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Fighting to Keep Employment Discrimination Class Actions Alive: How Allison v. Citgo's Predomination Requirement Threatens to Undermine Title VII Enforcement

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Fighting to Keep Employment Discrimination Class Actions Alive: How *Allison v. Citgo*'s Predomination Requirement Threatens to Undermine Title VII Enforcement

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I.
INTRODUCTION

The class action device is critical to the enforcement of Title VII of the Civil Rights Act of 1964. For decades, Title VII class actions have resulted in extensive reforms in employers' policies and millions of dollars in monetary relief for thousands of employees nationwide.[1] However, this traditional tool of enforcement has come under attack. The Civil Rights Act of 1991, which provides compensatory and punitive damages, and attendant jury trials in cases alleging intentional discrimination, was designed to enhance enforcement and expand remedies.[2] Its enactment, however, has created a schism among the courts over the propriety of class certification where employees seek monetary damages as well as injunctive relief for Title VII claims.

The courts of appeals hotly contest what the proper standard is for determining whether monetary damages or injunctive relief predominates, a necessary inquiry for determining whether plaintiffs are entitled to class certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

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1. *See* Press Release, Texaco, Texaco Announces Settlement in Class Action Lawsuit (Nov. 15, 1996) (African-American class received $176 million in settlement with Texaco), *available at* http://www.texaco.com/sitelets/diversity/; Ingram v. Coca-Cola Co., 200 F.R.D. 685, 687-88 (N.D. Ga. 2001) (describing "far reaching" programmatic relief of settlement in Title VII class action against Coca-Cola); Julie Dunn & Andy Vuong, *Retail Titans Battle Bias More Workers Sue Warehouse Stores Rapid Growth is Blamed Wal-Mart, Home Depot and Costco Have Dealt with Claims that They Discriminated Against Workers Based on Race and Sex*, DENVER POST, Sept. 19, 2004, at K1 (describing Home Depot $5.5 million settlement in employment discrimination class action and others); Mark Diana, *Beginning of the End of Money Damage Class Actions? The Future of Big Money Employment Discrimination Class Actions, On the Rise Since the 1991 Civil Rights Act was Passed, Is Unsettled*, N.J.L.J., Mar. 25, 2002 at S2 (discussing "extraordinary settlements" against Coca-Cola ($192.5 million), Home Depot ($87 million), Publix ($82 million), and Texaco ($176 million)); Nadya Aswad & Joyce Cutler, *Home Depot Agrees to Pay $65 Million to Settle Sex Discrimination Class Action*, Daily Lab. Rep. (BNA) No. 183, at A-11 (Sept. 22, 1997)); Lesley Frieder Wolf, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 COLUM. L. REV. 1847, 1847 n. 3 (2000) (citing multi-million dollar settlements against employers such as Home Depot, Boeing, Amtrak and others).

2. *See* The Civil Rights Act of 1991 § 2-3, Pub. L. No. 102-166 (1991).

The Fifth Circuit concluded in *Allison v. Citgo Petroleum Corp.*,[3] that monetary relief predominates unless it is "incidental," and that compensatory and punitive damages are by "nature" not "incidental."[4] This narrow interpretation of Rule 23 has been adopted by the Third, Seventh,[5] and Eleventh Circuits.[6] On the opposite end of the spectrum is the Second Circuit's standard set forth in *Robinson v. Metro-North Commuter Railroad Co.*, which permits the courts to use a liberal "ad hoc" approach when determining predomination.[7] This approach is also embraced by the Ninth Circuit.[8]

This division between the circuits is reason for great concern. Employees are currently subject to inconsistent and inadequate standards of justice. The more restrictive formulation set forth in *Allison* threatens to undermine the enforcement of civil rights in three ways. First, the Fifth Circuit's adoption of an "incidental" standard of damages and its conclusion that compensatory and punitive damages are not per se "incidental" make it much harder for plaintiffs seeking such damages to get a case certified as a class action under provision (b)(2), or even (b)(3) in some circuits, of the federal class action rule. Deprivation of this enforcement mechanism will result in unchecked systemic employment discrimination because of the critical role the class action plays in Title VII enforcement. Second, the propensity of the Fifth Circuit (and other circuits) to deny certification to plaintiffs seeking class-wide monetary relief under (b)(2) forces plaintiffs to forgo relief to which they are entitled as a cost of class certification. Consequently, deterrence objectives are undermined and defendants receive a windfall. Finally, the heightened standard for certification under (b)(2) compels employees to seek certification under (b)(3), a provision which imposes greater costs, burdens, and scrutiny. These additional hurdles may be just enough to prevent some plaintiffs from vindicating their civil rights.

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3. 151 F.3d 402, 415-18 (5th Cir. 1998).

4. *Id.* at 417.

5. An alternative approach is suggested by the Seventh Circuit. While the Seventh Circuit has adopted *Allison*'s "incidental" predomination test for (b)(2) classes, this circuit has put forward various ways a district court may be able to certify such cases under (b)(3). *See* Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 898-99 (7th Cir. 1999); Lemon v. Int'l Union of Operating Eng'rs, Local 139, 216 F.3d 577, 581-82 (7th Cir. 2000).

6. *See* Barabin v. Aramark Corp., No. 02-8057, 2003 WL 355417, at * 1 (3d Cir. Jan. 24, 2003); Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 898 (7th Cir. 1999); *accord, e.g., In re* Allstate Ins. Co., 400 F.3d 505, 507 (7th Cir. 2005); Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001). *Cf.* Coleman v. Gen. Motors Acceptance Corp., 296 F.3d 443, 446-47 (6th Cir. 2002) (in race discrimination case brought under Equal Credit Opportunity Act, court reserved judgment as to whether compensatory damages are ever recoverable in a 23(b)(2) class action, but concluded that if they were, such damages dominated over the injunctive relief sought because of the "highly individualized determinations that would be required to determine those damages").

7. *Robinson*, 267 F.3d 147, 162-64 (2d Cir. 2001).

8. Molski v. Gleich, 318 F.3d 937, 949-50 (9th Cir. 2003).

Given the importance of the class action mechanism to civil rights enforcement, it is imperative that the predomination approach—taken by the majority of circuits that have ruled on this issue—be abandoned in favor of the more equitable ad hoc balancing approach established by the Second Circuit in *Robinson*. Under the latter approach, plaintiffs will be able to effectively vindicate their statutory rights under Title VII, courts will retain their discretionary power under Rule 23, and Congressional intent articulated in the Civil Rights Act of 1991 will be honored. The latest amendments to Rule 23 and the recently enacted Class Action Fairness Act of 2005 only bolster the protections against judiciary abuse of power in class certification determinations, thereby preserving due process. Thus, the minority's ad hoc balancing approach to predomination is preferable to the majority's bright-line one.

II.
THE DEVELOPMENT OF THE CIRCUIT CONFLICT OVER THE INTERPRETATION OF RULE 23'S PREDOMINATION REQUIREMENT AFTER THE ENACTMENT OF THE CIVIL RIGHTS ACT OF 1991

A. The Central Role of Rule 23(b)(2) Certification in Civil Rights Enforcement

The class action mechanism has been the cornerstone of civil rights enforcement, particularly in Title VII actions, for the past forty years. Rule 23 governs cases brought in federal court on behalf of a class of people. In order to represent a class, plaintiffs must meet all four criteria of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation,[9] and one of three criteria set forth in Rule 23(b). Rule 23(b)(1) is designed primarily to protect the interests of defendants who may be forced to follow inconsistent or incompatible judgments and absent class members whose rights may be compromised in the absence of a class action.[10] The most common provision utilized for Title VII class actions has been provision (b)(2), which applies where "the party opposing the class has acted or

9. These prerequisites are set forth in Rule 23(a): "One or more members of a class may sue or be sued as representative parties on behalf of all only if (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 interests of the class." FED. R. CIV. P. 23(a).

10. Rule 23(b)(1) certification is appropriate where the prosecution of separate actions would create a risk of either "(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]" FED. R. CIV. P. 23(b)(1).

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[.]"[11] Conduct that is "generally applicable" means that "the party opposing the class 'has acted in a consistent manner towards members of the class so that his actions may be viewed as part of a pattern of activity, or to establish a regulatory scheme, to all members.'"[12] Rule 23(b)(3) certification is meant to provide a representative action where the class is less cohesive than those certified under (b)(1) or (b)(2), but efficiency and manageability make certification desirable.[13] Specifically, certification is appropriate under Rule 23(b)(3) where "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 that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[14] Because a (b)(3) class is by nature less cohesive and often involves monetary damages, class members are entitled to notice and the right to opt out of the class.[15]

Because civil rights cases have historically sought to curtail discrimination on a broad scale, they are uniquely suited for (b)(2) certification.[16] Plaintiffs in these cases have customarily sought injunctive and declaratory relief for systemic conduct based on race and other protected statuses. This benefits the class as a whole. Such cohesiveness makes notice and the right to opt out unnecessary,[17] especially where

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

12. CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1775 at 43-46 (3d ed. 2005).

13. *See* FED. R. CIV. P. 23(b)(3) advisory committee notes to 1966 amendment (Rule 23(b)(3) is intended to provide aggregate litigation where "class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results" (citing CHAFEE, SOME PROBLEMS OF EQUITY 201 (1950))).

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

15. *See* FED. R. CIV. P. 23(c)(2)(B)("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must . . . state . . . that a class member may enter an appearance through counsel if the member so desires, that the court will exclude from the class any member who requests exclusion, . . . and the binding effect of a class judgment on class members under Rule 23(c)(3).").

16. *See, e.g.*, Kyriazi v. W. Elec. Co., 647 F.2d 388, 393 (3d Cir. 1981) (explaining that a Title VII class action seeking injunctive and declaratory relief for systemic discrimination is "obviously the paradigm of a Rule 23(b)(2) class action"); East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977) (stating that race discrimination cases "are often by their very nature class suits, involving class-wide wrongs").

17. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 250-51 (3d Cir. 1975).

plaintiffs only seek class-wide injunctive or declaratory relief.[18] It is well recognized that provision (b)(2) in particular "was promulgated . . . essentially as a tool for facilitating civil rights actions."[19] The Supreme Court has more recently recognized the centrality of Rule 23(b)(2) to civil rights class actions as well.[20]

B. The Impact of the Civil Rights Act of 1991

Despite the pivotal role (b)(2) certification has played in the enforcement of civil rights in general, and Title VII rights in particular, the propriety of such certification is being questioned in the wake of the Civil Rights Act of 1991. Prior to 1991, employees had limited recourse for Title VII actions; they could pursue only equitable relief, such as injunctions, declarations, reinstatement, back pay, and front pay. The Civil Rights Act of 1991 enhanced employees' remedies, enabling them to seek compensatory and punitive damages and a jury trial in Title VII cases alleging intentional discrimination.[21]

The Act, however, did not immediately awaken the giant; rather, employees continued to successfully bring class actions seeking certain monetary and injunctive relief under Rule 23(b)(2).[22] The courts agreed that in order for a case to be certified under (b)(2), monetary relief could not

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18. *See* Jones v. CCH-LIS Legal Info. Servs., No 97-CIV-4372, 1998 WL 671446, at *2 (S.D.N.Y. Sept. 28, 1998); *see, e.g.*, Jefferson v. Windy City Maint., Inc., No. 96-C-7686, 1998 WL 474115, at *10 (N.D. Ill. Aug. 4, 1998); Vaszlavik v. Storage Tech. Corp., 183 F.R.D. 264, 272 (D. Colo. 1998) (ERISA case).

19. 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.43[1][b], at 23-192 (3d ed. 2005); *see* advisory committee's note to Proposed Rule of Civil Procedure 23, 39 F.R.D. 69, 102 (1966) (explaining that Rule 23(b)(2) certification was intended to apply to civil rights cases where "final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate"); Eubanks v. Billington, 110 F.3d 87, 92 (D.C. Cir. 1997) ("Title VII and other civil rights class actions are frequently certified pursuant to Rule 23(b)(2)."); Holmes v. Cont'l Can Co., 706 F.2d 1144, 1152 (11th Cir. 1983) (noting that civil rights class actions are usually certified pursuant to Rule 23(b)(2)); Kincade v. Gen. Tire & Rubber Co., 635 F.2d 501, 506 n.6 (5th Cir. 1981) (same); Barefield v. Chevron, No. C-86-2427-TEH, 1988 WL 188433 (N.D. Cal. Dec. 6, 1988) (explaining it is "often acknowledged, (b)(2) was deliberately drafted to facilitate the vindication of civil rights through the class action device"); *see also* Harvey S. Bartlett III, *Determining Whether a Title VII Plaintiff Class's "Aim is True": The Legacy of* Allison v. Citgo Petroleum Corp. *for Employment Discrimination Class Certification Under Rule 23(b)(2)*, 74 TUL. L. REV. 2163, 2170-71 (2000) (concluding that some courts treat employment discrimination cases as "categorically certifiable" under Rule 23(b)(2), as opposed to analyzing them on a case-by-case basis).

20. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of (b)(2) classes).

21. 42 U.S.C. §§ 1981a, 1981(c) (2001).

22. *See, e.g.*, Orlowski v. Dominick's Finer Foods, Inc., No. 95 C1666, 1997 U.S. Dist. LEXIS 1984 (N.D. Ill. Feb. 21, 1997), *aff'd*, 172 F.R.D. 370 (N.D. Ill. 1997) (certifying a (b)(2) case where monetary relief was sought because it did not predominate and court counseled that disputes over which type of relief predominates should be avoided); Jones v. CCH-LIS Legal Info. Servs., No 97-CIV-4372, 1998 WL 671446, at *2 (S.D.N.Y. Sept. 28, 1998) (focusing on appropriateness of certifying (b)(2) class in civil rights case and not focusing on whether monetary damages predominated over injunctive relief).

"predominate" over the equitable relief sought—a standard articulated by the Advisory Committee Notes that accompany Rule 23. However, the inclusion of compensatory and punitive damages and jury trials to Title VII ultimately led to a major division among the courts.[23] The Fifth Circuit's ruling in *Allison* marked the moment at which the giant awoke and the propriety of (b)(2) certification for employees seeking monetary damages and injunctive relief came into sharp focus.

C. Allison v. Citgo

The Fifth Circuit, in *Allison*, was the first appellate court to hold that plaintiffs who pursued compensatory and punitive damages in addition to injunctive relief were precluded from seeking class-wide relief under Rule 23(b)(2). The Fifth Circuit held that:

> [M]onetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief. By incidental, we mean damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief.[24]

More specifically, the court defined "incidental" damages as 1) "concomitant with, not merely consequential to, class-wide injunctive or declaratory relief"; 2) "capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances"; and 3) "not requiring additional hearings to resolve the disparate merits of each individual's case;" and not introducing "new and substantial legal or factual issues", or entailing "complex individualized determinations."[25] The Fifth Circuit's definition of incidental damages has also been adopted by the Third, Seventh, and Eleventh Circuits.[26]

Using this approach, the Fifth Circuit in *Allison* affirmed the district court's conclusion that neither the compensatory nor punitive damages were sufficiently incidental to the injunctive and declaratory relief to warrant (b)(2) certification.[27] The Fifth Circuit concluded that the amount of compensatory damages could not be determined by objective standards, but rather required specific, individualized proof of actual injury for each class

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23. *See* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 236 n. 368 (2003) (explaining "Judicial efforts to give practical meaning to this passage have led to a dizzying array of approaches.").

24. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415 (5th Cir. 1998).

25. *Id.*

26. *See* Barabin v. Aramark Corp., No. 02-8057, 2003 WL 355417, at * 2 (3d Cir. Jan. 24, 2003); *In re* Allstate Ins. Co., 400 F.3d 505, 507 (7th Cir. 2005); Murray v. Auslander, 244 F.3d 807, 812 (11th Cir. 2001).

27. *Allison*, 151 F.3d at 416.

member.[28] The Fifth Circuit concluded that because the punitive damages were dependent upon the determination of the compensatory damages, the former also required individualized proof and were based on subjective differences.[29]

Allison has been interpreted by some as the death knell for Title VII (b)(2) class actions seeking compensatory and punitive damages in addition to equitable relief.[30] Absent Supreme Court intervention on the issue, this interpretation is not unreasonable in certain circuits. *Allison*'s definition of incidental damages is interpreted in such a way that compensatory and punitive damages automatically fail to qualify, thereby making it practically impossible to seek such remedies in a (b)(2) class.[31] The adoption of such a "rigid bright-line" test strips district courts of their discretion to certify a class action when appropriate and to conduct a "rigorous analysis" as required.[32] Courts are left with little room to navigate (b)(2) certification in Title VII cases.[33]

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28. *Id.* at 416-17.

29. *Id.* at 416-18.

30. *See, e.g., id.* at 431 (Dennis, J., dissenting) ("The majority's rule, contrary to the intent of the drafters and Congress, threatens a drastic curtailment of the use of (b)(2) class actions in the enforcement of Title VII and other civil rights acts."); *see also* Bartlett III, *supra* note 19, at 2165, 2184 ("That *Allison* represents the demise of the effectiveness of the Civil Rights Act of 1991 remains inescapable . . ."); Wolf, *supra* note 1, at 1848 (the combination of the Civil Rights Act of 1991 and current case law, *e.g.*, *Allison*, "threatens to drastically curtail—if not eliminate altogether—employment discrimination class actions); *see generally* Nikaa Baugh Jordan, *Allison v. Citgo Petroleum: The Death Knell for the Title VII Class Action?*, 51 ALA. L. REV. 847 (2000).

31. *See Allison*, 151 F.3d at 426 (Dennis, J., dissenting).

32. *See id.* (Dennis, J., dissenting); s*ee also* Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982) (district courts must conduct a "rigorous analysis" in determining the appropriateness of class certification); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 408 (1980) (explaining that district courts are not obligated to construct subclasses).

33. The plot has thickened even further. In the case of *In the Matter of Monumental Life Insurance Co., Industrial Life Ins. Litigation*, the Fifth Circuit addressed the scope of *Allison* in a non-employment case. Plaintiffs brought suit against three insurance companies for discriminating against African-Americans in setting premiums for low-value life insurance policies. The district court found that plaintiffs' damages predominated over the injunctive relief sought and therefore denied certification under Rule 23(b)(2). *In re* Indus. Life Ins. Litig., 208 F.R.D. 571, 572-74 (E.D. La. 2002), *rev'd sub nom. In re* Monumental Life Ins. Co., 365 F.3d 408 (5th Cir. 2004). However, the Fifth Circuit reversed, concluding that because the damages could be calculated mechanically based on "factors developed and maintained in the course of defendants' business," such damages did not predominate. *In re* Monumental Life Ins. Co., 365 F.3d 408, 418-20, n. 20 (5th Cir. 2004), *cert. denied*, American Nat'l Ins. Co. v. Bratcher, 125 S.Ct. 277 (2004). In *Monumental Life Insurance*, the Fifth Circuit concluded that a refund-type case, involving "factors such as premium rate, issue age, and benefits paid" presented an ideal situation for calculating damages using objective standards. 365 F.3d at 420 n. 20. While the majority conceded, "[o]ne is left wondering in what circumstances (if any) the dissent would permit monetary damages in a rule 23(b)(2) class," 365 F.3d at 420 n. 20, thereby belying the fact that the Fifth Circuit itself has yet to define the precise scope of *Allison*, the case confirms its narrow approach in employment cases. The *Monumental Life Insurance* majority made clear that its facts were distinguishable from those in *Allison*: "This is not . . . like *Allison*, a title VII case in which class members' claims for compensatory and punitive damages necessarily implicated[ ] subjective

Moreover, the Fifth Circuit's cramped interpretation of what constitutes predomination is unwarranted. Based on the text of Rule 23, the accompanying Advisory Committee Notes to Rule 23(b)(2), and the underlying policies of both Rule 23(b)(2) and the Civil Rights Act of 1991, the Fifth Circuit was not compelled to read predomination so narrowly.[34] Rule 23 is silent on the issue of whether monetary relief is permitted in a (b)(2) class; nothing in the Rule's text suggests that certification under such circumstances is impermissible.[35] The Advisory Committee Notes interpreting provision (b)(2) shed some light on the issue, noting that (b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages."[36] This, of course, means that the Advisory Committee anticipated that some amount of monetary damages would be permissible in a (b)(2) class, so long as they did not predominate.[37] Given the Committee's endorsement of civil rights cases as prototypical (b)(2) class actions,[38] it follows that the Committee must have foreseen the possibility of civil rights (b)(2) class actions involving monetary damages. The underlying policy rationale for Rule 23(b)(2) is to provide an effective tool for the vindication of civil rights,[39] which countenances certification where employees seek compensatory and punitive damages, as well as equitable relief. Finally, the purpose of the Civil Rights Act of 1991 favors a liberal interpretation of (b)(2) certification because it was enacted to bolster, not limit, employees' ability to seek relief for intentional employment discrimination.[40] This is true in the class context as well. For all the above stated reasons, the Fifth Circuit and others need not, and should not, read Rule 23(b)(2) so restrictively.[41]

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differences of each plaintiff's circumstances.'" 365 F.3d at 419. The impact of *Monumental Life Insurance* on district court rulings in employment cases will be important to follow.

34. *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 431-32 (5th Cir. 1998) (Dennis, J., dissenting), *reh'g en banc denied with clarification*, No. 96-30489, 1998 U.S. App. LEXIS 24651 (5th Cir. Oct. 2, 1998).

35. *See* FED. R. CIV. P. 23; *see also* Parker v. Local Union No. 1466, 642 F.2d 104, 107 (5th Cir. 1981) (explaining that while Rule 23(b)(2) explicitly refers to injunctive and declaratory relief, the text does not exclude the possibility of monetary relief).

36. FED. R. CIV. P. 23(b)(2) advisory committee's note.

37. Plaintiffs have also been successful in obtaining back pay awards in (b)(2) classes prior to the enactment of the Civil Rights Act of 1991 because of the equitable nature of such relief. *See Allison*, 151 F.3d at 415 ("Back pay, of course, had long been recognized as an equitable remedy under Title VII.") (describing cases); *see, e.g.*, Williams v. Owens-Ill., Inc., 665 F.2d 918, 928-29 (9th Cir. 1982) (describing back pay as equitable and incidental and distinguishing between compensatory damages), *amended by*, No. 79-4110, 1982 WL 308873 (9th Cir. June 11, 1982).

38. *See* FED. R. CIV. P. 23 advisory committee's note to subdivision (b)(2). (citing civil rights cases as illustrative).

39. 5 JAMES WM. MOORE ET AL., *supra* note 19, § 23.43[1][b], at 23-192 (3d ed. 2005).

40. *See* Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001).

41. Melissa Hart offers some compelling reasons for why the courts have sought to restrict (b)(2) certification of civil rights cases. She concludes that the courts are swayed by three things: 1) the perception that class actions are unfair; 2) the perception that employment class actions are unnecessary;

D. Robinson v. Metro-North

In contrast, the Second Circuit, in *Robinson v. Metro-North Commuter R.R. Co.*, explicitly rejected *Allison*'s test and set forth an alternative analytical framework for certification under Rule 23(b)(2) when monetary damages are sought.[42] *Robinson* adopted an "ad hoc" approach, whereby the district court must assess whether (b)(2) certification is appropriate in light of the "relative importance of the remedies sought, given all of the facts and circumstances of the case."[43] The court may certify a (b)(2) class, where in its "informed sound judicial discretion," it finds that:

> [T]he positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are . . . claimed . . . and 2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy.[44]

The Second Circuit elaborated that even using an ad hoc approach, a court must ensure two criteria are met to satisfy (b)(2) certification where plaintiffs seek monetary damages and injunctive relief:

> [E]ven in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and 2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.[45]

The *Robinson* approach is designed to promote judicial efficiency and to provide a case-by-case assessment of certification.[46] While the *Robinson* court conceded that (b)(2) certification of classes involving nonincidental monetary damages could present due process risks for absent class members, it encouraged courts to consider providing notice and opt-out rights to alleviate this concern.[47] The Ninth Circuit is the only other circuit to adopt *Robinson*'s analytical framework.[48]

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and 3) the concern that employment class actions are meritless. *See* Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813 (2004).

42. Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 164 (2d Cir. 2001) ("[T]he question we must decide is whether this bright-line bar to (b)(2) class treatment of *all* claims for compensatory damages and other non-incidental damages (e.g., punitive damages) is appropriate. . . . [W]e believe that it is not and therefore decline to adopt the incidental damages approach set out by the Fifth Circuit in *Allison* and flowed by the district court below.").

43. *Id.* at 164 (quoting Hoffman v. Honda of Am. Mfg., Inc., 191 F.R.D. 530, 536 (S.D. Ohio 1999)).

44. *Id.*

45. *Id.*

46. *Id.* at 165.

47. *Id.* at 165-67.

48. *See* Molski v. Gleich, 318 F.3d 937, 949-50 (9th Cir. 2003).

E. Hybrid Approaches to Class Certification

Some courts, while adopting the *Allison* predomination test, have encouraged alternative means, such as bifurcation and hybrid certification,[49] for aiding employees seeking monetary damages and injunctive relief in obtaining class certification. For example, the Seventh Circuit, in *Jefferson v. Ingersoll International Inc.*, suggests ways that due process concerns might be overcome where plaintiffs seek significant monetary damages.[50] Because some class members might have a significant financial stake in the litigation, they may prefer not to be bound by a class judgment and instead to forge litigation on their own. Under such circumstances, certification under (b)(2) with no notice or right to opt out threatens to deprive absent class members of due process. Rather than deny certification altogether, *Jefferson* suggests that the district court consider: certifying the entire case under Rule 23(b)(3); certifying the entire case under Rule 23(b)(2) and provide notice and opt-out rights; or certifying class-wide liability and equitable issues under Rule 23(b)(2) while certifying damages issues under Rule 23(b)(3).[51] These alternatives are well within a court's discretion, address manageability concerns, and give employees the benefit of the class action device as a civil rights enforcement tool. They have been employed by many courts.[52]

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49. It is not unusual to bifurcate a civil rights case by having a jury consider the pattern and practice liability at Stage I and individual damages at Stage II. These are referred to as Teamsters hearings. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 360-61 (1977); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 32.42 (2004).

50. Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894, 898-99 (7th Cir. 1999). In *Ingersoll*, the district court granted (b)(2) certification where plaintiffs sought money damages. The Seventh Circuit vacated the certification order and remanded so that the district court could consider if the damages sought were "incidental." The Seventh Circuit, however, offered alternatives for how a such a case could still be certified as a class action, even if the monetary damages predominated. *See id.* at 897-98.

51. *Id.* at 897-99; *see also* Lemon v. Int'l Union of Operating Eng'rs Local 139, 216 F.3d 577, 581-82 (7th Cir. 2000); Eubanks v. Billington, 110 F.3d 87, 92-96 (D.C. Cir. 1997).

52. *See, e.g.*, Warnell v. Ford Motor Co., 189 F.R.D. 383, 387-89 (N.D. Ill. 1999) (certifying a Title VII case under (b)(2) and (b)(3)); Smith v. Univ. of Wash., 233 F.3d 1188, 1196 (9th Cir. 2000) (holding that hybrid certification is available in Ninth Circuit), *cert. denied*, 532 U.S. 1051 (2001); Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 632-33 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); Beck v. Boeing Co., 203 F.R.D. 459, 465-68 (W.D. Wash. 2001) (certifying the liability phase under (b)(2) and the damages phase under (b)(3)), *aff'd in part and vacated in part*, 60 F. App'x 38 (9th Cir. 2003) (holding court abused its discretion by certifying damages phase under (b)(3) prematurely, while recognizing possibility of hybrid certification); Barefield v. Chevron, No. C-86-2427-TEH, 1988 WL 188433 (N.D. Cal. Dec. 6, 1988); Eubanks v. Billington, 110 F.3d 87 (D.C. Cir. 1997); Taylor v. Dist. of Columbia Water & Sewer Auth., 205 F.R.D. 43, 48-50 (D.D.C. 2002); Wilson v. United Int'l Investigative Servs. 401(k) Savings Plan, No. Civ.A. 01-CV-6126, 2002 WL 734339, at * 6-7 (E.D. Pa. Apr. 23, 2002) (certifying injunctive relief under (b)(2) and damages under (b)(3) to avoid due process concerns in ERISA class action).

F. The Supreme Court's Due Process Concerns

The circuit split continues because the Supreme Court has yet to determine the due process prerequisites for putative class members seeking significant monetary damages as well as injunctive relief under a (b)(2) class.[53] In *Phillips Petroleum Co. v. Shutts*, the Supreme Court did, however, address the issue of whether a court could bind absent class members who asserted claims "wholly or predominantly for money damages" absent contacts with the forum state.[54] There, the Court concluded that before an absent class member's cause of action was extinguishable, due process mandated that the class member "receive notice plus an opportunity to be heard and participate in the litigation" and "at a minimum" be given "an opportunity to remove himself from the class."[55] And, of course, an absent class member's interests had to be adequately represented.[56] Because the Court explicitly limited its ruling to the scenario where plaintiffs sought wholly or predominantly monetary damages, there remained the question of what due process was required when plaintiffs sought some monetary damages as well as equitable relief in a mandatory class action—i.e. the "*Shutts* problem."[57]

Unfortunately, this problem has not yet been solved. In *Ticor Title Insurance Co. v. Brown*,[58] the Supreme Court granted certiorari in hope of resolving, inter alia, whether notice and opt-out rights were required by due process in mandatory class actions.[59] Although the Court ultimately dismissed the writ as improvidently granted, it did note that there is "at least a substantial possibility" that "in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not."[60] In *Adams v. Robertson*, the Court admitted its "continuing interest" in the *Shutts* problem but again concluded that the petition for writ of certiorari was improvidently granted.[61] In *Ortiz v. Fibreboard Corp.*, when presented with the issue of whether opt-out rights were necessary in mandatory class actions, the Supreme Court declined to address the issue and instead decided the case

53. *See also* Nagareda, *supra* note 23 (discussing the problem of punitive damages within a limited fund case under Rule 23(b)(1) and arguing that this violates Ortiz and works against the interest of class members).

54. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

55. *Id.* at 812.

56. *Id.* (citing Hansberry v. Lee, 311 U.S. 32, 42-43 (1940)).

57. *See* Linda S. Mullenix, *Getting to Shutts*, 46 U. KAN. L. REV. 727, 730 (1998).

58. Ticor Title Ins. Co. v. Brown, 510 U.S. 810 (1993).

59. Mandatory class actions are those brought pursuant to (b)(1) or (b)(2) where putative class members do not have a right to opt-out.

60. Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994).

61. Adams v. Robertson, 520 U.S. 83, 92 n. 6 (1997).

on other grounds.[62] The Supreme Court noted, however, that the "inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class" because the "legal rights of absent class members . . . are resolved regardless of either their consent, or . . . their express wish to the contrary."[63] The Supreme Court's dicta suggest that courts' efforts to bolster due process procedural protections for class members seeking monetary damages in mandatory class actions are prudent. Nothing indicates, however, that the Supreme Court would never find it appropriate to permit (b)(2) certification where plaintiffs seek some degree of monetary damages and injunctive relief.

In sum, the enactment of the Civil Rights Act of 1991 has resulted in a serious schism among the courts over the correct interpretation of when monetary damages predominate, thereby foreclosing Rule 23(b)(2) certification in employment discrimination cases. In the absence of firm guidance from the Supreme Court on this issue, the courts will continue to provide inconsistent and incomplete justice for employees seeking to fully protect their Title VII statutory rights through the pursuit of compensatory and punitive damages and jury trials.

III.
THE RESTRICTIVE INTERPRETATION OF THE PREDOMINATION REQUIREMENT THREATENS TO UNDERMINE CIVIL RIGHTS ENFORCEMENT

The narrow interpretation of the predomination requirement threatens to undermine enforcement of Title VII in various ways. Specifically, enforcement will be jeopardized by fewer class certifications, fewer monetary damages being awarded, and greater costs and burdens to plaintiffs challenging systemic intentional discrimination.

A. Fewer Employment Discrimination Class Actions Will Be Certified

Unlike ever before, plaintiffs challenging systemic employment discrimination by filing class actions are facing additional, and sometimes insurmountable, hurdles. The terrain has become littered with cases rejected as class actions because plaintiffs sought monetary damages as well as injunctive relief on a class-wide basis. Although employees may pursue individual Title VII claims or have their interests represented by the Equal Employment Opportunity Commission,[64] these alternatives to a class action

62. Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

63. *Id.* at 846-47.

64. *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, 345 (2001) (claiming individual suit is, for the individual, "an equivalent opportunity for justice" to the class action).

offer no solace because of the superiority of the class action device in vindicating civil rights.[65]

The class action device is an essential and irreplaceable component of the Title VII enforcement scheme for several reasons. First, while an employee may bring her own individual action, an employer can more easily mask and justify discrimination when challenged on an individual level. By bringing a pattern or practice claim against an employer, an employee can more easily identify and expose discriminatory conduct.[66] Second, as private attorneys general, plaintiffs in a class action can craft remedies and injunctive relief that are far greater in scope than those in an individual case.[67] Third, the class action mechanism enables individuals with small resources and claims to pool them together and share risk and burdens so that they can pursue such claims. In the absence of such a scheme, 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. Finally, a finding of class-wide liability shifts the burden of proof in favor of plaintiffs.[68] By proving a pattern or practice of discrimination, each class member enjoys a rebuttable presumption that he was victimized by the discrimination as an individual.[69] The defendant has the burden of proving otherwise.[70] Given the power of this procedural device, victims of employment discrimination

65. The Equal Employment Opportunity Commission, which is tasked with Title VII enforcement in pattern or practice cases, offers no solace either. This government agency may easily be restricted by limited resources and political will. *See* Hart, *supra* note 41, at 844; *but see*, Piar, *supra* note 64, at 345-46.

66. *See, e.g.*, Graniteville Co. (Sibley Division) v. EEOC, 438 F.2d 32, 38 (4th Cir. 1971). The Fourth Circuit observed: "[S]ophisticated general policies and practices of discrimination are not susceptible to such precise delineation by a layman who is in no position to carry out a full-fledged investigation himself" although "[l]ong observation of plant practice may bring the realization that he and his black coemployees are not getting anywhere." *Id.*

67. *See* Zepeda v. INS, 753 F.2d 719, 727-29 (9th Cir. 1983) (in absence of class certification, injunction was limited to individual plaintiffs); Nat'l Center for Immigrant Rights v. INS, 743 F.2d 1365, 1371-72 (9th Cir. 1984) (same), *vacated on other grounds*, 481 U.S. 1009 (1987); Bresgal v. Brock, 843 F.2d 1163, 1170-71 (9th Cir. 1987) (noting that in absence of certification, class-wide relief was only available to named plaintiffs); Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 766-67 (4th Cir. 1998), *vacated and remanded on other grounds*, 527 U.S. 1031 (1999) (systemic injunction going beyond providing individual plaintiffs relief reversed); *but see* Piar, *supra* note 64, at 345-46 (arguing that "[s]weeping changes are therefore possible (though usually only prospectively) in nonclass cases").

68. Int'l Bd. of Teamsters v. United States, 431 U.S. 324, 360 (1977)

69. Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 875-76 (1984) (citing Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976)).

70. *Teamsters*, 431 U.S. at 361-62; Franks v. Bowman Transp., 424 U.S. 747, 772-73 (1976); Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. at 875-76; Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 168 (2d Cir. 2001), *cert. denied*, 535 U.S. 951 (2002). This burden-shifting scheme is not available through other multi-aggregate party tools such as consolidation under Rule 42. *But see* Piar, *supra* note 64, at 346 (equating efficiencies of class action with Rule 42's provision for consolidation and severance).

have been able to obtain significant relief for over four decades. The fewer class actions certified, the less effective civil rights enforcement will be.

B. Fewer Monetary Damages Will Be Awarded to Those Who Deserve Them

The restrictive predomination requirement jeopardizes employees' ability to obtain full relief. While the Fifth Circuit and others contend that the inclusion of compensatory and punitive damages normally forecloses (b)(2) and (b)(3) class certification in Title VII cases, this interpretation is unwarranted. Such an interpretation puts plaintiffs in a dilemma that Congress could not have intended. Employees are confronted with the untenable choice of foregoing the monetary damages to which they are entitled under the Civil Rights Act of 1991 to ensure class-wide injunctive relief, or abandoning class treatment altogether; thereby abandoning their mandate to challenge widespread systemic discrimination as private attorneys-general. It was not Congress's intention to compel victims of intentional discrimination to choose between their right to monetary damages and complete injunctive relief.

In enacting the Civil Rights Act of 1991, Congress sought to bolster the rights of victims of intentional discrimination and expand the remedies available to them, in both the individual and class action context.[71] This was accomplished by providing for compensatory and punitive damages and a jury demand.[72] One of the legislature's major goals of amending the Civil Rights Act of 1964 was to overturn *Wards Cove Packing Co., Inc. v. Atonio*,[73] and *Martin v. Wilks*,[74] decisions in which the Supreme Court limited remedies for discrimination.[75] The legislative history makes clear that Congress valued the class action and anticipated its continued viability after the 1991 amendments. Notwithstanding the minority view that permitting damages in class actions alleging intentional discrimination on the basis of statistical proof would unfairly burden employers and coerce

71. Civil Rights Act of 1991, Pub. L. No 102-166, § 2(1), 105 Stat. 1071 (codified as amended at 42 U.S.C.A. § 1981 (1994)) (finding "additional remedies under Federal law are needed to deter unlawful . . . intentional discrimination in the workplace"); *id.* § 3(1), (4) (stating that Congress passed the Act "to provide appropriate remedies for intentional discrimination . . . in the workplace . . . and expand[ ] the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination"); *see also* H.R. REP. NO. 102-40 (I), at 4, *as reprinted in* 1991 U.S.C.C.A.N. 549, 602, 603, 607 (recognizing a damages remedy is necessary for deterrence).

72. *See* Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 852 (2001) (explaining the intention of the Act is to expand remedies, not contract them).

73. 490 U.S. 642 (1989).

74. 490 U.S. 755 (1989).

75. H.R. REP. NO. 102-40 (I), at 4 (1991), *as reprinted in* 1991 U.S.C.C.A.N. at 595.

them into covertly applying quotas to avoid litigation,[76] Congress did not take steps to curtail the availability of class-wide damages.[77]

Despite the legislature's intent to the contrary, the Fifth Circuit and others have put plaintiffs in a no-win situation, in which some feel compelled as a cost of certification to forgo damages altogether, to choose between compensatory or punitive damages, or to limit the amount of potential damages by using formulas.

For example, plaintiffs may seek punitive damages because they arguably do not require the individualized determinations that compensatory damages do. To the extent that the Fifth Circuit in *Allison* permits a punitive damage award on a class-wide basis where each plaintiff is affected by a discriminatory policy in the same way,[78] class counsel may chose to strategically forgo compensatory damages. In *Dukes v. Wal-Mart Stores, Inc.*,[79] for example, plaintiffs alleged that Wal-Mart engaged in company-wide discrimination in pay and promotions against a class of approximately 1.5 million women, in violation of Title VII. In the largest private-employer civil rights case in American history, the district court certified a class action where plaintiffs chose to forgo compensatory damages and instead sought class-wide injunctive and declaratory relief, lost pay, and punitive damages.[80] Wal-Mart has challenged the propriety of class certification, and the Ninth Circuit has granted its Rule 23(f) petition for review.

In *Beck v. Boeing Co.*, female employees challenged the Boeing Company with gender-based employment discrimination in promotions and

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76. *See* H.R. REP. NO. 102-40 (II), at 68 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 694, 754 (finding that "[n]ot only would H.R. 1 allow the recovery of punitive and compensatory damages in individual disparate treatment cases, it would allow recovery of such damages and jury trials for class action disparate treatment suits"); *see also* H.R. REP. NO. 102-40 (I), at 127 (1991), *as reprinted in* 1991 U.S.C.C.A.N. at 656 ("Further, the concerns with "quotas" . . . are heightened by inclusion of punitive and compensatory damages. Class action intentional discrimination claims are also based on statistical imbalances; employers will again feel inordinate pressure to engage in race-and sex-based preferential treatment.").

77. *See, e.g.*, H.R. REP. NO. 102-40(I), at 143, *as reprinted in* 1991 U.S.C.C.A.N. at 672 ("Class actions claiming intentional discrimination will be based—as they are under current law—on racial and sexual statistical imbalances in the workforce."); H.R. REP. NO. 102-40 (II), at 68, *as reprinted in* 1991 U.S.C.C.A.N. at 754 ("Not only would H.R. 1 allow the recovery of punitive and compensatory damages in individual disparate treatment cases, it would allow recovery of such damages and jury trials for class action disparate treatment suits."); 137 CONG. REC. E2086-01 (1991) (statement of Rep. Doolittle (quoting letter from Zachary Fasman, Attorney of Paul, Hastings, Janofsky & Walker, to Bill Goodling, Congressman)) ("The proponents of this legislation consistently have argued that the expanded remedies in question will apply only to cases of intentional discrimination. In fact, the bill would allow compensatory and punitive damages in class actions premised upon the disparate treatment theory of discrimination.").

78. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417 (5th Cir. 1998).

79. 222 F.R.D. 137 (N.D. Cal. 2004).

80. *Id.* at 141, 170.

compensation under Title VII and various other federal civil rights laws.[81] Plaintiffs chose not to seek back pay, individualized equitable relief, or punitive damages for their promotions claims, but instead pursued injunctive relief for a pattern or practice of discriminatory promotion-making.[82] Plaintiffs, however, did seek back pay, injunctive relief, and punitive damages for a pattern or practice of discriminatory compensation, which would flow from a finding of class-wide liability.[83] Defendants argued that plaintiffs were inadequate representatives because they failed to seek all potential relief in a mandatory class action—thereby jeopardizing absent class members' ability to pursue such relief in the future because of res judicata.[84] The district court rejected defendants' argument on the grounds that the court could certify a notice and opt-out class under (b)(3) for the punitive damages portion of the litigation.[85] Moreover, the court recognized that in bringing only certain types of relief in a (b)(2) class, plaintiffs were identifying the injunctive relief as primary.[86] Plaintiffs used statistics and testimony from Boeing's most senior executives to demonstrate that Boeing's decision making impacted the class as a whole. This convinced the court that individualized, fact-specific inquiries were unnecessary and that punitive damages could be awarded on a class-wide basis.[87] Thus, the district court certified the class for the liability phase under (b)(2) and the punitive damages phase under (b)(3).[88] Plaintiffs' success, however, was short-lived. The Ninth Circuit vacated the court's certification in part, concluding that it abused its discretion by certifying the class for punitive damages claims in Phase II of the litigation. The Ninth Circuit held that it was premature for the court to have certified the Phase II punitive damages class.[89]

Unitary punitive damage awards are appropriate because "the purpose of punitive damages is not to compensate the victim, but to punish and deter the defendant, [therefore] any claim for such damages hinges, not on facts unique to each class member, but on the defendant's conduct toward the class as a whole."[90] Moreover, punitive damages are more likely to be

81. Beck v. Boeing Co., 203 F.R.D. 459, 460-61 (W.D. Wash. 2001), *aff'd in part & vacated in part*, 60 F. App'x 38 (9th Cir. 2003) (unpublished).

82. *Id.* at 461, 465.

83. *Id.*

84. *Id.* at 465.

85. *Id.*

86. *Id.*

87. *Id.* at 466-67.

88. Ironically, the district court did not certify the request for back pay for the claims of pay discrimination, concluding that individualized inquiries would be necessary. *Id.* at 468.

89. Beck v. Boeing Co., 60 F. App'x 38, at 39-40 (9th Cir. 2003) (unpublished).

90. Barefield v. Chevron, U.S.A., Inc., No. C-86-2427-TEH, 1988 WL 188433, at *3 (N.D. Cal. Dec. 6, 1988) (citing Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 474 (5th Cir. 1986), *reh'g denied*, 785 F.2d 1034 (5th Cir. 1986) (applied in asbestos case)). Note, however, that in *Smith v. Texaco*, the

considered incidental when treated as an outgrowth of defendant's systemic misconduct:

> [T]he addition of a class-wide claim for punitive damages, to claims for injunctive and declaratory relief, and lost pay, does not render the monetary aspect of the case predominant. Rather, such relief may be treated as ancillary to the claims for injunctive and declaratory relief which remain at the heart of this action.[91]

However, while punitive damages may lend themselves to class certification, plaintiffs should not be limited to such damages in order to get a class certified.

Other plaintiffs have pursued compensatory damages but sought to reduce their complexity to increase the likelihood of certification, despite the fact that such an approach may yield lower damages for the class. While some courts require substantial evidence to justify the award of compensatory damages,[92] others may grant such damages for "garden variety" emotional harm and distress claims, without requiring medical or other expert testimony.[93] However, such "garden variety" compensatory claims will likely yield lesser, if not nominal, damages for class members.[94] In an effort to assuage the court of manageability concerns, plaintiffs

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Fifth Circuit suggested that in Title VII cases, in accordance with *Allison* and *Jenkins*, punitive damages, like compensatory damages, rely on individual inquiries when considering predominance. Despite the fact that the *Smith v. Texaco* opinion was withdrawn and the case dismissed, the Fifth Circuit may retain this view. Smith v. Texaco, Inc., 263 F.3d 394, 408-13, n.23 (5th Cir. 2001), *withdrawn*, 281 F.3d 477 (5th Cir. 2002). Interestingly, the court in *Allison* even conceded that class-wide awards of punitive damages may be appropriate under some circumstances. *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417 (5th Cir. 1998).

91. *Barefield*, 1988 WL 188433, at *3 (N.D. Cal. Dec. 6, 1988) (citing Fontana v. Elrod, 826 F.2d 729, 730 (7th Cir. 1987) (certifying a (b)(2) class seeking punitive damages)); Stolz v. United Bhd. of Carpenters Local 971, 620 F. Supp. 396, 406-07 (D. Nev. 1985) (certifying a (b)(2) class seeking punitive damages); Edmondson v. Simon, 86 F.R.D. 375, 383 (N.D. Ill. 1980) (certifying a (b)(2) class seeking compensatory and punitive damages); *accord* Butler v. Home Depot, Inc., No C-94-4335 SI, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996). Some courts have also awarded punitive damages on a class-wide basis in cases outside of the employment and civil rights contexts. *See, e.g.*, Hilao v. Estate of Marcos, 103 F.3d 767, 786 (9th Cir. 1996) (human rights violations); *In re* Exxon Valdez, 229 F.3d 790 (9th Cir. 2000) (environmental claims), *reh'g granted*, 270 F.3d 1215 (9th Cir. 2001); Day v. NLO, 851 F. Supp. 869, 884-85, 887 (S.D. Ohio 1994) (permitting plaintiff class to seek punitive damages for injuries allegedly resulting from radiation exposure).

92. *See, e.g., Allison*, 151 F.3d at 417; Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 938-40 (5th Cir. 1996) (citing cases); Price v. City of Charlotte, 93 F.3d 1241, 1250-56 (4th Cir. 1996) (citing cases).

93. For example, in *Burrell v. Crown Central Petroleum*, plaintiffs who chose not to put forth medical or psychiatric evidence to prove emotional harm and distress damages were excused from having to produce such information in discovery. *See* Burrell v. Crown Cent. Petroleum, 177 F.R.D. 376 (E.D. Tex. 1997). The court concluded that where the "crux of the case is the work-related income loss resulting from discrimination[,]" then "[m]ental anguish is incident[al] to the work-related economic damages like lost wages." *Id.* at 380.

94. *See, e.g., Burrell*, 177 F.R.D. at 384.

compromise the amount of damages to which they may be entitled. Again, plaintiffs choose between full relief and class certification.[95]

Whether plaintiffs forgo compensatory or punitive damages or both, or limit their potential relief, defendants are protected by the uncertainty created by the courts' narrow predomination test. Where plaintiffs are risk averse, defendants found guilty of intentional discrimination are inoculated from the risk of having to pay significant damages. Because plaintiffs appropriately fear that they will not be able to get a (b)(2) case certified if they seek monetary damages as well as injunctive relief, defendants enjoy a windfall.

Moreover, the restrictive predomination interpretation not only gives defendants a monetary boon, it also undermines deterrence objectives. If compensatory and punitive damages are per se not "incidental," plaintiffs are less likely to obtain certification when they seek the most significant damage awards.[96] Ironically, in the most egregious discrimination cases—where systemic intentional misconduct results in extensive emotional harm and warrants punitive damages—defendants enjoy the most protection from class-wide exposure. Alternatively, where plaintiffs seek backpay—an equitable remedy that merely makes the plaintiffs whole—defendants are more likely to incur class-wide liability because such mandatory relief is considered "incidental." Thus, defendants have a greater risk of a monetary penalty when there is less money at stake. Deterrence objectives of Title VII and the Civil Rights Act of 1991 are not served where defendant's only real exposure to class-wide relief involve those cases concerning the least amount of money.

Finally, plaintiffs who sacrifice damages for the sake of (b)(2) certification risk being attacked as inadequate class representatives. Where a plaintiff fails to pursue all of the claims available to the class, such as

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95. Such a quandary could be ameliorated in the Ninth Circuit, where the courts permit plaintiffs to seek compensatory damages for emotional harm and distress without introducing economic loss or medical evidence. Instead, the plaintiff's own testimony and inferences from the circumstances may form the basis for proof of an individual's emotional harm and distress. *See* Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 552-53 (9th Cir. 1980); Johnson v. Hale, 940 F.2d 1192, 1193 (9th Cir. 1991); Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 513 (9th Cir. 2000). Class members who suffer in similar ways could reasonably be rewarded similar compensatory damages. For example, in a multi-party case, Lambert v. Ackerley, 180 F.3d 997, 1011 (9th Cir. 1999), each plaintiff received an identical award of $75,000 where "the jury likely concluded that the emotional harm to each plaintiff was roughly equal given the similar treatment each plaintiff suffered at the hands of the defendants." A similar approach could be taken for class members.

96. To the extent that class members have incurred different amounts of compensatory and punitive damages because of their individual circumstances, it follows that certification of a mandatory class action might be less desirable—especially in cases involving extensive monetary damages—because of a break down in class cohesion. Those class members who have a greater financial stake in the litigation would seek to have their due process rights protected through notice and the right to opt-out, features required under (b)(3). However, these protections and others could be provided in a (b)(2) class, subject to the court's discretion.

compensatory and punitive damages claims, absent class members may be precluded from later raising such claims individually because of res judicata.[97] For example, in *Zachery v. Texaco Exploration and Production, Inc.*,[98] the named plaintiffs decided to drop their claims for compensatory and punitive damages to maximize the chance of getting their Title VII case for class-wide disparate treatment certified under Rule 23(b)(2). The court denied certification because it was "greatly concern[ed]" that the named plaintiffs' unilateral decision to drop the damages claims would preclude class members in the future from being able to seek the monetary damages to which they were entitled.[99]

Moreover, because the law is not yet settled on the question of whether a class member is entitled to opt out from a (b)(2) class seeking monetary damages, the court in *Zachery* was hesitant to permit plaintiffs to "gamble away . . . class members' potential rights to compensatory" and punitive damages.[100] Given that the named plaintiffs chose not to pursue the monetary damages that some class members wanted and might not have had the opportunity to seek individually, the court concluded that the named plaintiffs were inadequate representatives due to a conflict of interest.[101]

Plaintiffs and their attorneys should not be forced into the dilemma of having to forgo monetary damages to obtain class certification. Due process requires that in order for an absent class member to be bound by a class judgment, his interests must have been adequately represented in the class proceedings. Plaintiffs who seek to curtail intentional employment discrimination on a large scale, however, are being forced to choose between pursuing all available claims or being deemed inadequate because they decided to forgo certain claims or relief to improve their chance of class certification. Equating adequacy with strategy, however, may lead to

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97. *See* Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 874 (1984) (holding that a class action decision generally binds the parties in subsequent decisions).

98. 185 F.R.D. 230, 242-44 (W.D. Tex. 1999).

99. *Id.* at 243 ("It is a very real possibility, if not a probability, that another court of competent jurisdiction could determine that the proposed class members would be barred from bringing individual actions for damages arising from intentional acts of discrimination if the class obtained a finding of intentional discrimination in this Court.").

100. *Id.* at 244 (discussing Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 118-21 (1994) (per curiam) (6-3 decision)).

101. *Id.* at 244, 245; *see* Bartlett III, *supra* note 19, at 2165 (discussing the competing goals of 23(b)(2) class certification and 23(b)(3) class certification in terms of the interests of the parties); Piar, *supra* note 64, at 323-24 (discussing same); *but see* Farmers Group, Inc. v. Geter, Nos. 09-03-404 CV, 09-03-396 CV, 2004 WL 2365394, at *6 (Tex. App.-Beaumont, Oct. 21, 2004) (not finding possible conflict of interest as grounds for inadequacy). *See also* Miller v. Baltimore Gas & Elec. Co., 202 F.R.D. 195, 203 (D. Md. 2001) (court denied plaintiff's motion for leave to amend class complaint to drop claims for compensatory and punitive damages, concluding that the motion "raises serious questions regarding the ability of the named plaintiffs to represent the putative class adequately"); Cooper v. Southern Co., 390 F.3d 695, 721 (11th Cir. 2004) (named plaintiffs' willingness to forego damages to achieve class certification called into question their adequacy to represent the class).

untoward results. Certainly, in any class action there are bound to be differences among the named plaintiffs and the other class members about various strategic decisions, including what claims to bring and relief to seek. The court must protect the interests of the class as a whole; if there is a minority of class members who diverge from the whole, the court may take measures to protect its separate interests. For example, such differences might be better resolved by certifying subclasses or specific issues under Rule 23(c)(4), rather than denying certification altogether.

In sum, *Allison*'s restrictive predomination interpretation threatens to decrease the amount of monetary damages to which victims of employment discrimination are entitled. In an effort to save the class action mechanism, which is critical to civil rights enforcement, plaintiffs are compelled to make a Hobson's choice. Plaintiffs are forced to choose between certification and full relief. On the one hand, plaintiffs must forgo certain relief (primarily compensatory and punitive damages) to improve their chances of certification. On the other hand, plaintiffs must seek complete relief so as not to be deemed inadequate or to preclude class members from certain remedies based on res judicata.[102]

C. *Plaintiffs Will Have to Meet the More Rigorous and Costly Certification Standards of Rule 23(b)(3)*

Since the Fifth Circuit and other courts increasingly have been denying victims of employment discrimination (b)(2) certification where they seek compensatory and punitive damages as well as injunctive relief, plaintiffs have been compelled to seek (b)(3) certification, which imposes a more formidable standard that has not historically been used in Title VII cases. This movement has subjected plaintiffs to greater costs and burdens.

First, the cost of pursuing a (b)(3) class is greater than a (b)(2) class, which may chill Title VII enforcement for some plaintiffs and their counsel. Pursuit of a (b)(3) case may cost more than a (b)(2) one because the named plaintiffs are required to send personal notice to each individual class member who can be identified through reasonable effort, pursuant to Rule 23(c)(2)(B). Because class counsel must attempt to identify, locate and contact every potential class member, notice can be prohibitively expensive, which in turn may discourage class counsel from bringing meritorious civil rights cases. Appropriate notice may be ordered at the discretion of the court for a (b)(2) class, pursuant to Rule 23(c)(2)(A) and Rule 23(d), and may take many forms, including much less expensive methodologies such as publication notice or postings on websites.[103] However, notice under

102. *See Baltimore Gas & Electric Co.*, 202 F.R.D. at 203 (describing "Hobson's Choice").

103. The Advisory Committee Note to the 2003 Amendments explains that the court's "authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care." The

(b)(3)—a cost plaintiffs usually bear[104]—must be the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[105] For example, notice to the class can easily cost hundreds of thousands of dollars, depending on the size and nature of the case.[106] Thus, the cost of (b)(3) notice may chill plaintiffs from bringing class-wide civil rights cases, resulting in the under-enforcement of Title VII.

Second, the provision of opt-out rights under provision (b)(3) may undermine the plaintiffs' ability to settle. If a significant number of class members opt out, thereby denying the defendant the "peace" he bought, a settlement fair, reasonable, and adequate to the class may be jeopardized.

Third, those plaintiffs who are able and willing to bear the higher cost of notice and the risk that opt-outs may undermine a potential settlement, also face a more difficult certification standard under Rule 23(b)(3) in certain circuits. Because Rule 23(b)(3) is designed to provide aggregate litigation where there is the least amount of cohesiveness among class members, it requires that: (1) common questions predominate over individual ones; and (2) the class action is superior to other mechanisms.[107] Although the question of whether a pattern or practice of discrimination exists often suffices as a common question under Rule 23(a)(2), individual determinations of compensatory and punitive damages often dwarf this common question under Rule 23(b)(3). Plaintiffs' ability to overcome the (b)(3) hurdle often depends on the extent to which courts believe that compensatory and punitive damages must be determined on an individualized basis and through labor-intensive hearings.[108] Those courts which conclude that individualized hearings on damages are necessary will

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Advisory Committee cautions the court to consider the costs of notice and encourages informal and inexpensive means when possible:

> The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice. . . . When the court does direct certification notice in a (b)(1) or (b)(2) class action, the discretion and flexibility established by subdivision (c)(2)(A) extend to the method of giving notice. . . . Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.

FED. R. CIV. P. 23 advisory committee's note to 2003 amendments subdiv. (c), para. (2).

104. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 32.42 (2004); *see also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974).

105. FED. R. CIV. P. 23(c)(2)(B).

106. *See, e.g.*, Ahearn v. Fibreboard Co., 162 F.R.D. 505, 528 (E.D. Tex. 1995) (cost of notice to absent class members was approximately $22 million).

107. *See* Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 215, 215 (because Rule 23(b)(2) classes "do not need to meet the more stringent 23(b)(3) requirements of predominance and superiority, certification under the mandatory classes is viewed as easier, and more desirable").

108. Courts are also impacted by whether they believe individual class members must still prove liability after a class-wide liability determination.

likely also conclude that a class action is not superior to other mechanisms because of manageability problems.[109]

The courts may be developing another schism over their willingness to certify cases under (b)(3) where plaintiffs seek compensatory and punitive damages as well as injunctive relief for Title VII violations. For example, the Fifth Circuit and Eleventh Circuits—which are apt to conclude that damages must be determined on an individualized basis—are also more likely to deny (b)(3) certification on the grounds that individualized inquiries predominate over common ones.[110] The Third and Seventh Circuits, however, have demonstrated a greater willingness to certify (b)(3) classes under similar circumstances.[111] For example, in *Chiang v. Veneman*, plaintiffs challenged the United States Department of Agriculture for lending discrimination, in violation of the Equal Credit Opportunity Act. The Third Circuit held that (b)(3)'s predominance and superiority requirements were met despite the fact that plaintiffs sought approximately 2.8 billion dollars in damages, which plaintiffs conceded involved individualized proof.[112] In *Lemon v. International Union of Operating Engineers, Local 139*, the Seventh Circuit vacated a district court's class certification order under (b)(2), concluding that individualized inquiries were necessary to determine compensatory and punitive damages in this Title VII case. The Seventh Circuit, however, then directed the district court to consider various alternative class certification options under (b)(3). Thus, plaintiffs are again being subjected to different standards of justice, depending upon the circuit in which their case is brought.

The additional challenges of (b)(3) certification in certain circuits threaten to discourage plaintiffs from pursuing meritorious civil rights cases, resulting in the under-enforcement of Title VII. Under the restrictive predomination test, some plaintiffs will be prohibited from bringing a case under either (b)(2) or (b)(3). For those class members who can not bring their cases individually, they will be precluded from vindicating their statutory rights at all. Thus, the ad hoc predomination test is necessary to preserve the Title VII enforcement scheme.

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109. Moreover, courts may be concerned that bifurcation violates the Seventh Amendment's Re-examination Clause, now that both stages of Title VII cases are tried to a jury. *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 422-25 (5th Cir. 1998). The Reexamination Clause states that "no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII; *see also* Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931) (regarding same).

110. *See, e.g.*, *Allison*, 151 F.3d 402; Cooper v. Southern Co., 390 F.3d 695, 721-23 (11th Cir. 2004).

111. *See, e.g.*, Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, 216 F.3d 577, 581-82 (7th Cir. 2000); Chiang v. Veneman, 385 F.3d 256, 273 (3d Cir. 2004).

112. *Chiang*, 385 F.3d at 273.

IV.
THE *ROBINSON* AD HOC BALANCING TEST IS A SUPERIOR PREDOMINATION TEST FOR THE ENFORCEMENT OF TITLE VII

The Second Circuit's ad hoc balancing approach enforces Title VII and its underlying purposes better than the *Allison* restrictive predomination approach. First, the *Robinson* approach more aptly recognizes the underlying rationale of the (b)(2) class and its basis in class cohesiveness. As a number of scholars have noted, the presence of monetary damages—even nonincidental ones—does not necessarily trample the cohesiveness of a class bound by a common injury where injunctive or declaratory relief is appropriate to the class as a whole.[113] Recognizing both the words and spirit of Title VII, the *Robinson* ad hoc balancing test properly compares the value of the monetary damages to the injunctive and declaratory relief sought. Utilizing an overly-narrow definition of incidental, the *Allison* test improperly gives inordinate weight to the individualized nature of monetary damages and insufficient weight to the value of class-wide injunctive and declaratory relief.

The *Robinson* ad hoc approach sufficiently addresses potential due process concerns by promoting the use of traditional safeguards such as bifurcation of class-wide liability and individual damages determinations,[114] importation of notice and the right to opt out of mandatory classes, and the use of significant judicial discretion and oversight.[115] Moreover, use of Rule 23(c)(4) to permit certification solely of class-wide liability issues under (b)(2) properly recognizes a district court's power to certify certain issues as a tool for managing complex litigation, rather than as an end run around Rule 23.[116]

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113. *See* Hart, *supra* note 41, at 827 ("The fact that individual members may also have individual damage claims against the employer does not necessarily diminish the significance of the shared burden. Nor does the existence of individual damages claims create intragroup conflict. . ."); W. Lyle Stamps, *Getting Title VII Back on Track: Leaving* Allison *Behind for the* Robinson *Line*, 17 BYU J. PUB. L. 411, 432-33, 447-48 (2003) (calling the *Allison* approach overly inclusive because neither the text nor plain meaning of advisory committee note requires that monetary damages be secondary, insignificant or dependent upon injunctive or declaratory relief to be appropriate under (b)(2)).

114. Various courts have promoted the use of bifurcation and hybrid claims to preserve class certification where plaintiffs seek monetary damages as well as injunctive and declaratory relief under Title VII, as discussed *supra* in Part II.E. Various scholars have promoted the same. *See, e.g.*, Robert M. Brava-Partian, *Due Process, Rule 23 and Hybrid Classes: A Practical Solution*, 53 HASTINGS L.J. 1359, 1363-78 (2002); Meghan E. Changelo, *Reconciling Class Action Certification with the Civil Rights Act of 1991*, 36 COLUM. J.L. & SOC. PROBS. 133, 152-62 (2003).

115. *See* Hart, *supra* note 41, at 814; Stamps, *supra* note 113, at 434.

116. *See* Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 167-69 (2d Cir. 2001); *Allison*, 151 F.3d at 421-22 (accusing plaintiffs of attempting to "manufacture predominance through the nimble use of subdivision (c)(4)" through severance of individual specific issues). *See also*, Piar, *supra* note 64, at 324-35 (describing attempt to reconcile the Civil Rights Act of 1991 remedies with Rule 23(b)(2) as distorting both).

The *Robinson* ad hoc approach protects victims of employment discrimination by preserving one of the most powerful enforcement mechanisms available—the class action device. Damage limits of up to $300,000 under Title VII have led some to believe that employment discrimination cases are no longer negative value suits—not worth the cost of litigation.[117] Empirical research indicates, however, that the availability of attorneys' fees, monetary damages, and litigation on an individual basis does not overcome the negative value suit dilemma faced by those denied class certification.[118] Furthermore, without strength in numbers in employment discrimination actions, individual employees are understandably deterred from bringing suit by fear of retaliation and personal exposure.[119] Even if plaintiffs may have a greater incentive to pursue their individual claims because of Title VII's $300,000 damage cap, plaintiffs are not able to spread the costs of litigation as class members would be able to in the class action context.[120] Thus, the class action device permits employees to challenge widespread discriminatory practices that would otherwise go unaddressed. Moreover, the increase in individual suits that may follow from fewer class certifications would create further backlog in the courts, undermining judicial economy and efficiency.[121]

The *Robinson* ad hoc approach has been criticized because certification has the potential to pressure innocent defendants overwhelmed by the confluence of bad publicity, exorbitant litigation costs, and tremendous risk into unfavorable settlements.[122] While class certification often changes the bargaining power of the parties to the detriment of defendants, there is no reason to believe that defendants, who often control the evidence, would not be able to defeat truly meritless claims through the use of dispositive motions.

Although the *Robinson* scheme "sacrifices simplicity for flexibility,"[123] such flexibility is crucial to the enforcement of Title VII. The *Robinson* ad hoc approach affords proper deference to the trial court in its certification

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117. Piar, *supra*, note 64, at 314, 331.

118. *See* Stamps, *supra* note 113, at 444-47 (concluding that *Allison* approach would "effectively eviscerate Title VII enforcement" and that "many individual plaintiffs may be effectively barred from bringing their claims due to the small recoveries available compared to litigation expenses").

119. *Id* at 446.

120. Bartlett III, *supra* note 19, at 2183.

121. *See* Stamps, *supra* note 113, at 447.

122. Piar, *supra* note 64, at 343-45; Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 77 (2003) (characterizing private class action attorneys as "bounty hunters"); George Priest, *The Economics of Class Actions*, 9 KAN. J. LAW & PUB. POL'Y 481, 482 (2000); Nagareda, *supra* note 23, at 163; Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357 (2003).

123. *See* Hart, *supra* note 41, at 829; *see also* Changelo, *supra* note 104, at 151.

determination. It is well established that courts enjoy broad discretion in this determination, given the highly factual nature of this inquiry.[124]

The *Robinson* scheme has been criticized for not sufficiently taking into account potential efficiency and manageability concerns that could arise from certification of compensatory and punitive damages in a (b)(3) class following certification of class-wide liability in a (b)(2) class.[125] *Robinson* arguably fails to provide, even with the protection of notice and opt-out rights, how the determination of class-wide damages for numerous individuals would efficiently take place in the context of a (b)(3) class that was bifurcated from a (b)(2) class determining a pattern or practice of discrimination.[126] As a solution, Meghan Changelo wisely proposes that the courts adopt the Ninth Circuit's approach in *Brown v. Ticor Title Insurance Co.*,[127] which permits individuals to litigate their damages in individual trials at the remedial stage, rather than on a class-wide basis.[128] Many courts disallow this approach on the grounds that damages claims should have been asserted in the context of the (b)(2) liability class and are therefore waived.[129] Courts could permit such bifurcation by giving res judicata effect to a (b)(2) class-wide liability finding and allowing class members to bring damages claims in individual subsequent actions.[130] This solution would be palatable, however, only if courts permitted plaintiffs to seek injunctive and declaratory relief on a class-wide basis, without being deemed inadequate for failure to seek monetary damages.

Overall, the Second Circuit's ad hoc approach is superior to the Fifth Circuit's bright-line one because the former ensures that plaintiffs can effectively vindicate their Title VII statutory rights, courts can exercise their proper discretion under Rule 23, and Congress's will, as articulated in the Civil Rights Act of 1991, is respected.

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124. *See* Stamps, *supra* note 113, at 436; 5 JAMES WM. MOORE ET AL., *supra* note 19, ¶ 23.80[1] (3d ed. 2005); 2 HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4.14, at 97 (4th ed. 2002).

125. Changelo, *supra* note 104, at 159-60 ("[T]he test provided by the *Robinson* court is overly complex and therefore unlikely to be efficiently or consistently applied by lower courts.").

126. *Id* at 159.

127. Brown v. Ticor Title Insurance Co., 982 F.2d 386 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994).

128. *Id.* at 392 (9th Cir. 1992).

129. *See, e.g.*, Zachery v. Texaco Exploration and Prod., Inc., 185 F.R.D. 230, 243 (W.D. Tex. 1999).

130. Changelo, *supra* note 104, at 159-61.

V.
THE IMPACT OF RECENT LEGISLATION ON PREVENTING POTENTIAL JUDICIAL ABUSE OF CLASS CERTIFICATION

To the extent that the most recent amendments to Rule 23 and the recently enacted Class Action Fairness Act of 2005 curtail potential judicial abuse of discretion, district courts will not be able to abuse their power easily under the *Robinson* ad hoc certification scheme. Such safeguards, designed to reign in judicial and attorney misconduct, should temper any great concern that the Second Circuit's ad hoc balancing test will go unchecked.

A. Amended Rule 23

Amended Rule 23, which went into effect on December 1, 2003, contains multiple safeguards to ensure that class members' rights are protected. Moreover, the amendments often confirm or add to the court's discretion—demonstrating a certain degree of confidence in the judicial system's ability to responsibly make class certification decisions. For example, the court is no longer required to make certification decisions "as soon as practicable," but instead "at an early practicable time."[131] While this change may seem minor, it stems from the important recognition that courts often need sufficient time to permit class discovery and to entertain dispositive motions before deciding certification.[132] The amended rule encourages district courts to make prompt and well-informed decisions. Additional time for the class certification decision would give courts the opportunity to weigh all the factors necessary in an "ad hoc" certification approach.

For the first time, the Rule explicitly states that a district court "may direct appropriate notice to the class" for mandatory class actions.[133] While Rule 23(c)(2)(A) merely codifies existing practice, the amendment makes clear that courts have the power, when certifying a (b)(2) class, to require notice when appropriate.[134] A court no longer need solely rely on its discretionary power under Rule 23(d) to provide notice for (b)(2) classes to address due process concerns. The amended Rule also indicates that the courts can be entrusted with more discretion and flexibility when handling class actions and protecting class members' due process rights.

The amendments to Rule 23 force the district court to define the class it is certifying and to more rigorously prove that the certification criteria are met. Rule 23(c)(1)(B) requires the court to "define the class and the class

131. FED. R. CIV. P. 23(c)(1)(A).

132. FED. R. CIV. P. 23 advisory committee's note.

133. FED. R. CIV. P. 23(c)(2)(A).

134. FED. R. CIV. P. 23 advisory committee's note.

claims, issues or defenses," in its order.[135] Rule 23(c)(1)(C) no longer allows the court to conditionally certify a class. While the court may alter or amend its certification order prior to final judgment, the court may no longer evade the certification criteria by conditioning certification upon circumstances that may never occur. The eradication of conditional certification should assuage concerns of certification as a form of legalized blackmail.[136] The fact that courts must now more rigorously prove that the certification criteria are met ensures that courts applying the *Robinson* ad hoc approach will have to carefully consider and justify their decisions. This safeguard reduces the concern that courts applying the ad hoc approach will improperly certify class actions.

Amendments to the Rule also provide additional protection for classes certified under provision 23(b)(3). For example, Rule 23(c)(2)(B) requires that (b)(3) notice "concisely and clearly state in plain, easily understood language" certain information, including the right of exclusion and the binding effect of class judgments. Additionally, Rule 23(e)(3) permits courts to provide (b)(3) class members with a second chance to opt out under certain settlements.

Finally, and perhaps most significantly, the new provisions (g) and (h) protect the most fundamental due process concern of class certification—adequacy of representation—by imposing more rigorous standards for selection of class counsel. Rule 23(g) requires that class counsel "fairly and adequately represent the interests of the class." While Rule 23(g) expands upon Rule 23(a)'s adequacy requirement and codifies established practice articulated in case law, the new provision also requires the court to follow a formal appointment procedure and to consider certain enumerated factors.[137] Rule 23(h) further monitors the selection of class counsel through its enhanced examination of attorneys' fees. Thus, through the most recent additions to Rule 23, adequacy of representation—the linchpin to class litigation—is further protected.

The amendments to Rule 23 reign in the possibility for the class action device to be misused. While many of the provisions simply codify existing practice, the amendments clarify the proper boundaries for class

135. *See also* FED. R. CIV. P.23(c)(3).

136. *See* L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 222-25 (2004) (discussing the inequitable bargaining advantage plaintiffs certified as a class have over defendants and noting that "[a]lthough the danger of blackmail exists with respect to class certification, the 2003 amendments to Rule 23 lessen this danger").

137. Rule 23(g) requires that courts consider: (1) "the work counsel has done in identifying or investigating potential claims in the action"; (2) "counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action"; (3) "counsel's knowledge of the applicable law"; and (4) "the resources counsel will commit to representing the class." FED. R. CIV. P. 23(g).

certification and management. These protections ensure that a court's use of the ad hoc approach will be properly checked. While the amendments serve to reinforce the court's boundaries, many of them expand and bolster the court's discretion in the class certification process. This is not surprising given the long held deference courts have enjoyed when making class certification determinations.

B. The Class Action Fairness Act of 2005

The Class Action Fairness Act of 2005, perhaps the most sweeping legislation impacting how class actions will be litigated, was enacted on February 18, 2005.[138] The Act, purportedly designed to curtail "abuses of the class action device" that have transpired over the last decade,[139] should help to curb potential state judicial abuse of discretion in certification decisions. Perhaps the most significant and controversial component of the Act is its liberalization of the jurisdictional requirements for class actions brought in federal courts on the grounds of diversity. The Act permits certain class actions with national implications to be heard more easily in federal court by requiring only minimal diversity among the parties for original jurisdiction to exist and by creating a more lenient device for removal of class actions from state to federal court.[140] The impetus behind this provision is a perception that state courts are less likely than federal courts to conduct a rigorous analysis when determining the propriety of class certification.[141] Thus, by making it easier for such cases to be heard in federal court, where certification issues might presumably by more rigorously analyzed, the number of certifications improvidently granted should diminish.

Assuming that this liberalization of the jurisdictional standards results in fewer improper class certifications of civil rights cases—and not just fewer civil rights class actions[142]—the Act should curtail some mischief by those state courts who would abuse their discretion. By shifting some class cases from state to federal court, the Act would seem to suggest that Congress has some measure of confidence that the federal courts will exercise their discretion responsibly. The Act—while not a ringing endorsement of class actions—seems at least a vote of confidence in the

138. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

139. S. 5, 109th Cong. §2 (2005).

140. *See* 28 U.S.C. § 1332(d) (2005).

141. *See, e.g.*, S.R. REP. NO. 109-14, at 14 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 314-15 (commenting that state courts are more lax in certification and noting high caseloads and a lack of judicial resources in state courts).

142. This, of course, is a real concern given the overwhelming docket under which the federal courts labor today and the propensity for some federal courts to be hostile to such claims. *See* Hart, *supra* note 41, at 835-46 (ascribing fewer employment discrimination class actions to the perception that such cases are unfair, unnecessary and unmeritorious).

federal judiciary's overall ability to fairly assess the propriety of class certification. And where the federal courts have been less diligent, such as in the settlement of consumer class actions, the Act has developed considerable new safeguards.[143] Thus, to the extent that the Act has facilitated a shift of class actions from state to federal court, the Act demonstrates Congress's confidence in the federal judiciary's discretion.

VI.
CONCLUSION

One of the most important tools for effective civil rights enforcement is in jeopardy. Should the majority's rigid interpretation of the predomination requirement prevail, employees fighting systemic intentional discrimination will be denied one of their most powerful weapons in their arsenal for justice—the class action.

Specifically, the restrictive interpretation threatens to undermine civil rights enforcement by diminishing the number of class actions, depriving employees of full relief, and imposing greater costs and burdens on those employment discrimination class actions that do survive. Deterrence and fairness will be undermined. The ad hoc approach, on the other hand, respects the courts' discretion and properly reconciles the goals of the Civil Rights Act of 1991 and Rule 23. The ad hoc approach's flexibility allows plaintiffs to seek full relief, while enjoying due process protections available through hybrid certification and discretionary notice and opt-out rights. The recent amendments to Rule 23 and the Class Action Fairness Act of 2005 only curb potential judicial abuse, and confirm the propriety of allowing federal courts wide latitude in making class certification determinations. The class action is vital to curtailing employment discrimination. Consequently, should the Supreme Court have occasion to consider the propriety of the predomination test in the future, it should embrace the ad hoc balancing test adopted by the minority of circuits to preserve this essential tool.

143. *See* 28 U.S.C. § 1711-15 (2005).