relation to a settled class action. Sam Wyly, who owned nearly a million shares of Computer Associates Int'l, Inc., sought all the files of Milberg Weiss in relation to a settled securities fraud class action against the company. Under New York law, a client usually has a right to all such files unless there is a pending fee dispute. The court recognized that Wyly had some of the benefits of the attorney-client relationship, such as the right to privileged communications with counsel and prohibition against attempts by defense counsel to communicate with him, but that he did not have other rights, such as the right to fire class counsel. Similarly here, he had no right of access without a showing of adequate need, which the court held he had not made.

DISCOVERY FROM UNNAMED CLASS MEMBERS

In Pioneer Electronics (USA), Inc. v. Superior Court, 150 P.3d 198 (Cal. 2007), the California Supreme Court dealt with the limitations a privacy provision in the California Constitution (adopted by initiative) can place on discovery by the class-action plaintiff. Plaintiff filed a class action against Pioneer, claiming that its DVD player was defective. Through pre-certification discovery, he learned that 700 to 800 other customers had also complained about this product, and plaintiff sought their names and addresses to solicit support for his case. Pioneer objected that revealing this information would violate the customers' rights under the privacy provisions of California law. Eventually, the trial court ordered Pioneer to write to each of these customers and give the customer the opportunity by responding to request secrecy. Pioneer sought a writ of mandate on the notion that identities could be revealed only when the customer affirmatively responded, and a California Court of Appeal agreed. Perhaps one could argue that, having identified themselves to Pioneer, these customers had no privacy interest against revelation of their identities to another customer suing Pioneer on their behalf. The Supreme Court suggested that it might agree with this view (see id. at 206 -- saying Pioneer failed to demonstrate that its customers entertained a reasonable expectation of privacy), and it held that the trial court's balancing of interests sufficed. There is no need to require that the customers respond affirmatively before discovery is allowed. On that subject, the court noted (id. at 205-06):

Contact information regarding the identity of potential class members is generally discoverable, so that the lead plaintiff may learn the names of other persons who might assist in prosecuting the case. Such disclosure involves no revelation of personal or
business secrets, intimate activities, or similar private information, and threatens no undue intrusion into one's personal life, such as mass-marketing efforts or unsolicited sales pitches.

Contrast First American Title Ins. Co. v. Superior Court, 53 Cal. Rptr. 3d 734 (Cal. Ct. App. 2007), in which the court held that a putative class representative who actually was not a member of the class because he had not suffered the harm asserted in the suit could not obtain pre-certification discovery to identify a proper class representative. The suit relied on allegations of kickbacks in relation to title insurance on home purchases. In early skirmishing, it appeared that the title insurer the named plaintiff had used was not involved in such kickbacks, although some 38,000 other Californians had been victims. Plaintiff sought class discovery of the names of those 38,000 victims, and the Court of Appeal held that discovery could not be ordered. Although such discovery might be allowed when the original named plaintiff had standing but a subsequent development changed that, the court held that it could not be employed when the original named plaintiff never had standing. Although actual victims might have an interest in pursuing relief, this plaintiff had no cognizable interest in seeking it for them. See id. at 743.

In Smith v. Loew's Home Centers, Inc, 236 F.R.D. 354 (S.D. Ohio 2006), the court held that opt-in plaintiffs in a class action under the Fair Labor Standards Act would not be treated as ordinary party plaintiffs in terms of their susceptibility to discovery at the precertification stage. Instead, the court limited discovery to a statistically significant sampling. Such an approach would avoid a huge burden on plaintiffs' counsel but still allow defendant a chance to do needed inquiry. See also Barham v. Ramsey, 246 F.R.D. 60 (D.D.C. 2007) (refusing to require class members to answer interrogatories about police conduct and their own activities in suit claiming violation of their rights in connection with mass arrests during a demonstration); In re Intel Corp. Microporcessor Antitrust Litig., 526 F.Supp.2d 461 (D.Del. 2007) (refusing to order discovery with regard to class representative's financial status because counsel was contractually obligated to advance litigation costs).

L. MOOTNESS

In Wiesmueller v. Kosobucki, 513 F.3d 784 (7th Cir. 2008), the court held that it was improper for the district judge to deny plaintiff's motion for class certification as moot even though it had already ruled that his claim was subject to dismissal on the merits. Plaintiff, who graduated from an out-of-state law school, claimed that the state had violated the commerce clause by permitting graduates of in-state law schools to practice without taking the bar exam, but required all others to take the bar exam. By the time plaintiff's appeal got to the court of appeals, he had taken and passed the bar exam, and defendants moved to dismiss on mootness grounds. But plaintiff's wife (also a graduate of an out-of-state law school) stood ready to act as class representative, and the court of appeals reversed and remanded for further proceedings on class certification. It explained that the district judge "does not have the last word on the merits of plaintiff's claim. The fact that he thinks it unsound does not mean that a class action is doomed to failure." Id. at 786. The granting of the motion to dismiss the claim did not moot the class certification motion.

N. JUDICIAL CONTROL OF SETTLEMENT

§ 3.03(a) of the ALI Principles of the Law of Aggregate Litigation (Tent. Draft No. 1, April 7, 2008) provides that the preliminary review of a proposed settlement "is not a substitute for a thorough and careful review of the settlement at the time of the actual fairness hearing."
The Comment explains that "[e]ven a preliminary decision in favor of the settlement may, as a practical matter, give an unwarranted presumption of correctness to a proposal that the court has not carefully considered." In the same vein, the court in In re New Motor Vehicle Canadian Export Antitrust Litig., 236 F.R.D. 53, 55 (D. Me. 2006) observes that "Rule 23 does not provide for 'preliminary approval' or a 'preliminary fairness determination.'" Contrast New England Health Care Emp. v. Fruit of the Loom, 234 F.R.D. 627, 631 (W.D. Ky. 2006) (quoting another case): "Preliminary approval gives rise to a presumption that the settlement is fair, reasonable, and adequate. Objectors, therefore, have the burden of persuading this Court that the proposed settlement is unreasonable." Lest it be thought that courts will rubber stamp all proposed settlements, however, see Acosta v. Trans Union, LLC, 240 F.R.D. 564 (C.D. Cal. 2007), in which the court rejects a proposed settlement at the preliminary approval stage.

Denney v. Deutsche Bank AG, 443 F.3d 253 (2d Cir. 2006), addressed two changes made to Rule 23 in 2003 that bear on settlement. First, Rule 23(c) was amended to remove reference to "conditional" class certification. Objectors had argued that the district court acted improperly in conditionally certifying the class for purposes of settlement. The court of appeals disagreed. It read the rule change as designed to emphasize that the court must ensure that the requirements of Rules 23(a) and (b) have been satisfied, but if they are satisfied conditional certification survives the 2003 amendment to Rule 23(c)(1). "The district court conducted a Rule 23(a) and (b) analysis that was properly independent of its Rule 23(e) fairness review, and determined that, for purposes of settlement, the certification requirements were met." Id. at 270. This was proper.

Second, the objectors argued that the district court should have provided a "second opt-out" under amended Rule 23(e)(3) because after the original opt-out period expired the terms for the opt-outs improved. This decision also fell within the district judge's discretion (id. at 271):

As the district court explained, the original notice informed all class members of the basic settlement terms. The terms for the class members have only improved since the notice was sent. That the terms for opt-outs have likewise improved does not mandate a new opt-out period. An additional opt-out period is not required with every shift in the marginal attractiveness of the settlement; there is always a chance that a better deal will come along for those who opt out.

In Olden v. Lafarge Corp., 472 F.Supp.2d 922 (E.D. Mich. 2007), the court dealt with some creative settlement ideas and rejected them. First, some class members attempted alternatively to object to the proposed settlement and, if their objections were not sustained, to opt out. The judge ruled that objecting and opting out are inconsistent actions, and that one who objects can't "reserve" the "right" to opt out. On the other hand, the proposed settlement itself nullified prior opt-outs, providing that all initial class members who did not opt out at the settlement stage were bound. In a sense, this provision stood Rule 23(e)(3) on its head; rather than affording a new opportunity to opt out, it imposed a new requirement to opt out to make the original opt-out decision effective. Although such second opt-out decisions have been allowed where the original decision to opt out was tainted in some way (see, e.g., Kleiner v. First National Bank of Atlanta, casebook p. 473), this was not such a case and the court found this provision improper.

For an argument that the only class members bound by a settlement should be those who opt in, see Bronsteen, Class Action Settlements, an Opt-in Proposal, 2005 U. Ill. L. Rev. 903 (2005). The result of adopting such a rule, the author predicts, would be that class action settlements would not work anymore and class actions would have to be litigated through to
judgment, with binding effect on class members. Although there would be a cost in additional litigation of meritorious class actions, this approach would deter groundless class actions.

One way of assuaging concerns about the binding effect of class action settlements is to authorize back-end opt outs. Indeed, in *Amchem* the Court seemed to think that sturdy back-end opt-outs would provide protections for class members. Perhaps so, but they can also produce headaches for courts when they are asked to enforce limits on such later suits by members of the settling class. Jurisdictional problems may confound a federal court seeking to enjoin a class member from pursuing litigation that is not allowed under the terms of the opt-out provision. Moreover, the Anti-Injunction Act may prevent an injunction even if both personal jurisdiction and subject-matter jurisdiction requirements are satisfied. For an examination of these problems, and some suggestions about how to design opt-out provisions that will avoid them, see Wasserman, *The Curious Complications of Back-End Opt-Out Rights*, 49 Will. & Mary L. Rev. 373 (2007).

In addition to other challenges to class action and related settlements, the professional responsibility requirement that all clients consent can pose a challenge. But there can be uncertainty about when this requirement applies. For example, if there is a right to opt out, does that solve the problem? For an analysis focusing on the features of settlements of class actions and other aggregate litigation that could inform application of these professional responsibility constraints, see Erichson, *A Topology of Aggregate Settlements*, 80 Notre Dame L. Rev. 1769 (2005).

The Class Action Fairness Act includes a number of provisions designed to strengthen fairness review of proposed class-action settlements. These provisions should apply to all class actions in federal court, not only those within federal-court jurisdiction solely because of the Act's invocation of minimal diversity jurisdiction for state-law class actions.

First, the Act adds 28 U.S.C. § 1712 to control the use of coupon settlements (see pp. 535-37, n.6). This section provides that if there is a settlement including coupons the court may approve it only after a hearing and based on a written finding that it is fair reasonable and adequate for class members. Whether this adds significantly to the 2003 amendments to Rule 23 is debatable. But it definitely changes things with regard to attorney's fee awards. It specifies that if the attorney's fee award is based on the value of the settlement, it must be based on the value to the class members of the coupons that are redeemed, not all that might be used. It seems that this provision may limit attention to those coupons that are redeemed by class members, as opposed to sold to others who themselves redeem the coupons. The lodestar can be used instead to determine the attorney's fee, and the statute acknowledges that an attorney's fee for obtaining equitable or declaratory relief is proper.

Regarding redemption by somebody other than the class member, consider Bandburg, Microsoft Class Claims Questioned, S.F. Recorder, Dec. 17, 2004, at 1. Microsoft settled a California state court class action by agreeing to give vouchers to 12 million Californians that could be used to buy computer products. A lawyer entrepreneur formed a company to solicit potential class members and submit claims on their behalf in return for a commission. One of the partners in the law firm representing Microsoft was approached in a shopping mall and asked to sign "a petition to get Microsoft to give money to charity." The lawyer-entrepreneur told that court that some 40,000 individuals had authorized his company to process their claims and donate the vouchers to one of 250 charities. Microsoft claimed, however, that all such claims were fraudulent. As of the date on the hearing, according to the solicitation company, only 700,000 of more than 14 million potential claimants had submitted claims.
28 U.S.C. § 1713 provides that the court can approve a settlement that requires a class member to pay sums to class counsel that would result in a net loss to that class member only if it makes a written finding that nonmonetary benefits to the class members substantially outweigh the monetary loss. This provision was probably prompted by Kamilewicz v. Bank of Boston Corp., 92 F.3d 506 (7th Cir. 1996), in which some class members found that their bank accounts were debited more to pay class counsel's fees than they were credited by the settlement. It may prove a challenge in some cases to determine whether there is any such class member. It is not clear that this sort of occurrence is frequent.

28 U.S.C. § 1714 deals with another problem that may not be widespread, forbidding settlements that approve larger payments to some class members than to other solely on the basis that the favored ones are located closer to the court. Presumably a payment scheme that differentiated according to variations in state law would not run afoul of this provision.

Finally, 28 U.S.C. § 1715 adds a notification requirement that may prove to be important. It requires that defined regulatory officials of the federal and state governments be notified of the terms of a proposed settlement before it is approved, and requires that the settlement not be approved until 90 days after this notice has been given. Identifying the appropriate officials and giving the notice may prove challenging in some cases, but defendants have a considerable incentive to do so because if the notice is not given any class member may choose not to be bound by the settlement agreement. Indeed, it is conceivable that some may argue that such a class member could file another class action on behalf of all those who have not affirmatively obtained the relief offered by the settlement. Walker, The Consumer Class Action Bill of Rights: A Policy and Political Mistake, 58 Hast. L.J. 849 (2007), argues that the inclusion of this potential role for state attorneys general invites trouble -- "I predict a high degree of public participation in class action settlements, especially by the Attorneys General of the states... I argue that the shift will encourage malfeasance by public officials, and add to information search costs." Id. at 850-51. Early reports, however, indicate that state attorneys general are not seizing this opportunity. See Geier, State AGs Eschew CAFA Review, Nat. L.J., Oct. 23, 2006.

In re Diet Drugs Products Liability Litig., 385 F.3d 386 (3d Cir. 2004), presents the problem of what to do if the money provided by the settlement runs out despite reasonable forecasts that it would suffice. The settlement of these claims provided a hierarchy of claims categories and obligated defendant to fund payment up to $3.75 billion. Before approving the settlement, the district court received expert forecasts that this amount would suffice. But after the settlement was approved the resulting trust was inundated with claim forms that the experts had not anticipated. These forms largely came from a few law firms that represented large numbers of claimants, and there were indications that they had used "mass screening procedures" in which cardiologists made unreasonable judgments about medical condition. In any event, this predicament prompted the parties to negotiate an amendment to the settlement agreement permitting those whose claims were not paid due to lack of funds to opt out and sue defendant, but not to seek punitive damages or join with another plaintiff in their opt-out suits. This amendment was approved by the district court after notice, but the approval was challenged on appeal on the ground that it took away the right to sue for punitive damages and to join with other plaintiffs and gave the class nothing since it also provided that defendant could decide to prevent opting out by paying the amount specified in the settlement agreement even though the trust lacked sufficient funds to do so. The court affirmed approval, rejecting claims that the original settlement approval was flawed because of the mistake about adequacy of funding, and concluding that the prospect that class members not paid in accordance with the settlement could avoid its limitations on their rights and file new suits untrammeled by the restrictions in the amendment was uncertain enough to justify the district court's approval of the amendment.
In *In re Orthopedic Bone Screw Products Liability Litig.*, 350 F.3d 360 (3d Cir. 2003), the court upheld a provision in a class action settlement that allowed defendant to be indemnified from the settlement fund (thereby depleting funds available to class members) for amounts it paid to settle an individual case in state court even though that payment was several times more than class members received under the class settlement agreement.

One possibility is that class members could sue class counsel if they are dissatisfied with the settlement. In *Koehler v. Brody*, 483 F.3d 590 (8th Cir. 2007), the court held that a lead plaintiff appointed by the court under PSLRA could not sue class counsel for entering into a settlement that the court approved. The objecting lead plaintiff had vigorously criticized the proposed settlement on the ground that counsel had misled the lead plaintiffs during negotiations leading up to the settlement. The district court approved the settlement despite this objection, and the court of appeals held that a PSLRA lead plaintiff does not have a veto power over approval of a settlement. In *re BankAmerica Corp. Sec. Litig.*, 350 F.3d 747, 750 (8th Cir. 2003). Then plaintiff sued class counsel, claiming breach of fiduciary duty and violation of the PSLRA for failure to obtain a better settlement. The district court dismissed for failure to state a claim, and the court of appeals affirmed. "Koehler is attempting in this collateral action to renew his old arguments that the settlement was too low." Because those issues were addressed at the settlement-approval stage, and the approval of the settlement was affirmed on appeal, plaintiff was precluded from pursuing the new suit.

Contrast *Janik v. Rudy, Exelrod & Zieff*, 14 Cal. Rptr. 3d 751 (Cal. Ct. App. 2004), which held that a disgruntled unnamed class member could both claim his recovery through the class settlement process and also sue class counsel for malpractice for failure to assert a claim that might have led to a better settlement. Eventually, class counsel settled for $1.5 million. Hirsch, $1.5M Settles Rudy, Exelrod Malpractice Suit, S.F. Recorder, Oct. 10, 2006, at 1, reports that the lawyer who sued class counsel claimed to regard the settlement as desirable because of concerns about collecting a larger judgment. Lawyers interviewed for the newspaper article said that the case probably meant that plaintiff lawyers would have to pay higher malpractice premiums.

**DISTRIBUTING THE SETTLEMENT FUNDS**

Cox & Thomas, Letting Billions Slip Through Your Fingers: Empirical Evidence and the Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements, 58 Stan. L. Rev. 411 (2005), finds that many institutional investors often fail to make claims for large sums they could receive through settlement of securities fraud class actions. The authors propose that there be a central place for posting notice of such settlement payouts (id. at 444):

> It would seem a simple matter for courts to condition their approval [of proposed settlements] upon the settlement administrator posting, on a centralized website, [settlement notices, claim forms, and information on how to file claims]. Each settlement could be assessed a modest fee to pay for the creation and maintenance of such a website. The website could be operated by a court, private company, or educational institution.

Recently, some have begun to use the Internet to communicate about claims against class-action settlement funds. For example, video notices about claims against the the Paxil settlement fund were posted on YouTube by Public Citizen.

> It is probably inevitable, but there continue to be problems with class settlement
administration. In DeJulius v. Sprint Corp., 429 F.3d 935 (10th Cir. 2005), the court of appeals rejected due process objections to a notice plan in a securities class action that called for mailing notices to shareholders even though most of the recipients would be brokerage houses who held the shares as nominees of the actual shareholders. But the district court did give such brokerage houses a cost-free option of providing a list of shareholders' home addresses (so that a follow-up mailing could be done to the actual shareholders) or obtaining the needed quantity of settlement packets to send to the shareholders. Some 37,000 packets were sent out initially, and another 89,000 sent out in follow-up mailings. Class members who said that they did not receive notice until the day of the settlement approval hearing objected on that ground, but the court held their due process rights had not been violated. See also Violette v. P.A. Days, Inc., 427 F.3d 1015 (6th Cir. 2005) (class settlement opt-out forms postmarked on the first business day after the court-ordered Saturday deadline were not timely filed despite rule authorizing extension of deadlines occurring on weekends or holidays).

When the claims process involves some sort of showing, other problems may develop. Glater, Asbestos Fund Bars 9 Doctors, N.Y. Times, Sept. 15, 2005, reports that the Manville Trust had barred payments to any victims who relied on reports from nine doctors or three X-ray screening companies. One of the doctors had submitted documents in support of more than 53,000 claims the trust had received. Another doctor on the list said it was "reactionary, knee-jerk and un-American."

CHP. V: DISCOVERY

B. E-DISCOVERY


The breadth of potentially available information is very large. MySpace Discovery, ABA J., Jan. 2007, at 34, reports that social networking sites like MySpace have proven a fertile focus of fact-gathering efforts. Francis, Spread of Records Stirs Patient Fears of Privacy Erosion, Wall St. J., Dec. 26, 2006, at 1, reports on cases in which insurers' electronic searches turn up materials that patients thought were confidential.

In Toshiba American Electronic Components, Inc. v. Superior Court, 21 Cal.Rptr.3d 532 (Cal.Ct.App. 2004), the court found in Cal. Code Civ. Proc. § 2031(g) a more demanding rule on shifting the cost of preparation of electronically stored information for production. Because the state statute says that "the responding party at the reasonable expense of the demanding party shall, through detecting devices, translate any data compilations included in the demand into reasonably usable form," the court held that this expense must be borne by the requesting party with regard to restoration of backup tapes. Toshiba had over 800 backup tapes and asserted that the cost of restoring them and locating information from them would be between $1.5 and $1.9 million, in part because some of them contained legacy data. It also said that some of the tapes had deteriorated. Although the trial court ordered production without payment of the costs, the
appellate court said that was an abuse of discretion given the provisions of the statute. "We agree that the cost-shifting provision of § 2031(g)(1) conflicts with the federal rule, but it appears to us that the Legislature intended it to be that way." Plaintiff argued this rule would encourage gamesmanship about what was needed to restore information, and the cost of doing so. The appellate court recognized that a requesting party could be protected against unnecessary costs or restoration, and did not hold that Toshiba was entitled to be paid all the money it said it would cost to do the restoration. The court also encouraged sampling (as done in Zubulake) to get a better feel for what was involved.

C. DOCUMENT PRESERVATION

The problem of preserving discoverable information has assumed a higher profile with the growing importance of electronically stored information. Rule 37(e) provides something of a "safe harbor" for loss of electronically stored information under certain circumstances. It operates as a limitation on the power of the court to impose sanctions "under these rules." The new rule applies when such information is lost due to the "routine, good-faith operation of an electronic information system." The routine is presumed to be arranged for business or technical reasons, not to affect the availability of information in litigation. And good faith may require the imposition of a litigation hold to modify the routine operation in order to preserve information known to be pertinent to impending litigation.

The Zubulake preservation odyssey (p. 569 n.5) continued. In Zubulake v. UBS Warburg LLC, 2004 WL 1620866 (S.D.N.Y., July 20, 2004), Judge Scheindlin imposed sanctions on defendant for failure to retain certain e-mails and backup tapes even after plaintiff filed her EEOC charge. In the process, she acknowledged that counsel did quite a lot to try to preserve information -- issuing a litigation hold and talking to most of the pertinent employees about the need to preserve information, as well as following up on these efforts from time to time. But despite that, some employees failed to keep some e-mails. Of those, some were eventually retrieved from backup tapes, but at least one disappeared altogether. And at least one employee was not talked to, with the result that her e-mail files were not produced until after her deposition in the sanctions process. Additionally, some backup tapes were lost even though they should certainly have been available at the time the EEOC charge was filed.

Judge Scheindlin faulted both counsel and the client. Counsel did a considerable amount to preserve evidence, but announcing a litigation hold is not sufficient all by itself:

[C]ounsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with "the key players" in the litigation, in order to understand how they stored information. In this case, for example, some UBS employees created separate computer files pertaining to Zubulake, while others printed out relevant e-mails and retained them in hard copy only. Unless counsel interviews each employee, it is impossible to determine whether all potential sources of information have been inspected.

And counsel must monitor compliance thereafter, but "[a] lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve." "At the end of the day, however, the duty to preserve and produce documents rests on the party. Once that duty is made clear to a party, either by court order or by
instructions from counsel, that party is on notice of its obligations, and acts at its own peril."

Concluding that the failures to preserve harmed plaintiff's trial preparation, the judge imposed sanctions including an adverse inference instruction. After trial, the jury awarded $9.1 million in compensatory damages and $20.1 million in punitive damages, which plaintiff's lawyer claimed was the largest single plaintiff sex discrimination verdict in U.S. history. Some, at least, view this outcome as "highlight[ing] the potential dangers workplace e-mail can create for employers and the need to take steps to minimize such dangers and their related potential costs." Solecki & Rosenberg, Great Need for Employer Policies Governing Workplace E-Mail, N.Y.L.J., June 17, 2005.

For a skeptical look at the realities of document retention policies, consider Sanchirico, Detection Avoidance, 81 NYU L. Rev. 1331, 1356 (2006), noting that "the chief expense is not in drafting the policy, but in enforcing it":

Presumably, few firms promote on the basis of how well an employee complies with its document policy; few bonuses reflect a job well done in this regard. More likely, routine instructions to comply with the firm's document retention policy sit long untended on employees' lists of low-priority things to do. . . .

Indeed, to the extent that employees would, without prodding, give document retention policies a first thought, this is likely to be immediately accompanied by second thoughts. Neglecting document cleanup might not seem like such a bad idea, given a modicum of foresight about the fact that, in future states of the world where such documents become important, the employee's interests may not always line up with those of the firm. Thus, while a midlevel supervisor may urge her subordinates to shred documents, she may decide to keep a choice collection in her own personal files, anticipating the possibility of later trading these for leniency with prosecutors and regulators.

D. DISCOVERY CONFIDENTIALITY AND PROTECTIVE ORDERS

Regarding "umbrella" protective orders covering discovery material, consider In re Terrorist Attacks on September 11, 2001, 454 F.Supp.2d 220 (S.D.N.Y. 2006), treating "broad assertions of good cause" as sufficient to justify protection in that litigation even though they would not ordinarily be: "[T]his multi-district litigation amounts to one of the largest private lawsuits in United States history. Defendant-by-defendant good cause determinations for individual protective orders at this juncture in this case, much less document-by-document confidentiality determinations where no protective order has issued, would impose an enormous burden upon the Court and severely hinder its progress toward resolution of pretrial matters." Id. at 223. Contrast In re Ullico Inc. Litig., 237 F.R.D. 314 (D.C.D.C. 2006), in which the court found that defendant abused the authority to stamp materials protected by designating over 99% of the documents it produced confidential.

Sometimes, efforts to circumvent confidentiality reach remarkable extremes. Thus, in In re Zyprexa Injunction, 474 F.Supp.2d 385 (E.D.N.Y. 2007), Judge Weinstein found that a New York Times reporter, an expert witness, and an Alaska lawyer conspired to arrange a fake discovery request to obtain documents that could then be used in a newspaper story. The judge had ordered internal documents of defendant Eli Lilly sealed on consent of the parties so that discovery would be expedited and individual cases promptly settled. After millions of documents had been thus obtained from Lilly, most of the cases settled. The Times reporter
discussed ways to circumvent the protective order with the plaintiffs' expert and they devised an intricate method of circumventing the protective order (guaranteeing the Times exclusive coverage of the documents). The method found was for the Alaska lawyer to intervene in an unrelated case in Alaska, subpoena the documents from the expert (without notice to Lilly) and distribute them clandestinely while the Times began to publish stories about their content. Judge Weinstein's lengthy opinion reads like a mystery novel, and condemns the actions even though the conspirators may have thought that they were acting in the public interest.

In Lugosch v. Pyramid Co. of Onondaiga, 435 F.3d 110 (2d Cir. 2006), the court dealt with nonparty access to materials filed under seal in relation to a summary judgment motion. After defendants moved for summary judgment, plaintiffs filed at least fifteen volumes of sealed appendices to their sealed memorandum in opposition to the motion. Media representatives then sought access to this material, which evidently had been produced pursuant to some sort of confidentiality agreement that called for filing under seal. Eventually defendants withdrew their opposition to access to documents, except for those that it claimed were protected by the attorney-client privilege. The district court refused to rule on the motion for access until after ruling on the motion for summary judgment. Although it recognized that the mere filing of a document in court did not make it a "judicial document" subject to a presumption of judicial access, the court of appeals held that there was no justification for deferring a ruling on access until after the decision of the summary judgment motion because there is a presumption of access to summary judgment documents. Id. at 121. But the attorney-client privilege issue might nonetheless overcome the common-law right of access, an issue left open on remand. Contrast Burkle v. Burkle, 37 Cal. Rptr. 3d 805 (Cal. Ct. App. 2006) (holding unconstitutional under the California Constitution a statute directing the sealing of any divorce pleadings containing financial information on the request of either party).

For an argument that the notion that the Federal Rules of Civil Procedure themselves adopt a presumption that all discovery is public (whether filed or not) is unfounded, see Marcus, A Modest Proposal: Recognizing (at last) That the Federal Rules Do Not Declare That Discovery is Presumptively Public, 74 Chi.-Kent L. Rev. 331 (2006). The article emphasizes the abiding privacy issues that exist in the background of discovery efforts, and that have been magnified by recent concerns about online access to materials filed in court. It also stresses the potential intrusiveness of E-Discovery, which could sometimes be used to justify access to the hard drives of individual litigants. Against this background, the concept that all materials accessed via discovery should be presumptively available to all is difficult to justify and not supported by the history or purpose of the Federal Rules.

Other countries' attitudes about confidentiality of materials used in connection with litigation vary. One analogy is provided by England, which reflects a distinctly different view of whether discovery is per se public:

As Lord Hoffmann explained in Taylor v. Serious Fraud Office [1999] 2 AC 177, 207, HL: "The concept of an implied undertaking originated in the law of discovery in civil proceedings. A solicitor or litigant who receives documents by way of discovery is treated as if he had given an undertaking not to use them for any purpose other than the conduct of the litigation. As Hobhouse J pointed out in Prudential Assurance Co Ltd v. Foundation Page Ltd [1991] 1 WLR 756, 764 the undertaking is in reality an obligation imposed by operation of law by virtue of the circumstances in which the document or information is obtained. The reasons for imposing such an obligation were explained by Lord Keith of Kinkel in Home Office v. Harman [1983] 1 AC 280, 308, HL: 'Discovery constitutes a very serious invasion of the privacy and confidentiality of a litigant's affairs.
It forms part of English legal procedure because the public interest in securing that justice is done between parties is considered to outweigh the private and public interest in the maintenance of confidentiality. But the process should not be allowed to place upon the litigant any harsher or more oppressive burden than is strictly required for the purpose of securing that justice is done."


E. PRESERVING PRIVILEGE PROTECTION

Proposed Fed. R. Evid. 502 has been presented to Congress by the Judicial Conference. The proposed rule, if enacted, would accomplish a number of things that deal with the problem of inadvertent waiver of privilege protection:

(1) It would narrow the effect of waiver to the documents turned over unless the waiver was intentional and the undisclosed documents "ought in fairness to be considered" together with the ones already turned over (Rule 502(a))

(2) It would provide that an inadvertent disclosure in connection with a federal proceeding is not a waiver in either a state or federal proceeding if the privilege holder took reasonable steps to prevent disclosure and promptly took further reasonable steps to rectify the error (Rule 502(b))

(3) It would protect against waiver arguments in federal court based on disclosures in state proceedings (except where the state court has found a waiver) unless the disclosure would be a waiver under the provisions of Rule 502 and under the law of the state where the disclosure occurred (Rule 502(c))

(4) It would make a federal court order that privilege is not waived under certain circumstances binding in connection with federal litigation in both federal and state proceedings (Rule 502(d))

(5) It would make a party agreement (absent a court order) binding on the parties to the agreement but not on others (Rule 502(e))

The Senate passed the bill, but as of early August, 2008, the House had not done so.

Regarding inadvertent disclosure, consider Krause, Metadata Minefield, ABA J, April 2007, at 32: "The risk of metadata is that an attorney will unknowingly send an electronic document to opposing counsel that includes confidential, privileged or trade secret information."

CHP. VI: JUDICIAL CONTROL OF PRETRIAL LITIGATION

A. THE CASE MANAGEMENT MOVEMENT

Single assignments systems (under which a case is assigned to one judge for all purposes) have become a hallmark of the federal court system. But they have also become increasingly prominent in state courts. In California, for some time it has been possible to have a case deemed "complex" and assigned to a single judge for all purposes. More recently, California superior courts have begun to adopt single assignment systems for all cases. Seabolt, Direct Effect, S.F.D.J., April 10, 2008, reports on these developments and observes: "Some lawyers
may like the master calendar system, but I have never met one."

In re New Motor Vehicles Canadian Export Antitr. Litig., 229 F.R.D. 35 (D. Me. 2005), offers an illustration of the way in which case management can supplant traditional litigant latitude. The judge ruled that resolution of one defendant's summary judgment motion would be stayed because the defendant had not told the judge that it was considering such a motion and as a result the court's schedule for motions did not include this motion. The judge detailed the conferences and schedules that had been developed and noted in regard to one of the parties' joint scheduling submissions: "Having already ruled on two very complex motions to dismiss and with two more such motions, even more complex, pending before me, I certainly would have wanted to discuss the timing of any such additional motions if they had been in anyone's contemplation. But there was no hint of such motions." Id. at 37-38. Despite that, defendant General Motors filed a summary judgment motion before even a discovery schedule had been adopted. The judge was not impressed with GM's argument that it had a right under the rules to file its motion (id. at 39-40):

General Motors says that it has the right to file a motion for summary judgment at any time and without the Court's permission. Perhaps. Perhaps I also have the "right" arbitrarily to deny such a motion. ** But neither is good practice. My goal as a trial judge is to move cases along to an orderly conclusion with only unavoidable expense and delays, and to treat all substantive issues fairly. In return I expect the lawyers to behave with candor and, when we discuss scheduling, to inform me or the magistrate judge what lies ahead, not keep certain cards up their sleeves. That is true in the ordinary case; it is even more important in a multidistrict case, where there are a multitude of parties and lawyers, the issues are complex, the expenses are high, and the Court will likely be called upon to approve an attorney's fee request at the end of the case.

In fact, I do not believe that General Motors has the right to file its motion when and how it chooses in the context of this litigation. Federal Rule of Civil Procedure 16 gives a trial judge extensive power over management issues. **

Implicitly the parties and I dealt with the timing issue in a schedule that did not contemplate summary judgment motions until later. Such a schedule "shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge," Fed. R. Civ. P. 16(b), and the "order shall control the subsequent course of the action unless modified by a subsequent order," id. 16(e).

Accordingly, General Motors could not insist on having its summary judgment motion taken up at the time it chose unilaterally.

Judge Peckham asserts (pp. 631-32) that judges have learned to screen out information that they are not supposed to consider in ruling even if their active management of cases brings it to their attention. Wistrich, Guthrie & Rachlinski, Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding, 153 U.Pa.L.Rev. 1251 (2005), finds based on experiments that judges display a surprising ability to ignore such information in some circumstances, but that they are generally unable to avoid being influenced by relevant but inadmissible information. Thus, judges were able to disregard evidence seized in violation of constitutional rights when determining whether probable cause existed. But they had difficulty disregarding demands disclosed during a settlement conference, conversations protected by the attorney-client privilege, prior sexual histories of alleged rape victims, prior convictions of a
plaintiff, and information the government promised not to rely upon in sentencing.

Brown, The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication, 93 Calif. L. Rev. 1585 (2005), makes an argument that the growing power of prosecutors should prompt judges to become more active in managing criminal cases as well as civil cases, borrowing on an "inquisitorial" tradition in American jurisprudence. The author complains that American judges "have no tradition of taking serious responsibility for the accuracy of evidence in the liability stage." Id. at 1641. The idea is that active judicial intervention can foster greater accuracy: "Especially in the context of mass tort litigation, judges have used this power [to gather evidence] aggressively to impanel experts whose views are effectively dispositive for large groups of cases." Id. at 1633 (citing experiences in the silicone breast implant litigation). To hold prosecutors in check, the author proposes, "[j]udges should receive something like a dossier of each case -- a full account of the investigation." Id. at 1636. With this information, judges could review prosecution evidence that is not subject to revelation to defendants before trial and, in relation to plea changes, conduct witness depositions to ensure that there is a factual basis for pleas. Id. at 1638.

Others continue to view such activities with skepticism. Thus, Gavin, Managerial Justice in a Post-Daubert World: A Reliability Paradigm, 234 F.R.D. 196 (2006), says that the growing array of management tools possessed by federal judges is a result of a "shift to the right." Id. A difference of opinion on the Supreme Court seems to point in the other direction, however. In Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007), the majority upheld dismissal of an antitrust complaint on the ground that its specific allegations did not make the general allegation that defendants conspired "plausible." Justice Stevens, in vigorous dissent, urged that the proper reaction to the concerns about groundless and burdensome litigation was not to dismiss but instead to permit the case to go forward with managed discovery. The majority, however, asserted that this technique was not sufficient to protect against overdiscovery.

Regarding "most favored nation" clauses used in settling multiparty cases (p. 643 n.6), DeLoach v. Lorillard Tobacco Co., 391 F.3d 551 (4th Cir. 2004), illustrates the potential trickiness of such arrangements. This case was a class action brought by tobacco growers who claimed that the defendant tobacco companies had violated the antitrust laws by agreements to depress the price of tobacco. All defendants but RJ Reynolds (RJR) reached an agreement with plaintiffs that contained two features that led to this decision. First, it required defendants to make two payments, but the second was to be made on "the day before the day of trial" only if a settlement with RJR had not been "reached" by that time. Second, it had a most favored nation clause regarding future purchases of tobacco by the settling defendants that came into play if a settlement with RJR were "entered before the beginning of trial." Trial was scheduled to begin on a Thursday, and on the Friday before that the court held a settlement conference during which the RJR lawyer said that he assumed the case would go to trial because of these provisions in the settlement agreement with the other defendants made pretrial settlement unacceptable. The judge said that there was nothing wrong with an attempt at settling the case then, with an understanding that it would not be fully settled until after a jury was empaneled. There ensued discussions over the weekend. Counsel for the class assured counsel for Philip Morris, one of the settling defendants, that no settlement had been reached, and on Wednesday it wired its second payment ($65 million). On Thursday morning, while the jury venire was in the jury room and the judge in chambers, class counsel and RJR signed a settlement agreement. The judge then released the jury. Philip Morris demanded its $65 million back and invoked the most favored nation clause. Plaintiffs said that no relief was due since the settlement with RJR did not occur by the time when these rights ended under its settlement agreement. The district judge denied Philip Morris' motions.
The court of appeals affirmed as to the $65 million payment. The district judge found that the parties had not "reached" an agreement until they signed the written agreement on the day trial was to begin, which was after "the day before the day of trial." Since this finding was not clearly erroneous, the district court's denial of return of the $65 million was affirmed. On the most favored nation clause, however, the result was different because the pertinent facts were undisputed and the question whether the RJR agreement was entered "before the beginning of trial" was a question of law. And since the agreement was signed before the judge entered the courtroom to begin the trial, it was before the trial began. Had the judge waited until impaneling a jury, as suggested during the settlement conference, the result might have been different.

B. SANCTIONS

In In re Phenylpropanolamine (PPA) Products Liability Litig., 460 F.3d 1217 (9th Cir. 2006), the court recognized the special deference it would pay to orders dismissing claims for failure to comply with case management orders in multidistrict proceedings. The underlying litigations asserted claims for alleged injuries resulting from use of a weight-control product. The JPML transferred all the cases to Judge Rothstein in Seattle, and eventually there were more than 1,500 plaintiffs in more than 700 cases. As a part of case management, the judge directed that each plaintiff fill out a "Plaintiff's Fact Sheet" with details on the use of the product and the alleged injuries suffered within a specified period of time. (This regime somewhat resembled the regime in Acuna v. Brown & Root, Inc., casebook pp. 636-37 n.4.) The problem was that many plaintiffs did not fill out the forms in a timely manner. In particular, the judge stressed the need for plaintiffs in cases in which dozens had joined to file a single suit to complete the form. Defendants, meanwhile, were not to take depositions of plaintiffs until they had completed the form. Failure to do so therefore compromised the management plan the judge had adopted. Eventually, she dismissed the claims of large numbers of plaintiffs for failure to fill out the form by the deadline. These claimants appealed.

The Ninth Circuit largely (but not entirely) affirmed Judge Rothstein's orders. The appellate court's attitude toward upholding merits sanctions (casebook, p. 652 n.7) in such cases must take account of the task involved (id. at 1231-32):

The task is enormous, for the court must figure out a way to move thousands of cases toward resolution on the merits while at the same time respecting their individuality. . . . For it all to work, multidistrict litigation assumes cooperation by counsel and macro-, rather than micro-judicial management because otherwise, it would be an impossible task for a single district judge to accomplish. . . .

Pretrial plans necessarily vary with the circumstances of the particular MDL. However, the district judge must establish schedules with firm cutoff dates if the coordinated cases are to move in a diligent fashion toward resolution by motion, settlement, or trial. . . . Once established in consultation with counsel, time limits and other requirements must be met and, "when necessary, appropriate sanctions are imposed . . . for derelictions and dilatory tactics." . . .

In sum, multidistrict litigation is a special breed of complex litigation where the whole is greater than the sum of its parts. The district court needs to have broad discretion to administer the proceeding as a whole, which necessarily includes keeping the parts in line. Case management orders are the engine that drives disposition on the merits.
C. RELIANCE ON JUDICIAL SURROGATES

For a comparison to the use of Special Masters to enforce judicial decrees, consider Saul, A Corporate Nanny Turns Assertive, N.Y. Times, Sept. 19, 2006, at C1. The chief executive of Bristol-Myers Squibb, which was under investigation by a federal prosecutor, arranged for Frederick B. Lacey, a former federal judge, to become involved. "The former judge . . . gradually became entrenched at Bristol-Myers, and now serves as a court-appointed overseer, monitoring the company's every activity. And last week, two days after celebrating his 86th birthday, Mr. Lacey successfully recommended that the board [of directors] dismiss [the company's chief executive]."

Independent federal monitors like Mr. Lacey, who are often appointed under deferred-prosecution agreements, have become an increasingly popular way to deal with accusations of corporate crime in recent years. Their presence is held out as a way for companies to be sanctioned without risking their extinction and the related loss of jobs. At least 16 such agreements have been signed since 2001, involving large companies including Bank of New York, AOL, and the PrudentialEquity Group.

But Mr. Lacey appears to have exercised unprecedented power in prompting [the chief executive's] ouster. And the episode has set off a debate on whether Mr. Lacey represents a tougher-style monitor who may put new teeth into that role in corporate America -- as some admirers hope -- or whether, in the view of some critics, he has overstepped his authority at Bristol-Myers.

Cobell v. Norton (p. 664) continues to produce tumult. A law professor who wrote an law review article entitled "Judge Lamberth's Reign of Terror at the Department of the Interior" and then attached the article to a judicial discipline complaint about the judge was subpoenaed by plaintiff's counsel, who claimed that they had a right to find out if he was "doing the United States' bidding." Coyle, Law Professor Fights Subpoena, Nat.L.J., Feb. 14, 2005, at 5. In June, 2005, plaintiffs announced at a press conference that they were willing to settle for $27.5 billion if Congress assured that the money would not be drawn from other programs for Indians. Indians Suing Over Royalties Offer a $27.5 Billion Settlement, N.Y. Times, June 21, 2005, at 18. They announced that they had determined that the royalties and interest totalled $176 billion (over $500,000 per class member for the 300,000 class members), but that they were more interested in getting some money to class members than completing an accounting. An Interior Department representative said that he found the proposal perplexing because the suit had, until then, been mainly about getting an historical accounting, and Interior had spent $100 million on doing such an accounting.

More directly on point with regard to use of special masters, see Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004), overturning the appointment of a "monitor" to report back to the judge on the defendants' compliance with the judge's injunction calling for an accounting. The appellate court held that the appointment of the monitor exceeded the judge's authority. It began by concluding that "the label 'Monitor' is inaccurate; the authority purportedly bestowed is really that of a 'Master.'" Id. at 476. The difference is that the "monitor" here had a broader role, including reporting back to the court. And the authority conferred exceeded that upheld in Ruiz v. Estelle (see casebook, pp. 657-58) See 392 F.3d at 477:

Despite the similarity of the language we used to distinguish Ruiz and the language used by the district court to limit the monitor's authority, there is a significant difference between the two cases. The "Fixing the System" part of the present injunction
**III** is not nearly as complex as the specific relief ordered in *Ruiz*. If at some future time the non-accounting aspects of the case culminate in a true remedial injunction with specific duties tied to specific legal violations cognizable under the APA, the usual latitude for masters to oversee compliance would come into play. Alternatively, appointment of a true judicial monitor, with duties focused on determining just how defendants' management of their trust duties is proceeding, might become appropriate.

See also *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004), denying a petition for a writ of mandamus seeking to recuse district judge Lamberth. Among the grounds urged was that the judge had met too often with the Monitor Kieffer and a special master he had appointed. Although Kieffer's time sheets showed that he met ex parte with the judge more than 80 times, for a total of over 120 hours, the court held that this was not a ground for recusal because the complexity of the case justified extensive interactions with these emissaries. Note that Rule 53(b)(2)(B) now directs that the order of appointment specify the circumstances in which ex parte communications may occur.

In *In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006), the court of appeals held that another Special Master appointed by the district court in Cobell v. Norton should be disqualified, this time for hiring an interested party to assist in an investigation of certain actions at the Department of the Interior. As discussed below (in regard to Chp. VI.F), shortly thereafter the D.C. Circuit ordered that the case be assigned to a different district judge because of the pervasive bias it detected in the district judge's attitude toward Interior.

**D. JUDICIAL SELECTION OF COUNSEL**

Some mention of the consequences and responsibilities of court-appointed counsel may be in order. An illustration is provided by *Janik v. Rudy, Exelrod & Zieff*, 14 Cal.Rptr.3d 751 (Cal.Ct.App. 2004), in which class counsel were sued by a class member for failure to assert a claim that plaintiff contended would have allowed a larger recovery. Defendant law firm had been appointed class counsel in a class action asserting violation of overtime rights under California's labor code. After that case settled, Janik filed a class action against the law firm, asserting that it should also have made a claim under the state's unfair competition law, which had a longer limitations period and would have been a "slam dunk" claim. The trial court dismissed on the ground that the lawyers had no duty to the class members to pursue claims that were not specified in the order certifying the class. The appellate court disagreed, finding authority in state law that class counsel have a responsibility to the class to pursue all claims that class members reasonably expect to be asserted. Accordingly, class counsel had a duty to consider whether to add unfair competition claims to the case, and to bring the issue to the attention of the class representatives, although that might lead to a decision not to pursue the claims for a variety of reasons. The case was later settled for $1.5 million. See Hirsch, $1.5M Settles Rudy, Exelrod Malpractice Suit, S.F. Recorder, Oct. 10, 2006, at 1.

The risks of insufficient attention to selection of counsel might also be explored. The prosecution of Milberg Weiss surely provides caution. See, e.g., Creswell, Ex-Partner at Milberg Pleads Guilty to Conspiracy, N.Y. Times, July 10, 2007, at C1 (describing guilty plea by David Bershad for arranging "secret and illegal kickbacks" to named plaintiffs in class actions). On the other hand, there is no guarantee of upright behavior by retained lawyers. For example, Liptak, Fraud Inquiry Looks at Lawyers in Diet-Drug Case, N.Y. Times, March 24, 2007, describes alleged shortchanging of plaintiffs by their retained lawyers. Perhaps, whatever court-appointed lawyers may do, they are not more trustworthy than those clients select for themselves. According to the story, because the lawyers skimmed off huge sums from the
settlement, the clients got only about 40% of the amount paid by defendant rather than the 70% they should have received.

Courts can be attentive to the real pressures under which lawyers operate. For example, in *Brieger v. Tellabs, Inc.*, 245 F.R.D. 345 (N.D. Ill. 2007), the court appointed multiple firms to represent plaintiffs, but cautioned "that its designation of multiple firms a class counsel is not intended as an invitation for duplication of effort." Id. at 357. In Alameda County (Calif.) Superior Court, meanwhile, judges have deferred some of the payment to class counsel until the settlement administration process is completed in settled class actions to "encourage" counsel to attend to these duties. See Hirsch, Fees Account for "Human Nature," S.F. Recorder, Nov. 21, 2007, at 1.

Regarding interim class counsel (p. 668 n.6), in *In re Issuer Plaintiff Initial Public Offering Litig.*, 234 F.R.D. 67 (S.D.N.Y. 2006), after plaintiffs' motion for class certification, and after the court stayed action on defendants' motion for summary judgment pending a ruling on the class certification motion, plaintiffs moved for appointment of interim class counsel. Reviewing the grounds for appointment of such counsel mentioned in the Committee Note -- to be in charge of the motion for class certification, to make or respond to other motions, discuss settlement, or to overcome rivalry among counsel -- the court found none of them to be applicable. It also pointed out that the Note says that counsel are obligated to act in the best interests of the class whether or not appointed interim counsel. "Thus, denying the appointment of interim counsel does not prejudice the putative class in any way." Id. at 70. For examples of appointment of interim class counsel, see *In re Air Cargo Shipping Serv. Antitrust Litig.*, 240 F.R.D. 56 (E.D.N.Y. 2006); *White v. Transunion, LLC*, 239 F.R.D. 681 (C.D. Cal. 2006).

Regarding PSLRA appointments of lead plaintiffs (p. 678 n.7), *Feder v. Electronic Data Systems Corp.*, 429 F.3d 125 (5th Cir. 2005), held that lead plaintiff could appoint a lawyer in private practice who had formerly been a superior court judge in New Jersey to act as its liaison with class counsel and thus to assist the lead plaintiff in monitoring class counsel. *In re Merck & Co., Inc. Securities Litig.*, 432 F.3d 261 (3d Cir. 2005), held that lead plaintiffs in securities fraud litigation need the court's approval, however, to retain any new counsel, even appellate counsel. See also *Pirelli Armstrong Tire Corp. v. LaBranche 7 Co., Inc.*, 229 F.R.D. 395 (S.D.N.Y. 2004) (holding that a co-lead plaintiff structure was appropriate in that litigation); Choi, Fisch, and Pritchard, Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Reform Act, 83 Wash. U. L. Rev. 859 (2005).

E. ATTORNEYS' FEES AWARDS

1. Authority to Award Attorneys' Fees

The operation of the common fund or common benefit doctrine has received some important refinement:

*In re Cendant Corp. Securities Litig.*, 404 F.3d 178 (3d Cir. 2005), addresses the right of non-designated counsel to recover part of the attorney fee award from the settlement in a common fund case, particularly focusing on the impact of the PSLRA (see casebook, p. 678 n.7). Under the common fund doctrine in general, other counsel whose work benefits the class may claim a portion of the fee. But under the PSLRA "the new paradigm of securities litigation significantly restricts the ability of plaintiffs' attorneys to interpose themselves as representatives of a class and expect compensation for their work on behalf of that class." Id. at 181. This is due to the role of the lead plaintiff, who is to select class counsel and make compensation
arrangements that are entitled to be respected by the court unless they are unreasonably.

Thus, the main area of opportunity for attorneys seeking a share by court order is for work performed during the period before appointment of the lead plaintiff. But courts must be careful not to treat filing a copycat complaint as providing meaningful benefits to the class (id. at 196):

[W]e think that the best approach is to view such complaints as entrepreneurial efforts: each firm's complaint is the price of admission to a lottery that might result in it being named lead counsel. If a firm wins that lottery, it stands to make significant fees at multiples of its lodestar. Compensating a firm for filing a complaint and not being named lead counsel would offer free tickets to the lead-counsel lottery, and would thus create incentives for redundant filings.

Beyond that, the court must determine whether the lawyer's work provided benefits to the class. Diligent work by counsel seeking that goal is not per se sufficient. "If a hundred lawyers each perform admirable but identical work on behalf of a class before the appointment of the lead plaintiff, the court should not award fees to each of the lawyers, as this would over incentivize duplicative work." Id. at 197.

Once the lead plaintiff is appointed, there is a presumption under the PSLRA in favor of the lead plaintiff's decision whom to compensate and how much. But this presumption can be refuted by a demonstration that the lead plaintiff failed to satisfy its fiduciary responsibilities or by "clearly proving that non-lead counsel reasonably performed work that independently benefitted the class." Id. at 200. The standard for such a demonstration will be high, however. Merely "monitoring" the actions of class counsel does not suffice. See id. at 201-02.

In Vollmer v. Selden, 350 F.3d 656 (7th Cir. 2003), the court held that attorneys who sought a fee for their activities on behalf of intervenors objecting to a class action settlement could not be sanctioned based on the record in the case. The district court imposed a $50,000 sanction on the ground that the lawyers intervened in order to extort a fee for themselves. The appellate court found that the fact their client did not know the details of the case, and that in the past these attorneys had sought intervention in several nationwide class actions, did not support the conclusion that they were seeking extortion in this case.

In Geier v. Sundquist, 372 F.3d 784 (6th Cir. 2004), the court rejected an attempt to use a common fund technique to value the services of plaintiffs' attorneys in a school desegregation case. The suit eventually achieved a unitary state university arrangement in Tennessee, and counsel for plaintiffs sought compensation on a common benefit rather than lodestar basis. The court held this was not proper because the doctrine is not applicable "where litigants are vindicating a social grievance" and because "there is simply no fund." Although one could put a dollar value on some of the remedial arrangements, "[t]he money designated by Tennessee for the remedial programs goes to fund the programs, not to pay the plaintiffs." Id. at 790.

Finally, with regard to "prevailing party" status for an award of fees under statutory fee-shifting regimes, note that Sole v. Wyner, 127 S.Ct. 2188 (2007), holds that obtaining a preliminary injunction does not make plaintiff a prevailing party if defendant ultimately wins the suit.

2. Determining the amount to be awarded
The Class Action Fairness Act focuses on attorney fee awards in coupon settlement cases. 28 U.S.C. § 1712(c) forbids using the "value" of the coupons as a whole as a basis for determining a attorney fee award on a percentage method. Instead, it provides that the award shall be based on the portion of the coupons redeemed by class members. This might create a problem if coupons are transferrable and actually redeemed by purchasers rather than the class members themselves. Alternatively, § 1712(b) provides that a fee award can be based on the lodestar technique.

Even in cases that seem to be naturals for a percentage fee measure, courts may resist one. In In re InfoSpace Inc. Securities Lit., 330 F.Supp.2d 1203 (W.D. Wash. 2004), the court rejected a request to award 25% of the settlement amount to counsel. Noting that "most securities fraud cases settle," the court saw only a "modest risk" of nonrecovery. It used a lodestar measure, leading to a fee award about half as large as the one requested by counsel.

But in the marketplace flat fees may be making gains. Pfeiffer, Law Firm Backs Away From the Billable Hour in Favor of Up-Front Fees, S.F. Daily J., Oct. 10, 2007, at 5, reports that a 5-lawyer employment law firm in Boston now charges a flat annual fee or flat price for a given task. Clients can call the firm as often as they want to discuss legal issues, but litigation representation costs extra beyond the annual fee. Jones, More Law Firms Charge Fixed Fees for Routine Jobs, Wall. St. J., May 2, 2007, at B1, reports that "thanks in part to improved technology for tracking the costs of legal work, companies are increasingly finding ways to avoid the oft-dreaded billable hour." Even companies that rely heavily on this technique, however, "tend to avoid it for big-ticket items, like a high-stakes merger or bet-the-company antitrust case." Another variation is to offer to work at a discount from regular hourly rates, but to define a successful outcome and provide a large bonus for that. See Elinson, Big Firms May Be Warming to Alternative Fees, Nat. L.J., July 16, 2007, at 10.

Focusing on the actual payouts from a common fund may often be a useful guide to the benefit provided by the case, but Masters v. Wilhemina Model Agency, Inc., 473 F.3d 423 (2d Cir. 2007), rejected a district court's conclusion that using a percentage of the claims made avoided a windfall for counsel. The court said that "[u]se of the entire Fund as the basis for computation does not necessarily result in a 'windfall' because the court may always adjust the percentage awarded in order to come up with a fee it deems reasonable." Id. at 437.

Regarding hours put into a case, for a remarkable example of sustained effort by one lawyer represented in a fee petition, consider Lattman, Kirkland Files Big Tab for UAL Bankruptcy Work, Wall St.J., March 9, 2006, at A11. Reporting on the overall fee application of Kirkland & Ellis for more than $99 million for its work on the United Air Lines bankruptcy petition, the Journal notes that one Kirkland lawyer billed 10,231 hours to the case during a 38 month restructuring. That works out to billing more than 3230 hours per year (or nearly nine hours per day, 365 days a year). At some point, can a court say that no lawyer can be sufficiently effective when working that much for that long? Or should it matter that this is simply about 50% more than the billable expectation for all lawyers at some firms?

Regarding hourly rate, Willis v. City of Oakland, 231 F.R.D. 597 (N.D. Cal. 2005), adopted a blended hourly rate representing the average rate in the local legal community as a whole as sufficient to compensate the defendant City Attorney lawyers for responding to a frivolous complaint.

In some places, the rates continue going up. Koppel, Lawyers Gear Up Grand New Fees, Wall St. J., Aug. 22, 2007, at B1, reports that the number of laywers who are charging more than...
$1,000 per hour is increasing. The four-digit barrier has deterred lawyers from raising rates for some time, but more and more are breaking that barrier. Perhaps this move will prompt more consideration of alternative methods of determining fees. One lawyer who has raised his rates above $1,000 per hour -- Steve Susman of Houston -- said that he did so in part to deter clients from hiring him on an hourly basis rather than some sort of percentage or other arrangement.

Arbor Hill Concerned Citizens v. County of Albany, 484 F.3d 162 (2d Cir. 2007), abandons the term lodestar (id. at 169):

The meaning of the term "lodestar" has shifted over time, and its value as a metaphor has deteriorated to the point of unhelpfulness. This opinion abandons its use. We think the better course -- and the one most consistent with attorney's fee jurisprudence -- is for the district court, in exercising its considerable discretion, to bear in mind all of the case-specific variables that we and other courts have identified as relevant to the reasonableness of attorney's fees in setting a reasonable hourly rate. The reasonable hourly rate is the rate a paying client would be willing to pay. In determining what rate a paying client would be willing to pay, the district court should consider, among others, the Johnson [v. Georgia Highway Express, Inc., casebook p. 686] factors; it should also bear in mind that a reasonable, paying client wishes to spend the minimum necessary to litigate the case effectively. The district court should also consider that such an individual might be able to negotiate with his or her attorneys, using their desire to obtain the reputational benefits that might accrue from being associated with the case. The district court should then use that reasonable hourly rate to calculate what can properly be termed the "presumptively reasonable fee."

An abiding problem in fee award situations is to divide the overall fee among various law firms if more than one is involved. In re High Sulphur Gasoline Prods Liability Litig., 517 F.3d 220 (5th Cir. 2008), offers an object example of how not to do this job. The underlying class action settled, and $6,875 million was allotted for attorneys' fees. Thirty-two firms had participated on the plaintiff side, and the judge appointed a five-member Fee Committee to devise an allocation method. The Committee invited each firm to submit not only its time and expense statements but also statements about what it contributed to the litigation and what it thought the other firms contributed. The Fee Committee submitted its proposed allocation scheme to the judge at an ex parte conference without notice to any of the other lawyers, and none of the other lawyers were shown the allocation proposal or the proposed order approving it. The order, in turn, placed under seal the recommended share of each attorney, prohibited each lawyer from revealing his or her share, and required that the money be paid out immediately on checks bearing a complete release of any further claims to fee entitlement by lawyers who cashed the checks. Under the plan, about half of the total fee award went to the firms of the members of the Fee Committee. Other lawyers objected and appealed. After these lawyers objected, the district court held a hearing during which it assured that lawyers that it had considered all the pertinent fee award factors.

The court of appeals held that this was a flawed procedure for awarding fees. The district judge had to spell out how the pertinent fee award factors were applied. Moreover, the judge abdicated the court's responsibility to determine fees by leaving it to the Fee Committee. The secrecy of the entire procedure compounded the problems (id. at 229):

The court made matters worse when it sealed the exhibit listing the individual fees and the record entries pertaining to fees and placed a gag order on the plaintiffs' attorney. These actions not only kept the public in the dark about each plaintiffs'
attorney's award but also prevented counsel from communicating with each other and with their own clients on the subject. The lack of transparency about the individual fee awards supports a perception that many of these attorneys were more interested in accommodating themselves than the people they represented.

F. RECUSAL

The court in In re Literary Works in Electronic Databases Copyright Litig., 509 F.3d 136, 138-39 (2d Cir. 2007), captured an enduring reality for complex litigation: "For better or worse, many lawsuits have become exercises in mass aggregation, and judges must confront new issues relating to the propriety of their participation in such cases as they come before them." The specific problem here was that two of the three members of the appellate panel appeared to be members of the plaintiff class because they owned copyrights on materials defendants had included in their databases. The court held that it was sufficient for them to disavow any interest in the proceeds of the litigation.

Cobell v. Kempthorne, 455 F.3d 317 (D.C. Cir. 2006), provides a contrast to In re IBM (p. 721). The court ordered that the longstanding litigation against the Department of the Interior for its handling of Indian trust accounts (see Cobell v. Norton, p. 654) be assigned to another judge because the district judge who had been handling it for about a decade had exhibited a pervasive antagonism toward Interior. It seems that the judge's attitude derived entirely from his experience with the case. But despite Liteky v. United States (p. 727 n.6), the court finds that the combination of virulent language about Interior in the district judge's opinions (saying that it is pervaded by racism and continuing to pursue a genocidal policy toward Indian culture) and an unbroken string of rulings against Interior that it had reversed satisfies Liteky's standard for removing a judge due to actions as judge in a case without any accusation of improper communications or the like.

For a comparison to U.S. v. State of Alabama (p. 717), consider Berthelot v. Boh Bros Const. Co. 431 F.Supp.2d 639 E.D. La. 2006), holding that a judge who worked and resided in New Orleans did not have an interest in litigation arising out canal levee breaches caused by Hurricane Katrina that required his disqualification. The judge affirmed that even though he was a resident of the city, he suffered much less harm or dislocation than most. His house was unharmed. He retrieved sufficient clothing to sustain him during his absence from the city, and was able then to hold court in Lafayette, La., where he lived with his wife's parents three blocks from the courthouse in which he was working. Later, he was able to hold court in a courthouse named for his former law partner in Houma, La., which is his home town. Under these circumstances, the judge concludes, there is no justification for recusal. And if there were, would not recusal be required for all local judges in all Katrina litigation? That result "would wreak havoc on the docket of the entire Eastern District of Louisiana, but more importantly would deprive those most in need of recourse the very judiciary that was established to deal with such litigation." Id. at 647.

In re Kensington International, Ltd., 368 F.3d 289 (3d Cir. 2004), offers an example of possible perils of active management of litigation. District Judge Wolin was appointed by then-Chief Judge Becker of the Third Circuit to preside over five huge bankruptcy proceedings of asbestos producers. Because he had limited experience in asbestos litigation, he appointed a panel of five "Advisors" to discuss pertinent issues with him. He even asked one of them to draft opinions on some matters for him. The problem is that two of these advisors also had active asbestos practices, and they represented future claimants in a sixth asbestos bankruptcy pending in the district but assigned to another judge. This created a conflict of interest for these lawyers,
the majority concluded, because the same issues were presented in all six bankruptcies. And that conflict created an appearance of unfairness that warranted recusal of the judge, the court held, in part because there were a large number of ex parte meetings between the judge and the advisors. The majority was careful to explain that it did not hold that retention of advisors always constituted grounds for recusal, or that all ex parte communication with such persons could be grounds for recusal. A dissenting judge found that there was no conflict or ground for recusal.

CHP. VII: TRYING COMPLEX CASES

C. IMPROVED TRIAL METHODS

1. Juror "Empowerment"

Effective Jan. 1, 2007, the California state courts have adopted new rules dealing with a variety of juror empowerment measures.

Cal. Rule of Court 2.1031 provides that "[j]urors should be permitted to take written notes in all civil and criminal trials." It also says the judge should so inform jurors and provide them with materials suitable for this purpose. Rule 2.1032 applies specifically to complex cases:

A trial judge should encourage counsel in complex civil cases to include key documents, exhibits, and other appropriate materials in notebooks for use by jurors during trial to assist them in performing their duties.

Rule 2.1033 then says that trial judges "should allow jurors to submit written questions directed to witnesses," but also that counsel should be able to object to these questions outside the presence of the jury. Rule 2.1035 authorizes the judge to preinstruct the jury immediately after the jury is sworn.

MacLean, No Final Answer Over Juror Questions, Nat. L.J., May 12, 2008, at 1, reports on the nationwide and growing experiment with permitting juror questioning. Although all but one federal circuit permit district courts to allow juror questioning, only two -- the Seventh and the Ninth -- seem genuinely to support it. Among state courts, meanwhile, four other states -- Florida, Indiana, New Jersey and Ohio -- have joined Arizona in allowing juror questioning frequently. Two states -- Mississippi and Nebraska -- bar the practice altogether, and three -- Georgia, Minnesota and Texas -- limit it to civil cases. One lawyer who was uneasy with juror questioning explained his views as follows: "My reservations are based on concern that jurors prematurely begin deliberating and become advocates, or inquisitors, or take positions about the lawyer's questioning of witnesses."

2. Use of Technology

LaMothe, Remote Location, S.F.D.J., Jan. 10, 2008, at 7, reports the experiences of the author (Louise LaMothe, former Chair of the ABA Section of Litigation) with videoconferencing in international arbitration:

Although surprisingly few parties suggest the use of videoconferencing, when I mention its use they are uniformly enthusiastic. I predict that videoconferencing will be used in arbitrations with increasing frequency very soon. The high cost of travel and the busy schedules of managers who are loath to take time away from the office make
videoconferencing an ever more viable alternative to appearing at the hearing location, especially if the witness is not central to the case. *** The low cost of technology allows videoconferencing to be used in virtually every case.

But there are additional concerns, such as making sure the witness looks into the camera and avoiding glare. In addition:

The parties need to agree on a schedule for creating a joint list of exhibits to be used at the hearing. If a hard copy of exhibits is going to be used, once the exhibit binders are assembled, the parties need to allow sufficient time to send a set of the exhibits to the location so that the witnesses located there have access to them while testifying.

3. Alternatives to In-Court Testimony

In Elkins v. Superior Court, 163 P.3d 160 (Cal. Sup. Ct. 2007), the Supreme Court of California rejected a local rule for family law matters that required all direct testimony to be submitted in declaration form before trial. The husband in a contested divorce case, who was acting pro per, failed to comply with the rule and was not permitted to offer his testimony at the trial. The Superior Court urged that the local rule improved efficiency, reduced rancor in relations between divorcing spouses, and promoted settlements. The Supreme Court was unpersuaded by those policy justifications, and found that other policy considerations mattered more:

A recent statewide survey reflects a *** concern with court procedures that do not permit family law litigants to tell their story, a circumstance reported by litigants to diminish their confidence in the courts.

Against that background, the Supreme Court stressed the bar on using affidavits in the hearsay rule and the desirability of having direct testimony live before the trier of fact: "The testimony of witnesses given on direct examination is afforded significant weight at trial in ascertaining their credibility; cross-examination does not provide the sole evidence relevant to the weight to be accorded their testimony. . . . Ordinarily, written testimony is substantially less valuable for the purpose of evaluating credibility."

CHP. VIII: PRECLUSIVE EFFECTS OF JUDGMENTS IN COMPLEX LITIGATION

A. CLAIM PRECLUSION (RES JUDICATA)

1. Persons or Entities Bound by Prior Judgment

In Taylor v. Sturgell, 128 S.Ct. 2161 (2008), the Court rejected the "virtual representation" theory that a number of lower courts had accepted (see p. 1170 n.5). The lower court had relied heavily on Tyus v. Schoemehl (p. 788). For this reason, we have created an edited version of the Supreme Court's decision, along with Notes and Questions, suitable for use as a handout to substitute for the material on pp. 788-803. That handout should accompany this Update.

The Supreme Court began with the "principle of general application" that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." Id. at 2166-67 (quoting Hansberry v.
The Court recognized six exceptions to this general principle, however: (1) when the nonparty agrees to be bound by the determination of issues in an action between others; (2) when a pre-existing "substantive legal relationship" between the nonparty and the litigant in the earlier case is proved; (3) in "limited circumstances" when the nonparty was "adequately represented by someone with the same legal interests" who was a party in the earlier case; (4) when the nonparty assumed control over the earlier litigation; (5) when the current party is acting as a proxy for the litigant bound by the earlier litigation in order to avoid its preclusive force; and (6) when a special statutory scheme expressly forecloses successive litigation, providing that statutory scheme satisfies due process. See id. at 2172-73.

In the case before the Court, the earlier litigation resulted from an FOIA request to the FAA by one Herrick, an antique aircraft enthusiast. Herrick sought detailed information on the Fairchild F-45 aircraft from the 1930s because he wanted to use the documents for work on his F-45. After Fairchild objected to release of the requested documents, the FAA refused, invoking the FOIA exemption for trade secrets and the like. Herrick sued the FAA, arguing that whatever trade secret protection may originally have applied had been waived in the mid 1950s when Fairchild authorized the FAA's predecessor agency to release any documents in its files for use in making repairs on Fairchild aircraft. The district court granted summary judgment in favor of the FAA, however, and the Tenth Circuit affirmed. But the Tenth Circuit did not rule on two assumptions underlying the district court's decision -- that trade secret status once waived could be "restored" by later assertion, and that "restoration" could occur even though it came only after an FOIA request for the documents in question.

Less than a month after the Tenth Circuit's ruling, Taylor brought the current suit. Taylor is president of the Antique Aircraft Association, of which Herrick is a member, and Herrick had asked Taylor (whom the Court described as his "close associate") to help in restoring Herrick's P-45. Fairchild, which had submitted an amicus brief in the Tenth Circuit case, intervened as a defendant in this case. (Query whether it would be bound in the current litigation by an adverse result in the Tenth Circuit had that case turned out the other way.) Among other things, Taylor asserted in his case that the "restoration" of trade secret protection attempted by Fairchild after Herrick's FOIA request was not effective. Nonetheless, the lower courts held that Taylor was bound because Herrick was his "virtual representative" in connection with the earlier litigation.

The Supreme Court held unanimously that there is no "virtual representation" basis for preclusion in cases in which none of the six grounds for preclusion that it had identified would apply. But it could not determine whether the fifth ground it identified -- that the current litigant is actually acting as a proxy for the litigant bound by the earlier judgment -- might apply. It characterized this inquiry as looking to "whether Taylor, in pursuing the instant FOIA suit, is acting as Herrick's agent." Id. at 2179. The Court did not define the showing necessary to demonstrate such agency, but it did direct that defendants have the burden of proving agency. See id. at 2179-80.

2. The Effect of Judgments in Class Actions


For class action law, Stephenson's outcome may have been the worst possible resolution of the case as it supplied a decision without reasoning to a field more in need of reasoning than decision. The Court's inability to render a decision left unresolved a
whole series of questions concerning the content of the adequate representation requirement and the proceedings attending both its initial adjudication and its likely re-adjudication on collateral attack. Two schools of scholarship have developed around these questions. Preclusionists have argued that the issue of adequacy, having necessarily been decided by the class court, cannot be re-litigated collaterally. The preclusionists' approach to relitigation is that there should be none. Constitutionalists have argued that because the issue of adequacy is embedded in the Due Process Clause, it is always open to reevaluation at the demand of any aggrieved individual class member not yet heard by a court. The constitutionalists' approach to relitigation is that there should always be one. The preclusion approach is functional and lays claim to the virtue of repose, the constitutional approach is normative and emphasizes the value of participation; both claim that their method achieves the most accuracy.

In In re Aget Orange Prod. Liabil. Litig., 517 F.3d 75 (2d Cir. 2008), the Second Circuit put an end to the Stephenson litigation on the ground that the military contractor defense protected all the defendant makers of Agent Orange from liability for doing what the government asked them to do. Perhaps it is worth noting that the existence of this overarching defense was one basis for finding that Rule 23(b)(3)'s predominance of common questions requirement was satisfied when the original Agent Orange class action was certified in the 1980s. Plaintiffs in these case included the Stephenson plaintiffs and others who claimed they became sick after the class action settlement funds were entirely distributed. Interestingly, the panel apparently asked for supplemental briefing during oral argument on whether the Second Circuit's earlier decision in Stephenson on the binding effect on these plaintiffs of the Agent Orange class-action settlement judgment. See Id. at 85 n.6. Because of its disposition on military contractor grounds, the panel did not reach this issue. Meanwhile, in Vietnam Assoc. for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir. 2008), the court rejected claims brought by citizens of Viet Nam on the ground that the Alien Tort Claims Act did not confer jurisdiction and that the government contractor defense would apply to these claims as well. Perhaps these decisions mean that the Agent Orange litigation is finally at an end.

In In re Diet Drugs Products Liability Litig., 431 F.3d 141 (3d Cir. 2005), the court rejected collateral challenges to the settlement (see In re Diet Drugs, p. 391), finding that Stephenson v. Dow Chemical Co. (p. 819) "is inconsistent with [Third] Circuit case law by which this panel is bound." Appellants there were class members who fell into two categories and contended that people in those categories were not adequately represented. One category was the "downstream opt-out" group, those who chose to opt out and sue in state court when diagnosed with cardiac problems. Under the settlement, they were protected against statute of limitations defenses but could not seek punitive damages. The other group exhibited elevated pulmonary hypertension, for which condition the settlement did not offer any significant benefits. With regard to them, the district court found that "the evidence did not support a connection between the use of diet drugs and these conditions." Id. at 145.

Collateral attack was not allowed, the court ruled, because the objections asserted collaterally had been raised and addressed by the district court during the settlement review process, and the district court then concluded that they were adequately represented. Although "[t]here must be a process by which an individual class member or group of class members can challenge whether these due process protections were afforded to them," id., there was such a process in the settlement-approval stage and there were objections on similar grounds. The fact that they were made by others is not significant as a due process matter (id. at 147-48):

These Appellants argue that because the specific individuals who are Appellants
in this case were not the specific individuals who raised objections at the fairness hearing, they must have the opportunity to litigate the issue themselves. This argument ignores the underpinnings of the class action mechanism. If this argument were to be accepted, each class member would be able to relitigate each issue, rendering the class action mechanism pointless. While it is true that the specific Appellants in this case did not, themselves, litigate this issue at the fairness hearing, other class members who are representative of them did litigate this issue and the District Court considered all of the arguments and evidence in that regard. Appellants were represented by other class members at the fairness hearing and because the District Court decided that the class was adequately represented, the issue of adequate representation has already been fully litigated.

In Wolfert v. Transamerica Home First, Inc., 439 F.3d 165 (2d Cir. 2006), the Second Circuit reaffirmed its commitment to permitting collateral attack of class action judgments, quoting Justice Ginsburg's concurring and dissenting opinion in Matsushita Elec. Indus. Cov. v. Epstein (p. 803). It invoked its own Stephenson v. Dow decision and asserted as well that the Third Circuit's precedent authorizes such attack (see id. at 171), although as noted above the Third Circuit seems to regard its precedent as inconsistent with Stephenson. The lawsuit challenged provisions in a reverse mortgage entered into between an octogenarian New Yorker and Transamerica that seemingly gave Transamerica a very large payoff due to appreciation in the value of plaintiff's house. But a nationwide state-court class action in California had sought relief against such exploitive provisions in Transamerica's reverse mortgages under California's Business & Professions Code § 17200, which allows actions for unfair business practices and has been denounced in business circles as allowing too many suits. The California case was settled for a sum that produced a payout to the New York plaintiff of about $2,600. Plaintiff was a member of this class and did not take any action on receipt of notice of the settlement. Some 18 class members opted out and one objected. The California court rejected the objections and approved the settlement, and that approval was affirmed on appeal in the California state court system.

Meanwhile, New York had revised its reverse mortgage statute, setting a 20 percent cap on the interest the lender can have in the appreciation in value of the home, much lower than the 50% provided in Transamerica's mortgages. When plaintiff sought to sell her home, she found that Transamerica could claim over $220,000 as its portion of the increased value. Plaintiff therefore sued, claiming that she could declare her obligation to share the appreciation void under New York law. She argued that she was not adequately represented in the California class action, which was premised only on the California unfair business practices law, and that she was therefore not bound by the class action judgment. In that circumstance, the court ruled, plaintiff could challenge the adequacy of representation collaterally (id. at 172):

[I]f the class action court ruled only in general terms that representation was adequate, without any adversarial consideration of the claim not advanced by Mrs. Wolfert that New York law affords her substantial rights beyond those afforded by California law, it would manifestly unfair to preclude her collateral attack. On the other hand, if, in the class action, a defendant opposing class certification or an objector to the settlement had made a serious argument that a sub-class was required because of claims substantially similar to hers, and that argument had been considered and rejected by the class action court, it would not be unfair to preclude collateral review of that ruling and relegate Mrs. Wolfert to her direct review remedies. * * * However, no such adversarial presentation occurred with respect to her claim that New York law affords her materially more rights than those available under California law. Although the class action court considered and
rejected, at the class certification stage, Transamerica's contention that the contract's choice of law provisions specifying New York law should be followed, no one made any claim concerning the content of New York law.

Accordingly, "if Mrs Wolfert is correct that New York law affords her significant protection not available under California law, she was not adequately represented." Id. at 173. The court then rejected plaintiff's argument on the merits, concluding that New York law did not offer her significantly more protection than California law. See id. at 173-75.

In Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96 (2d Cir. 2005), dissident class members were held bound by the settlement of an earlier class action. The underlying (and massive) litigation had to do with the "Honor all Cards" policy that defendant credit card companies imposed on plaintiff retailers. The plaintiff class consisted of about five million retailers led by behemoth Wal-Mart. The case settled, and the court approved the settlement despite objections as "the culmination of approximately seven years of hard-fought litigation." According to the court, it "represents the largest antitrust settlement in history." It included a release, which five objecting retailers challenged, precluding suit for conduct occurring prior to 2004 that was or could have been alleged in the complaint. At least two other class actions had been filed by objectors asserting such claims.

The court of appeals upheld the release even though it included some potential defendants who were not parties to the class action. It began by noting that class-action settlements would not be possible if they did not set firm limits on defendants' liability. It stressed that the binding effect of the settlement judgment was limited by the adequacy of representation due process requirement and the "identical factual predicate" doctrine. Even though the objectors urged that their claims were based on different features of the defendant's setup, the district court had concluded that they involved "essentially the same issues." And including nonparty banks within the release was proper because the claims against them were based on an identical factual predicate to those against the defendants. Indeed, the court noted, the banks actually provided most of the consideration on which the settlement was based. For this reason, "it is hard to imagine that defendants would have settled without also releasing their member banks from liability; to do so would have invited relitigation of the same factual allegations against the banks." Id. at 109. Regarding adequacy of representation, the court rejected an analogy to its earlier decision in Stephenson v. Dow Chemical Co. (casebook, p. 819) because this case does not involve future claimants but rather class members who receive compensation now through the settlement.

In In re Diet Drugs Products Liability Lit., 385 F.3d 386 (3d Cir. 2004), the court approved a settlement based on assurances that the trust fund would suffice to cover claims, but the trust fund ran short of money and the parties negotiated an amended agreement that expanded opt-out rights but limited the rights of opt-outs to only certain types of relief. Objectors urged that this revision should not be approved because they had not been adequately warned about the risk of a funding shortfall, and that the case was like Stephenson v. Dow (casebook, p. 819) because of the importance of unforeseen events. The court rejected the analogy (see 385 F.3d at 395-96) because it was really a due process challenge to the notice that accompanied the original settlement agreement, not an objection to the amendment. To make the Stephenson argument would require filing a new suit and resisting preclusion, not objecting to the amendment to the agreement that ensued when the unforeseen event occurred.

For a comprehensive examination of preclusion issues in class actions, see Wolff, Preclusion in Class Action Litigation, 105 Colum. L. Rev. 717 (2005). This article presents a
theory on which courts may undertake to prescribe certain aspects of the preclusive consequences of class actions they entertain as an important part of their class certification process. In part, it takes its inspiration from Cooper v. Federal Reserve Bank (casebook, p. 831). Thus, it offers the following answer to the question posed in note 1 on p. 838: "Cooper, in short, is a Title VII opinion, not an opinion about the preclusive effects of class action judgments." Id. at 730. Prof. Wolff elaborates (id. at 729):

[T]he assertion of a pattern or practice claim encompasses all allegations of a series of individual instances of discrimination, any one of which might itself serve as a basis for relief in an individual lawsuit. As a consequence, it is not merely the case that pattern or practice claims are well suited to classwide treatment, as is the case with many civil rights suits; they call out for such treatment. An individual who has suffered discrimination could ordinarily obtain complete relief in an individual action, making a separate pattern or practice claim redundant. And an individual who has not suffered discrimination would have no standing to raise a pattern or practice claim by invoking the injuries of others, any more than she would be an appropriate representative for such a claim in a class proceeding. The question of what preclusive effect to attach to a pattern or practice claim is thus most appropriately addressed in the class action context, and the Cooper Court used the dispute before it to set forth the appropriate policy on the litigation of such claims.

More generally, the article offers a very sophisticated and thorough analysis of the propriety of courts doing something that the Supreme Court has seemingly abjured recently -- prescribing in the current case, particularly if it is a class action, at least some of the pertinent factors that would determine the preclusive effect the decision of this case should have in another later case.

CHP. IX: ALTERNATIVES TO LITIGATION

A. EXTRA-JUDICIAL MECHANISMS

1. Arbitration

In Hall Street Assoc. v. Mattel, Inc., 128 S.Ct. 1396 (2008), the arbitration agreement signed by the parties required the court to vacate, modify, or correct any award if the arbitrator's conclusions of law were "erroneous." The District Court vacated the award for legal error, expressly invoking the agreement's legal-error review standard. The Supreme Court held that the AFF's grounds for prompt vacatur and modification of awards were exclusive for parties seeking expedited review under the FAA, rejecting arguments that expandable judicial review agreed to by the parties had been accepted in prior cases.

In another case concerning the question of arbitrability, the Supreme Court in Preston v. Ferrer, 128 S.Ct. 928 (2008), held that when parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.

Buckeye Check Cashing, Inc. v. Cardegna, 126 S.Ct. 1204 (2006), addresses several issues that are discussed in this section, including the Prima Paint "separability" doctrine (p. 885) and "Court Review and Arbitrability" (p. 890).

John Cardegna signed a contract for a loan from Buckeye Check Cashing, which contained an arbitration clause requiring any controversy over the loan to be resolved by
arbitration. Cardegna filed a class action against Buckeye in a Florida state court, claiming that
the loan was usurious, disguised as check cashing transactions in violation of Florida usury and
other statutes. Buckeye moved to have the case resolved by arbitration, and Cardegna countered
that the contract as a whole was illegal and the arbitration clause was therefore not enforceable.
On appeal, the Florida Supreme Court ruled in favor of Cardigan, holding that the contract was
illegal and therefore void, and not merely voidable (distinguishing the Prima Paint
"severability" doctrine that a challenge to the validity of a contract as a whole, rather than to the
arbitration clause only, should be determined by the arbitrator rather than the court).

The issue before the Supreme Court was whether, under the Federal Arbitration Act, a
party may avoid arbitration by arguing that the contract in which the arbitration clause is
contained is illegal. The 7-1 majority (Justice Alito not participating), in an opinion by Justice
Scalia, ruled that challenges to the legality of a contract as a whole must be decided by the
arbitrator rather than the court. Relying on Prima Paint (p. 885), the court stated that "unless the
challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the
arbitrator in the first instance." It held that the Florida Supreme Court had been wrong to rely on
a distinction between void and merely voidable contracts, because the word "contract" in the
Federal Arbitration Act includes contracts later found to be void. Also relying on Southland Corp. (p. 885), it held that this application of federal arbitration law applies in state as well as
federal courts. Justice Thomas dissented due to his long-held view that the FAA does not apply
in state courts.

d. Classwide Arbitration

In response to Bazzle (p. 914), a number of businesses have modified their consumer
arbitration clauses to forbid classwide arbitrations. See Gilles, Opting Out of Liability: The
Forthcoming Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev 373 (2005)("class actions will soon be virtually extinct"); "corporate caretakers have concocted an
antigen, in the form of the class action waiver provision, that travels through contractual
relationships and dooms the class action device. Where class actions are based on some sort of
contractual relationship, this toxin is completely lethal.").

A number of cases have determined that the question of whether a ban on classwide
arbitration is unconscionable is for the court and not the arbitrator (see discussion of this issue at
pages 890-891). These cases generally predate Buckeye, and one might ask whether that case
would affect those decisions. Recent cases include Jenkins v. First American Cash Advance of
Georgia, LLC, 400 F.3d 868, 877 (11th Cir. 2005)("this claim alleges the Arbitration
Agreements specifically are unconscionable because they preclude class action relief," and so
the court may adjudicate the claim because “it places the making of the Arbitration Agreements
in issue”). But see Hawkins v. Aid Ass’n for Lutherans, 338 F.3d 801, 807 (7th Cir.
2003)(“Because the adequacy of arbitration remedies has nothing to do with whether the parties
agreed to arbitrate or if the claims are within the scope of that agreement, these challenges must
first be considered by the arbitrator”; “the same reasoning applies to [plaintiff’s] complaint that
they are prohibited from proceeding in arbitration as a class”). Cf. Wilson, “No-Class-Action
Federal Judicial Restraint and Congressional Action, 23 Quinnipiac L. Rev. 737, 781-83
(2004)(although the Seventh Circuit’s approach “seems plainly inconsistent with Prima Paint,”
it does avoid some “practical difficulty,” and “arguably makes sense in certain cases,” because it
permits the arbitrator to interpret the contract [to determine whether is permits class
arbitration], determine the enforceability of any [clause prohibiting class actions], and decide the
merits of the case, all without interruption").
Since Bazzle, a number of cases have found a prohibition on classwide arbitration to be unconscionable under the state contract law (see Blue Cross of California (p. 903) and Notes and Questions (p 913)). No consensus has as yet emerged. A leading case is the California Supreme Court’s decision in Discover Bank v. Superior Court, 36 Cal.4th 148, 113 P.3d 1100, 30 Cal.Rptr.3d 76 (2005). The plaintiff had filed a class action alleging that the defendant had violated the Delaware Consumer Fraud Act, by imposing an unauthorized late fee of $29 on the payment of a loan. The agreement contained a Delaware choice-of-law clause, and also barred either party from arbitrating “any claim as a representative or member of a class.” The court noted that not all class actions waivers were “necessarily unconscionable,” but laid down the rule that

When the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of a party “from responsibility for [its] own fraud,

and thus contrary to the state’s public policy. This principle that class action waivers may be “unconscionable as unlawfully exculpatory” did not, the court stated, “specifically apply to arbitration agreements, but to contracts generally” — and therefore was not preempted by the FAA—which was, after all, never intended to “federalize the law of unconscionability.” (see discussion of FAA preemption at p. 889) Nevertheless the case was remanded to the lower court for a determination as to “whether and to what extent Delaware law should apply.” On remand, the court determined that in fact Delaware had “a materially greater interest” than California in the issue of the waiver’s enforceability: Although the named plaintiff was a California resident, he was asserting claims only under Delaware law, on behalf of a nationwide class, against a bank domiciled in Delaware – “we fail to see how California has a greater interest [in the suit] than any other state.” A review of Delaware law indicated that under the law of that state, the class-action waiver would be “enforceable and not unconscionable.” Discovery Bank v. Superior Court, 134 Cal.App.4th 886, 36 Cal.Rptr.3d 456 (2005).

In Gentry v. Superior Court, 165 P.3d 556 (2007), the Supreme Court of California held unconscionable a waiver of classwide arbitration in an employment contract. Gentry sued Circuit City, his employer, claiming that it routinely misclassified hourly workers as managerial to get around rights to overtime pay. The defendant argued that the waiver should be effective because the employment contract allowed Gentry to opt out of this provision within 30 days, and because the amounts at issue in individual cases might be substantial. Over a sharp dissent, the California Supreme Court held rejected these arguments, stressing "real world obstacles" to meaningful consent by employees.

Other recent cases include Kinkel v. Cingular Wireless, LLC, 357 Ill.App.3d 556, 293 Ill. Dec. 502, 828 N.E.2d 812 (2005), leave to appeal granted, 298 Ill. Dec. 378, 216 Ill.2d 690, 839 N.E.2d 1025. This was a class action challenging Cingular’s early-termination fee as both a breach of the service agreement and statutory fraud under the state Consumer Fraud and Deceptive Business Practices Ac. Since “the most” the plaintiff could hope to recover in an action of this nature is $150, the court found that “consumers in the plaintiff’s position are left without an effective remedy in the absence of a mechanism for class arbitration or litigation.” However, since the remainder of the arbitration clause can be severed from the unconscionable prohibition on class arbitrations, “the claim can still be arbitrated if the arbitrator is free to
determine that class arbitration is appropriate.”

But compare Walther v. Sovereign Bank, 386 Md. 412, 872 A.2d 735, 750 (2005)(“numerous courts, both federal and state, have rigorously enforced no-class-action provisions in arbitration agreements and found them to be valid provisions of such agreements and not unconscionable“(collecting cases); Strand v. U.S. Bank Nat’l Association ND, 693 N.W.2d 918 (N.D. 2005)(“the right to bring an action as a class action is purely a procedural right,” and “all substantive remedies available to [the plaintiff] in a judicial action” would be available in arbitration; since the plaintiff would be entitled to an award of attorney’s fees if he prevails, and since he has provided “no empirical evidence that all attorneys would be unwilling to litigate these claims,” there is at least “a chance that [the plaintiff] can be made whole through individual arbitration”). Cf. Schultz v. AT & T Wireless Services, Inc. 376 F.Supp.2d 685 (N.D. W.Va. 2005)(since the plaintiff seeks damages for “aggravation, annoyance and inconvenience, emotional distress, humiliation, anger, monetary losses, attorney’s fees and expenses, and punitive damages,” totaling in excess of $75,000, his claim “cannot be considered ‘small dollar’ and thus he can “effectively and cost-efficiently vindicate his rights through arbitration”).

Some courts have found a waiver of classwide arbitration to be unconscionable based on a denial of adequate remedies to vindicate one’s rights. In Wong v. T-Mobile USA Inc, 2006 WL 2042512 (E.D.Mich. 7/20/06), the federal district court found the waiver at odds with the Michigan Consumer Protection Act in an action by a customer of cellular services. It said the class action waiver would prevent the effective vindication of the consumer’s rights since her damages were “a paltry $19.74, hardly enough to make arbitration worthwhile,” while the defendant “has probably collected millions of dollars improperly.”

In Muhammad v. County Bank of Rehoboth Beach, 2006 WL 2273448 (N.J.S.Ct. 8/9/06), the New Jersey Supreme Court found a class action waiver unconscionable in an action against a payday lender which was effectively charging 608% interest on a $200 loan. It stated that “the public interest at stake in [the plaintiff’s] ability and the ability of her fellow consumers effectively to pursue their statutory rights under this State’s consumer protection laws overrides the defendants’ right to seek enforcement of the class arbitration bar in their agreement.” In a companion case, Delta Funding Corp. v. Harris, 2006 WL 2277984 (N.J.S.Ct. 8/9/06), the Court found a class action not unconscionable in a mortgage loan contract. It stated:

[Un]der New Jersey law, the class-arbitration waiver in her arbitration agreement is not unconscionable per se. In Muhammad, we found a class-arbitration waiver unconscionable in the context of low-value consumer claims. Muhammad is distinguishable from the instant case, as Harris is seeking more than $100,000 in damages, and it is unclear whether that includes application of statutory multipliers. The plaintiff’s potential damages in Muhammad, including statutory damage multipliers, totaled less than $600 in a complicated matter. Harris's claim is not the type of low-value suit that would not be litigated absent the availability of a class proceeding. Harris has adequate incentive to bring her claim as an individual action. Not only are her damages substantial, but the fact that her home is at stake in the foreclosure proceeding makes it likely that she would contact an attorney. The same cannot be said of low-value claims where individuals have little, if any, incentive to seek out an attorney. Moreover, all of the statutes under which Harris seeks relief provide for attorney's fees and costs to prevailing plaintiffs. Those remedies, in combination with the substantial damages that Harris seeks, render the class-arbitration waiver enforceable in the context of this litigation.
Some arbitration clauses purport to supersede class actions that have already been filed. Such a clause was held ineffective in In re Currency Conversion Free Antitrust Litigation, 361 F.Supp.2d 237 (S.D.N.Y. 2005) ("in the absence of candid disclosure" by the defendants, there was "no reasonable manner for cardholders to know that by failing to reject the arbitration clause they were forfeiting their rights as potential plaintiffs"; "the putative class members’ rights in this litigation were protected as of the filing date of the complaint," and "indeed, where a defendant contacts putative class members for the purpose of altering the status of a pending litigation, such communication is improper without judicial authorization").

As discussed at p. 922, Note 3, AAA announced it would not administer classwide arbitrations where the arbitration clause bans them unless there is a court order. However, it has now administered a number of classwide arbitrations under its new rules (p. 922). JAMS, another of the leading arbitration providers, announced that it would no longer honor arbitration clauses prohibiting consumer and employment class actions. See Hilary Miller, “Outside Counsel: Arbitration and Class Actions After JAM’s Flip-Flop,” N.Y.L.J., May 4, 2005.

B. JUDICIAL MECHANISMS

2. Court-Annexed Arbitration

Interesting issues also arise as to whether arbitrators should have such judge-like supervisory powers as subpoena, ordering of discovery, and holding in contempt. Increasingly, rules are giving arbitrators some such powers. The Rhode Island Supreme Court's Court-Annexed Arbitration Rule provides: "Arbitrators have the authority of a trial judge to govern the conduct of the hearings, except that they do not have the power to punish for contempt." 3 ADR Rep. 199 (June 8, 1989).

4. Court-Annexed Mediation

The issue of confidentiality often arises concerning mediations, whether or not performed pursuant to a court order. A number of states have now adopted, through statute or court rule, a mediation confidentiality privilege. They vary considerably as to absoluteness or limitations on such confidentiality. See Deason, Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality, 35 U.C. Davis L. Rev. 33 (2001). The Uniform Mediation Act, which as of the summer of 2006 had been passed by eight states, contains elaborate confidentiality provisions with a number of exceptions as to such matters as the enforcement of the agreement itself.

The California courts have wrestled with whether exceptions on important policy grounds can be read into the broad California mediation confidentiality statute. In Foxgate Homeowners Association, Inc., v. Bramalea California, Inc., 25 P.3d 1117 (Cal. S.Ct. 2001), the California Supreme Court refused to balance the conflicting policy interests to find an exception in the mediation confidentiality statute. In that case, testimony as to what occurred at the mediation was needed to support court sanctions for the failure of one party to participate in good faith. It concluded that the legislature “has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the process.”

In Stewart v. Preston Pipeline Inc., 134 Cal.App.4th 1565, 36 Cal.Rptr.3d 901 (Cal.App. 2005), defendant sought to introduce evidence of a settlement agreement entered into at the
mediation after the plaintiff repudiated the settlement. Bound by the *Foxgate* precedent, the California Court of Appeals for the 6th District nevertheless found that evidence of the agreement was not barred by the confidentiality agreement. It distinguished *Foxgate* (and a subsequent California Supreme Court case, *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 93 P.3d 260, that also refused to find a policy exception to confidentiality) on the ground that in those cases, the parties had not expressly waived mediation confidentiality, as had been done in *Stewart*. It found that the purpose of mediation confidentiality – to ensure open communication – would not be promoted by applying confidentiality to prevent one settling party from enforcing an agreement signed by the reneging party. Perhaps this is the best that the Court of Appeals could do, given *Foxgate*. The result would seem to be that the parties must sign waiver provisions at the mediation (which is usually done anyway) or that exceptions will have to come from the legislature.