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It may be that the concept of a geographically-based as opposed to case complexity-based lodestar will someday have as much relevance to the selection of an attorney as dinosaurs have to birds.¹

I. INTRODUCTION

Recently, the Second Circuit has aggressively implemented a rule that has the potential to sharply curtail the use of the class action mechanism in suits arising under fee-shifting statutes by dramatically changing the risk-reward calculations undertaken by plaintiffs’ counsel. Under the so-called “forum rule,” courts award attorneys’ fees to prevailing plaintiffs based on the hourly rate charged by attorneys in the forum district.² The forum rule has the potential to significantly reduce the fees that class action attorneys can receive for winning suits in Second

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¹ Gutman v. Klein, No. 03 Civ 1570, 2009 WL 3296072, at *2 n.1 (E.D.N.Y. Oct. 13, 2009). In footnote 1, Judge Cogan laments the handcuffs imposed on Second Circuit district judges with regard to attorney fee petitions. He writes: “Although I am of course bound by Simmons, there remain concerns with requiring litigants to justify their attorney selection by proving that a reasonable client would have selected [an out-of-district] attorney because it would ‘likely produce a substantially better net result.” Id. Judge Cogan proceeds to agree with Judge Gershon’s view that hourly rate analysis “‘should not be read so strictly as to create an unreasonable disincentive’” for out-of-district counsel to bring suits in a district with lower hourly rates. Id. (quoting New Leadership Comm. V. Davidson, 23 F. Supp. 2d 301, 304 (E.D.N.Y. 1998)).
² See Simmons v. New York City Transit Authority, 575 F.3d 170, 174 (2d Cir. 2009) (“Courts ‘should generally use ‘the hourly rates employed in the district in which the reviewing court sits’ in calculating the presumptively reasonable fee.’” (quoting Arbor Hill Concerned Citizens Neighborhood Ass’n v. Albany, 493 F.3d 110, 119 (2d Cir. 2007))).
Circuit districts other than the Southern District of New York.\(^3\) In the context of employment discrimination class actions, the forum rule’s rise to prominence is occurring at the same time as the standards for plaintiffs to obtain class certification are becoming more stringent.\(^4\) The increased difficulty of prosecuting class suits necessitates the use of experienced class counsel to represent the plaintiff classes.\(^5\) By considerably reducing the expected fees to be derived from such class suits, the Second Circuit rule contravenes the purpose of the fee shifting provisions by discouraging competent out-of-forum counsel from undertaking representation of these classes.\(^6\)

Even assuming that the statutory objectives are not offended by the forum rule, the rule itself is premised upon a fundamental misunderstanding of the economic incentives underpinning the choice of what counsel a client should obtain. The courts applying the rule have framed counsel selection as a choice between two attorneys – an inexpensive local attorney and an expensive out-of-town attorney.\(^7\) The courts then proceed to reason that a reasonable paying plaintiff would not pay the more expensive attorney to do the same job unless that attorney was.

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\(^{3}\) The forum rule sets the presumptively reasonable rate at the prevailing market rate in the forum district. *Id.* Thus cases in the Southern District of New York are unaffected because the prevailing market rate is higher there than any other district in the Second Circuit. Since the disparity in hourly rates is relatively minor as between the districts other than the Southern District of New York, the forum rule does not have the same effect, for example, on an Eastern District of New York attorney seeking his regular hourly rate in Southern District. Instead, the rule is most applicable when an attorney based in the Southern District of New York (or other major cities around the country) seeks fees in one of the other Second Circuit districts. An Eastern District of New York judge recently observed that the border between the Eastern and Southern Districts of New York is “‘uniquely permeable’ . . . linked together by numerous bridges, tunnels, and highways; indeed, the two district courthouses are each juxtaposed to the Brooklyn Bridge within an easy stroll from each other.” Luca v. County of Nassau, No. 04-CV-4898, 2010 WL 307027, at *1 (E.D.N.Y. Jan. 25, 2010) (citation omitted). Interestingly, the court went on to note that “[a strict application of the forum rule] would create an unreasonable disincentive for Manhattan-based attorneys to bring suits in Brooklyn, as well as ‘an incentive for lawyers based in the Eastern District not to take cases in their own backyard because higher rates for the same lie just across the river.’” *Id.*

\(^{4}\) Although the forum rule has not yet been applied to a Title VII class action, the Second Circuit has demonstrated a willingness to apply the rule to other class actions. See, e.g., Green v. City of New York, No. 05-CV-429, 2010 WL 148128 (E.D.N.Y. Jan. 14, 2010) (reducing attorneys’ fees pursuant to the forum rule in IDEA class action suit because the suit was not as complicated as “large complex multi-district products liability litigations, consolidated securities fraud class actions, tobacco litigations, and common fund cases”). See *infra* note 39, for a discussion of the increasing difficulty in certifying Title VII classes.

\(^{5}\) As the difficulty associated with bringing these suits to a favorable conclusion increases, the probability of success for plaintiffs decreases. See *infra* Part IV, for a discussion of the class action mechanism in the context of Title VII suits.

\(^{6}\) See *infra* Part IV (discussing risk-reward calculation shifts’ effect on counsel).

\(^{7}\) See *infra* Part V, for a discussion of the court’s flawed reasoning in using the false choice of counsel.
likely to achieve a substantially better result. Mere success is insufficient to qualify as such a substantially better result. Yet in most ways, success is all that matters to plaintiffs. When litigation is viewed as an “all-or-nothing contest” in which plaintiffs may either succeed or not succeed, paying plaintiffs can reasonably select more expensive counsel who provide a relatively minor increase in plaintiffs’ chance of prevailing. Although this minor increase is impossible to demonstrate empirically, the increase is critical to plaintiffs and can justify committing a significantly larger sum to pay counsel fees.

The application of this rule will result in plaintiff classes having an increasingly difficult time finding competent counsel. Cutting the fees of the relative few specialty attorneys in this field using a flawed understanding of the economic motivations of reasonable plaintiffs could create a chilling effect that will push attorneys with a class discrimination specialty toward other types of employment class cases considered to be less time intensive or risky – i.e., more lucrative. This article identifies fundamental issues overlooked by the Second Circuit when applying the forum rule to class actions. Furthermore, the article clarifies the economic incentives at play during the counsel selection process while distinguishing between individual plaintiffs and plaintiff classes.

Part II of this article examines the bases for the fee-shifting device in employment discrimination jurisprudence. By reviewing the importance of the fee-shifting device in Title VII

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8 See Simmons v. New York City Transit Authority, 575 F.3d 170, 175 (2d Cir. 2009); see also McDaniel v. County of Schenectady, 595 F.3d 411, 415 (2d Cir. 2010) (noting “a reasonable paying client wishes to spend the minimum necessary to litigate the case effectively” (quoting the district court’s Oral Decision at 11)).

9 See infra notes 85 & 88 and accompanying text, for a discussion of the “all-or-nothing” situation for plaintiffs in the context of litigation. The essence of the concept is that at several junctures during litigation, plaintiffs are faced with an “all-or-nothing” moment wherein they can either lose the entire case or proceed with prosecuting it. For example, plaintiffs often face motions to dismiss, or motions for judgment on the pleadings as well as motions for summary judgment and ultimately, trial. The result of any one of those events could cause plaintiff to lose. In the context of class actions, the class certification motion is often effectively an “all-or-nothing” moment for plaintiffs as well since, absent certification, many classes no longer have an economically viable suit.

10 See infra notes 80-84 and accompanying text, for a discussion of the hypothetical model contained in Appendix A.

11 See infra notes 85 & 88 and accompanying text for a discussion of the “all-or-nothing” concept.
litigation, Part II provides a background for analyzing the effects of a reduction in fees. Part III examines the history, intent, and application of the forum rule for determining the reasonable hourly rate. Part IV provides a brief review of the class action mechanism in Title VII suits to illustrate the need for specialty counsel in these actions. Part V provides a critique of the application of the forum rule to class action employment discrimination suits. In response to the Second Circuit’s basis for creating the forum rule, Part V in conjunction with Appendix A describes a hypothetical case that demonstrates the inherent inadequacy of the rule’s standard for rebutting the presumptively reasonable rate. Lastly, Part VI explores policy considerations that necessitate abandoning the use of the forum rule in class action discrimination litigation.

II. THE PURPOSE AND EFFECTS OF FEE-SHIFTING IN EMPLOYMENT DISCRIMINATION CASES

As a general matter, the purpose of fee-shifting provisions in civil rights statutes is to make it easier for plaintiffs to bring meritorious suits to enforce their rights by encouraging qualified attorneys to take on the cases.12 For example, the fee-shifting provision in Title VII allows the trial court, in its discretion, to award reasonable attorneys’ fees and costs to a prevailing party.13 Since Title VII plaintiffs often do not possess the means to pay an attorney

12 See Evans v. Jeff D., 475 U.S. 717, 743 (1986) (“Congress authorized fee shifting to improve enforcement of civil rights legislation by making it easier for victims of civil rights violations to find lawyers willing to take their cases.”); Christianburg Garment Co. v. EEOC, 434 U.S. 412, 420 (1978) (stating one of two primary purposes to Title VII fee-shifting provision was to make it easier for poor plaintiffs to bring meritorious suits); see also Joanna L. Grossman, The First Bite is Free: Employer Liability for Sexual Harassment, 61 U. Pitt. L. Rev. 671, 734 (2000) (“Without the potential to recover fees, plaintiffs will have a reduced incentive and ability to sue their employers and enforcement of the anti-discrimination law will be undermined.”); Michael Selmi, The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects, 81 Tex. L. Rev. 1249, 1311 (2003) (noting requiring defendants to pay legal fees of prevailing plaintiff was intended to create an incentive for attorneys to pursue civil rights cases that may not otherwise be financially lucrative).

[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.
unless the plaintiffs prevail, the fee-shifting provision is particularly important to proper enforcement of the statute. Without an assurance that Title VII plaintiffs’ attorneys will be paid, such plaintiffs could have difficulty finding competent counsel even for meritorious suits because attorneys may fear that the cost of bringing the suit will outweigh the monetary relief that may be obtained.

Fee-shifting has other significant effects on employment discrimination cases. The potential liability for plaintiffs’ attorneys’ fees affects strategies for both plaintiff and defense counsel and also alters incentives for discriminating employers by increasing potential liability resulting from their discriminatory acts. The potential award of plaintiffs’ attorneys’ fees can thus deter employers from discriminating against employees. In this way, attorneys’ fees can both serve as a punitive remedy for past conduct and a deterrent for future conduct.

\[\text{Id.} \quad \text{Although the statutory provision provides for attorneys fees and costs to be recovered by the prevailing party, the common interpretation of this provision has been to make defendants and plaintiffs meet strikingly different standards in order to recover fees. See, e.g., Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) (affirming lower court decision to deny attorneys fee petition from prevailing defendant because plaintiff’s suit was not frivolous); see also Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983) (citing H.R. Rep. No. 94-1558, at 7 (1976)) (relying on legislative history in concluding prevailing defendant’s attorney’s fee petition should be denied). The Christiansburg Court laid out two rules that govern the fee-shifting aspect of Title VII: (1) under 42 U.S.C. § 2000e-5(k), prevailing plaintiffs should be awarded reasonable fees and costs in all but the most special of circumstances; and (2) prevailing defendants may only be awarded fees where plaintiff’s suit was frivolous, unreasonable, or without foundation even though plaintiff’s suit may have been brought in good faith.}

\[\text{14 Although a contingent fee arrangement may serve to alleviate some problems associated with plaintiffs who cannot afford to pay attorneys, such a fee can only be paid if the suit recovers monetary damages sufficient to recover the attorneys’ time. In the context of Title VII, injunctive relief can often be a primary motivator for plaintiffs. Furthermore, the fees in larger class action cases can represent a significant portion of the recovery if they are not added to the plaintiffs’ recovery. See, e.g., Wright v. Stern, No. 01-CV-4437, 553 F. Supp. 2d 337 (S.D.N.Y. May 15, 2008) (awarding plaintiffs $11 million and plaintiffs’ attorneys $9 million in Title VII class action).}

\[\text{15 In the absence of a fee-shifting provision, if the monetary relief is less than the attorneys’ fees, plaintiff recovers nothing.}

\[\text{16 Grossman, supra note 11, at 735 (citing Hensley v. Eckerhart, 461 U.S. 424, 443 n.2 (1983) (Brennan, J., concurring in part and dissenting in part); Cooper v. Singer, 719 F.2d 1498, 1501 (10th Cir. 1983); Shadis v. Beal, 685 F.2d 824, 829 (3d Cir. 1982); Oldham v. Ehrlich, 617 F.2d 163, 168 (8th Cir. 1980)). However, at least one commenter has found no effect on employer practices resulting from large discrimination class actions. See generally Selmi, supra note 11 (finding these suits rarely result in meaningful institutional reform). Since most class action discrimination filings are settled, the parties often settle for monetary benefits as opposed to enforced systemic change. Id. at 1250. Settlements largely remove the court from the process of constructing and enforcing the content of a consent decree. Id. at 1251-52. In his article, Selmi also describes his statistical study whereby he found that lawsuits do not substantially influence stock prices either at the time of filing or at the disposition stage.}
Consider the effects of a fee-shifting provision on employees and employers in discrimination litigation. Under a fee-shifting statutory regime, plaintiffs’ maximum recovery increases from total damages less her attorney’s fees and costs to, simply, her total damages.\textsuperscript{17} This result is consistent with the Title VII objective of making victims of invidious discrimination whole. The effect of fee-shifting on the losing defendant, by contrast, is that defendant’s monetary liability increases from total damages plus defendant’s legal fees, to total damages and defendant’s legal fees plus plaintiff’s attorneys’ fees and costs.

Without the fee-shifting provision, employers benefit from a decrease in case filings and potential overall liability when cases are filed.\textsuperscript{18} Plaintiffs who must pay their own legal fees out of their recovery\textsuperscript{19} would be less likely to bring a variety of suits with lower potential monetary relief because it would not be worth their time and effort to pursue the case in actions that would recover little more than the cost of counsel.\textsuperscript{20} Additionally, such plaintiffs would be less likely to find competent counsel willing to advance legal fees.\textsuperscript{21}

\textit{Id.} at 1250. Importantly, Selmi notes that even though stock prices are unaffected, managers take such suits seriously. \textit{Id.} at 1250.

\textsuperscript{17} \textit{Cf.} Janice Madden & Jennifer Wissink, \textit{Achieving Title VII Objective at Minimum Social Costs: Optimal Remedies and Awards,} 37 Rutgers L. Rev. 997, 1006 (1985) (finding increases in punitive damages and or attorney fee awards increase net legal benefits to plaintiffs if they file suit). Madden & Wissink fixed the level of attorney time input and found punitive damages and attorneys’ fees paid by losing defendants both increase net legal benefits and, in turn, increase plaintiff incentives to file suit. \textit{Id.}

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} It is important to distinguish between plaintiffs who pay attorneys out of their proceeds from the trial – and only if they win (also known as contingent fee cases) - and those plaintiffs who must pay their attorney regardless whether they win or lose. The latter will be significantly more risk averse than the former due to their potential liability for fees in the event the litigation nets them no relief. \textit{See infra} notes 63-68 and accompanying text, for a discussion of the risk aversion difference between plaintiff employees and defendant employers.

\textsuperscript{20} For example, if plaintiff had a claim expected to receive $10,000 but counsel would bill plaintiff $9,500 to bring the suit to that conclusion, plaintiff is unlikely to have interest in proceeding with the suit. If counsel’s expected fees would eclipse the relief expected in the case, counsel would be almost certain to reject the suit.

\textsuperscript{21} Since the expected value of a suit is based on the expected relief multiplied by the \textit{a priori} probability of success, counsel will not prosecute a case on plaintiff’s behalf if the expected value is insufficient to pay counsel’s costs. \textit{Cf.} Madden & Wissink, \textit{supra} note 16, at 1006 (discussing “expected benefits” of a lawsuit as it pertains to plaintiff’s incentive to file suit). For example, if a plaintiff’s expected relief in the event she prevails is $10,000 but she only has a 50\% chance of winning, the expected value of the suit is $5,000. Counsel will not finance and bring the case if his expected fees exceed $5,000.
In the case of plaintiffs who would pay their counsel even if they did not prevail, the absence of a fee-shifting provision would also have the effect of reducing case filings because such plaintiffs are highly risk averse and lack access to capital markets. Since the cost of attorneys and maintaining a case represents a significant percentage of individual plaintiffs’ household budgets, such plaintiffs require a significantly higher potential recovery to motivate them to bring an action. Therefore, employees faced with the risk of having to pay substantial fees even where they have a relatively strong case could be dissuaded from ever filing suit. Additionally, employees lack access to external capital markets limiting their ability to borrow to finance litigation. Thus, a paying plaintiff’s choice of counsel is constrained by both risk aversion and limitations on capital availability absent a fee-shifting provision or contingent fee arrangement.

On defendants’ part, their maximum loss absent a fee-shifting provision is equal to plaintiff’s total damages (punitive and compensatory) plus the fees and costs of the defendant’s attorney. Overall, plaintiffs’ recoveries in successful discrimination cases is diminished absent

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22 See infra notes 63-68 and accompanying text, for a discussion of the risk aversion and capital access differences between plaintiff employees and defendant employers.

23 Consider a plaintiff who makes $40,000 per year in net salary and suffers some form of job discrimination. If she must pay for her attorney regardless of whether she prevails in her suit, she will take into consideration the potential cost to her if she loses. So, for example, if her attorney would charge her $10,000 to bring the suit irrespective of the result, she has to consider the very realistic possibility that she would lose her suit and lose a quarter of her net pay. Even if winning the suit could recover $100,000 in monetary relief and she has a fifty-fifty chance of success, the risk of one quarter of her net income is sufficiently large to potentially dissuade that plaintiff from bringing the suit notwithstanding the economic reasonableness of the suit. Note that, in economic terms, the suit is reasonable because she has a 50% chance of paying $10,000 and a 50% chance of winning $100,000 yielding an expected value of $45,000 for the suit (equal to the probability of each outcome multiplied by the corresponding monetary figure or: $100,000 * 0.50 - $10,000 * 0.50). This plaintiff is also not considering the “all-or-nothing” aspect to litigation under which it is economically reasonable to increase plaintiff’s potential legal fees due if she loses in order to increase her chance of prevailing – at least to the extent of any increase in expected value. See infra notes 85 & 88 and accompanying text, for a discussion of the “all-or-nothing” aspect of litigation.

24 Cf. Madden & Wissink, supra note 16, at 1006 (discussing expected net benefit to plaintiff). The necessary corollary to Madden & Wissink’s point is that any benefits inuring to plaintiff must result from costs burdening defendant in the context of litigation. Defendants also bear their own legal costs in litigation for which recovery from losing plaintiffs is exceedingly rare.
a fee shifting provision, and, on the other side, defendants benefit from fewer cases being filed as well as a reduction in their overall liability in cases they lose.

In addition to affecting the recoveries and liabilities in discrimination cases, fee-shifting provisions also affect plaintiff and defendant case strategies by altering incentives to control costs. Absent a fee-shifting provision in the statutory regime, defendants can institute strategies targeted at delay and increased costs on the plaintiff’s side. For example, defendants could respond to plaintiff’s document request with tens of thousands of documents requiring plaintiff’s counsel to sift through the response and bill exorbitant fees. In such a case, defendants put tremendous economic pressure on plaintiff and plaintiff’s counsel to settle the matter before the projected fees eclipse the expected recovery.

On the other hand, under a fee-shifting statute, defendants must add a number of variables to their strategic calculus. The fee-shifting statute forces defendants to consider the possibility that they will ultimately be required to pay for plaintiffs’ attorneys’ time and costs. Moreover, defendants must proceed through the entire suit with the knowledge that plaintiff’s counsel’s fees and costs are accruing and, as such, the economic pressure to settle is shifted – at least in part – to the defendant.

III. THE FORUM RULE

In response to the dilemma posed by plaintiffs’ attorneys petitioning for fees based on high hourly rates without having any paying clients\(^\text{25}\) to substantiate the reasonableness of the rate, the Second Circuit has adopted the so-called “forum rule.” Under the forum rule, the presumptively reasonable hourly rate is set at the market rate for attorneys with comparable

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\(^{25}\) For the purposes of the forum rule, a paying client is one who pays for the lawyer’s services from his or her own funds extrinsic to the litigation regardless of the disposition of the matter.
experience in the geographic district of the forum court. This so-called “forum rule” is not necessarily new. Twenty-six years ago, the United States Supreme Court held that “reasonable fees” are to be calculated according to the prevailing market rates in the “relevant community,” not according to the cost of providing legal services. The forum rule is essentially an interpretation of that Supreme Court fee-shifting precedent.

The forum rule attempts to recognize the relative incentives behind a plaintiff’s selection of counsel in fee-shifting cases. Since prevailing plaintiffs in employment discrimination litigation often do not pay their own fees – and in many cases losing plaintiffs do not have to pay for their attorneys’ fees per a contingent fee arrangement – plaintiffs lack the incentive to control their legal costs. The forum rule has a dual role to protect defendants from being unfairly gouged by plaintiffs’ choice of counsel and to prevent windfalls to plaintiffs’ attorneys. Therefore, the forum rule sets fee awards “just high enough to attract competent counsel.”

For an out-of-district attorney seeking to have his higher rate approved, the attorney must overcome this presumptively reasonable hourly rate. The trial court may, in its discretion, approve a higher rate where it is clear that a reasonable paying client would have paid the higher rate. Recently, the Second Circuit has adopted a stringent standard that prevailing plaintiffs’ attorneys must meet to have their fee petitions approved in whole. Pursuant to Simmons v. New York City Transit Authority, 575 F.3d 170, 174 (2d Cir. 2009) (“Courts ‘should generally use ‘the hourly rates employed in the district in which the reviewing court sits’ in calculating the presumptively reasonable fee.’” (quoting Arbor Hill Concerned Citizens Neighborhood Ass’n v. Albany, 493 F.3d 110, 119 (2d Cir. 2007))).

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26 See Simmons v. New York City Transit Authority, 575 F.3d 170, 174 (2d Cir. 2009) (“Courts ‘should generally use ‘the hourly rates employed in the district in which the reviewing court sits’ in calculating the presumptively reasonable fee.’” (quoting Arbor Hill Concerned Citizens Neighborhood Ass’n v. Albany, 493 F.3d 110, 119 (2d Cir. 2007))).
27 Blum v. Stenson, 465 U.S. 886, 995 (1984) (“‘[R]easonable fees’ . . . are to be calculated according to the prevailing market rates in the relevant community . . .”).
28 See Simmons, 575 F.3d at 177 (“While [plaintiff] cannot be faulted for wanting to retain counsel with the best possible reputation, it is not the [defendant’s] responsibility to compensate for such counsel . . . [unless plaintiff shows chosen counsel] were likely to produce a substantially better result . . .”).
29 Id. at 176 (quoting Arbor Hill Concerned Citizens Neighborhood Ass’n v. Albany, 493 F.3d 110, 121 (2d Cir. 2007)) (emphasis omitted).
30 Arbor Hill, 493 F.3d at 119.
31 The Second Circuit is ground zero for the forum rule discussion due to the drastically different hourly rates of attorneys practicing in the Southern District of New York vis-à-vis the rates in the Eastern District of New York.
York City Transit Authority, in order to demonstrate that a higher out-of-district rate should apply despite the presumptive forum rate, the district court must make a supported factual finding that “a reasonable client would have selected out-of-district counsel because doing so would likely (not just possibly) produce a substantially better net result.” In so doing, the district court should consider objective factors including counsel’s special expertise in litigating the specific type of case at issue but the court should not look to the geographic proximity of districts or counsel’s prestige.

Despite providing some guidance, the Simmons court has left plaintiffs’ counsel with a difficult standard to overcome because it is an impossible standard for lower courts to apply. Trial courts are supposed to consider “experience-based, objective factors” including “counsel’s special expertise in litigating the particular type of case, if the case is of such nature as to benefit from special expertise.” However, the Simmons court provided no guidance or examples of what constitutes such a case. The court also prohibited consideration of the prestige or “brand

An Eastern District judge recently observed that the order between the Eastern and Southern Districts of New York is “‘uniquely permeable’ . . . linked together by numerous bridges, tunnels, and highways; indeed, the two district courthouses are each juxtaposed to the Brooklyn Bridge within an easy stroll from each other.” Luca v. County of Nassau, No. 04-CV-4898, 2010 WL 307027, at *1 (E.D.N.Y. Jan. 25, 2010) (citation omitted). The court went on to note “[a strict application of the forum rule] would create an unreasonable disincentive for Manhattan-based attorneys to bring suits in Brooklyn, as well as ‘an incentive for lawyers based in the Eastern District not to take cases in their own backyard because higher rates for the same lie just across the river.’” Id.

32 575 F.3d 170 (2d Cir. 2009).
33 Id. at 175 (emphasis added).
34 Id. at 175-76. The court noted “[l]awyers can achieve prestige and fame in numerous ways that do not necessarily translate into better results.” Id. at 176. Strangely, instead of requiring courts to consider the source of a firm’s prestige, the court prohibited consideration of prestige in any way. Yet, in considering whether a “reasonable client” would have retained a lawyer’s services at a given price, the court should review the factors that motivate reasonable clients. Prestige is just one of the many factors but to ignore it is clear error. See infra note 60 and accompanying text, for a discussion of prestige as a factor in client selection of attorneys.

35 See Noeleen G. Walder, Amici Request En Banc Review of Standards on Fee-Splitting, 242 N.Y.L.J. 1, Col. 3 (Sept. 18, 2009) (“[F]ederal court decisions [have] establish[ed] a ‘virtually insurmountable’ standard for determining fees for out-of-district counsel that will ‘rob some civil rights plaintiffs of the only representation they can find.’”).
36 Simmons, 575 F.3d at 175-76.
name” of plaintiff’s selected counsel because such prestige may be achieved in numerous ways that do not necessarily translate into better results.\(^{37}\)

After Simmons, litigants seeking attorneys’ fees must make “a particularized showing, not only that the selection of out-of-district counsel was predicated on experience-based, objective factors, but also of the likelihood that use of in-district counsel would produce a substantially inferior result.”\(^{38}\) While the Simmons court did note that one manner by which a plaintiff could make such a showing was to demonstrate that local counsel possessing requisite experience were unwilling or unable to take the case,\(^{39}\) the court did not explain how the trial court should evaluate plaintiffs’ evidence in such matters.\(^{40}\) Moreover, the court did not identify a procedure or provide guidance for evaluating circumstances in which local counsel may not arguably have the requisite experience or financial resources to try the case. Instead, the court noted in conclusory fashion that where local counsel was “unable or unwilling” to take the case, the presumptive rate is rebutted.\(^{41}\) Without such guidance, the rule is inoperable in that it cannot be applied justly and fairly to common types of cases including employment discrimination class actions.

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\(^{37}\) Id. at 176. However, the court’s wholesale rejection of prestige as a consideration ignores the value “reasonable” clients place on prestige in their selection of counsel. Although prestige could be linked to factors that have nothing to do with competency and effectiveness, prestige could also be linked to factors that increase an attorney’s value. Instead of rejecting consideration of prestige in a wholesale fashion, the court could have required some inquiry into the nature of petitioning counsel’s prestige. For a discussion of the issue of prestige, see infra note 60 and accompanying text.

\(^{38}\) Id. (emphasis added).

\(^{39}\) Id.

\(^{40}\) For example, what does plaintiff need to show to satisfy the burden? How many local attorneys must plaintiff visit and be declined by prior to seeking out-of-district counsel? More importantly, counsel selection is performed at the outset of a case whereas this evaluation is performed at the conclusion of the matter. Thus, the court must evaluate whether plaintiff chose counsel on the basis of a probable substantially better result even though the court is hamstrung with the retrospective knowledge of the ultimate difficulty involved in prosecuting the case.

\(^{41}\) See Simmons, 575 F.3d at 177.
IV. THE CLASS ACTION MECHANISM AND TITLE VII

This section focuses on the class action mechanism as it is used to enforce the statutory objectives of Title VII to demonstrate that the class action attorneys with a specialization in this field should qualify as the “relevant community” for the purposes of the forum rule. This section distinguishes employment discrimination class actions from other types of cases (including other types of class actions and individual employment discrimination cases) in order to illustrate the importance of experience specific to this specialty field and demonstrate the need for an exception to the forum rule for attorneys versed in this very specific practice area.

The Title VII class action practice area is a specialty field because the cases are significantly different from both their individual counterparts and other types of class actions generally. The skill set required of Title VII class action attorneys is distinct from those of other class action attorneys and those of attorneys whose practice focuses on individual discrimination actions. Title VII classes have become increasingly difficult to certify and, in their current form, require extensive use of experts and statistical evidence to satisfy the demands of the certification process. Actions under other employment statutes and causes of action are easier to certify due to their statutory use of different certification procedures or the fact that the courts have been less strict in the application of the procedural mechanism. Class action discrimination cases also

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42 See Michael Waterstone, A New Vision of Public Enforcement, 92 MINN. L. REV. 434, 444 (2007); see also Allison v. Citgo Petrol. Corp., 151 F.3d 402, 407-10 (5th Cir. 1998) (finding Civil Rights Act of 1991 “ultimately render[s] this case unsuitable for class certification under Rule 23”). See generally Suzette M. Malveaux, Fighting to Keep Employment Discrimination Class Actions Alive: How Allison v. Citgo’s Predominance Requirement Threatens to Undermine Title VII Enforcement, 26 BERKELEY J. EMP. & LAB. L. 405 (2005) (arguing the Civil Rights Act of 1991’s changes to remedies have caused courts to improperly make class certification in employment discrimination suits overly difficult). But see Melissa Hart, Will Employment Discrimination Class Actions Survive?, 37 AKRON L. REV. 813 (2005) (arguing courts’ reluctance to certify classes is rooted in a change in perception as to the merits, fairness, and necessity of such actions). The reasons behind this shift have been debated in scholarly and judicial circles. See, e.g., Allison, 151 F.3d 402 (attributing denial of certification to the remedial changes in the Civil Rights Act of 1991); Hart, supra (arguing courts’ reluctance to certify classes is rooted in a change in perception as to the merits, fairness, and necessity of such actions).

43 For example, the Age Discrimination in Employment Act (ADEA), the Equal Pay Act, and the Fair Labor Standards Act utilize the collective action procedure of 29 U.S.C. § 216(b) whereby class members must file “opt-in”
operate under a different proof structure from their individual counterparts. The practice area of employment discrimination class actions is thus a specialty field because such cases differ significantly from both individual discrimination cases and other types of class action cases.

The class action mechanism is essential to broad enforcement of Title VII because many meritorious discrimination cases, particularly those targeting large institutions, would not yield individual damages sufficient to make an action economically feasible. As a general matter, the class action mechanism reduces the costs of litigation for both plaintiffs and defendants alike. The principle at play is that both plaintiffs and defendants are aggregating all potential cases into a single civil action utilizing economies of scale to eliminate duplicative legal fees and other costs that are unnecessary when all cases pertaining to a single issue are tried at once. Despite the fact that both sides to a class action suit benefit from the reduced legal costs, defendants tend to oppose easing rules for filing a class suit or loosening standards for certifying forms with the court to participate in the action. The standard for certifying collective actions is considerably more lenient. In the EPA and FLSA, the cases require less investment and can have a higher return for attorneys due to the statutory liquidated damages provision triggered by a showing of employer willfulness. Due to the smaller investment, potentially larger damages, and greater simplicity involved in procedural hurdles and trying the cases yielding greater chances of prevailing make these cases more attractive to competent counsel.

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44 See Allison v. Citgo Petrol. Corp., 151 F.3d 402, 409 (5th Cir. 1998) (discussing typical theories under which Title VII Classes proceed). “Disparate impact” theories are used to challenge a facially neutral employment policy that adversely affects a protected class of employees disproportionately. See id. (citing Pouncey v. Prudential Ins. Co. of Am., 668 F.2d 795 (5th Cir. 1982)). “Systemic disparate treatment,” also known as “pattern or practice” discrimination, focuses on whether the employer engaged in a pattern or practice of intentional discrimination. See Teamsters v. United States, 431 U.S. 324, 336 (1977). Both causes of action do not work on the individual level. 45 Malveaux, supra note 41, at 406; see also Allison, 151 F.3d at 409 (citing Jenkins v. United Gas Corp., 400 F.2d 28, 34 & n.14 (5th Cir. 1968)) (recognizing the class action device can be implemented to effectively eradicate widespread or institutional discrimination on a large scale under certain circumstances).

46 Madden & Wissink, supra note 16, at 1011. This proposition assumes that all class members would bring individual cases in the absence of the class mechanism. In cases where individual damages are small, this should not be assumed. However, where individual damages are large enough, the assumption is wholly plausible. 47 Madden & Wissink, supra note 15, at 1011; see also Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 99 (2009) (noting plaintiffs seek class certification when aggregate unit will be considerably more valuable than individual claims that form constituent parts of the class).
a class.\textsuperscript{48} Defendants’ opposition to such changes is partially rooted in the fact that plaintiffs’ incentive to file suit increases as their projected legal costs decrease.\textsuperscript{49}

In the context of employment discrimination lawsuits, class actions are not a perfect substitute for an aggregate of individual actions. Employment discrimination class actions rely on a different theory of liability whereby the plaintiffs must prove that the employer engaged in a pattern or practice of discrimination as opposed to simply proving that the employer discriminated against an individual.\textsuperscript{50} To succeed in a pattern or practice suit, plaintiffs must show that the defendant employer engaged in a discriminatory pattern or practice. Plaintiffs generally do so using statistical evidence. Defendant employers then have the burden to establish that plaintiffs’ proof is either inaccurate or insignificant. After succeeding on liability, plaintiffs move to the remedy stage wherein each individual plaintiff must show that they are entitled to relief. This system is more complex and utilizes different types of evidence as compared to an individual disparate treatment suit. In addition to satisfying those requirements, plaintiffs must establish the various requirements to certify a Rule 23 class.\textsuperscript{51}

Notwithstanding the differences between the liability theories of class versus individual discrimination, the reduction in legal fees and costs plaintiffs achieve by utilizing the class action mechanism permits plaintiffs to file suits that are otherwise not economically feasible. If the per

\textsuperscript{48} Madden & Wissink, supra note 16, at 1013.
\textsuperscript{49} Id.
\textsuperscript{50} “Systemic disparate treatment,” also known as “pattern or practice” discrimination, focuses on whether the employer engaged in a pattern or practice of intentional discrimination. See Teamsters v. United States, 431 U.S. 324, 336 (1977). An alternative class theory of liability is the disparate impact theory. Under disparate impact theories of liability, the employer engages in some conduct or imposes some rule that, although facially neutral, results in a disproportionate impact on a protected class. Because employer conduct cannot result in an individual “disparate impact” there is no corollary to an individual theory of liability. As with pattern or practice cases, disparate impact cases require similar efforts on behalf of plaintiffs including but not limited to the use of experts to establish both the disparate impact and the requirements for certifying a class.
\textsuperscript{51} The difficulties of the class certification process for Title VII plaintiffs has been well covered by academic journals and I will not endeavor to add to that body of scholarship. For our purposes, I only note that certification is a significant hurdle in Title VII litigation that requires experts and significant abilities on behalf of plaintiffs’ counsel to overcome the procedural difficulties. For a more in depth discussion of the class certification issue in Title VII litigation, see Malveaux, supra note 41; Hart, supra note 41; Nagareda, supra note 46.
capita damages are low enough, but total damages are sufficiently high when aggregating similarly situated plaintiffs, the class action mechanism permits a case to be brought due to the reduced legal fees and costs. In these class actions, where defendants are only at risk of suit if a class is certified, defendants do not view their costs in the sense that they are choosing between a class action suit and a large number of individual suits; rather, defendants’ potential costs are between defending the class action and defending either very few individual suits or no lawsuit whatsoever. This choice has added to the employment defense bar’s impetus to target the class certification process in employment discrimination class suits: If the class is not certified, defendant will be subject to a significantly reduced potential liability.

Adding motivation to defendants’ strategy of moving the primary battle to the class certification stage is the tremendous economic pressure awaiting defendants after a class is certified. Generally, class certification puts the case on the path to settlement instead of testing the suit on its merits. Once a class is certified, a tremendous amount of economic pressure to settle can build on a defendant.

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52 Madden & Wissink, supra note 16, at 1013; Malveaux, supra note 41, at 418 (“In the absence of [class actions], it is unlikely that a ‘negative value suit’ – an action in which the attorney’s fees exceed the available damages – would be pursued by an individual, and even more unlikely, by an attorney.”). But see Daniel F. Piar, The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991, 2001 B.Y.U. L. Rev. 305, 346 (arguing Rule 42’s provision for consolidation and severance to be equally as efficient as class actions). The Supreme Court endorsed the concept in support of encouraging class actions in Amchem Prods., Inc. v. Windsor: The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor. 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)); see also Nagareda, supra note 46, at 99 (noting plaintiffs seek class certification when aggregate unit will be considerably more valuable than individual claims that form constituent parts of the class).

53 See Nagareda, supra note 46, at 99 (noting class certification allows plaintiffs to pursue actions not otherwise economically feasible); see also Malveaux, supra note 41, at 418 (discussing the importance of class actions to bring “negative value” suits).

54 Nagareda, supra note 46, at 99; see also Selmi, supra note 11, at 1310 (discussing fact that recent large class action employment discrimination cases settled after certification without testing the claims on their merits).

55 Recognizing this pressure, the Third Circuit, in In re Hydrogen Peroxide, held that the district court must conduct an inquiry leading to factual findings beyond a mere threshold showing that each requirement of Rule 23 is met in order to certify a class. 552 F.3d 305, 307 (3d. Cir. 2008). The court’s held further that “[p]laintiffs’ burden at the
In post-certification circumstances, defendants seeking cost certainty in litigation must project their chance of prevailing and use that risk to inform settlement offers. In doing so, defendants weigh the amount they project to pay their own attorneys if the case proceeds all the way through a trial. That cost represents the minimum defendants can expect to pay to conclude the suit. On the other end, defendants must consider the maximum total damages plus both defendant’s and plaintiffs’ projected legal fees and costs thus representing the total cost of suit to a losing defendant.

As the class certification process trends toward increasingly difficult and expensive certification battles, plaintiffs’ firms have stayed in the business of prosecuting employment discrimination class actions only by dispersing the risk across several firms. While many firms could be capable of navigating the various procedural hurdles leading to certification (assuming the requisite experience), a significant hurdle for all firms is financing the case for several years without any return on the investment. In the last two years, eight reported settlements have been approved in Title VII class actions in excess of two million dollars. Every one of these eight

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56 This concept is, in essence, the inverse of Madden & Wissink’s analysis of plaintiffs’ incentives. See Madden & Wissink, supra note 16, at 1006 for discussion of how plaintiffs’ incentives are affected by their expected legal net benefits. To ascertain defendants’ expected legal net costs, defendants must determine the expected value of damages by multiplying the actual value of damages plus plaintiffs’ projected attorneys fees by the a priori probability that defendant will lose. Defendant must then add his own legal fees and costs to the expected value of damages to determine the value of a suit at any given juncture. However, since the outcome of a suit is never certain, the only certainty is achieved by settlement. In Appendix A, a hypothetical plaintiff class’ expected value – a function of the projected probability of winning, expected recovery, and expected costs – for settlement purposes is demonstrated at various stages of trial.

cases had multiple plaintiffs’ firms cooperate to finance and prosecute the cases that ranged from two to seven years from filing to settlement approval and resulted in $800,000 to $9 million in attorneys’ fees and costs. Few firms could advance that time and out-of-pocket expenses for such a duration particularly with an increasingly uncertain chance of success at the certification stage.

As employment discrimination jurisprudence continues to trend toward making class certification more difficult, the law needs to account for the changing incentives for plaintiffs’ lawyers. If Congress felt compelled to institute a fee-shifting provision in the statute, whether other statutory changes alter the incentives of attorneys must be considered when applying the fee-shifting provision. In essence, since competent counsel are already less likely to take on a case because the risks increased sufficiently to change the risk-reward calculation, courts must strongly consider whether tightening standards for awarding attorneys fees are consistent with the enduring purpose of the fee-shifting provision. Moreover, as the procedural hurdles become increasingly difficult to navigate, the need for specialists in the class action employment discrimination field is enhanced. Without some recognition of the increased value these specialists bring to class discrimination cases, courts discourage attorneys from specializing and, in turn, decrease the available pool of specialists.


See Bellifemine, No. 07-cv-02207 (two firms settling three years after filing including $4.6 million in attorneys’ fees); Tucker, No. 05-CV-440 (three firms settling three years after filing including $5.5 million in attorneys’ fees); Wright, 553 F. Supp. 2d 337 (four firms, NAACP and New York Attorney General settling seven years after filing including $9 million in fees and costs); Curtis-Bauer, No. 06-CV-3903 (four firms settling two years after filing including $800,000 in fees); Wynne, 06-cv-3153 (more than three firms settling two years after filing including $900,000 in attorneys’ fees); Nelson, 04-CV-00171 (eight firms settling five years after filing including $6.1 million in fees and costs); Wade, 01-cv-699 (five firms settling seven years after filing including $4 million in fees); Warren, 01-CV-2909 (two firms settling seven years after filing including $4 million in fees).
V. The Inherent Inadequacy of the Forum Rule in Class Action Employment Discrimination Cases

The Second Circuit’s strict forum rule relies on several fundamental misunderstandings about both paying clients and the economic operations and incentives of discrimination class actions. This section reviews the economic considerations in discrimination lawsuits in an effort to elucidate the reasonable paying client’s economic considerations, the inadequacy of the standard for overcoming the forum rule’s presumptively reasonable rate, as well as the issues specific to class action employment discrimination cases and the firms that prosecute them.

Attorneys in Title VII suits are selected with different methods and based on different criteria depending upon the type of case and which party is selecting. A plaintiff who anticipates having to pay her own legal fees in the event she does not prevail will select an attorney she can afford whom she believes will adequately and competently represent her interests. As part of evaluating her case, such a plaintiff must balance the costs she will incur if she loses against the potential recovery while accounting for the relative probabilities of each outcome. Plaintiffs must also account for the quality of defense counsel when selecting counsel. The quality of defense counsel has a direct effect on plaintiffs’ chance of winning because lower quality defense counsel is more likely to make an error or fail to make a winning argument. This effect is largely independent of plaintiffs’ choice of counsel because regardless of the quality of defense counsel, the outcome is determined by the quality of the evidence and arguments presented.

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59 Determining the value of the suit for individual plaintiffs requires a calculation based on the probability of winning or losing. The relative probability of winning or losing must then be multiplied by the cost or gain associated with each outcome. If plaintiff loses, the cost will be the number of attorney hours expended multiplied by the attorney’s hourly rate. If plaintiff wins, the gain will be equal to the monetary relief. The difference between the expected cost of losing and the expected gain in the event plaintiff prevails is the “expected value” of the suit. Where the expected value is positive, the suit is economically feasible. This calculation, however, does not account for the risk aversion of a party. For a discussion of risk aversion and capital limitations in plaintiffs, see infra note 63-68 and accompanying text.

60 Appendix A provides an hypothetical example of the effect of defense counsel quality on plaintiffs’ prospect of prevailing. The theory is simply that as defense counsel’s quality improves, plaintiffs’ chance of prevailing decreases absent a corresponding increase in the quality of plaintiffs’ counsel.
plaintiffs’ counsel, plaintiffs’ chance of winning increases as defendant’s counsel quality decreases.

Defendant employers, on the other hand, often have experienced employment defense counsel on retainer but even when they do not (or where retained counsel does not specialize in class actions), they select counsel based upon factors including but not limited to counsel’s reputation and experience. Defendants, unlike plaintiffs, do not stand to gain anything from prevailing in Title VII litigation. Rather, defendants are seeking to minimize monetary costs and avoid judgments that show the defendant employer discriminated against its employees. At a minimum, defendants expect to pay their own attorneys’ fees billed in bringing the suit to a favorable result. At a maximum, defendants must pay plaintiffs’ monetary award and both parties’ attorneys’ fees. The gross disparity between the two figures justifies a large fee for an attorney the defendant employer reasonably believes gives defendant an edge. Moreover, employers often take large Title VII lawsuits more seriously than their financial impact necessitates indicating a desire on the behalf of employers to avoid losing such a suit and be labeled a discriminating employer.62

The Second Circuit’s application of the forum rule treats plaintiffs unfairly because the rule ignores fundamental differences between plaintiffs’ and defendants’ financial situations. The rule is based on the actions of the reasonable paying plaintiff but ignores financial factors that skew plaintiffs’ behavior. Plaintiffs have smaller budgets and lack access to capital markets

61 Reputation is an index of past success and the market’s expectation of future success. Therefore, reputation is a particularly important indicator of quality for defendant employers seeking to gauge an attorneys’ quality. Note however, that plaintiffs are expressly prohibited from hiring attorneys based on reputation and prestige. See Simmons v. New York City Trans. Auth., 575 F.3d 170, 175-76 (2d Cir. 2009). The Simmons court noted “[l]awyers can achieve prestige and fame in numerous ways that do not necessarily translate into better results” and summarily dismissed the use of reputational factors in assessing the reasonableness of plaintiffs’ counsel choice. Id. at 176.

62 See Selmi, supra note 11, at 1250. Selmi notes that many changes implemented by employers as part of settlements are primarily designed to address public relations problems as opposed to meaningful reform.
which keeps paying plaintiffs from being able to finance expensive litigation. The Second Circuit, for purposes of the forum rule, creates a legal fiction of a “reasonable paying plaintiff.” When creating this fictional party, the court imputes an ability to pay for counsel’s services. The court should not, however, impute the financial differences between plaintiffs and defendants and should, instead, assume a reasonable paying plaintiff would simply behave in an economically efficient manner.\(^{63}\)

One primary financial difference between an individual paying plaintiff and a defendant employer in selecting counsel is that plaintiffs are risk averse. Since legal expenditures are a smaller share of the defendant employer’s overall budget as compared to an individual plaintiff,\(^{64}\) the latter is likely to be more risk averse than the employer. Even where employers have internal capital constraints, their ability to borrow to finance litigation is greater than their individual employees’ ability. As a result, the plaintiff is less likely to pursue a case which involves paying $10,000 to an attorney who offers a $15,000 greater expected outcome while the defendant who is risk neutral will hire an attorney who could reduce the expected damages by $15,000 but would cost an additional $10,000.

Another important financial difference between individual plaintiffs and defendant employers seeking an attorney is that the plaintiffs’ budget for legal services is limited by their income and constrained individual ability to borrow to finance the litigation.\(^{65}\) Defendant employers, by contrast, have larger budgets and greater access to capital markets (both internal to

\(^{63}\) “Economically efficient” in this context means that the expected cost of counsel’s legal services is less than the expected recovery.

\(^{64}\) See Selmi, supra note 11, at 1266 (noting settlements in author’s study fell below 3.5% of each employer’s capitalization with some falling below 1%); id. (noting $104 million dollar settlement agreed to by Home Depot in a discrimination suit amounted to two weeks’ pretax profit); cf. id. at 1250 (discussing author’s statistical study that found Title VII lawsuits did not substantially influence stock prices).

\(^{65}\) In the class action context, the named plaintiffs are not constrained as to their individual ability to borrow to finance the litigation. Rather the class counsel finances the litigation on behalf of the class. Nonetheless, in the forum rule’s fictional world where the Title VII plaintiff would pay counsel absent the fee-shifting provision, that plaintiff is so limited.
the company and externally) to finance litigation.\textsuperscript{66} Thus, even where plaintiffs are willing to
gamble high percentages of their income on a higher expected result, they lack the ability to raise
sufficient capital to pursue claims that require significant investment.

Since plaintiffs who pay for their own legal fees are highly risk averse when weighing
whether to file suit, their chance of prevailing or their expected recovery must increase more
with respect to each additional dollar in legal fees than do defendants.\textsuperscript{67} Defendants are more
likely to be risk neutral resulting in less sensitivity to increases in legal costs.\textsuperscript{68} Furthermore,
companies can include the costs of defending such lawsuits in their budget.\textsuperscript{69} Courts should not
use plaintiffs’ risk aversion in evaluating the reasonableness of a non-paying plaintiffs’ counsel
selection because the aversion to risk improperly skews plaintiffs’ demand for legal services and
would likely result in even the local market rate exceeding the amount plaintiffs may be willing
to pay. Since the court is already creating a legal fiction to contemplate the reasonableness of the

\textsuperscript{66} Although individual employer’s access to capital and capital markets vary, in the vast majority of cases, the
employer’s access is substantially greater than that of their plaintiff employees’ access.

\textsuperscript{67} Consider the plaintiff who must pay her own fees and seeks to employ an attorney at $400 per hour to prosecute
her discriminatory termination case from her job that paid $40,000 per year. Assume that attorney will need to
spend 50 hours on the case to conceivably prevail. If plaintiff does not prevail, she must pay that attorney $20,000 –
half her former yearly earnings. Regardless of the prospect of winning, an individual victim of discrimination will
be extremely hesitant to put $20,000 of her own money on the line in her case. The idea that such a plaintiff would
double her hourly rate liability to hire a New York City litigation partner and result in $40,000 to marginally
increase her chances of prevailing seems absurd. Thus, the plaintiff’s demand is elastic because increases in the cost
of legal services cause plaintiff’s demand to drop precipitously. Nevertheless, significant increases in the

\textsuperscript{68} Consider a defendant employer with $1 million in yearly profits. As a matter of economics, when the defendant is
sued by the plaintiff depicted in note 66, supra, the defendant will pay counsel more to the extent of the expected
 savings on the judgment. Thus, this defendant employer is more likely to employ counsel that is more expensive to
gain even a minimal advantage in the litigation provided defendant’s expected costs are reduced by as much or more
than the difference in legal costs. While defendant employers tend to be risk neutral, other factors can skew a
defendant’s choice of counsel including a concern for reputational harm that the suit may cause creating costs
external to the litigation that the employer internalizes with counsel selection. See Selmi, supra note 11, at 1250
(noting managers take Title VII class actions more seriously than their financial impact).

\textsuperscript{69} See Selmi, supra note 11, at 1266 (noting settlements in author’s study fell below 3.5% of each employer’s
capitalization with some falling below 1%); id. (noting $104 million dollar settlement agreed to by Home Depot in a
discrimination suit amounted to two weeks’ pretax profit); cf. id. at 1250 (discussing author’s statistical study that
found Title VII lawsuits did not substantially influence stock prices).
attorneys’ fees, the court should seek simply to discern whether plaintiffs’ counsel selections are economically efficient.

Notwithstanding the effect a party’s aversion to risk has on their decision to retain one counsel over another, the reasonableness of counsel selection is rooted in the expected value of the suit. At a basic level, both plaintiffs and defendants make a decision about which counsel to hire based on how counsel’s quality and cost affects the suit’s expected value. Plaintiffs’ expected value – assuming they pay their own legal fees if they do not prevail – is determined by multiplying the cost of losing and the potential recovery by the relative probabilities of each occurring and determining the difference between the two products.\(^{70}\) Defendant employers, by contrast, have a negative value for the suit because regardless of whether the employer prevails, the employer must pay its own legal fees; and if the employer loses, the employer must pay the plaintiffs’ damages and attorneys’ fees as well. The economically efficient employer thus hires counsel so as to minimize the expected cost. The employer’s expected cost of the suit is equal to the legal costs in the action plus the product of the probability of losing times the damages awarded.\(^{71}\)

The Second Circuit has also articulated the forum rule in too simplistic a manner. According to the court in *Simmons v. New York City Transit Authority*,\(^ {72}\) reasonable paying plaintiffs would not pay a high hourly rate for an out of town attorney when they could hire a local attorney at a lower rate.\(^ {73}\) This assessment of the economic incentives fails on three levels. First, the forum rule incorrectly assumes reasonable paying plaintiffs, notwithstanding any risk

\(^{70}\) For example, at a basic level, if plaintiff has a 50-50 chance of prevailing in her suit and her fees would cost her $10,000 if she prevails and she would receive $100,000 if she wins, her expected value for the suit is equal to: 
$100,000 \times 50\% - $10,000 \times 50\% = $50,000 - $5,000 = $45,000$

\(^{71}\) For example, if defendant has a 50-50 chance of winning in a suit brought by the plaintiff in note 69, supra, defendant has a 50% chance of paying his own legal fees of $20,000 and a 50% chance of paying plaintiff’s relief plus his own legal fees. Thus, defendant’s expected cost is equal to: 
-$20,000 \times 50\% \times $100,000 = -$70,000$

\(^{72}\) 575 F.3d 170 (2d Cir. 2009).

\(^{73}\) See *Simmons*, 575 F.3d at 176 (quoting Chrapliwy v. Uniroyal, Inc., 670 F.2d 760, 768 (7th Cir. 1982)).
aversion or capital limitations,\textsuperscript{74} will choose an attorney based on the hourly rate rather than the economically efficient expected value at the outset of the suit.\textsuperscript{75} Second, the forum rule incorrectly assumes that the high-priced out-of-district attorney and the cheaper local attorney would both prevail and proceeds to determine whether plaintiffs’ choice is reasonable based on the degree of success obtained. The forum rule thus creates a false choice between two attorneys when assessing the reasonability of a rate instead of recognizing plaintiffs’ choice of counsel as reasonable so long as the choice is economically efficient. Lastly, the forum rule misunderstands the nature and process of economically efficient counsel selection in a class action.\textsuperscript{76}

In Title VII class action litigation, the proper metric to assess the reasonableness of plaintiffs’ counsel selection is the attorney’s effect on the expected value of the suit relative to his hourly rate. Plaintiffs selecting counsel based on expected value will look to three core attributes: (1) the attorney’s probability of winning or losing; (2) the total expected recovery if plaintiffs prevail; and (3) the costs including both attorney time costs and out-of-pocket expenses.\textsuperscript{77} When evaluating expected values in this manner, increases in the probability of prevailing need not be large to justify a substantially higher hourly rate if the damages are high enough.\textsuperscript{78} Yet, the standard the forum rule requires is that plaintiffs demonstrate that more

\textsuperscript{74} Whether the forum rule should apply to the individual plaintiff in Title VII litigation is debatable because of the effect risk aversion and limitations on access to capital have on the reasonable paying plaintiff. In the context of a class action, on the other hand, the relevant party for risk and capital considerations is actually the class action law firm who stands to lose if the plaintiff does not prevail and recoup their investment only if plaintiff does prevail. Unlike strictly budgeted plaintiffs, however, class action law firms have access to capital markets which, although they may not be as accessible as many employers, far surpass the financial capabilities of individual plaintiffs. Therefore, the issue of risk aversion does not affect plaintiffs’ selection of class counsel.

\textsuperscript{75} See Simmons, 575 F.3d at 176 (quoting Chrapliwy v. Uniroyal, Inc., 670 F.2d 760, 768 (7th Cir. 1982)) (setting up the inquiry as a comparison of the hourly rates and not the expected value of the suit).

\textsuperscript{76} See infra text accompanying notes 92-97 (discussing counsel selection in class actions).

\textsuperscript{77} See Appendix A (displaying a hypothetical breakdown of the interaction between these three attributes)

\textsuperscript{78} See generally Appendix A. Assuming the plaintiff must pay her own legal fees if she does not prevail – the fiction the forum rule requires - an individual plaintiff must evaluate the value of her suit based upon the cost of losing, the potential recovery, and the relative probabilities of each result. Appendix A is a matrix showing the probability of success and the expected value at several junctures in a large hypothetical discrimination class suit depending upon the counsel selection of plaintiffs and defendant. Since plaintiffs select counsel before filing the suit, plaintiffs’
expensive out-of-district counsel would likely, and not just possibly, produce a substantially better result.\textsuperscript{79} Proving that more expensive counsel “likely” provided a slightly better probability of prevailing leading to a substantially higher expected outcome is simply impossible.\textsuperscript{80}

By way of example, Appendix A provides a matrix showing the considerations a plaintiff class might undertake in a hypothetical class action. In this suit, plaintiffs could receive $125 million if they succeed at trial. But, before getting to that point, plaintiffs must survive several motions for which, if the defendants prevail, plaintiffs’ suit is effectively over.\textsuperscript{81} Thus, the probability that plaintiffs prevail is significantly lower than the “coin flip” metaphor commonly used to describe parties’ prospects in litigation.\textsuperscript{82} Even though the overall prospects of prevailing are low, small changes in quality of counsel get magnified when carried through multiple potentially dispositive stages.\textsuperscript{83} When plaintiffs select counsel, they are making the selection of counsel and decision to file should be reasonable at the “Pre-Case Aggregate” stage. To be reasonable or economically efficient, the plaintiff should select the attorney yielding the highest “Expected Value.” Regardless of whether defendants select local non-specialty counsel or out-of-district class specialists, the “Expected Value” is larger for the expensive specialty counsel in this suit.\textsuperscript{84} See Simmons, 575 F.3d at 175.

\textsuperscript{80} Since class action discrimination suits are usually settled either before certification or after certification but before trial, even though a suit has identical total damages, the resulting settlement will be a function of the expected value. Thus, a higher settlement value will be based on an attorneys’ providing a higher expected value of the suit at the particular moment the case is settled.

\textsuperscript{81} Although many of other motions would surely be filed in such a case, the motion to dismiss, the motion for class certification, and the motion for summary judgment represent the critical motions in the litigation. While other motions could significantly affect plaintiffs’ prospects of success, for the sake of simplicity, they will not be considered.

\textsuperscript{82} As seen in Appendix A, the “Pre-Case Aggregate’s” “Chance of Winning” (i.e. 11.03% vs. 5.77% vs. 14.97% vs. 9.8%) is equal to the probability of prevailing at each stage of the litigation which is the product of the probability of winning at each stage. For the first panel, the calculation is 11.03% = 98% * 45% * 50% * 50%.

\textsuperscript{83} For example, if Attorney A provides a 50% chance of prevailing at the class certification stage, the summary judgment stage, and the trial stage and the Attorney B provides only a 45% chance of prevailing at each stage, the chance of prevailing is calculated as follows:

\begin{align*}
\text{Attorney A provides plaintiffs a 12.5% chance of prevailing because the product of the probability of prevailing at each stage} &= 50\% \times 50\% \times 50\% = 12.5\% \\
\text{Attorney B provides plaintiffs a 9\% chance of prevailing because the product of the probability of prevailing at each stage} &= 45\% \times 45\% \times 45\% = 9\%.
\end{align*}

The difference between the overall probability of prevailing before the case has been filed is equal to 3.5\%. Thus, Attorney A provides plaintiffs with a 3.5\% better chance of prevailing than Attorney B. While a 3.5\% difference may not seem like a lot, the better attorney actually provides plaintiff a 25\% better chance of prevailing. However,
selection at a point in the case timeline where recovery is highly uncertain and the probability of prevailing is below fifteen percent at best. Proving that one attorney provided an 11% probability of prevailing while another provides a 6% probability is simply an impossible task. However, the difference in the expected value of the suit is significant to plaintiffs.

Moreover, by forcing the legal fiction of a choice between two attorneys with different hourly rates, the circuit has missed the importance the “all-or-nothing” concept driving counsel selection for litigation. Instead of doing a comparison of two firms, the court should evaluate the reasonableness of plaintiffs’ perception that counsel could possibly achieve success – instead of likely achieve a substantially better result. In litigation, plaintiffs and class counsel have the primary goal of prevailing in the litigation and the secondary goal of increasing the ultimate monetary relief since, in the absence of prevailing, plaintiffs and counsel get nothing. The Second Circuit, instead, presupposes success – since the fee petition would not be before the court in the absence of success – and seeks only to determine whether plaintiff needed that counsel after counsel has already succeeded. This retrospective analysis of a decision made prospectively by plaintiffs and plaintiffs’ counsel is inappropriate and unwarranted.

The Simmons standard requires plaintiffs show that the higher priced counsel would “likely” produce a “substantially better result.” Thus, the Second Circuit requires a demonstration that a better result is likely and that the result will be substantially better as empirically proving that Attorney A provided plaintiffs a 3.5% better chance of prevailing is impossible. Appendix A represents a more detailed example of such an attorney comparison.

See Appendix A (showing the various “Chance of Winning” values at the “Pre-Case Aggregate” stage in the first row of each panel/scenario).

Even though plaintiffs in Appendix A are selecting between attorneys with dramatically different hourly rates of $850 per hour and $350 per hour, the expected values show that the more expensive attorney yields an expected value that is higher than the difference between the two attorneys expected costs. Thus, the selection of the more expensive counsel is more economically efficient.

The “all-or-nothing” concept is that plaintiffs are in a situation at several junctures in the case where they could either win something or lose everything. In such a situation, plaintiffs behaving in an economically efficient manner will pay more for counsel who gives them any greater probability of success at each stage to the extent of the increase in expected value. See infra note 88, for an example of the operation of this concept.

Simmons, 575 F.3d at 175.
opposed to an increased expected value that is greater than the additional fees.\textsuperscript{88} However, if we look only at two options for the result – prevailing or not prevailing – small increases in the plaintiff’s chance of winning have a serious effect on plaintiffs’ expected outcome or value of the suit. In this “all-or-nothing” situation, a reasonable paying client is willing to pay an attorney the entire additional value of the case that the attorney generates notwithstanding the increased liability for legal fees should the client lose.\textsuperscript{89} This reasonable paying client will pay more for an attorney who could “possibly” be more likely to prevail so long as the expected increase in damages is greater than the increase in attorneys’ fees – indicating that based on relative probabilities, the suit will make sufficient money to pay plaintiffs’ costs.

The importance of the “all-or-nothing” concept is that it directly refutes the legal fiction the Second Circuit has created whereby the reasonable paying client must look at the expensive out-of-district counsel and compare him to local cheaper counsel and make a determination solely based on the hourly rate and substantial quality disparities. When paying plaintiffs are faced with the prospect of just “maybe” losing everything, they will risk and pay significantly more provided the excess fees are less than the expected proceeds from the suit.

Further complicating the reasonable paying client’s motivations in class cases are the procedural hurdles that must be overcome to arrive at a settlement or jury award. Although individual cases have their own procedural hurdles, class action lawsuits have an additional expensive and risky hurdle: class certification.\textsuperscript{90} At every effectively dispositive hurdle, such as

\textsuperscript{88} Simmons, 575 F.3d at 175.
\textsuperscript{89} For example, if an Attorney A provides a 60% chance of winning a case that will receive $100,000 in damages and Attorney B provides a 50% chance of winning that same sum, the “all-or-nothing” nature of the litigation will make a reasonable plaintiff willing to pay the entire difference between the expected values to the attorney just to gain the additional opportunity to win. In this example, the expected proceeds from Attorney A are equal to $100,000 \times 60\% = $60,000 and the expected proceeds from Attorney B are equal to $100,000 \times 50\% = $50,000. Thus, pursuant to the “all-or-nothing” concept, plaintiffs would be willing to pay Attorney A $10,000 more than Attorney B even though, if plaintiff loses, plaintiff has to pay more money.
\textsuperscript{90} See supra note 41, for a discussion of the increased difficulty of certifying classes in Title VII actions.
motions to dismiss, class certification, summary judgment and trial, plaintiffs are put in an all-or-nothing situation in which they have a certain probability of winning or losing. To arrive at a settlement or jury award, plaintiffs’ counsel must navigate and succeed at each stage of the litigation that they face. If plaintiffs reasonably believe that counsel provides even a slight advantage over alternate cheaper counsel and paying that counsel’s rates yields a positive expected value, then plaintiffs’ choice of more expensive out-of-district counsel is economically efficient and reasonable. But more importantly, if chosen counsel provides even a narrow advantage over alternate counsel at each stage, those advantages are multiplied.

Additionally, class action attorneys are selected in a very different way from attorneys representing individual plaintiffs. Very often, a local firm receives a client but the firm realizes that it cannot handle the financial and time commitments of the case. The small firm seeks out a class action boutique law firm experienced in handling the procedural demands of such a suit and capable of bearing the financial burdens as well. However, even these boutique firms generally spread their risk over multiple cases and by employing the use of likewise experienced co-counsel to prosecute each case. To devote sufficient resources for each case while managing risk,

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91 See, e.g., Appendix A (providing hypothetical probabilities of prevailing at each stage and the effects on the expected value of the suit going forward after plaintiffs prevails at the stage).
92 See generally Appendix A (showing dramatically different results for counsel who offer minor advantages in the overall litigation). For example, consider the first two scenarios in Appendix A. Defendants have hired an expensive attorney. The first panel illustrates the outcome probabilities where plaintiffs also hire an expensive specialty attorney and the second shows the plaintiffs’ alternative of hiring a non-specialty local attorney. Prior to filing the case, the plaintiffs have an 11.03% chance of winning the case with the more expensive specialty attorney and a 5.77% chance of winning with the cheaper local attorney. See supra note 78 (describing the basis for the chances of winning pre-filing). At each stage of the litigation, the specialty attorney provides the plaintiff class with a marginally better chance of prevailing (e.g. a 98% chance of prevailing vs. a 95% chance of prevailing at the motion to dismiss stage). The last column, “Expected Value” represents the expected value as the case goes forward based on the relative probabilities of prevailing in the remaining stages. Therefore, in the first scenario, if the plaintiff class is certified, the attorney in the first panel has an expected value of $21.1 million going forward to summary judgment and trial as compared to $20 million for the local attorney in the second panel. Thus, the plaintiff class could reasonably settle after certification for $21.1 million if represented by the specialty counsel but only $20 million if represented by local counsel. According to the chart, the more expensive specialty counsel who offers these relatively minor advantages at each stage is worth approximately $2 million more to plaintiffs than the local attorney.
these firms team up with other boutique firms on a regular basis to spread the risk and hedge their finances to increase their chances of recouping more money over all of their cases. Under these circumstances, plaintiffs’ selection of counsel essentially stops at the point local counsel refers the case out to a boutique. These boutiques, in turn, make their own selections of co-counsel while consulting the plaintiff only to the extent necessary to satisfy ethical requirements and to keep the client informed.\footnote{Note, however, that this situation is not significantly different from how defendants may seek counsel in cases where their retained counsel does not possess the desired expertise.}

Class action firms have incentives in common with both individual employee plaintiffs and defendant employers. Because class plaintiffs almost never stand to pay class counsel in the event plaintiffs lose, class action firms stand to lose substantial sums of money if they lose the case just as defendant employers do.\footnote{Firms in class action employment discrimination cases front time and costs in substantial quantities for extended periods. \textit{See, e.g.}, Tucker v. Walgreen, No. 05-CV-440 (S.D. Ill. 2008) (filed in 2005, none of the $915,000 in costs and $7.7 million in fees recouped until 2008 when costs and 60% of fees were awarded); Wright v. Stern, No. 01-CV-4437, 553 F. Supp. 2d 337 (S.D.N.Y. May 15, 2008) (filed in 2001, $1.2 million in costs and $11 million in fees not recouped until 2008); Wade v. Kroger Co., No. 3:01-CV-00699, 2008 WL 4999171 (W.D. Ky. Nov. 20, 2008) (filed in 2001, $350,000 in costs and $2.5 million in fees not recouped until 2008); Warren v. Xerox Corp., No. 1:01-CV-02909, 2008 WL 4371367 (E.D.N.Y. Sept. 19 2008) (filed in 2001, no fees and costs recouped until 2008 when awarded $4 million at settlement); \textit{see also} Davis v. Eastman Kodak Co., No. 6:04-CV-06098 (W.D.N.Y.) (filed in 2004, Berger & Montague, P.C., Garwin, Gerstein & Fisher, LLP, and The Chavers Law Firm have expended more than $13 million in hours and expenses while prosecuting the case and negotiating settlement but as of February 27, 2010, court has yet to approve the settlement award of $9.7 million in fees and costs).} However, like plaintiffs, the firm stands to gain substantially if plaintiffs prevail. Both plaintiffs firms and defense firms must set their rates at a level expected to make the firm a profit, but unlike defense firms, plaintiffs firms do not actually receive a return on every dollar billed to clients because the firm does not win every case yet is only paid for cases won. Ultimately, the Second Circuit’s forum rule holds class action firms to the standard of an individual plaintiff barely capable of paying legal fees which ignores the class action firm model and incentives in selecting co-counsel and billing fees and expenses.\footnote{Once the local counsel brings in a class action boutique to finance and run the case, the boutique brings in other firms to spread the risks and financial commitments. The first class action boutique firm has a very different set of incentives from the initial plaintiff and the defendant employer. Like the defendant employer but unlike the plaintiff}

\footnote{Note, however, that this situation is not significantly different from how defendants may seek counsel in cases where their retained counsel does not possess the desired expertise.}
\footnote{Firms in class action employment discrimination cases front time and costs in substantial quantities for extended periods. \textit{See, e.g.}, Tucker v. Walgreen, No. 05-CV-440 (S.D. Ill. 2008) (filed in 2005, none of the $915,000 in costs and $7.7 million in fees recouped until 2008 when costs and 60% of fees were awarded); Wright v. Stern, No. 01-CV-4437, 553 F. Supp. 2d 337 (S.D.N.Y. May 15, 2008) (filed in 2001, $1.2 million in costs and $11 million in fees not recouped until 2008); Wade v. Kroger Co., No. 3:01-CV-00699, 2008 WL 4999171 (W.D. Ky. Nov. 20, 2008) (filed in 2001, $350,000 in costs and $2.5 million in fees not recouped until 2008); Warren v. Xerox Corp., No. 1:01-CV-02909, 2008 WL 4371367 (E.D.N.Y. Sept. 19 2008) (filed in 2001, no fees and costs recouped until 2008 when awarded $4 million at settlement); \textit{see also} Davis v. Eastman Kodak Co., No. 6:04-CV-06098 (W.D.N.Y.) (filed in 2004, Berger & Montague, P.C., Garwin, Gerstein & Fisher, LLP, and The Chavers Law Firm have expended more than $13 million in hours and expenses while prosecuting the case and negotiating settlement but as of February 27, 2010, court has yet to approve the settlement award of $9.7 million in fees and costs).}
most employment discrimination class action specialists are also capable – and indeed do –
handle other types of class action cases, they must receive fees in an amount sufficient to attract
them to discrimination cases.97

A class action firm that undertakes to represent an employment discrimination class will
seek firms based upon their ability to co-finance the litigation and the initiating firm’s perception
of the prospective partner firms’ ability to increase the likelihood of prevailing. Thus, class
action firms are seeking to mitigate potential losses and increase the possibility of recovery.
Since the potential recovery is large in class cases, class counsel is reasonably economically
motivated in selecting partner firms who either increase the chance of prevailing by whatever
amount or co-finance to reduce the class firm’s exposure in the event the class loses.98 Moreover,
like paying plaintiffs, class action firms are in an all-or-nothing situation whereby they must
prevail in the suit to recover any of their cash or labor outlays.

For a plaintiffs firm99 to be profitable, the firm must diversify its portfolio of cases
considering a number of factors. First, for each potential case, the firm must estimate the
ultimate recovery for both the plaintiff and the firm. To achieve this figure, the firm must
evaluate the total monetary damages and any attorneys’ fees the firm may recoup by operation of
a fee-shifting statute. Second, the firm must evaluate the likely duration of the litigation before

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97 This statement presupposes the need for class action specialists to try these types of cases. Given that
specialists in class action employment discrimination cases are the most competent to adequately represent the
interests of the class, the rates for such attorneys must be, at a minimum, commensurate with their wage
expectations in other cases or else the prevailing rate is too low to attract competent counsel.
98 See Appendix A, (demonstrating expected value of a large class case as well as the projected expenditures needed
to be spread across class counsel)
99 For the purposes of this discussion, the hypothetical plaintiffs firm operates exclusively on a contingent fee basis.
any of the money invested is returned. Third, the firm must ascertain the *a priori* likelihood of success. Finally, the firm must determine both what the actual costs of the litigation will be – *e.g.* , expert witness fees, travel, court reporters, etc. – and the time costs – *i.e.*, the value of the attorneys’ time multiplied by the number of attorney hours expected to bring the case to the desired result.

After the firm evaluates each of these factors, the firm must calculate the value of the particular case. The calculation requires multiplying the total damages by the probability of success to obtain the gross prospective gain. While this evaluation is generally informal, the calculation produces a range of results the firm will use to decide whether the case merits investment. Then, the firm must evaluate the likely duration of the suit to determine whether the result will merit investment given the “time value of money” and the extent to which the firm must commit its capital for extended durations so as to inhibit the firm from engaging in other representations. The firm’s ultimate evaluation of the case is based on the “value ratio” achieved by comparing the gross prospective gain to the actual cost. Whether attorneys will work on the case is rooted in whether their time is best spent on that case or on cases with better value ratios.

The prospect for the recovery of attorneys’ fees and costs has a significant effect on the value ratio of the case in employment discrimination litigation. Since fees in Title VII cases are usually determined by multiplying the reasonable hourly rate by the reasonable number of hours expended and not a percentage of the recovery, the value assigned to the “reasonable rate” is the most significant positive factor in the value ratio. By decreasing fees, courts reduce the incentive

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100 In addition to the “time value of money,” discussed infra, the estimated duration of the litigation is important to firms because firms have finite resources and if their attorneys’ time and finances are tied up in one case, it can inhibit their ability to take on a larger more profitable case.

101 The basic premise underlying the time value of money is that if the firm took the actual cash it invests in the costs associated with bringing the case and invested the money of the expected duration of the case, the cash would accumulate some sort of return, *e.g.* interest.
for competent counsel to take on Title VII cases because the value ratio declines.\footnote{Of course, rules like the forum rule apply to all fee-shifting statutes including the Fair Labor Standards Act, and thus suppression of fee rates alone across the board have less effect on the incentives related to the value ratio. However, other remedial employment statutes like the Fair Labor Standards Act have significantly lower costs and a higher probability of prevailing. Thus, each dollar decrease in fee rate has a greater effect on the value ratio for employment discrimination cases than for FLSA cases. See \textit{supra} note 40, for discussion of the difference between FLSA, EPA, and ADEA collective action mechanism versus the Title VII class mechanism.} When the value ratio falls below the ratio applicable to other types of class cases, the class action specialty counsel will shift their practice to the other types of cases leaving Title VII classes without the competent counsel necessary to ensure proper enforcement of Title VII.

\textbf{VI. THE FLAWED FORUM RULE IS FURTHER WEIGHED DOWN BY NEGATIVE POLICY EFFECTS}

The Second Circuit’s forum rule inappropriately applies a destructive retrospective analysis to reduce fees awarded to prevailing plaintiffs in Title VII cases. In the context of class actions, this rule could either effectively end the use of the class action mechanism or create a two tiered system of Title VII enforcement whereby employees in geographic districts with higher market rates can obtain competent counsel but similar employees in rural districts cannot – or must settle for counsel of lesser quality and experience. The forum rule misunderstands the economic considerations of plaintiffs and class counsel and subverts plaintiffs’ right to select their own counsel.

The effect of the forum rule is to discourage highly qualified employment discrimination class action counsel from well-respected firms with large budgets to take on class employment discrimination cases in districts where lawyers have lower hourly rates by altering the risk-reward balance. The rule reduces potential rewards for the firms that invest large amounts of money into cases that are becoming increasingly difficult to try. As it currently stands, few firms are capable of taking on larger class cases and the imposition of this rule could force them out of the field altogether (or except in cases that can be brought in New York City). Of the eight Title...
VII settlements in excess of two million dollars in the past two years, three featured firms named as “Top Employment Law Firms of 2009” by Employment Law360, a publication that follows employment law settlements and two of the other five classes were represented by the well-known class action law firms, Cohen, Milstein, Sellers & Toll and the firm formerly known as Milberg Weiss. Maintaining incentives for these firms to remain in the employment discrimination class action market and to increase rather than decrease the number of cases they are willing to finance and prosecute is important to ensuring that the objectives of Title VII are reached.

The large specialty firms bring together the two most important attributes for plaintiff classes: financing and the expertise required to obtain class certification. If Title VII class actions receive lower fee awards than other types of class actions, these firms will allocate their financial resources and expertise in the class mechanism to other cases. The result of the reallocation will be that employment discrimination plaintiff classes will have an increasingly difficult time locating competent counsel. Additionally, plaintiffs will need to find a larger number of firms to build a coalition capable of financing and prosecuting the cases. As the number of firms required to finance and prosecute the cases rise, the likelihood that all such firms will be from the same geographic district or districts with comparable rates declines.

Furthermore, application of the forum rule invites the court to substitute its judgment of appropriate counsel for plaintiff. When plaintiff retains out-of-district counsel, at the time of consultation, plaintiff and counsel could very well believe that out-of-district specialty counsel will achieve a better result than local counsel. The Second Circuit then asks its district judges to

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103 An eighth case currently pending in the Western District of New York was prosecuted by Berger & Montague P.C. of Philadelphia which was also on the Top Employment Law Firms of 2009 list.
evaluate retrospectively what was a prospective evaluation for plaintiff and counsel. Making matters worse, the Second Circuit *presumes* that plaintiff should not have selected the more expensive out-of-district counsel. This presumption favors the wrong party given the timing of a judge retrospectively evaluating counsel selection based on a prospective perception of the case. It is unfair and inappropriate to ask judges to evaluate relatively small differences in counsel quality after the case has already been resolved. By presuming the higher rate is inappropriate, the forum rule favors a discriminating employer rather than the plaintiff victims and their counsel who has often financed the suit for a long period of time.

Finally, and perhaps most importantly, the forum rule goes against the presumption that plaintiffs are entitled to freely select their own counsel. While the forum rule does not directly take that right from plaintiffs, by declining to pay out-of-district counsel their rates, the courts discourage competent counsel from taking on these class cases in the first instance. The forum rule’s goal is, to put it simply, to require plaintiffs to select the cheapest possible counsel capable of achieving a favorable result.  

105 By stating that plaintiffs are not entitled to obtain counsel plaintiff believes provides the best chance of success, the Second Circuit is taking a troubling step toward creating a different justice system for rural, poorer Title VII plaintiffs than those who work in major metropolitan centers and/or who could afford to pay their attorney in excess of the reasonable counsel fee as determined by this flawed rule.

Since class action firms with a specialty in employment discrimination cases have a national practice, they must be paid their national rate to ensure equal justice for both rural and urban plaintiff classes. The law does not become more plaintiff-friendly in rural districts, thus

105 See Simmons v. New York City Trans. Auth., 575 F.3d 170, 177 (2d Cir. 2009) (“While [plaintiff] cannot be faulted for wanting to retain counsel with the best possible reputation, it is not the [defendant’s] responsibility to compensate for such counsel based on higher out-of-district rates where [plaintiff] has not shown that they were likely to produce a substantially better result than competent [local] counsel . . . would produce for less . . . money.”).
plaintiffs must be afforded the same quality of counsel as is available to urban plaintiff classes whose district sets the prevailing rate at a higher value. Since minimal but nonetheless significant quality differences in counsel cannot be proven empirically to overcome the forum rule’s presumption, the Second Circuit’s forum rule is unworkable and operates to deprive plaintiffs of their rightful choice of counsel.
APPENDIX A

The matrix below illustrates how relatively small differences in the chances of winning for expensive attorneys who specialize in Title VII class actions yield large differences in expected values of a lawsuit for plaintiffs. Because a loss at any stage of the suit erases all recovery (i.e. represents an “all-or-nothing” scenario where the winner takes all), small differences in likelihood of winning (i.e. 11.03% vs. 5.77% or 14.997% vs. 9.8%) create differences of millions of dollars in recovery for plaintiffs.

The last column (“Expected Value”) indicates the expected value of the case after plaintiffs survive that stage and represents the amount at which plaintiffs could reasonably settle given their prospects for winning. For example, in Panel 1, plaintiffs could settle for $5.9 million before filing the suit if they retained a specialty attorney but only $3.8 million if they retained a local attorney without Title VII class experience. After class certification, plaintiffs could reasonably settle for $21.1 million with the specialty attorney but only $20 million with the local counsel.

The first two panels of the matrix examine the returns to plaintiffs hiring an expensive specialty attorney (Panel 1) versus a non-specialty local attorney (Panel 2) when defendants hire an experienced specialty attorney. The third and fourth panels examine the same decision for plaintiffs when defendant hires a local attorney.

Regardless of the defendant’s strategy, the plaintiffs’ expected value of the case after paying the specialty attorney who offers only a small increase in likelihood of winning at each stage is substantially greater.
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<tr>
<th>Panel 1: Both Plaintiff and Defendant have Expensive Specialty Attorneys</th>
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<td>Chance of Losing</td>
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<td>Pre-Case Aggregate</td>
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<th>Panel 2: Defendant has Expensive Specialty Attorney; Plaintiff has Non-Specialist Local Attorney</th>
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<td>Chance of Losing</td>
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<th>Panel 3: Defendant has Non-Specialty Local Attorney; Plaintiff has Expensive Specialty Attorney</th>
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<th>Panel 4: Both Defendant and Plaintiff have Non-Specialty Local Counsel</th>
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### DEFINITIONS

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<th>Term</th>
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<tr>
<td>Chance of Losing</td>
<td>The “Chance of Losing” is a function of the <em>a priori</em> probability of prevailing at each effectively dispositive stage of the proceeding. The “Chance of Losing” at is equal to (1-“Chance of Winning”). Although the specific percentages can change in any given case and for any given counsel, these percentages were chosen to reflect the effect that experienced class action specialists can have on a plaintiff class’ chance of prevailing.</td>
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<td>Cost of Losing</td>
<td>The “Cost of Losing” is equal to the product of the number of “Hours” worked as of that juncture and the hourly rate of Plaintiffs’ attorney. Where Plaintiffs retain a class action specialist, the hourly rate is set at $850/hour. Where Plaintiffs retain a non-specialty local attorney, the hourly rate is set at $350. At the later stages of the case, costs such as expert witness fees, discovery costs, etc. are added to the product of “Hours” and the hourly rate.</td>
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<tr>
<td>Hours</td>
<td>Although attorney hours change dramatically from case to case, the “Hours” selected for this case were chosen to represent a relatively realistic example of the manpower required to take the case to a favorable conclusion. Since only one attorney hourly rate has been applied to the “Hours” and that rate represents the billing rate of the top paying partner on the case (either $850 or $350) and not the many associates that would work on such a case at dramatically lower hourly rates, even though more hours could be required, the product of “Hours” and the top hourly partner rate still represents a plausible figure.</td>
</tr>
<tr>
<td>Expected Cost of Losing</td>
<td>The “Expected Cost of Losing” at the “Pre-Case Aggregate Stage” is equal to the product of (1-“Chance of Winning”), the total “Hours” for the entire case, and the hourly billing rate for the top partner on the case – either $850 or $350. For subsequent junctures, the “Expected Cost of Losing” is equal to one minus the product of the all subsequent “Chances of Losing” each juncture and multiplied by the “Hours” expected to be worked in the future, the top partner billing rate. That figure is added to any costs already incurred including “Hours” and any “Expenses” already billed.</td>
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| Chance of Winning           | The “Chance of Winning” at the “Pre-Case Aggregate Stage” is equal to the product of the Plaintiffs chance of prevailing at each subsequent potentially dispositive stage. The “Chance of
Winning” listed at each subsequent stage has been chosen to reflect counsel’s specialization – or lack thereof – in the class action mechanism as well as how class counsel matches up against defense counsel. Since class certification is difficult regardless of defense counsel, even where plaintiffs’ hire a class specialist and defendants do not, I have conservatively set the probability of success at certification below 50%.

**Total Recovery**

The “Total Recovery” has been fixed at a set figure representing what the plaintiff class would receive, inclusive of attorneys fees, if the case were brought to its ultimate conclusion by way of jury verdict in plaintiffs’ favor. This figure is not unrealistic given the compensatory and punitive damages available as well as back pay and front pay for a large class.

**Expected Winnings**

“Expected Winnings” are the gross expected relief given the “Total Recovery” and the prospects for success (“Chance of Winning”). “Expected Winnings” at the “Pre-Case Aggregate” is equal to the product of “Chance of Winning” and “Total Recovery.” At each subsequent stage, “Expected Winnings” is equal to “Total Recovery” multiplied by the probability of success at each subsequent potentially dispositive hurdle.

**Expenses**

“Expenses” are estimated costs for the case including discovery costs, expert witness fees, etc. For the purposes of this matrix, I have simplified the numbers and assumed that no counsel would incur significant costs at the early 12(b)(6) stage. The majority of costs have been built into the Class Certification stage because a) that is where the biggest fight in these suits occurs; and b) much of the work performed by experts and discovery can be applied to the later stages as well reducing later costs.

**Expected Value**

The “Expected Value” of the suit is the most important figure in the matrix. At each juncture, the suit takes on an expected value equal to the “Expected [Gross] Winnings” less the “Expected Cost of Losing.” Where that figure is positive, paying plaintiffs’ choice of counsel is economically reasonable because the expected costs of the case are less than the expected return. The matrix also shows the difference between the “Expected Value” for different counsel selections by either party holding “Hours” and “Total Recovery” constant and changing only the percentage chance of winning or losing to reflect specialization and quality.