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Enforcement Issues: A Practical Overview

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When Congress enacted the Civil Rights Act of 1991,[1] legislative protagonists on all sides claimed victory. Representatives of civil rights groups and the plaintiffs' bar claimed they had succeeded in obtaining legislation that was "restorative" in nature—after a series of adverse Supreme Court decisions in 1989—and that would more adequately compensate victims of employment discrimination and deter wrongdoing.[2] By contrast, representatives of the Bush administration and, to a lesser extent, members of the management defense bar, claimed they had successfully headed off a "quota bill" and defanged a potential "litigation monster."[3] If these protagonists were to be believed, Congress had enacted sweeping civil rights legislation that, notwithstanding a prior presidential veto and an incredibly acrimonious legislative debate, required compromise from neither side and created only legislative winners and no losers.

Of course, self-serving proclamations are par for the course in legislative debate and, at the time, came as no surprise to disinterested, outside observers. But questions remained concerning which side actually had compromised and who, if anyone, had really "won" and "lost" as a result of those compromises. It is those questions that are sought, at least tentatively, to be addressed in this article.

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1. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in various sections of 42 U.S.C. (Supp. III 1992)).

2. *See, e.g.*, William T. Coleman, Jr. & Vernon E. Jordan, Jr., *How the Civil Rights Bill Was Really Passed*, Wash. Post, Nov. 18, 1991, at A21 (bill "significantly strengthens civil rights protections"); Bruce Fein, *Time Bombs in Rights Bill*, Wash. Times, Nov. 4, 1991, at E1 (Bush "outfoxed by the Democratic opposition"); Stuart Taylor, *The Civil-Rights Bill: Punt to the Courts*, Legal Times, Nov. 4, 1991, at 25 (White House "cave[d] in on lawyer's bonanza front" by accepting jury trial and damages awards provisions).

3. *See, e.g.*, C. Boyden Gray, *Civil Rights: We Won, They Capitulated*, Wash. Post, Nov. 14, 1991, at A23 ("President Bush did not 'cave' or 'surrender' on quotas in the new civil rights bill." Bush opposed provisions that would have "expos[ed] countless employers to ruinous litigation and liability any time their numbers were not 'right.'"); *White House Announces Civil Rights Compromise Ending Two-Year Long Dispute*, 208 Daily Lab. Rep. for Executives (BNA), at A-20 (Oct. 28, 1991) (Bush denied that his administration retreated: "[I]t is not a quota bill. . . . We didn't cave."); 210 Daily Lab. Rep. for Executives (BNA), at D-1 (Oct. 30, 1991) (by dropping "pro-lawyer provisions" of 1990 bill, 1991 Act represents "a further vindication of the President's resistance to legislation creating a bonanza for lawyers").

In doing so, however, an attempt shall be made to avoid reentering the debate that immediately preceded and followed the Civil Rights Act's enactment. Rather, the developments in law and practice that have occurred in the wake of the Civil Rights Act's passage will be examined and compared to the predictions and claims of the legislative protagonists. The tentative conclusion, based on the results to date, is, not surprisingly, that both sides made significant compromises and that neither side can properly claim to be the "winner" of this legislative battle, though the civil rights groups and representatives of the plaintiffs' bar appear to have a slight edge. But, because the 1991 Act has greatly exacerbated the substantial administrative backlog and congestion in the federal court system, the resulting overload on the civil rights enforcement system may ultimately mean that the Act works to the detriment of all litigants, particularly civil rights plaintiffs.

Part I of the article examines the developments in law and practice in the two-year period since passage of the 1991 Act. Part II compares these developments to the respective predictions and claims of the legislative protagonists and, as stated above, concludes that neither side can properly claim to have "won" the legislative battle, though civil rights groups and representatives of the plaintiffs' bar certainly have scored some early victories. Finally, Part III notes that, because of the administrative and judicial logjam created by the 1991 Act, this legislation ultimately may only make "losers" out of many of those that the legislation aimed to protect.

I. DEVELOPMENTS TO DATE UNDER THE CIVIL RIGHTS ACT

First, this article begins with a section-by-section review of developments in law and practice under the Civil Rights Act. Among other things, this review reveals that, while the provisions of the bill were heavily debated, thus far there has been surprisingly little litigation about their meaning.

A. Section 102[4]

Section 102 of the Act revised prior law by authorizing a plaintiff in a Title VII case to recover compensatory and punitive damages as a remedy for intentional discrimination (as opposed to disparate impact), in addition to the relief traditionally available under Title VII[5] and the Americans with Disabilities Act ("ADA").[6] The statute places a limit on the amount of total compensatory and punitive damages that may be awarded to a plaintiff. For an employer with more than 14 and fewer than 101 employees, the cap is $50,000; for an employer with more than 100 and fewer than 201 employees, the cap is $100,000; for an employer with more than 200 and fewer than 501 employees, the cap is

4. Pub. L. No. 102-166, 105 Stat. 1071, 1072 (1991).
5. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1988 & Supp. V 1993).
6. Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (Supp. V 1993).

$200,000; and for an employer with more than 500 employees, the cap is $300,000. In a case in which such damages are sought, either party may demand a jury trial.

Since the enactment of Section 102, there has been an "explosion" in charges of employment discrimination filed with the Equal Employment Opportunity Commission.[7] Charge filings are up nearly 45% since 1991.[8] Indeed, the fiscal 1993 total of 87,942 charges is the largest in the EEOC's history, and represents a staggering 21.6% increase from the previous year's total.[9] Although some of the increase is attributable to the passage of the ADA,[10] informed observers have attributed a substantial portion of the increased filings to the Civil Rights Act's "major new incentives for individuals to sue their current or former employers."[11]

Interestingly, however, this increase in charge filing has not yet produced a corresponding increase in litigation over the meaning and effect of Section 102. While there has been substantial litigation seeking the damages made available by Section 102 and about whether Section 102 may be applied retroactively to conduct or trials that occurred prior to the statute's enactment,[12] there are only a few reported decisions addressing interpretive disputes under Section 102 itself.

In *U.S. Equal Employment Opportunity Commission v. AIC Security Investigations*,[13] a federal district court examined the standards for imposing the statutory caps on compensatory and punitive damages set forth in Section 102(b) of the Act. Noting that the plain language of the limitations compelled a reduction of the jury's award of damages to the plaintiff, the court reduced only the punitive damages portion of the award to meet the limit of the statutory ceiling. It based this decision on its earlier finding that "the compensatory damages award [wa]s not excessive in light of defendants' behavior, and [wa]s in line with awards in similar cases."[14] Consistent with the standard established in Section 102(b)(1), the court then considered the character of the employer's conduct in assessing the propriety of the punitive damages determination. Specifically, it found that the employer's discharge of plaintiff—a fiercely loyal employee responsible for much of the company's success—in the last months of his battle with terminal cancer was "outrageous,"[15] and reflected a "reckless indifference to his rights and a callous insensitivity to his human condition."[16]

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7. Donald R. Livingston, *Hard Times at EEOC Forecast Bad News for Employers and Employees*, I Empl. Disc. Rep. (BNA) 58 (Nov. 3, 1993).

8. *Id.*

9. 9 Daily Lab. Rep. (BNA), at AA-1 (Jan. 13, 1994).

10. *See* 483 Empl. Prac. Rep. (CCH) 11 (Dec. 8, 1993) (EEOC receives nearly 1000 new ADA charges each month).

11. Livingston, *supra* note 7, at 58.

12. *Infra* Part II.

13. 823 F. Supp. 571 (N.D. Ill. 1993).

14. *Id.* at 576.

15. *Id.* at 579.

16. *Id.* at 578.

Notwithstanding these findings, however, the court concluded that a punitive award ten times greater than the amount of compensatory relief awarded was excessive and therefore properly reduced pursuant to the statutory limitation.[17] Significantly, the court found both the corporate and individual defendants jointly and severally liable for the resulting punitive damages award.[18]

While this case presents the most significant judicial decision interpreting the provisions of Section 102, the EEOC and the Internal Revenue Service have been more active than the courts in its interpretation. Recognizing the potential significance of these provisions to their enforcement mandates, the two agencies have issued clarifications or rulings that, for at least the time being, fill interpretive gaps in the new law.

On July 14, 1992, the EEOC published an Enforcement Guidance on the availability of compensatory and punitive damages under Section 102 of the 1991 Act. The guidance sets forth the EEOC's intention, in cases where it is pursuing a claim on behalf of more than one person, to apply the damages caps to *each* aggrieved individual. It also provides that, in the agency's view, since relief traditionally recovered under Title VII is not considered "compensatory," a complaining party may recover *fully* for backpay, interest on back pay, front pay, and any other relief available under Section 706(g) of Title VII[19]—without inclusion in the statutory caps. It further outlines various legal parameters and factors for computing compensatory and punitive damages claims, suggesting that "[c]ases awarding compensatory and punitive damages under other civil rights statutes will be used for guidance in analyzing the availability of damages under Section [102]. [Title 42,] Section 1981 cases are particularly useful because Congress treated the § [102] damages provisions as an amendment to § 1981."[20]

More recently, the IRS has ruled that damage awards for intentional discrimination under the 1991 Act and the ADA are nontaxable. In Revenue Ruling 93-88,[21] the IRS based its decision to exclude from gross income all compensatory damages, including back pay, received in satisfaction of a claim of disparate treatment gender discrimination under the 1991 Act and racial discrimination under § 1981 and Title VII on the ground that such damages constitute relief for personal injury under Section 104(a)(2) of the Internal Revenue Code.[22] The agency also concluded, however, that "back pay received by a victim of disparate impact discrimination is not excludable from gross income."[23]

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17. *Id.* at 578-79.

18. *Id.* at 579-80.

19. 42 U.S.C. § 2000e-5(g) (Supp. V 1993).

20. EEOC Enforcement Guidance, 10 n.13 (July 14, 1992). *See also* EEOC General Counsel Memorandum (Mar. 1, 1993) (reviewing the agency's litigation position on jury trials, damages, affirmative action, retroactivity, and after-acquired evidence).

21. Issued in 1993-41 I. R. B. 4 (Dec. 20, 1993).

22. *Id.*

23. *Id.*

B. Section 105[24]

While Section 102 of the Act has produced much activity, but little interpretive litigation, Section 105 of the Act does not appear to have produced either. Section 105 addresses the standards that govern proof of disparate impact claims—the standards that were at issue in the case providing much of the Act's impetus, *Wards Cove Packing Co. v. Atonio*.[25] Among other things, Section 105 permits a plaintiff to challenge an employer's "decisionmaking process" as one employment practice if the elements of that process are shown to be inseparable. It also restates the "business necessity" defense and places upon the employer the burden of proving that a practice causing disparate impact is "job related for the position in question and consistent with business necessity." Although these issues were heavily debated prior to the passage of the Civil Rights Act, thus far the new law has apparently produced only one issue that has been the subject of reported litigation.

In *Bradley v. Pizzaco of Nebraska, Inc.*,[26] the Eighth Circuit applied the 1991 Act in determining whether the EEOC was entitled to prospective injunctive relief which would have required an employer to recognize a medical exception to its no-beard policy. The EEOC claimed that the policy had a disparate impact upon African-American males, approximately half of whom apparently suffer from a skin condition that makes shaving difficult or even impossible. Granting the EEOC its requested relief, the court first noted that the 1991 Act is meant "'to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, and other Supreme Court cases prior to *Wards Cove Packing Co. v. Atonio*.'"[27] The court then placed the burden of persuasion regarding these issues upon the employer, requiring it to prove "both a 'compelling need' for the challenged policy, and the lack of an effective alternative policy that would not produce a similar disparate impact."[28] Noting that this burden "is a heavy one,"[29] the court concluded that the employer had failed to produce sufficient evidence demonstrating both a compelling need for its policy and that the "current policy is without workable alternatives or that it has a manifest relationship to the employment in question."[30]

That Section 105 has produced few reported litigable issues does not, of course, necessarily mean that the provision has produced little impact. It could

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24. This provision is discussed in greater detail in C. Boyden Gray, *Disparate Impact: History & Consequences*, 54 La. L. Rev. 1487 (1994).

25. 490 U.S. 642, 109 S. Ct. 2115 (1989).

26. 7 F.3d 795 (8th Cir. 1993).

27. *Id.* at 797.

28. *Id.*

29. *Id.* at 798.

30. *Id.* at 799 (citing Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849 (1971)). *But see also* Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993) (even under plaintiff-oriented standards of 1991 Act, city entitled to summary judgment on claim that no-beard policy for firefighters caused a disparate impact).

be that the EEOC simply has not processed disparate impact charges under Section 105, or that interpretive disputes under Section 105 simply are not arising. But, informal inquiries of the EEOC suggest that this is basically not the case. Rather, consistent with our own practice experience, while there has been a substantial increase in the filing of statistics-based cases during the past two years, government enforcement agencies and plaintiffs' lawyers are, for reasons that will be discussed later, tending to file these cases as disparate treatment or "pattern-and-practice" cases, rather than as disparate impact cases under Section 105.

C. Sections 106, 107, and 116[31]

There are interesting possibilities for interplay among Sections 106, 107, and 116 of the Act. Each addresses deliberately or potentially the legality of so-called "benign race" and "gender-conscious" preferences in employment.

Section 106 makes it an unlawful employment practice for an employer "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, religion, sex, or national origin." Section 107(a) provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Yet, Section 116 provides that "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."

To date, it does not appear that any court has relied on these provisions to invalidate a time-honored employment selection device—most likely because of the rule of construction set forth in Section 116. One recent case, however, involved several of these provisions of the new Act and shows their interrelationship.

In *Officers for Justice v. Civil Service Commission*,[32] the Ninth Circuit addressed whether an employer's proposal to "band" scores from promotion examinations violated the 1991 Act or the Constitution. As the court explained, a "'band' is a statistically derived confidence range that is applied to the examination results. Differences between scores within the band are considered to be statistically insignificant due to measurement error inherent in scoring the examination."[33] The city sought to band certain test scores as a means of complying with a prior consent decree.[34] The district court held that voluntary "banding" constituted a legally valid scoring procedure because scores within the

31. Pub. L. No. 102-166, 105 Stat. 1071, 1075-76, 1079 (1991).
32. 979 F.2d 721 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993).
33. *Id.* at 723.
34. *Id.*

band are "substantively equivalent for purpose of the knowledge, skills, and abilities measured by the examination."[35] Although the court of appeals declined to reach the plaintiff's challenge to these "banding" procedures under Section 106 on the ground that plaintiff had failed to raise the issue in its opening brief, the court did address the interplay of Sections 107 and 116 of the new law. Specifically noting the "inconsistency" of the plaintiff's reading that "Congress sought to protect affirmative action in Section 116 while outlawing it in Section 107," the court concluded that the 1991 Act does not generally alter existing affirmative action case law.[36]

In an interesting footnote in another recent decision, the Ninth Circuit also alluded to the effect of Section 107 upon the proof required in a "mixed motive" case. In *Washington v. Garrett*,[37] the court considered numerous claims against the Navy of unlawful personnel practices and employment discrimination. Contrasting the necessary proof to be provided by plaintiffs in disparate treatment and mixed-motive cases, the court noted that "[a] plaintiff need not label her case a single or mixed motive case from the beginning,"[38] but the district court must decide at "some point in the proceedings, . . . whether a particular case involves mixed motives."[39] The court ordered the district court on remand to use this approach.[40]

D. Section 109[41]

Section 109 of the Act makes Title VII applicable in some circumstances to employment actions that occur overseas. Among other things, it makes Title VII applicable to the actions of foreign corporations that are under an American employer's "control." So far, there are no reported cases interpreting Section 109.

On October 20, 1993, however, the EEOC released an Enforcement Guidance on Section 109 that addressed, *inter alia*, the extraterritorial application of Title VII and the ADA to American and American-controlled employers abroad. (It also addressed the coverage under both statutes of foreign employers discriminating within the United States.) The guidance states that the four factors identified in Section 109(a)(3) for determining "control" of a business entity are identical to those used by the EEOC in ascertaining when two or more

35. *Id.* at 722-23.

36. *Id.* at 725.

37. 10 F.3d 1421 (9th Cir. 1993).

38. *Id.* at 1432 n.15.

39. *Id.* (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12, 109 S. Ct. 1775, 1789 n.12 (1989)).

40. *See also* EEOC Enforcement Guidance (July 14, 1992) (discussing the evaluation of indirect evidence, direct evidence, and evidence of mixed motives under the disparate treatment theory of discrimination after the 1991 Act).

41. Pub. L. No. 102-166, 105 Stat. 1071, 1077 (1991).

entities may be treated as an "integrated enterprise" or "single employer." Thus, under the EEOC's view, courts and employers evidently may rely upon the existing policy guidance and ample authorities interpreting those standards to determine the existence of American control under new Section 109.[42]

E. Section 402[43]

Section 402 of the statute purports to establish the Act's effective date. Nonetheless, it states only that, "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." In striking contrast to the other provisions of the statute, which thus far have not generated much interpretive dispute, Congress's ambiguity on this critical issue has created an exceedingly costly litigation logjam. As one district court presciently predicted, this "tragi-comedy of confusion" has necessitated "thousands of judicial hours, which Congress could easily have saved."[44]

Familiar camps have formed in this new litigation battle, following predictable lines of attack. Spurred by the Act's damages and jury trial amendment, plaintiffs' attorneys have scrambled to revive dormant cases and amend complaints in pending litigation to take advantage of the Act's new remedies. Similarly, management attorneys have prepared for litigation by crafting voluminous briefs outlining the law against retroactivity.[45]

Less than one month after the law's enactment, a federal district court heard arguments regarding the retroactive application of the new law in a race-discrimination action in which the plaintiff sought damages and a jury trial even though he filed suit before the effective date of the Act.[46] This case, however, was merely the first raindrop in a downpour. Ultimately, cases seeking similar guidance reached nearly every circuit court of appeals. All but one of the circuits considering the issue concluded that the 1991 Act does not apply retroactively.[47] Recognizing the split among the circuits and the need for clarification, the Supreme Court agreed to review two cases that rejected

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42. *See, e.g.*, Lavrov v. NCR Corp., 600 F. Supp. 923 (S.D. Ohio 1984) (relying on the four factors to determine whether a foreign subsidiary and American parent were an integrated enterprise in the context of a Title VII claim).

43. Pub. L. No. 102-166, 105 Stat. 1071, 1099 (1991).

44. King v. Shelby Medical Ctr., 779 F. Supp. 157, 158 (N.D. Ala. 1991).

45. *See* Jonathan Groner, *New Rights Act Ducks Crucial Issues; Courts Left to Grope with How Statute Affects Pending Cases*, Legal Times, Dec. 9, 1991, at 1, 18.

46. Van Meter v. Barr, 778 F. Supp. 83 (D.D.C. 1991).

47. *See* Gersman v. Group Health Ass'n, Inc., 975 F.2d 886 (D.C. Cir. 1992); Landgraf v. USI Film Prods., 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 1250 (1993); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S.Ct. 207 (1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Baynes v. AT&T Technologies, 976 F.2d 1370 (11th Cir. 1992). *Contra* Estate of Reynolds v. Martin, 985 F.2d 470 (9th Cir. 1993).

retroactive application of the 1991 Act.[48] The Court heard oral arguments in September 1993 and, in April 1994, rendered decisions holding that, at least with respect to Sections 101 and 102 of the Act, the statute may not be applied retroactively to conduct or trials occurring before the statutes effective date.[49]

The litigation controversy has not concerned only Section 402(a)'s general effective date provision. Section 402(b) of the Act has also raised controversy; indeed, due in part to the unusual exemption of this provision—"nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983"—the "long and complex history"[50] of the *Wards Cove* case itself continues. On December 7, 1993, the Ninth Circuit determined the constitutionality of Section 402(b), upholding it on three grounds. First, it declared that the provision does not violate the separation-of-powers doctrine because the exemption does not order "any federal court to dismiss the workers' complaint, to enter judgment against them, or to make particular findings of fact or conclusions of law."[51] The court next rejected the workers' Fifth Amendment challenge, finding that Congress had a rational basis for enacting the exemption—namely that, because the suit already had expended significant private and judicial resources and the Supreme Court's decision provided clear standards for remand, Congress reasonably decided that the case would be decided pursuant to those standards.[52] Finally, the court held that the provision does not constitute an unlawful bill of attainder because Congress did not intend to punish the workers by enacting it; it intended only to "relieve the canneries from the cost of additional litigation."[53]

II. SCORING THE DEVELOPMENTS

While the data concerning developments under the Act is admittedly still quite limited, it is possible to reach at least some preliminary conclusions concerning the Act's scope and impact. Specifically, the "winners" and "losers" of the acrimonious legislative battle that led to the statute's enactment may be identified more accurately by the Act in action.

First, although there has been little dispute over the meaning and application of Section 102's new damages and jury trial provisions, the effect of Section 102 has clearly been to promote a dramatic increase in the number of EEO charges

48. *See* Landgraf v. USI Film Prods., 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 1250 (1993); Harvis v. Roadway Express, Inc., 973 F.2d 490 (6th Cir. 1992), *cert. granted sub nom.* Rivers v. Roadway Express, Inc., 113 S. Ct. 1250 (1993).

49. Rivers v. Roadway Express, Inc., No. 92-938 (decided April 26, 1994); Landgraf v. USI Film Products, No. 92-757 (decided April 26, 1994) (*see supra* note *).

50. Atonio v. Wards Cove Packing Co., 10 F.3d 1485, 1489 (9th Cir. 1993).

51. *Id.* at 1492.

52. *Id.* at 1494.

53. *Id.* at 1496.

filed and lawsuits pursued.[54] The authorization of jury trials, compensatory damages, and punitive damages has greatly increased the stakes of adverse employment actions against females and minorities and the visibility of civil rights enforcement itself. As a consequence, individuals who previously would not have sued are apparently suing, and plaintiffs' lawyers who previously would not have been interested in Title VII litigation are apparently accepting such cases much more frequently. Moreover, our practice experience indicates that employers are increasing their investment in antidiscrimination prevention efforts to avoid, where reasonably possible, the substantially increased costs associated with Title VII litigation. While the caps on liability have no doubt moderated, at the margin, the effect of these provisions (and, together with the IRS's ruling on taxability of damages, facilitated settlement in many cases), the dramatic rise in EEO charge filings and damages demands since the Act's enactment strongly suggests that, contrary to its assurances, the Bush administration in fact failed to defang what it had previously described as a "litigation monster."

Second, although it is too early to draw final conclusions about the meaning and effect of Section 105 of the Act, the Eighth Circuit's decision in *Bradley v. Pizzaco of Nebraska, Inc.*[55] suggests that, in this regard too, the Bush administration may have failed in its battle over the legislative standards to be applied in disparate impact cases. In agreeing to Section 105, the administration acknowledged that it was accepting a legislative shift of the burden of proof to defendants, making "business necessity" and "job-related" affirmative defenses to a disparate impact claim. But, the administration claimed still to have prevented enactment of a "quota bill" by, among other things, warding off efforts to require employers to show that practices causing disparate impact are, for example, "indispensable" to their business and the performance of the employment in question. Yet, the Eighth Circuit in *Pizzaco* seems to have adopted precisely such a standard. Thus, while other circuits and, most importantly, the Supreme Court may ultimately take a different approach, at least at the end of the first round of litigation about the meaning and effect of Section 105, the civil rights groups and plaintiffs' lawyers who opposed the administration appear to be ahead on points.

Third, regardless of what happens in future rounds of litigation concerning the meaning and effect of Section 105, as a practical matter, the Civil Rights Act of 1991 may ironically mark the beginning of the end for much disparate impact litigation. It has long been recognized that the statistical proof that is used to prove disparate impact can, in many circumstances, be used to attempt to prove discriminatory intent.[56] Nevertheless, prior to the enactment of the Civil Rights Act, most statistics-based cases were brought as disparate impact cases for two

54. Livingston, *supra* note 7, at 58.

55. 7 F.3d 795 (8th Cir. 1993).

56. *See* Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843 (1977); Barbara L. Schlei & Paul Grossman, Employment Discrimination Law 1288-1290, 1331 (2d ed. 1983).

reasons. The first was because of a perception among government enforcement agencies and plaintiffs' lawyers that "effect" is easier to prove than "intent." The second was because of their perception that the rebuttal burden on the defendant is more demanding in a disparate impact case than in a disparate treatment or "pattern-and-practice" case. As noted above, however, after the enactment of the 1991 Act, statistics-based cases tend now to be brought as disparate treatment or pattern-and-practice cases rather than as disparate impact cases, apparently because a jury trial is available in such cases (whereas it is not available in disparate impact litigation), because nontaxable back-pay *and* compensatory *and* punitive damages awards are available in such cases (whereas only taxable back-pay awards are available in disparate impact litigation), and because the statutory restrictions on disparate impact suits—such as the requirement that each employment practice be challenged separately—do not necessarily apply to disparate treatment or pattern-and-practice suits. If this trend away from disparate impact litigation toward pattern-and-practice litigation continues, any victories that the Bush administration ultimately may have won in the debate over Section 105 will be pyrrhic ones at best.

Fourth, as the Ninth Circuit's decision in *Officers for Justice*[57] illustrates, while the Act does not directly alter the legal standards generally applicable to affirmative action programs, the Act is going to generate litigation about the legality of such programs. Section 106 clearly proscribes race-norming practices that had previously been used—a clear victory for the Bush administration. And, as one of us has elsewhere pointed out,[58] certain amendments made by the 1991 Act—including the new damages and jury trial provisions—arm opponents of affirmative action in employment with substantial new weapons for challenging such efforts. On the other hand, other provisions of the Act make it riskier and more expensive for employers to take actions that are adverse to women and minorities and, therefore, create substantial new incentives for employers to institute and expand either formal or informal (e.g., surreptitious) affirmative action efforts.[59] The developments in the two years since the Act's passage do not yet provide a basis for assessing which provisions will have the greater behavioral impact. Nonetheless, litigation is almost certain to come, and the statute that promised not to affect affirmative action programs is clearly going to do so.[60]

Fifth, as noted above, the Supreme Court has held that the statute's provisions are to be applied only prospectively. Moreover, in doing so, the Supreme Court and, before it, the courts of appeals generally declined to place weight on Democratic efforts to characterize the Act as "restorative" in nature—efforts that the Bush administration strongly resisted and succeeded in having deleted from the

57. 979 F.2d 721 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993).

58. Glen D. Nager, *Affirmative Action After the Civil Rights Act of 1991: The Effects of a "Neutral" Statute*, 68 Notre Dame L. Rev. 1057, 1072-80 (1993).

59. *Id.* at 1081-88.

60. *Id.* at 1088-93.

statute's language. The administration thus won the battle over the Act's effective date provisions—and with it, arguably, the battle over the political characterization of the Act and the Supreme Court decisions to which the Act was, in part, a response.

Finally, in evaluating the Act in action, it is important to remember that earlier versions of the Act proposed rather significant revisions to a number of other provisions in the civil rights laws, including provisions relating to attorneys fees, the use of Rule 68 of the Federal Rules of Civil Procedure in employment discrimination cases, and the statutes of limitations applicable to the filing of EEO charges. While other proposals (such as Section 109) were passed without objection from the Bush administration, the administration opposed these revisions to the statute and succeeded in having them withdrawn. No fair assessment of the political battle can be done without giving recognition to the administration's successful opposition to these proposed provisions.

In sum, it is clear that protagonists on both sides of the legislative battle compromised. Contrary to its claims, the Bush administration accepted provisions that have indeed created a potential litigation monster; and, while it is really too early to tell, the administration may in fact have accepted statutory provisions that will encourage the very kinds of statistics-based lawsuits that it claimed to have prevented. On the other hand, the administration successfully opposed certain radical revisions to the civil rights enforcement scheme and, at least for the near term, achieved limitations on the damages provisions that will be a practical, albeit loose, rein on such cases. Moreover, it appears that the administration won the battle over the statute's effective date provisions and, along with it, the battle over whether the Act may properly be characterized as merely "restorative" of prior law. In short, neither side appears completely to have "won" this legislative battle, though liberal civil rights groups and representatives of the plaintiffs' bar are, on balance, ahead on points.

III. OVERLOADING THE SYSTEM

That neither side can properly claim complete victory in this legislative battle is, however, not the only proper comment that can be made about the developments in law and practice that have occurred under this statute. Appropriate comment can also be made about the lack of consideration given to, or understanding of, the ability—or, more accurately, the inability—of the civil rights enforcement system to cope with the legislative victories of each side.

First, it is clear that civil rights groups and representatives of the plaintiffs' bar did not give adequate consideration to the effect that the availability of jury trials and compensatory and punitive damages would have on the system of enforcing civil rights. As noted above, the statute has contributed to a dramatic increase in charge filings that has simply overwhelmed the EEOC. Despite the resolution of over 71,000 charges during the past year, the agency still reports

an inventory of approximately 73,000 charges.[61] Already overworked agency officials, further taxed by inadequate support and even greater caseloads, are simply unable to engage in thorough conciliation negotiations and, not surprisingly, are less successful in achieving both voluntary compliance and mediated resolutions of discrimination disputes. "By necessity, if not by choice, litigation has become a primary means for resolving workplace employment discrimination grievances."[62] While it is stating the obvious to predict that this escalating litigation will result in similarly escalated costs and possibly in less favorable outcomes for employers, the delays in dispute resolution also impede claimants in their efforts to receive the fruits of their new rights. It may even deter some potential claimants from pursuing their grievances. Indeed, to the extent that the new remedial provisions dissuade employers from hiring individuals who they perceive as potential litigants or dampen enthusiasm for voluntary affirmative action or other training programs,[63] the new law in action may deny its benefits to the very persons that its proponents intended to benefit.

Likewise, even if the civil rights groups and representatives of the plaintiffs' bar prevail in their efforts to liberalize the acceptable uses of statistics in civil rights cases, they have not adequately considered or addressed the inability of the federal court system effectively to handle and process such massive cases. Even where statistics are used to establish systemic discrimination, individualized hearings are necessary on liability and damages issues. Such large, class-based cases can take years to litigate and resolve. Indeed, in today's congested federal court-system, litigation of such cases can, as the *Wards Cove* case illustrates, drag out for over two decades. In such circumstances, it can fairly be said that the 1991 Act may have created rights that, as a practical matter, are not practicably enforceable under the existing system.

Concomitantly, even though the Bush administration and the management defense bar may ultimately succeed in litigation over the meaning and effect of Section 105, they still have not adequately accounted for the substantial pressures that will impel employers toward both lawful and unlawful race- and gender-conscious employment actions. Until the ambiguities are resolved, the legal uncertainties that exist in this statute will themselves create strong pressure for employers to use all available means—legal and illegal—to integrate their workforces, eliminate relevant statistical disparities, and avoid the use of selection practices or processes that adversely affect minorities and women. Indeed, as noted above, even when the statutory ambiguities are resolved, considerable pressure for race- and gender-conscious employment actions—lawful and unlawful—will remain from the potential for "pattern-and-practice" and disparate treatment type cases, with their attendant jury-trial rights and potential compensatory and punitive

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61. Livingston, *supra* note 7, at 58.

62. *Id.*

63. *See* Taylor, *supra* note 2, at 27-28. *See also* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 1022, 1024-28 (1991).

damages awards. The civil rights enforcement system includes these uncertainties and pressures, and the Bush administration simply did not adequately account for them (or, more cynically, chose to ignore them).

Finally, neither of the protagonists adequately considered the cost of all of the compromises that they chose to make on the statute's effective date provision. No matter how the litigation about this issue was ultimately resolved, it is clear that the legislative agreement to create purposeful ambiguity about the statute's effective date imposed an enormous and unnecessary cost on the civil rights enforcement system. As noted above, this issue produced exponentially more litigation than any other issue under the statute—at considerable cost to both the litigants and the federal courts. In a system that was overloaded to begin with, this litigation burden was unconscionable.

IV. CONCLUSION

This article has sought to evaluate, by reference to the legal and practical developments that have occurred under the Civil Rights Act of 1991 since its enactment, who "won" and who "lost" in the acrimonious debate that preceded and followed enactment of the statute. While it is too early to make an ultimate determination, it appears that each of the legislative protagonists made significant compromises and that neither can properly claim to be the legislative winner. Moreover, even to the extent that a particular protagonist can claim victory on a particular issue, it can do so only by continuing to ignore the practical inability of the current civil rights enforcement system effectively to resolve statutory ambiguities and process claims. Until the protagonists deal with these issues, many of the persons for whom each of these protagonists respectively fought will fail to realize the benefits that supposedly were gained for them in this legislative battle.