ALLISON V. CITGO PETROLEUM: THE DEATH KNELL FOR THE TITLE VII CLASS ACTION?

I. INTRODUCTION

Since the early 1970s, employment discrimination has been the most widely litigated form of discrimination and has received more attention from courts and commentators than other areas of civil rights.[1] Much of the attention and discussion is due to the number and frequency of employment discrimination claims brought as class actions against employers.[2] In 1997, seventy-nine different employers from different areas across the country found themselves defending discrimination class actions brought by employees.[3] This figure is twice the number of such actions brought in 1992.[4] However, as this Article suggests, the Fifth Circuit's recent decision in *Allison v. Citgo Petroleum Corp.*[5] may function to reverse this recent upward trend.

Part I of this Article provides a cursory overview of the theories and remedies available to victims of discrimination under Title VII. Part II examines the approaches taken to Title VII class action certification after the Civil Rights Act of 1991, emphasizing the absence of any real analysis regarding the impact that the new damages and jury trial provisions had on class

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1. Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1427 (1994) (explaining that in 1996, civil rights plaintiffs brought over 23,000 employment discrimination cases in federal court, as compared to only around 900 housing cases and 200 voting cases. Employment discrimination claims have greatly outnumbered other types of civil rights claims since the 1970s).

2. Marifrances Dant Bolger & Mark S. Dichter, *Challenging Class Certification in Employment Discrimination Litigation*, *in* LITIGATING EMPLOYMENT DISCRIMINATION CASES, at 7, 9 (PLI Litig. & Admin. Practice Course Handbook Series No. H-586, 1998) (reporting that Amtrak, Home Depot, Merrill Lynch, Mitsubishi, Publix and Smith Barney recently defended widely-publicized class discrimination suits brought by current and former employees).

3. *Id.*

4. *Id.*

5. 151 F.3d 402 (5th Cir. 1998).

certification. Part III examines the Fifth Circuit's decision in *Allison v. Citgo Petroleum Corp.*, emphasizing that court's recognition of the difficulties inherent in the class-wide resolution of Title VII claims. Finally, Part IV of this Article attempts to highlight the specific ways in which certification of a Title VII class action must be rethought.

II. TITLE VII: THE BASIC STRUCTURE OF THE RECOURSE AVAILABLE TO VICTIMS OF DISCRIMINATION

A. Title VII—The Basic Provisions

In its original form, Title VII of the Civil Rights Act of 1964[6] prohibited covered employers from discriminating against an individual on the basis of his or her race, color, religion, sex or national origin.[7] Employers who failed to hire or who discharged an applicant or employee on the basis of one of the protected characteristics or used those characteristics to classify employees in ways that adversely affected their employment relationships violated Title VII.[8] This prohibition—which is the most fundamental mandate against discrimination—has survived intact and unscathed through several amendments to the 1964 Act.[9]

1. The Remedies Available to Successful Title VII Claimants.—The remedial provisions of Title VII, as it was enacted, allowed for limited forms of relief.[10] Courts were authorized to issue injunctions against employers to prevent them from engaging in unlawful employment practices.[11] In addition, courts could force employers to reinstate or rehire employees.[12] In cases of reinstatement or rehiring, an employer could also be made

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6. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII § 701, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e to -17 (1994)).

7. *Id.*

8. *Id.*

9. *Compare* Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII § 701, 78 Stat. 253, *with* 42 U.S.C. § 2000e to -17.

10. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII § 701, 78 Stat. 253.

11. *Id.*

12. *Id.*

to pay back pay to the aggrieved employee.[13] In addition to these statute-sanctioned remedies, courts were empowered to order "any other equitable relief . . . deem[ed] appropriate."[14] Congress intended to give the courts "wide discretion in exercising their equitable powers to fashion the most complete relief possible."[15] Despite this stated remedial breadth, recovery for injured employees or applicants was limited to back pay, attorneys' fees or injunctive relief; compensatory and punitive damages were not available.[16]

2. Jury Trials.—As it was enacted, Title VII made no mention of the right to a jury trial.[17] Although the Supreme Court never directly addressed whether a jury trial was available under Title VII as it was enacted, lower courts predominantly held that if the plaintiff's cause of action was based entirely upon Title VII, neither party was entitled to a jury trial.[18]

3. The Creation of the Equal Employment Opportunity Commission.—Another key provision of the 1964 Act was the creation of the Equal Employment Opportunity Commission ("EEOC").[19] The EEOC is the administrative body responsible for enforcing Title VII's provisions.[20] It was created to investigate allegations of employment discrimination, interpret the terms of Title VII, and in cases where further action was found to be appropriate, refer cases to the United States Attorney General.[21] The EEOC did not have the impact on employment discrimination that its founders had hoped.[22] Rather, it stag-

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13. *Id.*

14. *Id.*

15. 118 CONG. REC. 7166, 7168 (1972) (statement by Sen. Williams).

16. M. Elizabeth Medaglia & Peter A. von Mehren, *Beyond Asbestos and Environmental Litigation: Coverage Disputes in the Twenty-First Century*, 33 TORT & INS. L.J. 1023, 1027 (1998).

17. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII § 701, 78 Stat. 253.

18. *See, e.g.*, Keller v. Prince George's County, 827 F.2d 952, 955 (4th Cir. 1987); Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

19. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII § 701, 78 Stat. 253.

20. *Id.*

21. *Id.*

22. Martin Adler, *Nailing Down the Coffin Lid: The Rise and Fall of the After-Acquired Evidence Doctrine in Title VII Litigation*, 39 N.Y.L. SCH. L. REV. 719, 726

gered under the sheer number of discrimination complaints that it was asked to resolve.[23]

B. Expansion of Title VII

The enactment of Title VII was hard-fought.[24] To see it passed, its proponents had to accept the legislation in a much more "watered down" version than was initially hoped for.[25] As a result of the unrequited aspirations of an effective federal mandate against employment discrimination, three significant amendments have been made to the Civil Rights Act of 1964.[26]

1. The Equal Employment Act of 1972.—The first significant amendment to Title VII came with the Equal Employment Act of 1972.[27] This amendment expanded several aspects of Title VII. First, it strengthened the EEOC's negotiating position and enforcement powers.[28] The EEOC was given the authority to bring civil actions in federal district court against violators of Title VII if a settlement between the parties could not be reached within thirty days of the date that the aggrieved employee filed his or her charge with the EEOC.[29] If the EEOC filed such an action, it could seek injunctive relief and other remedies for the illegal discrimination.[30] In addition, the EEOC was enabled to intervene in private civil suits "upon certification that the case [was] of general public importance."[31]

Another significant aspect of the 1972 Act was its expansion of the number of employees within the penumbra of the anti-

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(1994).

23. *Id.* (citing Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1, 33 (1977) ("Toward the end of 1971 the Commission was handicapped by a backlog of more than 23,000 unresolved complaints of discrimination.")).

24. *Id.* at 725.

25. *Id.*

26. *Id.*

27. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended in scattered sections of 42 U.S.C. (1994)).

28. 42 U.S.C. § 2000e-5(f)(1) (1994).

29. *Id.*

30. *Id.* § 2000e-5(g).

31. *Id.* § 2000e-5(f)(1).

discrimination laws. In its original form, Title VII's prohibitions extended only to employers who had more than twenty-five employees.[32] After the 1972 Act, however, employers with as few as fifteen employees were made subject to the anti-discrimination provisions of Title VII.[33] It has been estimated that the 1972 Act brought as many as six million more private sector employees than were previously afforded the Act's coverage within the protective sweep of Title VII.[34] The 1972 changes also provided select state and local government employees, as well as federal employees, the protections of Title VII.[35] In addition, the 1972 Act brought secular educational institutions within the scope of Title VII.[36]

The 1972 amendments also changed certain procedural aspects of Title VII. For example, the statute of limitations period for filing an EEOC complaint was increased from 90 days to 180 days.[37] Another important procedural change allowed representative discrimination charges to be brought on behalf of individuals who alleged that they had been victims of illegal discrimination.[38] Under this new provision, alleged victims of discrimination could retain their anonymity. They would not be identified by name in the charge; rather, the EEOC would ascertain their identity from the parties making the charges as their representatives.[39]

2. The Pregnancy Discrimination Act of 1978.—The next major amendment to Title VII came in the form of the Pregnancy Discrimination Act of 1978.[40] This amendment was spawned by the Supreme Court's decision in *General Electric Co. v. Gilbert*,[41] which garnered congressional attention and sparked a

32. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII § 701, 78 Stat. 253.
33. 42 U.S.C. § 2000(e)(b).
34. Adler, *supra* note 22, at 728.
35. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e-16(b) (1994)).
36. *Id.* (codified as amended at 42 U.S.C. § 2000e-1(a)).
37. *Id.* (codified as amended at 42 U.S.C. § 2000e-5(e)).
38. *Id.* (codified as amended at 42 U.S.C. § 2000e-5(b)).
39. *Id.*
40. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)).
41. 429 U.S. 125 (1976).

collective outcry from feminist groups.[42]

In *Gilbert*, the Supreme Court held that a private employer who excluded pregnant employees from a disability benefits plan did not run afoul of Title VII's sex discrimination provisions.[43] In an earlier, related case, *Geduling v. Aiello*,[44] the Supreme Court had rejected the argument that the Equal Protection Clause prohibited an employee-funded disability insurance program from specifically excluding pregnancy from its list of covered disabilities.[45] Therefore, after *Gilbert* and *Geduling*, pregnant women were left with no recourse under either Title VII or the Equal Protection Clause against employment discrimination.

That crater in the landscape of employment discrimination law was filled, however, by the 1978 Act. It outlawed discrimination on the basis of pregnancy or childbirth[46] and also provided that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work."[47]

3. The Civil Rights Act of 1991.—The most recent and significant alterations to Title VII came with the Civil Rights Act of 1991.[48] The most significant of these alterations relates to the remedial provisions of the Act. Specifically, compensatory and punitive damages are now available to plaintiffs who make a showing of intentional violations of Title VII.[49] These newly-available damages may be had for many different forms of injuries, including "future pecuniary losses, emotional pain, suffer-

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42. *See* Patricia J. Bejarno, *Labor Pains: The Rights of the Pregnant Employee*, 43 LAB. L.J. 780, 781 (1992) (stating that the 1978 legislation was enacted after an intensive lobbying campaign by women's rights groups following the Supreme Court's decision in *Gilbert*).

43. *Gilbert*, 429 U.S. at 138-39.

44. 417 U.S. 484 (1974).

45. *Geduling*, 417 U.S. at 490.

46. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)).

47. *Id.*

48. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C. § 1981a (1994)).

49. § 102, 105 Stat. at 1072-74 (codified as amended at 42 U.S.C. § 1981a(c) (1994)).

ing, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."[50]

Although seemingly broad with respect to the various forms of compensable injuries for which they may be awarded, the damages are not unlimited in amount.[51] The Act limits the total amount of damages that may be recovered according to the number of employees that an employer has.[52] Another major change in the context of Title VII that came with the Civil Rights Act of 1991 involves the availability of jury trials.[53] Prior to the 1991 Act, it was generally accepted that jury trials were not available under Title VII.[54] Now, however, Title VII provides that either party may insist upon a jury trial if compensatory or punitive damages are sought.[55]

C. A Model of the Title VII Class Action Proceeding: The Basic Structure

Before an understanding of the issues surrounding certification of a Title VII class action may be gleaned, a cursory examination of the general components of the typical Title VII claim is in order. Class actions brought under Title VII typically involve two different theories: disparate impact and disparate treatment.[56] The disparate impact theory comes into play when the plaintiff asserts a challenge to a facially neutral employment policy that, when applied, has a disproportionate adverse impact on a protected class of employees or applicants.[57] The disparate

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50. *Id.* at 1073 (codified as amended at 42 U.S.C. § 1981a(b)(3)).

51. *Id.*

52. *Id.*

53. 42 U.S.C. § 1981a(c) (1994).

54. *See, e.g.*, Keller v. Prince George's County, 827 F.2d 952, 955 (4th Cir. 1987); Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

55. 42 U.S.C. § 1981a(c).

56. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 408 (5th Cir. 1998).

57. Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 799 (5th Cir. 1982). The quintessential example of a disparate impact claim involves height and weight requirements for employment. Assume that the Alabama State Troopers Association requires that its troopers be 5 feet, 7 inches tall and weigh at least 140 pounds. As written, this rule is neutral; it applies to both men and women equally. In effect, however, it would be expected to have a disparate impact on women because women are generally genetically predisposed to be shorter and to weigh less than men.

treatment theory involves the assertion that the employer engaged in a "pattern or practice" of intentional discrimination.[58] More specifically, the disparate treatment theory is at issue when the employer is alleged to have intentionally discriminated against a protected class as a matter of course.[59]

After the Civil Rights Act of 1991, these theories of discrimination function as more than the blueprint by which plaintiffs' complaints are constructed. Now, they shape both the damages and fact-finding portions of Title VII claims. Compensatory and punitive damages are not available in disparate impact claims.[60] As previously noted, such recovery is only allowed upon proof of intentional discrimination—which is typically contained in a plaintiff's disparate treatment claim.[61] Therefore, because the Civil Rights Act of 1991 mandates that a jury trial will be awarded upon the request of either party when compensatory or punitive damages are sought, this right extends only as far as the disparate treatment claim.[62]

III. THE TITLE VII EMPLOYMENT DISCRIMINATION CLASS ACTION AFTER THE CIVIL RIGHTS ACT OF 1991 BUT BEFORE *ALLISON V. CITGO PETROLEUM*: UNCLEAR, UNDISCIPLINED AND OFTEN INCORRECT CONSIDERATION OF THE REQUIREMENTS FOR CLASS CERTIFICATION

Although the Civil Rights Act of 1991 substantially changed the form of damages available for violations of Title VII, there was no corresponding change in courts' analyses of whether Title VII actions were still suited for class certification.[63] Rather, certification of Title VII class actions remained common under varying schemes. Three of these schemes and the reasoning attendant to each are discussed in three subparts below. A fourth subpart is devoted to the related issues of the phase of class action proceedings at which punitive damages determina-

58. *See* Wessman v. Gittens, 160 F.3d 790, 817 n.20 (1st Cir. 1998).

59. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977).

60. *See* 42 U.S.C. § 1981a(c) (1991).

61. *See id.*

62. *Allison*, 151 F.3d at 423.

63. *See, e.g.*, Griffin v. Home Depot, Inc., 168 F.R.D. 187, 190 (E.D. La. 1996).

tions are made and the role that the Seventh Amendment played in Title VII class actions before *Allison v. Citgo Petroleum Corp.*

A. Certification of the Whole Under Rule 23(b)(2) and the Division of Trial into Two Phases

One approach to the Title VII class action that has been taken by lower courts after the Civil Rights Act of 1991 is certification of the whole controversy under Rule 23(b)(2) of the Federal Rules of Civil Procedure and division of the trial proceedings into two components. Certification of a class action is appropriate under Rule 23(b)(2) of the Federal Rules of Civil Procedure when the requirements of Rule 23(a)[64] are met, and in addition, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."[65]

In *Orlowski v. Dominick's Finer Foods, Inc.*,[66] female and Hispanic employees of Dominick's Finer Foods, Inc. ("Dominick's") brought suit against their employer for discrimination under Title VII.[67] The plaintiffs alleged that Dominick's engaged in discriminatory practices and policies, including denying promotional opportunities to the protected classes and discriminating with respect to various terms and conditions of their employment.[68] The court concluded that the plaintiffs had satisfied the requirements of Rule 23(a) and Rule 23(b)(2).[69]

Although the court acknowledged the general rule that monetary recovery was not available as part of a Rule 23(b)(2) class action unless it was part of the equitable relief granted or sec-

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64. FED. R. CIV. P. 23(a). Rule 23(a) allows a class action to be maintained when (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interest of the class. *Id.*

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

66. 172 F.R.D. 370 (N.D. Ill. 1997).

67. *Orlowski*, 172 F.R.D. at 372.

68. *Id.*

69. *Id.* at 374-75.

ondary to the injunctive or declaratory relief sought,[70] the court stated that that "is not the case here."[71] Moreover, the court opined that when plaintiffs meet the requirements of Rule 23(a) and request injunctive and declaratory relief, questions about whether the suit is primarily about injunctive or declaratory relief instead of monetary relief should be avoided.[72] After certifying the whole controversy under Rule 23(b)(2), the court ruled that the case would proceed in two discrete phases. First, a liability phase would be conducted to determine liability with respect to the class as a whole and punitive damages.[73] The second phase would determine each individual class member's award of compensatory damages.[74]

With respect to its determination of the appropriateness of the proceedings for Rule 23(b)(2) certification, the court did not provide any insight into the parts of the case that were concerned with injunctive or declaratory relief nor into the parts of the case that would center on individual entitlements to compensatory and punitive damages, concluding simply that monetary relief did not predominate in the case.[75] Furthermore, the court did not discuss what relation the second phase of the proceedings would bear to the first, i.e., whether the compensatory damages entitlements would follow an objective computation format after liability was established or, in the alternative, whether each plaintiff would be required to adduce individualized proof of damages.[76]

It is also important to note that the *Orlowski* court did not follow a hybrid structure—certifying the first stage under Rule 23(b)(2) and the second under Rule 23(b)(3). Rather, the entire proceeding appears to be a Rule 23(b)(2) class action, with determinations to proceed in discrete phases.[77] Equally noteworthy is the fact that the court seemed to give much weight to the generalized statement that an inquiry regarding whether injunc-

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70. *Id.* at 374 (citing Edmondson v. Simon, 86 F.R.D. 375, 383 (N.D. Ill. 1980)).
71. *Id.*
72. *Orlowski*, 172 F.R.D. at 374-75.
73. *Id.* at 375.
74. *Id.*
75. *Id.* at 374.
76. *Id.* at 374-75.
77. *Orlowski*, 172 F.R.D. at 374-75.

tive or declaratory relief are the predominant factors should be avoided in favor of Rule 23(b)(2) certification.[78] Furthermore, the *Orlowski* court did not provide an analysis of the different theories under which the plaintiffs were proceeding.[79]

B. The Hybrid Approach: Certification of the Liability Stage Under Rule 23(b)(2) and Deferred Determination of Certification of the Damages Phase Under Rule 23(b)(3)

The approach used in *Orlowski* is unlike the more common hybrid approach in that the latter imposes two different types of certification on the whole controversy. Specifically, the hybrid approach involves certification of the initial liability stage of the proceedings under Rule 23(b)(2) and delays certification of the second phase under Rule 23(b)(3) until a later point in the proceedings.[80] Even though the hybrid class action is the more common form of resolution, there are wide differences in reasoning and results among the courts which follow that basic structure.

In *Butler v. Home Depot, Inc.*,[81] female employees and applicants alleged gender discrimination practices throughout Home Depot's West Coast Division.[82] First, plaintiffs alleged that Home Depot used an entirely subjective system of hiring, job assignment, training, promotions and compensation.[83] Specifically, they alleged that Home Depot did not use concrete, objective criteria to make decisions regarding hiring of new applicants or to determine pay levels for existing employees.[84] Second, plaintiffs presented statistical evidence to show that Home Depot employees were classified on the basis of gender.[85]

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78. *Id.* at 375 (citations omitted).
79. *Id.*
80. *See Allison*, 151 F.3d at 418.
81. No. C-94-4335 SL, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996).
82. *Butler*, 1996 WL 421436, at *1.
83. *Id.*
84. *Id.*
85. *Id.* Plaintiffs alleged specifically that there were few women in sales, merchandising, managerial and supervisory positions in relation to the number of men who occupied those positions and that there was a high number of women in cashier and other operator positions and a comparatively low number of men in these positions. *Id.* at *1.

The plaintiffs in *Butler* sought injunctive relief, as well as punitive and compensatory damages.[86]

After determining that the requirements of Rule 23(a) were met,[87] the *Butler* court ruled that the requirements of Rule 23(b)(2) were also met.[88] The court noted that the fact that plaintiffs asked for damages in addition to declaratory and injunctive relief did not per se prevent certification under 23(b)(2).[89] Furthermore, the court stated that it is "'well established . . . that employment discrimination suits involving such individual-specific awards of lost back pay may be maintained as (b)(2) class actions.'"[90] Although the individual damages sought were not limited to back pay,[91] the court reasoned that the plaintiffs' claims for monetary relief were secondary to their claims for injunctive relief to deter sex-biased employment practices, thereby rejecting the defendant's argument that certification was inappropriate because the monetary damages requested overshadowed the injunctive relief sought.[92] The court granted plaintiffs' motion to certify the first stage under Rule 23(b)(2) and deferred consideration of certification of the second, damages stage of the proceedings.[93]

Although the *Butler* court delayed formal certification of the second phase of the proceedings, in which individualized compensatory and punitive damages would be determined, it analyzed the appropriateness of Rule 23(b)(2) certification from the standpoint of the proceedings as a whole, finding that the individualized monetary components of the case did not predominate over requests for injunctive or declaratory relief.[94] The court did not give a concrete standard leading to its conclusion that money damages did not predominate since both compensatory and puni-

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86. *Butler*, 1996 WL 421436, at *1.

87. *Id.* at *1-4.

88. *Id.* at *5.

89. *Id.* (citing Probe v. State Teachers' Retirement Sys., 780 F.2d 776, 780 (9th Cir. 1986)).

90. *Id.* (quoting Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439 (citing *Probe*, 780 F.2d at 780)).

91. *Butler*, 1996 WL 421436, at *1.

92. *Id.* at *4-5.

93. *Id.*

94. *Id.*

tive damages were requested, along with injunctive relief.[95] In addition, the court did not consider whether the damages portion of the suit would be workable under Rule 23(b)(3); rather, it delayed consideration of that point until a later stage in the proceedings.[96] This raises the question of what path the court would have taken if, upon reaching the "later stage" in the proceedings, certification under Rule 23(b)(3) was not appropriate. Furthermore, the court did not explain the theories under which the plaintiffs were proceeding or the extent to which the various theories involved in the case informed their decision regarding the hybrid structure.[97]

A similarly lax approach was taken to hybrid certification in *Shores v. Publix Super Markets, Inc.*[98] In *Shores*, the plaintiffs alleged that a pattern and practice of discrimination against female employees pervaded Publix stores.[99] Plaintiffs sought back pay, front pay, injunctive relief and punitive and compensatory damages.[100] After determining that the requirements of Rule 23(a) were met, the court determined that the requirements of Rule 23(b)(2) were also met, thereby rendering certification of the initial liability stage appropriate under Rule 23(b)(2).[101] The court delayed a determination regarding whether the second stage of the proceedings was certifiable under Rule 23(b)(3) and the mechanism by which punitive damages were to be determined.[102]

Although the results were the same in *Butler* and *Shores*, the reasoning of the *Shores* court is quite different with respect to its Rule 23(b)(2) analysis. The *Shores* court reasoned that the requirement that a defendant act in a way that makes injunctive or declaratory relief appropriate with respect to the class as

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95. *Id.*

96. *Butler*, 1996 WL 421436, at *4-5.

97. *Id.*

98. No. 95-1162-CIV-T-25(E), 1996 U.S. Dist. LEXIS 3381 (M.D. Fla. Mar. 12, 1996).

99. *Shores*, 1996 U.S. Dist. LEXIS 3381, at *3.

100. *Id.* at *12.

101. *Id.* at *11-12.

102. *Id.* at *12-13. The court noted the approval of such bifurcation procedures in Cox. v. American Cast Iron Pipe Co., 784 F.2d 1546 (11th Cir. 1986), even though that case arose under Title VII as it existed prior to the Civil Rights Act of 1991. *Id.*

a whole is subsumed under the commonality requirement of Rule 23(a).[103] Therefore, since the court had previously determined that the commonality requirement was met, the Rule 23(b)(2) standard was also presumptively met.[104] In response to the defendant's assertion that the individual monetary claims sought by the plaintiffs predominated over the claims for injunctive and declaratory relief, the court stated simply that the two were "intertwined."[105] The *Shores* court did not engage in any real analysis with respect to how the requests for injunctive and monetary relief related to each other.

Not only did the *Shores* court certify the initial phase of the lawsuit under Rule 23(b)(2) without giving separate consideration to the impact that individualized damages had on the plaintiffs' claims for injunctive relief, but it also essentially certified the class as a Rule 23(b)(2) class action by virtue of the fact that it met one of the factors required under Rule 23(a).[106] This process is clearly against the weight of authority stating that class action certification requires satisfaction of all of the Rule 23(a) factors in addition to at least one of the factors enumerated in Rule 23(b).[107] Furthermore, the court did not engage in any thoughtful consideration regarding the second phase of the trial or the possibilities attendant to Rule 23(b)(3) certification of the damages phase; it did not detail the theories under which the plaintiffs asserted their Title VII claims.[108]

Still a different line of analysis was employed in *Morgan v. United Parcel Service of America*.[109] In that case, African-American employees of United Parcel Service ("UPS") alleged that the defendant's pay system and promotion policies violated Title VII.[110] Specifically, they alleged that African-American employees were routinely promoted more slowly and less often than their white counterparts because UPS utilized subjective

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103. *Shores*, 1996 U.S. Dist. LEXIS 3381, at *12 (citing Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 45-46 (N.D. Cal. 1977)).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Shores*, 1996 U.S. Dist. LEXIS 3381, at *12.

109. 169 F.R.D 349 (E.D. Mo. 1996).

110. *Morgan*, 169 F.R.D. at 352.

selection procedures.[111] In addition, the plaintiffs alleged that UPS adhered to a scheme of race-based pay differentials, resulting in less pay for African-American employees working in the same positions as white employees.[112] The *Morgan* plaintiffs sought relief in the forms of back pay, front pay and compensatory and punitive damages.[113]

In *Morgan*, the court noted that the inquiry regarding whether certification under Rule 23(b)(2) was appropriate involved whether injunctive or declaratory relief was the predominant form of relief sought for the class.[114] The court noted that requests for back pay coupled with injunctive relief did not preclude Rule 23(b)(2) certification.[115] The court held, however, that the plaintiffs' requests for compensatory and punitive damages in addition to their requests for equitable relief rendered money damages the predominant form of relief sought; therefore, the plaintiffs' case did not meet the Rule 23(b)(2) requirements.[116]

That problematic conclusion was remedied, however, by the same process of bifurcation used by the aforementioned courts. The *Morgan* court noted that Rule 23(c)(4) allows for certification of issues only,[117] and because requests for injunctive relief and monetary damages in the case were distinct, the prayer for injunctive relief could stand alone, forming the basis for an initial Rule 23(b)(2) liability phase.[118]

This reasoning is different from that employed in the *Butler* and *Shores* cases in that, in those cases, separation of the proceedings into two phases was allowed precisely because injunctive relief was not overshadowed by monetary relief.[119] In the

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111. *Id.*
112. *Id.*
113. *Id.* at 358.
114. *Id.*
115. *Morgan*, 169 F.R.D. at 358 (citing Paxton v. Union Nat'l Bank, 688 F.2d 552, 559 (8th Cir. 1982)).
116. *Id.* at 358.
117. *Id.* Rule 23(c)(4) provides that, when appropriate, an action may be maintained as a class action with respect to particular issues. FED R. CIV. P. 23(c)(4).
118. *Morgan*, 169 F.R.D. at 358.
119. *See* Butler v. Home Depot, Inc., No. C-94-4335 SL, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996); Shores v. Publix Super Markets, Inc., No. 95-1162-CIV-T-25(E), 1996 U.S. Dist. LEXIS 3381 (M.D. Fla. Mar. 12, 1996).

Morgan case, however, the predominance of injunctive relief was manufactured by considering the two phases distinctly, rather than by the initial consideration of the two phases together.[120] The result is that bifurcation of the proceedings was allowed despite the fact that the whole controversy could not satisfy Rule 23(b)(2).[121] It is important to note this analytical severance as a cure for failure to meet Rule 23(b)(2).

Morgan is not unlike the *Butler* and *Publix* cases in that several of the issues related to Rule 23(b)(2) certification were ignored. *Morgan*, like *Butler* and *Publix*, dealt cursorily with the suitability of the damages phase for Rule 23(b)(3) certification, delaying any such inquiry until a later point in the litigation.[122] Likewise, the varying theories to be advanced by the plaintiff class were not mentioned in connection with the feasibility of certification of either phase under Rule 23(b)(2) or Rule 23(b)(3).[123]

C. Certification of the Whole Under Rule 23(b)(3)

Yet another model of the Title VII class action after the Civil Rights Act of 1991 is certification of the whole controversy as a Rule 23(b)(3) class action. A Rule 23(b)(3) class action is appropriate when the requirements of Rule 23(a) are fulfilled, when the court finds that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and when it finds that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[124] Therefore, in considering certification under Rule 23(b)(3), a court is to consider commonality, manageability and judicial economy.[125] These factors are to be "rigorously scrutinized"[126]

In *Griffin v. Home Depot,* the court granted the plaintiffs'

120. *Morgan*, 169 F.R.D. at 358.
121. *Id.*
122. *Id.*
123. *Id.*
124. FED. R. CIV. P. 23(b)(3).
125. Forbush v. J.C. Penney Co., 994 F.2d 1101, 1104-05 (5th Cir. 1993).
126. Griffin v. Home Depot, Inc., 168 F.R.D. 187, 188 (E.D. La. 1996).

motion to certify their Title VII claims as a Rule 23(b)(3) class action.[127] In that case, female employees alleged that they were denied employment, favorable working hours, compensation and other varying terms and conditions of employment on the basis of sex.[128] The plaintiffs sought injunctive and declaratory relief, as well as damages for back pay, front pay, lost compensation and job benefits, emotional distress, humiliation, embarrassment and punitive damages.[129]

After concluding that economic relief was the predominant form of relief sought, thereby precluding certification under Rule 23(b)(2),[130] the court focused its attention on whether the class could be certified as a Rule 23(b)(3) class action.[131] The court noted that a Rule 23(b)(3) certification was not precluded by issues of manageability and judicial economy, but the court did not fully delineate its reasoning.[132] The court was equally cursory in finding that the plaintiffs' allegations were sufficient to meet the requirements of Rule 23(b)(3), even though no discovery had been conducted.[133]

It is important to note that in *Griffin* the court did not inquire as to whether the common questions of law or fact predominated over individual ones, as is required by the text of Rule 23(b)(3).[134] One might have expected this inquiry to be a difficult hurdle considering the highly individualized forms of compensatory relief sought by the plaintiffs in the case.[135] Nor did the court explain precisely why these individualized forms of relief sought did not hamper manageability of the class action or detract from its superiority.[136] It is likely that the lack of analysis is due to the preliminary posture of the case and the fact that little discovery had been conducted. However, one is led to wonder why certification was not delayed until such time as the court could conduct a rigorous examination of the factors

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127. *Griffin*, 168 F.R.D. at 191.
128. *Id.* at 189.
129. *Id.* at 190.
130. *Id.*
131. *Id.*
132. *Griffin*, 168 F.R.D. at 190.
133. *Id.*
134. *Id.* at 191.
135. *Id.*
136. *Id.* at 190.

involved in certification.

Equally frustrating is the reasoning set forth in *Bremiller v. Cleveland Psychiatric Institute*.[137] In *Bremiller*, female employees of Cleveland Psychiatric Institute ("CPI") alleged that they were subjected to a myriad of abuses.[138] Specifically, the plaintiffs alleged that they were verbally threatened, physically intimidated, and touched and groped by male employees.[139] In addition to their Title VII claims, the plaintiffs brought state law claims for intentional infliction of emotional distress, battery and false imprisonment.[140] The plaintiffs sought damages and injunctive relief.[141]

After determining that the requirements of Rule 23(a) were met, the court ruled that the plaintiffs had also fulfilled the conditions of Rule 23(b)(3).[142] The court's reasoning was remarkably conclusory and arguably outright incorrect when compared to other cases addressing Rule 23(b)(3) analysis. The court simply concluded that "questions of law and fact common to the members of the class predominate over any questions affecting only individual members and that the class action is the most appropriate vehicle by which to fairly and efficiently adjudicate this controversy."[143] This is the exact language that is found in the text of Rule 23(b)(3).[144]

The court did not indicate the precise nature of the common questions of law or fact but supported its assertion that the class action was the most appropriate mechanism for maintaining the plaintiffs' claims with the fact that the venue chosen by the plaintiffs was desirable because the putative class members and the defendants were within the court's jurisdiction.[145] The court also enumerated the facts that no member of the putative class had expressed the desire to have individual control over the litigation and that no other litigation had been filed in re-

137. 879 F. Supp 782 (N.D. Ohio 1995).
138. *Bremiller*, 879 F. Supp. at 794, 796.
139. *Id.* at 785.
140. *Id.*
141. *Id.* at 797.
142. *Id.*
143. *Bremiller*, 879 F. Supp. at 797.
144. *See* FED. R. CIV. P. 23(b)(3).
145. *Bremiller*, 879 F. Supp. at 797.

sponse to the alleged discrimination at CPI.[146] Although the court did not clearly articulate the precise role that these factors played in its analysis, Rule 23(b)(3) does include the interest of putative class members in controlling the litigation on an individual basis and the benefits of having the litigation centered in one particular forum as factors to be considered when undertaking a Rule 23(b)(3) analysis.[147] However, the court's analysis of these factors relates to the issues of abatement of other actions and convenience of forum rather than the inquiry regarding questions common to the class.

D. Related Issues: When Are Punitive Damages Determined and How Does the Seventh Amendment Impact the Bifurcation Scheme?

1. The Placement of Punitive Damages.—As discussed above, the routes taken to and reasons articulated for certification of the Title VII class action vary markedly. The precise structure of these suits also varies, with very little discussion or justification devoted to which determinations are to be made in which of the two phases when the proceedings are divided into discrete phases. It is clear that the defendant's liability and the availability of injunctive remedies is to be determined in the first phase.[148] Equally clear is that individual compensatory damages are to be determined in the second phase.[149] The placement of punitive damages is, however, much less lucid. Two of the cases discussed above, *Butler* and *Orlowski*, placed the determination of punitive damages in the first phase,[150] while the other two cases, *Shores* and *Morgan*, held that a punitive damages award would be determined later, in the second phase of the proceed-

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146. *Id.*

147. FED R. CIV. P. 23(b)(3).

148. *See* Butler v. Home Depot, Inc., No. C-94-4335 SL, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996); Morgan v. United Parcel Serv. of Am., Inc., 169 F.R.D 349 (E.D. Mo. 1996); Shores v. Publix Supermarkets, Inc., No. 95-1162-CIV-T-25(E), 1996 U.S. Dist. LEXIS 3381 (M.D. Fla. Mar. 12, 1996); Orlowski v. Dominick's Finer Foods, Inc., 172 F.R.D. 370 (N.D. Ill. 1997); Griffin v. Home Depot, Inc., 168 F.R.D. 187 (E.D. La. 1996).

149. *See Butler*, 1996 WL 421436; *Morgan*, 169 F.R.D. 349; *Orlowski*, 172 F.R.D. 370, *Griffin*, 168 F.R.D. 187.

150. *See Butler*, 1996 WL 421436, at *1; *Orlowski*, 172 F.R.D. at 374-75.

ings.[151] None of the six cases devoted any discussion to their reasons for the structure they adopted.

2. Jury Trials, Bifurcation and the Seventh Amendment.—Another significant change brought by the Civil Rights Act of 1991 is the availability of jury trials in a Title VII action.[152] A jury trial must now be awarded if requested by either party when punitive and compensatory damages are claimed.[153] This new provision, when coupled with the continued willingness of courts to certify bifurcated Title VII class actions, poses potentially significant problems. Like the issue of class certification, however, courts have not given this issue extensive or reasoned consideration.

The bifurcation scheme discussed above involves separate trials on the issues of liability and damages, which would presumably be heard by different fact-finders. This scheme raises potential Seventh Amendment concerns because the Seventh Amendment prohibits separate trials on the issues of liability and damages if "the question of damages . . . is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty."[154] This rule comes from the "'recognition of the fact that inherent in the Seventh Amendment's guarantee of a trial by jury is the *general right of a litigant to have only one jury pass on a common issue of fact.*'"[155] The goals of this mandate are two-fold: "'preventing jury confusion and avoiding inconsistent verdicts.'"[156]

The fundamental inquiry is whether two fact-finding bodies are actually considering the same issues. In *Butler v. Home Depot,* the court held that the determinations to be made at each phase of the proceedings were sufficiently distinct so as to raise

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151. *See Shores,* 1996 U.S. Dist. LEXIS 3381, at *12; *Morgan,* 169 F.R.D. at 358.

152. 42 U.S.C. § 1981a(c) (1994).

153. *Id.* § 1981a(c).

154. Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 500 (1931).

155. McDaniel v. Anheuser-Busch, Inc., 987 F.2d 298, 305 (5th Cir. 1993) (quoting Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir. 1978) (emphasis added)).

156. Sperling v. Hoffmann-LaRoche, Inc., 924 F. Supp. 1346, 1353 (D. N.J. 1996) (quoting Opinion of Special Master, Aug. 30, 1994, at 17).

no Seventh Amendment concerns.[157] The court reasoned that the first phase of the proceedings focused exclusively on class-wide claims, that is, on whether the defendant had engaged in discriminatory employment practices.[158] This determination, the court noted, might result in injunctive or declaratory relief and punitive damages.[159] Since the second phase of the proceedings would entail the adjudication of individual claims, the "same issues" would not be considered in both proceedings.[160] Furthermore, the court noted that the Seventh Amendment does not mandate that all sequences of the case be presented to the same jury.[161]

IV. *ALLISON V. CITGO PETROLEUM*: A MODEL OF THOUGHTFUL ANALYSIS OF THE DIFFICULTIES INHERENT IN CLASS CERTIFICATION OF TITLE VII CLAIMS AFTER THE CIVIL RIGHTS ACT OF 1991

The first appellate court decision addressing the impact that the Civil Rights Act of 1991 had on the suitability of Title VII claims for class certification was *Allison v. Citgo Petroleum Corp.*[162] *Allison*, unlike the cases discussed above, gave thorough, at times painstaking, consideration to the ways in which the 1991 amendments to Title VII changed the class certification analysis. The court considered five different methods under which the plaintiffs' claims could be maintained as a class action, rejecting each for the reasons discussed below.

In *Allison,* named class representatives filed suit on behalf of African-American employees and applicants of Citgo, alleging that Citgo had discriminated based on race with respect to the class as a whole.[163] Specifically, the plaintiffs argued that Citgo had discriminated with respect to hiring, promotion, compensation and training programs at its Lake Charles, Louisiana man-

157. *Butler,* 1996 WL 421436, at *6.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. 151 F.3d 402 (5th Cir. 1998).
163. *Allison*, 151 F.3d at 407.

ufacturing facilities.[164] The plaintiffs sought traditional equitable relief in the form of an injunction and a declaratory ruling, as well as monetary relief.[165] Specifically, the plaintiffs wanted restructuring of discriminatory hiring and advancement policies, reinstatement of African-Americans into existing jobs, and retroactive seniority and benefits for employees who had been discriminated against.[166] In addition, the plaintiffs sought the monetary relief that has always been available under Title VII in the form of back pay and front pay.[167] Finally, the plaintiffs invoked the new provisions of Title VII to seek compensatory and punitive damages.[168] It is important to note that the defendant did not argue that the plaintiffs did not meet the requirements of Rule 23(a).[169]

A. Certification of the Whole Under Rule 23(b)(2): The Requirement that Monetary Damages Play an "Incidental" Role in Relation to Injunctive and Declaratory Relief

Allison held that the plaintiff class could not be certified as a Rule 23(b)(2) class action because monetary damages predominated over the injunctive and declaratory relief that were sought.[170] Before so holding, however, the court engaged in extensive consideration of the requirements of Rule 23(b)(2).[171]

1. A Purpose-Centered Analysis of Rule 23(b)(2) and the Role of Opt-Out and Notice in the Rule 23(b)(2) Class Action.—The court began by examining the plain language of Rule 23(b)(2), noting its clear availability when injunctive or declaratory relief is sought.[172] However, the court also noted that Rule 23(b)(2) does not address whether monetary relief may be pursued in ad-

164. *Id.* at 406.
165. *Id.*
166. *Id.* at 407.
167. *Id.*
168. *Allison,* 151 F.3d at 410.
169. *Id.*
170. *Id.* at 416.
171. *Id.* at 410-16.
172. *Id.* at 411.

dition to injunctive or declaratory relief.[173] Recognizing that the Advisory Committee's Notes on Rule 23 state that class certification under subsection (b)(2) "'does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages,'"[174] the court surmised that the creators of Federal Rule of Civil Procedure 23 anticipated that Rule 23(b)(2) would allow for monetary relief to some extent.[175] In addressing precisely how much monetary relief is permissible in a Rule 23(b)(2) class action, the court examined the purposes behind the requirement that Rule 23(b)(2) class actions be used to obtain monetary relief only if injunctive or declaratory relief is the predominant form of relief pursued.[176]

The court, in determining the meaning of "predomination" in the Rule 23(b)(2) context, noted that the predominance requirement in the Rule 23(b)(2) class action had two purposes.[177] First, the court opined that predominance gives deference to class members who prefer to bring their claims on an individual basis, as opposed to having their claims adjudicated among an entire class of similar claims.[178] The court noted that the Rule 23(b)(2) class action was designed for cases in which sweeping injunctive or declaratory relief is necessary with respect to the entire class.[179] The court identified the "group nature of the harm alleged and the broad character of the relief sought" as support for the assumption that a 23(b)(2) class action is for a "homogenous and cohesive group"[180] whose members' interests are aligned with little disparity.[181] That premise is shattered when class members seek monetary relief according to the class members' individualized injuries.[182] Therefore, the court rea-

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173. *Allison*, 151 F.3d at 410.

174. *Id.* 411 (quoting FED. R. CIV. P. 23 advisory committee notes).

175. *Id.* at 410 (citing Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974)).

176. *Id.* at 410-14.

177. *Id.* at 414.

178. *Allison*, 151 F.3d at 414.

179. *Id.* at 411 (citing Holmes v. Continental Can Co., 706 F.2d 1144, 1155 n.8 (11th Cir. 1983)).

180. *Id.* at 413 (quoting Penson v. Terminal Trans. Co., 634 F.2d 989, 993 (5th Cir. 1981)).

181. *Id.*

182. *Id.* (citing Eubanks v. Billington, 110 F.3d 87, 95 (D.C. Cir. 1997)).

soned, the model of a class action as a "homogenous and cohesive group" deteriorates as individualized requests for monetary relief come into greater focus, and the protection of the rights of individual class members demands "enhanced procedural safeguards."[183] Thus, certification under Rule 23(b)(2) becomes less appropriate as homogeneity and cohesiveness decrease.

Based on this line of reasoning, the court announced that monetary relief is the predominant factor in a Rule 23(b)(2) analysis when the request for it implicates the use of procedural mechanisms—notice and opt-out—to protect the individual interests of the class members.[184] In other words, when the money damages remedy is "less of a group remedy and instead depend[s] more on the varying circumstances of each potential class member's case," that prayer for relief predominates.[185]

The court noted that the second purpose served by Rule 23(b)(2) is the promotion of judicial economy.[186] The court reasoned that Rule 23(b)(2)'s predominance requirement encouraged the efficient adjudication of class-wide claims by narrowing the focus to questions of law and fact common to each class member's claim.[187] Furthermore, the court noted that the group nature of the forms of relief available in a Rule 23(b)(2) class action allows each plaintiff's claim to be adjudicated without resort to fact-intensive and time-consuming examinations of each class member's particular case.[188] This simplifies the award of damages because remedies are collective, as there are no individualized determinations of money damages to be made.[189] The court credited this model of the 23(b)(2) class action with obviating the requirement that the 23(b)(2) class action embody the superior method for maintaining a claim and making superfluous an inquiry into the extent to which common issues predominate over individualized issues, as is required for certification under Rule 23(b)(3).[190]

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183. *Allison*, 151 F.3d at 412.
184. *Id.* at 413.
185. *Id.*
186. *Id.* at 414.
187. *Id.* (citing *Holmes*, 706 F.2d at 1156).
188. *Allison*, 151 F.3d at 414.
189. *Id.*
190. *Id.* (citations omitted).

2. The Requirement that Monetary Damages Are Incidental to Injunctive and Declaratory Forms of Relief.—From this purpose-centered framework of the predomination requirement of Rule 23(b)(2), the court concluded that monetary relief predominates in a Rule 23(b)(2) class action unless it is "incidental" to requests for traditional equitable relief.[191] The court explained that "incidental" means those damages that directly follow a determination that the claims on which the requests for traditional equitable relief are based have been established.[192] The court also stated that an award of these "incidental damages" will generally be "concomitant with, not merely consequential to" traditional equitable relief with respect to the class as a whole.[193] The court asserted that these damages should lend themselves to an objective calculation and should not rest primarily "on the intangible, subjective differences" that exist among the plaintiffs' varying situations.[194] It further noted that the determination of whether a defendant is liable for incidental damages must not involve additional, fact-specific proceedings in the case.[195] Specifically, such proceedings "should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations."[196]

According to the court's reasoning, the plaintiffs' claims in *Allison* were not suited for Rule 23(b)(2) certification. First, the compensatory damages that the plaintiffs sought were not within the concept of predominance as announced by the court.[197] The court reasoned that a showing of infringement upon a plaintiff's constitutional or statutory rights will not lead to an award of compensatory damages.[198] Rather, each plaintiff must present his or her own proof of emotional distress or mental anguish to recover such damages.[199] Furthermore, these types of damages involve the various subjective and intangible dispari-

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191. *Id.*
192. *Id.*
193. *Allison*, 151 F.3d at 415.
194. *Id.* at 415.
195. *Id.*
196. *Id.*
197. *Id.* at 416.
198. *Allison*, 151 F.3d at 416 (citing Patterson v. PHP Healthcare Corp., 90 F.3d 927, 938-40 (5th Cir. 1996)).
199. *Id.* at 417.

ties among each plaintiff's claim as a matter of course.[200] Therefore, compensatory damages, unlike traditional forms of equitable relief, can never be characterized as the class-wide relief associated with the traditional remedies available in a Rule 23(b)(2) class action.[201] Because monetary damages are incapable of computation by an objective, straight-forward method and because they bring new and detailed legal issues to the case, Rule 23(b)(2)'s predominance requirement could not be satisfied under the circumstances in *Allison*.

B. The Relationship Between Compensatory and Punitive Damages and the Mandate that the Determination of Punitive Damages Follow the Determination of Compensatory Relief

The court concluded that the plaintiffs' claims for punitive damages were likewise non-incidental.[202] The court noted that a finding that the defendant engaged in discriminatory practices is significant only because it proves the plaintiffs' assertion that there has been a "general harm to the group and that injunctive relief is appropriate."[203] The court further noted that any award of damages intended to punish the defendant and to deter the defendant from engaging in future discrimination must bear a reasonable relationship to the degree of "reprehensibility" that can be attributed to its actions as well as to the amount required to compensate the plaintiffs for the past wrongful conduct.[204] In short, the court reasoned that punitive damages are also non-incidental. That is, any award of punitive damages involves evidence of the ways in which each plaintiff was subjected to discrimination through the introduction of "new and substantial legal and factual issues" not capable of objective determination.[205]

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200. *Id.*
201. *Id.*
202. *Allison*, 151 F.3d at 417.
203. *Id.* (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 266 (1989) (O'Connor, J., concurring in the judgment)).
204. *Id.* (citing *Patterson*, 90 F.3d at 938-40).
205. *Id.* at 418.

C. The Hybrid Approach: Certification of the Damages Issues under Rule 23(b)(3) and the Remainder Under Rule 23(b)(2)

Allison also spotlighted the bifurcated process so widely employed in the cases preceding it. As previously noted, the bifurcation scheme involves certification of the liability stage of a Title VII class action under Rule 23(b)(2) and certification of the damages portion of the proceedings under Rule 23(b)(3).[206] Assuming that the requirements of Rule 23(a) are met, certification under Rule 23(b)(3) is proper when "'questions of law or fact common to the members of the class predominate over any questions affecting only individual members.'"[207] In addition, in order for certification to be proper under Rule 23(b)(3), the class action must be found to be the superior method for the "fair and efficient adjudication of the controversy."[208]

In its analysis of whether certification of the damages portion of the controversy under Rule 23(b)(3) was appropriate, the court noted that the claims and defenses—as well as the facts and controlling law—of the case must be analyzed to determine whether the superiority and predominance elements of the rule are fulfilled.[209] In addition, the court opined that before compensatory and punitive damages may be awarded, each class member must present proof of his or her injury that is "individualized and independent" in terms of the nature of the injury itself and the means by which it was received.[210] Thus, the court noted that the requests for monetary relief rested almost entirely on evidence that was individualized, as opposed to group-based.[211] Under such circumstances, the court recognized the danger that a series of claims certified as a class action could "'degenerate in practice into multiple lawsuits separately tried.'"[212]

The court opined that the pervasive nature of the individu-

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206. *Id.* at 418-19.

207. *Allison*, 151 F.3d at 419 (quoting FED. R. CIV. P. 23(b)(2)).

208. FED. R. CIV. P. 23(b)(3).

209. *Allison*, 151 F.3d at 419 (citing Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996)).

210. *Id.* at 419 (citing *Patterson*, 90 F.3d at 938-40).

211. *Id.*

212. *Id.* (quoting *Castano*, 84 F.3d at 745 n.19).

alized proof necessary for an award of compensatory and punitive damages rendered the class action mechanism an inferior method for adjudication of the plaintiffs' claims.[213] The court further noted that the manageability problems were made more salient by the distinct differences among the plaintiffs' claims.[214] These differences, the court opined, would increase the risk that a jury would have to determine issues that had already been passed on by an earlier jury.[215] This potential for a Seventh Amendment violation further detracted from the class action being the superior method for resolving the plaintiffs' claims.[216]

In addition, the court noted that because these claims had potentially large monetary value, it would be easy for the plaintiffs to bring their claims on an individual basis. [217]Specifically, the availability of attorneys' fees under the statute obviated any financial impediments that individual plaintiffs might encounter outside of the class action context.[218] Therefore, the court found that the problem of the no-value suit, which it characterized as the "most compelling rationale for finding superiority in a class action," was absent in *Allison*.[219] A denial of class certification in that case would not be expected to sound the "death knell" for the plaintiffs, as it might in cases where individual prosecution of claims is impractical or inappropriate because the stakes of recovery, even when had, are simply too low to justify the litigation costs.[220] Therefore, the court concluded, the principles underlying the Rule 23(b)(3) class action weighed against certification of the damages portion of the proceeding.[221] The court

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213. *Id.* (citing *Castano*, 84 F.3d at 744 (explaining that the greater the number of individual issues, the less likely that superiority of the class action mechanism can be established)).

214. *Allison*, 151 F.3d at 419. The court explained that there were "more than a thousand potential plaintiffs spread across two separate facilities, represented by six different unions, working in seven different departments, and alleging discrimination over a period of nearly twenty years." *Id.*

215. *Id.*

216. *Id.* (citing *Castano*, 84 F.3d at 750-51; *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302-03 (7th Cir. 1995)).

217. *Id.*

218. *Allison*, 151 F.3d at 420.

219. *Id.*

220. *Id.*

221. *Id.*

analyzed the feasibility of the hybrid approach primarily from the standpoint of certification of the damages portion under Rule 23(b)(3), rather than from the standpoint of the suitability of the liability phase of the proceedings under Rule 23(b)(2).[222] This analysis is quite different from that employed by other courts taking the hybrid approach.

D. Severance of the Plaintiffs' Theories of the Case to Facilitate Certification

1. Certification and Trial of the Disparate Impact Claim and the First Stage of the Pattern or Practice Claim Under Either Rule 23(b)(2) or Rule 23(b)(3).—In its continued attempts to find a suitable route by which to certify the claims of the *Allison* plaintiffs, the court also considered whether partial certification of the proceedings was a viable alternative.[223] Specifically, the court considered the alternative of certifying the first phase of the plaintiffs' pattern or practice claim as either a 23(b)(2) or a 23(b)(3) class action and presenting it and the disparate impact claim to the jury.[224] The court would then postpone its own conclusions until after the jury's findings had been made.[225] In addition, the court would wait until the initial proceedings were completed before deciding whether the second stage of the case would be certified.[226]

Before considering this alternative, the court found it important to note that the plaintiffs' claims for compensatory and punitive damages were still, at least from the plaintiffs' standpoint, a viable part of the proceedings.[227] The plaintiffs argued that after the issues had been narrowed, eventual Rule 23(b)(3) certification could be had for at least some portion of the plaintiffs' damages claims.[228] But this narrowing of the issues could only be achieved by class-wide discovery and by determinations of the disparate impact claim and the first stage of the

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222. *Id.* at 418-20.
223. *Allison*, 151 F.3d at 420.
224. *Id.*
225. *Id.* at 420.
226. *Id.*
227. *Id.* at 421.
228. *Allison*, 151 F.3d at 421.

pattern or practice claim.[229]

The plaintiffs' argument was rejected by the court for two reasons.[230] First, the court did not agree that certifying the first stage of the claim would render the second stage any more suited for class certification.[231] Rather, the court noted that there "are no common issues between the first stage of a pattern or practice claim and an individual discrimination lawsuit."[232] Therefore, because certification and class-wide discovery of the first stage of the proceedings would not significantly narrow the issues involved in the second phase, the court found no reason to certify the first stage of the class in anticipation of certifying the second phase at some later point.[233]

Second, the court referred back to its earlier reasoning to preclude certification of the first stage of the pattern or practice claim as a Rule 23(b)(3) class action.[234] Again, the court noted that there were highly individualized issues involved in the plaintiffs' pattern or practice claim.[235] As previously discussed, the individualized issues to which the court referred are due in large part to the plaintiffs' requests for compensatory and punitive damages.[236] The plaintiffs argued, however, that the first stage of the pattern or practice claim could be certified because those individualized issues would be severed, thereby rendering common issues predominant.[237]

The court rejected this approach and the plaintiffs' reasoning.[238] The court indicated that the plaintiffs were attempting to "'manufacture'"[239] predominance from Rule 23(c)(4), which provides that "when appropriate, an action may be brought or maintained as a class action with respect to particular issues."[240] The court opined that if Rule 23(c)(4) were read in

229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* (citing Cooper v. Federal Reserve Bank, 467 U.S. 867, 877-80 (1984)).
233. *Allison*, 151 F.3d at 421.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 421-22.
238. *Allison*, 151 F.3d at 421-22.
239. *Id.* at 422 (quoting *Castano*, 84 F.3d at 745 n.21).
240. FED. R. CIV. P. 23(c)(4).

this manner, the predominance requirement of Rule 23(b)(3) would be nullified.[241] Furthermore, the court asserted that this approach would result in automatic class certification for "every case where there is a common issue."[242] The court stated that this could not have been intended under Rule 23(c)(4).[243]

2. Certification of the Disparate Impact Claim and Delayed Decision Regarding the Pattern or Practice Claim: An Obstacle of Constitutional Proportions.—Next, the court considered the only alternative remaining for the plaintiffs—certifying a class with respect to the disparate impact claim and reserving the decision to certify the pattern or practice claim until a later date.[244] The court again noted that traditional forms of equitable relief were appropriate in disparate impact cases brought as Rule 23(b)(2) class actions.[245] It further acknowledged that the issues involved in the pattern or practice claim could be considerably narrowed following resolution of the disparate impact claim.[246] In addition, under this approach, the case would be rendered more manageable as a jury trial and thereby would become the superior method for adjudicating the controversy.[247]

Despite these benefits, the court rejected this approach on Seventh Amendment grounds.[248] The court noted that the Seventh Amendment preserves the right to a jury trial "'in Suits at common law.'"[249] Furthermore, the court noted that this right extends to all cases in which "'legal rights are to be determined, as opposed to those in which only equitable rights and remedies are involved.'"[250] The court noted that Seventh Amendment considerations are not limited to actions at common law, but

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241. *Allison*, 151 F.3d at 422.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Allison*, 151 F.3d at 422. The court noted that resolution of the entire disparate impact claim could clarify Citgo's employment practices and could identify those members of the class without colorable claims, thereby decreasing the size of the class and the number of individual issues. *Id.*
247. *Id.*
248. *Id.* at 422-24.
249. *Id.* at 422 (quoting U.S. CONST. amend. VII).
250. *Allison*, 151 F.3d at 422 (quoting Ross v. Bernhard, 396 U.S. 531 (1970)).

they may be statutorily created as well.[251] The court stated that the provision of 42 U.S.C. § 1981a allowing for a jury trial at the request of either party when compensatory or punitive damages are sought created such a right.[252]

Because compensatory and punitive damages are not available in disparate impact claims, the court recognized that the right to trial by jury under Title VII extends only to the plaintiffs' pattern or practice claim.[253] The court stated that "[o]nce the right to a jury trial attaches to a claim . . . it extends to all factual issues necessary to resolving that claim."[254] Therefore, the court reasoned, the factual issues that must be resolved to determine whether a defendant has engaged in a pattern or practice of discrimination carry over to the determination of whether the defendant is liable to a particular plaintiff and, if so, whether there should be any award of compensatory and punitive damages.[255] However, the right to trial by jury does not extend to the determination of the disparate impact claim or the corresponding determination of the appropriateness of any injunctive or declaratory relief.[256]

Nevertheless, the court found that resolution of the disparate impact claim and its accompanying remedies must be weighed under the Seventh Amendment because when claims for legal and equitable relief are combined, the right to trial by jury mandates that any common factual determinations must be made by a jury before the court is allowed to rule on the equitable claims or the attendant equitable remedies.[257] Thus, the court concluded that the trial court was prohibited from passing on the plaintiffs' disparate impact claim until after a jury had decided the common factual issues.[258]

The court then considered whether the disparate impact claim shared any of the same factual issues with the pattern or

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251. *Id.* at 422-23.

252. *Id.* (citing 42 U.S.C. § 1981a(c) (1991)).

253. *Id.* (discussing 42 U.S.C. § 1981a(c)).

254. *Id.* at 423 (discussing Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959)).

255. *Allison*, 151 F.3d at 423.

256. *Id.*

257. *Id.*

258. *Id.* (citing Ward v. Texas Employment Comm'n, 823 F.2d 907, 908-09 (5th Cir. 1987)).

practice claim.[259] Because the claims challenged the same employment policies and practices, there were overlapping issues.[260] First, the court noted that the causal connection between the alleged discriminatory employment practices and each plaintiff's harm was a shared requirement of both claims.[261] To illustrate, the court identified the required findings of whether each individual class member failed with respect to a challenged criteria of employment, whether it was that failure that caused the non-hire, and whether each class member could be considered to have been an applicant for the job to be filled.[262]

In addition, the court considered the defenses that the defendant would likely raise at each stage of the proceedings.[263] The court concluded that the business necessity defense, which is routinely used to rebut allegations of disparate impact, and the legitimate nondiscriminatory reason defense, commonly relied upon in disparate treatment claims, were not "'so distinct and separable' from one another" that two different fact-finding bodies could consider them without impinging upon the defendant's rights under the Seventh Amendment.[264] The court noted that proof that a challenged practice is "'job-related for the position in question and consistent with business necessity'"[265] strongly, if not completely, precedes the finding that the same practice is a legitimate nondiscriminatory reason for the employer's actions in a pattern or practice claim.[266] Therefore, there were issues of fact common to the plaintiffs' disparate impact and pattern or practice claims which constitutionally precluded the plaintiffs from presenting to the court their disparate impact claim for traditional equitable relief before the

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259. *Id.* at 424.

260. *Allison*, 151 F.3d at 424. The court noted that the plaintiffs challenged Citgo's failure to post or announce job vacancies, use of an informal word-of-mouth announcement process, use of racially biased tests to evaluate candidates, and use of a subjective decision-making process as resulting in unlawful racial discrimination. *Id.* at 424 n.22.

261. *Id.* at 424.

262. *Id.*

263. *Id.*

264. *Allison*, 151 F.3d at 424 (quoting Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931)).

265. *Id.* at 425 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(I) (1991)).

266. *Id.* at 424-25.

pattern or practice claim.[267]

V. In Conclusion: The Lessons and Lasting Impact of *Allison v. Citgo Petroleum*

Even the most cursory review of the Fifth Circuit's opinion in *Allison v. Citgo Petroleum Corp.* illustrates that the complications in class certification wrought by the Civil Rights Act of 1991 are profound and much more complex than this Article reveals. The short statement of the Title VII class action quagmire is this: it's not so simple anymore. Specifically, there are four key areas of class certification that should either be re-analyzed in light of *Allison* or watched carefully as other cases similar to *Allison* climb the appellate ladder.

The first is the standard for Rule 23(b)(2) certification that *Allison* announces. Regardless of whether the predominance inquiry is conducted from the vantage point of the proceedings as a whole or as to only that portion of the proceedings relating to a defendant's liability, *Allison* illustrates that the analysis regarding whether the request for injunctive relief is the predominant form of relief sought must be more rigorous than a generalized acceptance of that fact and adherence to the old notion that civil rights cases are well-suited for Rule 23(b)(2) certification.

Second, with respect to the punitive damages element of a Title VII class action, *Allison's* lasting impact seems to be that the determination of punitive damages must follow a determination of compensatory damages. Whether this result is peculiar to the theories advanced by the plaintiffs in *Allison* remains to be seen, but it still must be explored and examined by the courts.

Third, the hasty or delayed consideration of whether a second, liability phase of a Title VII class action proceeding is maintainable under Rule 23(b)(3) is no longer sufficient. After *Allison*'s close scrutiny of the feasibility of such a structure and the court's detailed consideration of the requirements of Rule 23(b)(3) at the outset, the defendants of such actions will no doubt demand that courts conduct a more searching inquiry before plaintiffs are allowed to conduct discovery and proceed

267. *Id.* at 425.

under the Rule 23(b)(2) structure for a time, thereby making the lure of quick settlement even more attractive to defendants.[268]

Finally, any attempts at partial class certification under a severed model must be analyzed in light of the specific theories advanced by plaintiffs so that the Seventh Amendment is not violated. After *Allison*, the complacency of courts accepting plaintiffs' arguments that a determination regarding liability and a subsequent determination regarding damages do not involve the "same issues," and therefore pass constitutional muster, is certainly questionable. On the contrary, defendants in Title VII class actions would be wise to demand analysis of partial class certification against a backdrop of the specifically delineated claims, issues and defenses involved.

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268. Note that the utility of settlement class actions is being rethought after the Supreme Court's recent opinions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Otiz v. Fibreboard Corp.*, 119 S. Ct. 2295 (1999). Those cases demonstrate essentially that a settlement class action is, above all, a class action. The requirements of Rule 23 are not dispensed with. The transferability that *Allison* would have as to the issue of certification of settlement classes remains to be seen.