University of Arkansas at Little Rock Law Review

Volume 23 | Issue 4 Article 2

2001

Resurgence of the Class Action Lawsuit in Employment Discrimination Cases: New Obstacles Presented by the 1991 Amendments to the Civil Rights Act

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RESURGENCE OF THE CLASS ACTION LAWSUIT IN EMPLOYMENT DISCRIMINATION CASES: NEW OBSTACLES PRESENTED BY THE 1991 AMENDMENTS TO THE CIVIL RIGHTS ACT

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I. INTRODUCTION

Microsoft was recently named in a five billion dollar class action lawsuit brought by seven current and former African-American employees claiming race discrimination.[1] This reflects what many employment lawyers have noticed: a definite resurgence in the use of the class action device to bring employment discrimination lawsuits against employers.

From the initial passage of Title VII of the Civil Rights Act of 1964,[2] the class action device has been an important tool for plaintiffs challenging discriminatory employment practices.[3] During the first decade, courts readily certified "across-the-board" class actions in employment discrimination cases.[4] In 1976 alone, there were 1,174 class action employment discrimination cases filed in the federal district court system.[5]

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* Director, Cross, Gunter, Witherspoon, & Galchus, P.C. The author acknowledges the assistance of Chad Alston Horner and Barbara Mills.

1. *See* Yochi J. Dreazen, *Microsoft To Face Discrimination Suit by Black Workers*, WALL ST. J., Jan. 3, 2001, at B4.

2. 42 U.S.C. § 2000e (1994).

3. 42 U.S.C. § 2000e-2(a) prohibits employers subject to Title VII from discriminating against employees and applicants for employment "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1994). The prohibition extends to all aspects of employment, as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

4. *See* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 23.23[5][e] (3d ed. 2000).

5. *See* Richard T. Seymour, *Trends in Fair Employment Litigation*, Midwinter Meeting of the Committee on Equal Employment Opportunity, ABA Section on Labor and Employment (Mar. 25, 1998). These statistics are also available in the Annual Report of the Director, Judicial Business of the United States Courts, Table X-5.

In 1977, the class action employment discrimination case began its descent into a fourteen-year coma. In that year, the United States Supreme Court handed down *East Texas Motor Freight System, Inc. v. Rodriguez*,[6] where the Court warned that there must be more than mere token recognition of Federal Rule of Civil Procedure 23.[7] The immediate results were dramatic: in 1978, 739 class action employment discrimination cases were filed.[8] By 1981, only 301 class action employment discrimination cases were commenced in the federal district court system.[9]

The Supreme Court struck another, much deeper, blow to the availability of a class action in employment discrimination cases in 1982. The Court held in *General Telephone Co. of the Southwest v. Falcon*[10] that "across-the-board" class actions generally were not in compliance with the adequacy requirement of Rule 23.[11] As a result, the class action employment discrimination case filings sank to thirty-two cases in 1991, down from 1,174 in 1976.[12]

With the passage of the Civil Rights Act of 1991, which allows punitive and compensatory damages and the right to jury trials in actions alleging intentional discrimination,[13] and with the utilization of a "crack" in the *Falcon*[14] analysis, the class action employment discrimination case is making a modest comeback. In 1999, plaintiffs filed seventy-four class action employment discrimination cases.[15] The

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6. 431 U.S. 395 (1977).
7. *See id.* at 405.
8. *See* Seymour, *supra* note 5, at 3.
9. *See id.*
10. 457 U.S. 147 (1982).
11. *See id.* at 157-58.
12. *See* Seymour, *supra* note 5, at 3.
13. *See* 42 U.S.C. § 1981(a)(1), (c) (1994).
14. *See supra* text accompanying notes 10-12.
15. *See* Seymour, *supra* note 5, at 3. The statistics for the 12 months ending September 30, 1999, are the most up-to-date numbers on the filings of class action employment discrimination cases. The following is a breakdown of employment discrimination class action filing by year:

1976	1,174
1977	1,138
1978	739
1979	515
1980	326
1981	301
1982	224
1983	156
1984	135
1985	82

publicity generated by the settlements of employment discrimination class actions is an indicator that the trend will continue.[16]

Defense attorneys have reacted with intense vigor to limit the use of the class action device in employment discrimination cases. Ironically, the very elements of the 1991 Act which make it attractive to plaintiffs and their counsel—the availability of compensatory and punitive damages and the right to a jury trial—provide the fodder for a challenge to its use in class actions. The notion that employment actions alleging intentional discrimination were not appropriate for traditional class action treatment was advanced by the United States Court of Appeals for the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*[17] This case has been cited extensively by the defense bar as controlling precedent on the issue of class certification in employment discrimination cases. Predictably, the plaintiffs' bar has argued that *Citgo* should be limited to the specifics of the case on appeal. Federal district courts and appellate courts from other circuits have taken varying positions on following, rejecting or modifying the approach of the *Citgo* court.

This article will briefly discuss in Parts II and III the history of the class action in Title VII cases prior to the Civil Rights Act of 1991. Part IV, the major thrust of the article, will address how courts have dealt with class certification issues in employment actions brought after the

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1986	68
1987	48
1988	46
1989	50
1990	42
1991	32
1992	30
1993	44
1994	56
1995	71
1996	68
1997	79
1998	85
1999	74

Id.

16. *See Judge OK's $105 Million Award in Racial Bias Suit Against Shoney*, KANSAS CITY STAR, Jan. 26, 1993, at D4; Betsy McKay, *Coca-Cola Agrees To Settle Bias Suits for $192.5 Million*, WALL ST. J., Nov. 17, 2000, at A3; Thomas S. Mulligan & Chris Kraul, *Texaco Settles Race Bias Suit for $176 Million*, L.A. TIMES, Nov. 16, 1996, at A1.

17. 151 F.3d 402, 410 (5th Cir. 1998). The effects of the Civil Rights Act of 1991 on the continued viability of class certification in Title VII cases was one of first impression at the appellate level. *See id.* at n.1. Several district courts had previously addressed the issue with varying conclusions. *See id.*

passage of the 1991 Act. Finally, the article will examine the extent to which the class action device remains a viable option in employment discrimination cases.

II. EMPLOYMENT DISCRIMINATION CASES SUSCEPTIBLE TO CLASS ACTION TREATMENT

"Class actions constitute an exception to the usual rule that litigation is conducted by and on behalf of the named parties only."[18] This procedural device allows one plaintiff to bring an action on behalf of others who have suffered the same harm.

A Title VII action filed in federal district court[19] where a plaintiff seeks to represent a purported class of others who have allegedly been discriminated against in employment must satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure.[20] In addition to satisfying Rule 23, a plaintiff must also have individual constitutional standing[21] to bring the action on his own behalf. Stated another way, a purported class representative must "possess the same interest and suffer the same injury" as the class he seeks to represent.[22] Some courts have identified an overlap between constitutional standing and the Rule 23(a) prerequisites.[23]

Rule 23 in its present revised form[24] became effective on July 1, 1966, just one year after the effective date of Title VII. Consequently, in the early Title VII class actions the federal courts were concurrently grappling with both the substantive parameters of the new discrimination statute and the scope of the revised procedural rule. It is not surprising that as some cases worked their way up through the appellate

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18. MOORE, *supra* note 4, § 23.02 (quoting General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 156 (1982)).

19. Although Title VII provides for concurrent jurisdiction in the state and federal courts, as a practical matter, most actions are filed in federal court.

20. *See* FED. R. CIV. P. 23.

21. *See* U.S. CONST. art. III, § 2.

22. East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977). *See also* Slader v. Pearle Vision, Inc., 84 Fair Empl. Prac. Cas. (BNA) 834, 835 (S.D.N.Y 2000); Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 THE LAB. LAW. 415, 426 n.77 (2000).

23. *See Falcon*, 457 U.S. at 159 n.15.

24. The original Rule 23 was promulgated in 1937 and was substantially a restatement of Equity Rule 38 (Representatives of Class). *See* FED. R. CIV. P. 23 advisory committee's note (1937). The 1966 revisions were an extensive overhaul of the former Rule and remained virtually unchanged until 1998, when subsection (f) was added to allow for discretionary interlocutory appeals.

courts and finally to the Supreme Court, the complexion of the Title VII class action changed.

Rule 23(a) and (b) of the Federal Rules of Civil Procedure set forth the five requirements for the certification of a class action lawsuit. First, all four prerequisites of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—must be satisfied.[25] If the four prongs of Rule 23(a) are met, the case must additionally satisfy one of the alternative subsections of Rule 23(b).[26]

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25. Federal Rule of Civil Procedure 23(a) provides:

> 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 of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). Federal Rule of Civil Procedure 23(b) provides that:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
> (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; or
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
> (3) the court finds that the 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. The matters pertinent to the findings include:
> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
> (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23 (b)(1)-(3).

26. Rule 23(b) is a fifth requirement. It is not enough to merely assign a case to one of the three categories of Rule 23(b). The case must actually satisfy the elements of one of the categories.

From the beginning of the enactment of Title VII of the Civil Rights Act, plaintiffs recognized that the remedies provided in the statute could most effectively be addressed through a class action. Federal district courts readily accepted that Title VII cases by their very nature involved class or group discrimination. [27]

Cases alleging race, national origin, religious, or gender discrimination were particularly suited to class action treatment. In fact, in many cases the courts gave great deference to employment discrimination actions and certified broad across-the-board class actions[28] without careful attention to the requirements of Rule 23. A discharged employee could represent a class challenging hiring and general employment practices,[29] and an applicant who had not been hired could challenge employment practices on behalf of a class of employees.[30]

One such example is *Johnson v. Georgia Highway Express, Inc.*,[31] a race discrimination class action certified under the across-the-board approach. The Fifth Circuit Court of Appeals rejected the district court's "narrowing of the class" to allow the named plaintiff who had been discharged to represent only other discharged employees.[32] The circuit court held this to be error "as it is clear from the pleadings that the scope of appellant's suit is an 'across the board' attack on unequal employment practices alleged to have been committed by the appellee pursuant to its policy of racial discrimination."[33] Without discussing how the Rule 23(a) requirements were satisfied, the appellate court allowed the discharged employee to represent others "harmed by the alleged discrimination in hiring, firing, promotion, and maintenance of facilities."[34]

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27. *See, e.g.*, Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 428 (8th Cir. 1970) ("The very nature of a Title VII violation rests upon discrimination against a class characteristic, i.e., race, religion, sex, or national origin."); Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966) ("Racial discrimination is by definition a class discrimination. If it exists it applies throughout the class."); 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1776, at 495-96 (2d ed. 1986).

28. Federal Rule of Civil Procedure 23(c)(1) requires that the district court make the determination as to whether a case shall proceed as a class action: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." FED. R. CIV. P. 23(c)(1).

29. *See* Long v. Sapp, 502 F.2d 34, 43 (5th Cir. 1974); Reed v. Arlington Hotel Co., 476 F.2d 721, 723 (8th Cir. 1973).

30. *See Parham*, 433 F.2d at 425.

31. 417 F.2d 1122 (5th Cir. 1969).

32. *See id.* at 1124.

33. *Id.*

34. *Id.*

During the first decade of Title VII,[35] it was relatively easy to certify an across-the-board class action. Rationale for satisfaction of the Rule 23(a) requirements was generally easy to provide. The initial lawsuits were brought against the larger employers. Although there are no rigid numerical guidelines for satisfying the numerosity requirement, generally more than forty is adequate and less than twenty-one is inadequate. Numbers between twenty-one and forty receive varying treatment.[36] Commonality of fact or law is generally met by an allegation that the employer's policy or practice has a class-wide impact.[37] Typicality generally relates to the relationship of the class representative's claims to the claims of the putative class members.[38] The adequacy of representation requires analyses of the expertise and financial ability of the attorney representing the class and the claims of the named plaintiff. The named plaintiff is expected to possess the same claims as those of the class in order to prevent conflicts and antagonism between himself and the putative class.[39] However, across-the-board employment discrimination class actions are often certified with no discussion of compliance with the Rule 23 requirements.[40] Even those courts which enumerated how Rule 23(a) had been satisfied routinely addressed Rule 23(b) by simply assigning the case to the Rule 23(b)(2) category rather than treating it as a fifth requirement.

Employment discrimination class actions have traditionally been certified under Rule 23(b)(2)[41] because they involved only claims for

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35. Title VII became effective on July 2, 1965.

36. *See* MOORE, *supra* note 4, § 23.22[3][a].

37. *See, e.g.*, Paxton v. Union Nat'l Bank, 688 F.2d 552, 561 (8th Cir. 1982) (holding that the commonality requirement was met even though the court admitted that each alleged act of discrimination affects individual employees differently).

38. *See id.* at 561-62.

39. *See* Batesville Casket Co. EEO Litig., 35 Fair Empl. Prac. Cas. (BNA) 1560, 1564 (D.D.C. 1984).

40. *See, e.g.*, Irvin v. Mohawk Rubber Co., 308 F. Supp. 152, 160 (E.D. Ark. 1970). Here, the only finding on certification was a conclusion of law that stated: "This is a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and plaintiffs . . . are appropriate representatives of that class." *Id.* at 160. Classes were even certified by courts of appeals without reciting compliance with Rule 23. *See generally* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

41. *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 Rule 23(b)(2) class actions.); *Paxton*, 688 F.2d at 563 ("Rule 23(b)(2) certification is appropriate when plaintiffs seek injunctive relief from acts of an employer 'on grounds generally applicable to the class' as a whole."); 5 HERBERT B. NEWBERG & ALBA COTE, NEWBERG ON CLASS ACTIONS § 24.81, at 24-26 (3d ed. 1992) ("The aptness of designating employment discrimination suits as class actions under Rule 23(b)(2) has been recognized repeatedly and definitively by the courts.").

equitable relief, i.e., back pay and reinstatement. The committee that revised Rule 23 in 1966 promulgated subsection (b)(2) primarily "as a tool for facilitating civil rights actions."[42] In fact, the Advisory Committee to the Federal Rules of Civil Procedure specifically identifies "actions in the civil-rights field where a party is charged with discriminating unlawfully against a class" as a type of action appropriately maintained under Rule 23(b)(2).[43]

III. UNITED STATES SUPREME COURT SOUNDS DEATH KNELL FOR DISCRIMINATION CLASS ACTION

During the second decade of Title VII, the United States Supreme Court issued two decisions that drastically limited the ability of a plaintiff to certify an across-the-board class action. First, in the 1977 decision of *East Texas Motor Freight System, Inc. v. Rodriguez*,[44] a unanimous Court overturned the Fifth Circuit's certification of a class consisting of Mexican-American and African-American employees and applicants for employment.[45] The Court held that even in suits alleging discrimination, "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable."[46]

Jesse Rodriguez, and other Mexican-American "city drivers" who had been denied transfer to "line driver" positions, sued their employer and labor unions for racial and ethnic origin discrimination.[47] Although the action was brought on behalf of all Mexican-American and African-American in-city drivers and applicants for line driver positions, the plaintiffs never moved to certify the class pursuant to Rule 23.[48] The district court dismissed the class action allegations.[49]

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42. MOORE, *supra* note 4, § 23.43[1][a].
43. FED. R. CIV. P. 23(b)(2) advisory committee's note on 1966 amendments.
44. 431 U.S. 395 (1977).
45. *See id.* at 403.
46. *Id.* at 405.
47. *See id* at 398-99. East Texas Motor Freight ("ETMF") was a common carrier that employed both "city drivers" and "over-the-road" drivers (otherwise known as "line drivers"). *See id.* at 397. The plaintiffs, who were employed as city drivers at ETMF's San Antonio terminal, challenged the company's "no-transfer policy" which prohibited transfers from one terminal to another and from city driver to line driver. *See id.* at 397-99. They also challenged the union's seniority system, which did not recognize for purposes of competitive seniority any time spent in another position within the company. *See id.*
48. *See id.* at 398.
49. *See id.* at 400. The district court also held against the plaintiffs on their individual claims. *See id.* According to the court, the no-transfer policy was a racially neutral policy and a proper business practice. *See id.*

The Fifth Circuit reversed the district court and certified a class consisting of all of the company's African-American and Mexican-American city drivers covered by the collective bargaining agreement.[50] Continuing the tradition of certifying across-the-board discrimination classes, the Court of Appeals noted that "the requirements of Rule 23(a) must be *read liberally* in the context of suits brought under Title VII and Section 1981."[51]

The United States Supreme Court held that the Fifth Circuit plainly erred in certifying a class because the named plaintiffs were not proper class representatives under Rule 23(a).[52] The Court noted two major deficiencies with the named plaintiffs: they were not members of the class they purported to represent,[53] and they could not establish the Rule 23(a)(4) adequacy of representation prerequisite.[54]

While acknowledging that discrimination suits, by their nature, are suited for class action treatment, the Court insisted that the requirements of Rule 23 not be ignored.[55] The Court warned that "[t]he mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination."[56]

Although some district courts and appellate courts continued to certify across-the-board classes,[57] *Rodriguez* proved to be a prophetic

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50. *See Rodriguez*, 431 U.S. at 401. The appellate court found that the district court had the responsibility to certify the class, despite plaintiff's failure to move for certification. *See id.*

51. *Id.* (quoting Rodriguez v. East Tex. Motor Freight, Inc., 505 F.2d 40, 50 (5th Cir. 1974) (emphasis added)).

52. *See id.* at 403. The circuit court had certified the class based on the record from below. The Supreme Court stated that it was not reaching the question of "whether a court of appeals should ever certify a class in the first instance." *Id.*

53. *See id.* Although the Court did not use the term standing, it quoted the standing test, i.e., that the class representatives must "possess the same interest and suffer the same injury" as the class they seek to represent. *Id.* (quoting Schlesinger v. Reservists Comm. To Stop the War, 418 U.S. 208, 216 (1974) and other cases). The Court found that the plaintiffs had not suffered injury with respect to denial of the line driver positions because they were not qualified for those positions and they had stipulated they were not discriminated against in their initial hire. *See id.* at 403-04.

54. *See id.* at 405. The Court found evidence of inadequacy of class representation because the named plaintiffs failed to move for class certification and because of the inherent conflict between the named plaintiffs who advocated a merger of the city and the line driver collective bargaining units and members of the class who had voted against such a merger. *See id.*

55. *See id.*

56. *Rodriguez*, 431 U.S. at 405-06.

57. *See, e.g.*, Ford v. United States Steel Corp., 638 F.2d 753, 755, 762 (5th Cir.

forerunner to the more definitive and expansive holding by the Court five years later. In *General Telephone Co. of the Southwest v. Falcon*,[58] the high Court again reversed the Fifth Circuit and held that a mere allegation of discrimination cannot determine whether a class action may be maintained.[59]

In *Falcon*, a complaint was brought on behalf of Falcon and on behalf of "Mexican-Americans persons who are employed, or who might be employed, by General Telephone Company . . . who have been and who continue to be or might be adversely affected by the practices complained of herein."[60] Without the aid of an evidentiary hearing, the district court certified the class to include present employees and applicants who were not hired, and the Fifth Circuit Court of Appeals affirmed.[61] The United States Supreme Court granted certiorari to decide whether the certification of the *Falcon* class was proper when it included some employees who had alleged injury in promotion practices and some employees who had alleged injury in hiring practices.[62]

The *Falcon* Court began its analysis by stating that the requirements of Rule 23 must be met.[63] "An individual litigant seeking to maintain a class action under Title VII must meet 'the prerequisites of numerosity, commonality, typicality, and adequacy of representation' specified in Rule 23(a)."[64] Citing *Rodriguez*, the Court also noted that the class representative must "'possess the same interest and suffer the same injury' as the class members."[65] The inherent problem with the

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1981) (reversing the district court, which relied on *Rodriguez* to certify a class of "Negro persons similarly situated, who are employed in the Rail Transportation Department of the United States Steel Corporation" and approving its class representative); Petty v. Peoples Gas Light & Coke Co., 86 F.R.D. 336, 340 (N.D. Ill. 1979) (certifying a class of black employees who were allegedly denied promotions, transfers, and fair treatment in compensation levels); Caldwell v. Seaboard Coastline R.R., 435 F. Supp. 310, 311-12 (W.D.N.C. 1977) (refusing to certify an appeal as to the certification of class that consisted of blacks who were allegedly discriminated against in hiring, training, promotion, and seniority placement).

58. 457 U.S. 147 (1982).

59. *See id.* at 157.

60. *Id.* at 150-51.

61. *See id.* at 152-53. Both parties appealed the district court's findings on class certification. Falcon argued that the class should have included all of the defendant's operations in Texas, New Mexico, Oklahoma, and Arkansas, while General Telephone argued that the class had been defined too broadly. The court of appeals rejected both arguments and held that the district court's certification of the class was proper. *See id.* at 153.

62. *See id.* at 155.

63. *See id.* at 156.

64. *Falcon*, 457 U.S. at 156.

65. *Id.* (quoting *Rodriguez*, 431 U.S. at 403).

across-the-board rule, the Court noted, is that it failed to properly evaluate the adequacy of the class representative under 23(a).[66] By simply alleging a discriminatory action on the part of the employer, the requirements of Rule 23 had not been met.[67] The Court stated that there was a "wide gap" between an individual's allegations of discrimination by company policy and the existence of a class of other employees who suffered the same injury and who had the same questions of law and fact as that individual. That gap is not met by merely proving the validity of the individual's claims.[68] Significant proof is required that the discrimination affected all facets of the class, whether it be employees, former employees, or applicants, in the same manner in order to comply with Rule 23.[69] Without this proof, a class action could not be had.[70]

Falcon sounded the death knell for the widespread practice of certification of across-the-board class actions in discrimination lawsuits.[71] It was no longer sufficient for one plaintiff, represented by one law firm, to allege across-the-board discrimination. An example of the impact of *Falcon* on the lower courts' adherence to Rule 23 requirements can be seen in comparing cases issued before and after that decision. The same courts of appeal that had held prior to *Falcon* that Rule 23 should be given a liberal interpretation have held subsequent to *Falcon* that the requirements must be strictly construed.[72] Not surprisingly, the small number of class actions filed after *Falcon* generally attempted to fit within footnote 15 of the decision where the Court articulated two exceptions to this rule:

> If petitioner used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirement of Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivably could

66. *See id.* at 160.
67. *See id.* at 157.
68. *See id.* at 157-58.
69. *See id.* at 159 n.15.
70. *See Falcon*, 457 U.S. at 159. The Court stated that "[i]f one allegation of specific discriminatory treatment were sufficient to support an across the board attack, every Title VII case would be a potential companywide class-action litigation." *Id.*
71. *See* Kramer, *supra* note 22, at 428.
72. *Compare* Wright v. Stone Container Corp., 524 F.2d 1058, 1061-62 (8th Cir. 1975) (stating that Rule 23 should be given a liberal rather than a narrow interpretation) *with* Roby v. St. Louis Southwestern RY Co., 775 F.2d 959, 961 (8th Cir. 1985) (holding that requirements of Federal Rule of Civil Procedure 23 must be strictly applied).

> justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.[73]

Thus, if a Title VII class action brought after *Falcon* had any chance of certification, it had to fit within one of the two exceptions in footnote fifteen. The first exception—"a biased testing procedure to evaluate both applicants for employment and incumbent[s]"—describes an action having a disparate impact which "clearly would satisfy" the requirements of Rule 23(a). The second exception suggested by the Court—where there are allegations that the decision-making processes were entirely subjective—is qualified[74] and arguably has much less guarantee of being certified.[75]

IV. POST-1991 ACT EMPLOYMENT DISCRIMINATION CLASS ACTIONS

The Civil Rights Act of 1991[76] amended Title VII of the Civil Rights Act of 1964 to allow recovery of compensatory and punitive damages in cases of intentional discrimination.[77] A jury trial is available when compensatory or punitive damages are sought.[78] Disparate impact claims, where discrimination results from the application of a neutral policy, are still limited to injunctive relief and are tried to a judge.[79] By 1991, due in large part to the Supreme Court's decision in *Falcon*[80], the class action device was seldom used in addressing claims of employment discrimination. The 1991 Act, with the opportunity to collect compensatory and punitive damages,[81] created an incentive for attorneys

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73. *Falcon*, 457 U.S. at 159 n.15.

74. Note the qualifiers: there must be "significant proof" that the employer operated under a general policy of discrimination; even then, it only "conceivably could justify" class treatment.

75. An analysis of the types of class actions that will still be certified after *Falcon* is beyond the scope of this article. For a discussion on that topic, see BARBARA LINDEMAN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1471-1524 nn.1-33 (3d ed. 1996).

76. 42 U.S.C. § 1981a (1994).

77. *See id.* § 1981a(a)(1), (b).

78. *See id.* § 1981a(c).

79. *See id.* § 1981a(a)(1).

80. Thirty-two employment discrimination class action lawsuits were filed in 1991. *See* Seymour, *supra* note 5, at 3.

81. Damages are capped depending upon the size of the employer in terms of number of employees as follows: $50,000 for 15 to 100 employees; $100,000 for 101 to 200 employees; $200,000 for 201 to 500 employees; and $300,000 for 500 or more employees. *See* 42 U.S.C. § 1981a(b)(3).

representing individual plaintiffs to certify these cases as class actions.[82] After a decline in employment discrimination class actions beginning in 1977, and reaching a low in 1992, the number of these cases began to rise again in 1993.[83]

After 1982, attorneys were required to tailor class action suits more narrowly in order to fit within the blueprint provided by *Falcon* and the circuit courts of appeals interpreting *Falcon*.[84] However, simply drawing a complaint more narrowly to satisfy *Falcon* proved to be not enough in the post-1991 Act era. Ironically, the very features of the 1991 Act that provided incentive to bring a discrimination lawsuit as a class action—the availability of a damage award and a jury trial—posed additional hurdles to class certification. Title VII cases prior to the 1991 amendment had traditionally been certified under Rule 23(b)(2), which was limited to cases involving equitable relief. Actions in which damages were an element had traditionally been certified under Rule 23(b)(3). The post-1991 amendment class actions were challenged on new ground: the availability of compensatory and punitive damages and the right to a jury trial precluded maintenance under Rule 23(b)(2); the actions could not meet the more rigorous standards for certification under Rule 23(b)(3).[85] In addition to the more stringent legal requirements, an action seeking class certification under Rule 23(b)(3) requires more administrative effort[86] and financial investment.[87]

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82. There is a direct relationship between attorneys fees and the amount of recovery awarded to a plaintiff. *See* Viking Elec. Supply Co. v. Hicks Constr. Co., No. C3-96-1464, 1996 WL 745233, at *1 (Minn. Ct. App. Dec. 31, 1996) (stating that "[t]he amount of the award should be in reasonable relation to the amount of the judgment secured").

83. There were 30 employment discrimination class action lawsuits filed in 1992 and 44 filed in 1993. *See* Seymour, *supra* note 5, at 3.

84. *See, e.g., In re* Milk Prods. Antitrust Litig., 195 F.3d 430 (8th Cir. 1999); *In re* American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996); Hartman v. Duffey, 19 F.3d 1459 (D.C. Cir. 1994); Chaffin v. Rheem Mfg. Co., 904 F.2d 1269 (8th Cir. 1990); Larkin v. Pullman Standard Div., Pullman Inc., 854 F.2d 1549 (11th Cir. 1988); Watson v. Fort Worth Bank & Trust, 798 F.2d 791 (5th Cir. 1986); Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590 (2d Cir. 1986); Jordan v. Los Angeles County, 713 F.2d 503 (9th Cir. 1983); Bishop v. Committee on Prof'l Ethics and Conduct of Iowa State Bar Ass'n, 686 F.2d 1278 (8th Cir. 1982); LeGrand v. NYC Transit Auth., 83 Fair Empl. Prac. Cas. (BNA) 1817 (E.D.N.Y. 1999); Baldridge v. Clinton, 139 F.R.D. 119 (E.D. Ark. 1991).

85. *See* discussion *infra* Part IV.A-D.

86. The actual mechanics and cost of providing notice must be borne by the plaintiff. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) ("The usual rule is that a plaintiff must initially bear the cost of notice to the class.").

87. *See* Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 TUL. L. REV. 2125,

These arguments have been raised in numerous district courts. The Fifth[88] and Seventh[89] Circuit Courts of Appeals have each dealt with challenges to class certification in Title VII cases seeking non-equitable monetary damages. The Eleventh Circuit Court of Appeals has addressed the issue in the context of non-employment civil rights actions.[90] The United States Supreme Court has not granted certiorari on any case at this time. It is expected that the issue will rapidly reach the other appellate courts due to an amendment to Rule 23, effective December 1, 1998, which permits a permissive interlocutory appeal of a decision granting or denying class certification.[91]

The remainder of this article will discuss in detail the cases from these three circuits and how the various district courts have dealt with these issues.

2141 (2000) (noting how expensive notice can be in Rule 23(b)(3) class actions).

88. *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998).

89. *See* Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, 216 F. 3d 577 (7th Cir. 2000); Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894 (7th Cir. 1999).

90. *See* Rutstein v. Avis Rent-A-Car, 211 F.3d 1228 (11th Cir. 2000); Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997).

91. Rule 23(f) provides:

> A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

FED. R. CIV. P. 23(f). The interlocutory appeal of a class certification ruling is not required to meet the more rigorous requirements of 28 U.S.C.§ 1292(b), which applies to all other permissive interlocutory appeals. *See* 28 U.S.C. § 1292(b) (1994). The rationale for treating class action appeals differently is discussed by the Advisory Committee:

> An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

FED. R. CIV. P. 23(f) advisory committee's note on 1998 amendments.

A. United States Court of Appeals for the Fifth Circuit

The Fifth Circuit, in *Allison v. Citgo Petroleum Corp.*,[92] was the first appellate court to fully address the impact of the 1991 Civil Rights Act on the issue of class certification.[93] In affirming a Louisiana district court's denial of certification of a potential class of over 1,000 African-American employees, former employees and applicants, the Fifth Circuit acknowledged that the action would have been certified in some fashion had it been brought under Title VII before the 1991 amendments:

> Before the passage of the Civil Rights Act of 1991, which for the first time provided plaintiffs with a right to compensatory and punitive damages as well as a jury trial (each demanded here), aspects of this case clearly would have qualified for class certification. As we shall explain, however, the plaintiffs' claims for money damages and the constitutional right of both parties to a jury trial, with all its substantive rights and procedural complications, ultimately render this case unsuitable for class certification under Rule 23.[94]

In *Citgo*, more than 130 named plaintiffs and intervenors brought a class action alleging class-wide racial discrimination on behalf of more than 1,000 African-Americans who had been employed or sought employment at Citgo's manufacturing facility in Lake Charles, Louisiana, from 1979 through 1995.[95] Plaintiffs filed the action pursuant to Title VII and the Civil Rights Act of 1866,[96] challenging

92. 151 F.3d 402 (5th Cir. 1998). For a detailed discussion of *Citgo*, see Nikaa Baugh Jordan, Allison v. Citgo Petroleum: *The Death Knell for the Title VII Class Action?*, 51 ALA. L. REV. 847 (2000).

93. A number of the landmark decisions in Title VII class actions were either issued by or originated in the Fifth Circuit Court of Appeals. For instance, broad across-the-board classes were certified in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969), and in *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968). The Supreme Court's decisions in *Rodriguez* and *Falcon* both reversed Fifth Circuit decisions certifying across-the-board class. *See* General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 159 (1982); East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977). In light of this, it is perhaps not surprising that the *Citgo* decision was issued from the Fifth Circuit.

94. *Citgo*, 151 F.3d at 407.

95. *See* Celestine v. Citgo Petroleum Corp., 165 F.R.D. 463, 465 (W.D. La. 1995).

96. 42 U.S.C. § 1981 (1994). This Act allows all persons to "make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a). It has been interpreted as providing protection against discrimination in employment on the basis of race and national origin. *See* BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 921 (3d ed. 1996).

Citgo's practices with respect to hiring, promotion, training, compensation, and harassment under both systemic disparate treatment and disparate impact theories.[97] The plaintiffs sought "every available form of injunctive, declaratory and monetary relief"[98] and demanded a jury trial on their intentional discrimination claims.[99] The district court denied certification and certified the question for an interlocutory appeal.[100]

Citgo affirmed and held that the district court did not abuse its discretion in the denial of class certification.[101] The Fifth Circuit's extensive opinion addresses three questions: (1) Whether a Title VII action seeking both traditional relief and compensatory and punitive damages, and a jury trial, can be certified under Rule 23(b)(2);[102] (2) whether a Title VII action can be certified as a "hybrid" class action with the claims for compensatory and punitive damages certified under Rule 23(b)(3) and the remaining claims certified under Rule 23(b)(2);[103] and (3) whether the Seventh Amendment right to jury trial precludes a partial certification of the disparate impact claims and the first stage of

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97. *See Citgo*, 151 F.3d at 407. Specifically, the plaintiff claimed as discriminatory the practices of: "(1) failure to post or announce job vacancies; (2) use of an informal word-of-mouth announcement process for filling job vacancies; (3) use of racially-biased tests to evaluate candidates for hire or promotion; and (4) use of a subjective decision-making process by a predominately white supervisory staff in reviewing applicants for hire and employees for promotion." *Id.*

98. *Id.* In addition to traditional Title VII monetary remedies of back pay, front pay, pre-judgment interest, and attorneys' fees, plaintiffs sought compensatory and punitive damages to the maximum allowable by law. *See id.*

99. *See id.* at 407-08.

100. *See id.* at 408. Prior to December 1, 1998, an interlocutory appeal from a class certification ruling was available only under 28 U.S.C. §1292(b), which provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . .

28 U.S.C. § 1292(b) (1994).

101. *See Citgo*, 151 F.3d at 407. The court recited the familiar deferential standard that the "district court maintains substantial discretion in determining whether to certify a class action, a decision we review only for abuse." *Id.* at 408.

102. *See id.* at 410-18.

103. *See id.* at 418-19.

the pattern and practice claim with judgment reserved on whether to certify the remaining claims.[104]

The *Citgo* plaintiffs first challenged the district court's refusal to certify the class under Rule 23(b)(2). The court stated that the correct test for determining whether certification is proper under Rule 23(b)(2) is whether the predominant relief sought is injunctive or declaratory.[105] In cases where monetary relief is sought in addition to injunctive or declaratory relief, monetary relief will always predominate unless "it is incidental to requested injunctive or declaratory relief."[106] Monetary damages are incidental if they "flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief."[107] The rationale for the predominance test is that it allowed those class members who might want to pursue their money damages on an individual basis to do so and because it preserved the interest in judicial economy.[108]

Using this test, the court had little difficulty in affirming the decision not to certify the class under Rule 23(b)(2).[109] The court agreed that the types of relief sought did not flow from the proof of liability on the claims that entitled the plaintiffs to injunctive and equitable relief.[110] Recovery of compensatory and punitive damages under these claims would take a high level of individualized proof.[111] "The very nature of these damages, compensating plaintiffs for emotional and other intangible injuries, necessarily implicates the subjective differences of each plaintiff's circumstances; they are an individual, not class-wide, remedy."[112] The *Citgo* court found the relief of punitive damages also required a highly individualized form of proof.[113] The plaintiffs did not allege that they were affected by the challenged employment policies in

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104. *See id.* at 419-25.

105. *See id.* at 411. The court noted that if the class had demanded only injunctive and declaratory relief, the class would have been certified under Rule 23(b)(2). *See id.*

106. *Id.* at 415.

107. *Citgo*, 151 F.3d at 415. The court further noted that "[i]deally, incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established." *Id.*

108. *See id.*

109. *See id.* at 416.

110. *See id.*

111. *See id.* at 417. *See also* Latson v. GC Serv., 83 Fair Empl. Prac. Cas. (BNA) 1778, 1782 (S.D. Tex. 2000); Riley v. Compucom Sys., 82 Fair Empl. Prac. Cases (BNA) 996, 999 (2000) (N.D. Tex. 2000); Adkins v. Burlington Northern Santa Fe, 83 Fair Empl. Prac. Cas. (BNA) 1782, 1785 (Neb. 2000).

112. *Citgo*, 151 F.3d at 416.

113. *See id.*

the same manner, thereby requiring that each member of the class put on proof to show his or her entitlement to punitive damages.[114] Due to the degree of individualized proof present in both the compensatory and punitive damages analyses, the court held that these damages were not incidental to injunctive and declaratory relief in this case.[115]

The court next addressed whether the district court erred in refusing to certify a hybrid class, one in which the monetary claims would be certified under Rule 23(b)(3) and the injunctive relief and declaratory relief would be certified under Rule 23(b)(2).[116] Under Rule 23(b)(3), the questions of law or facts common to the group must predominate over questions affecting individual members, and the class action must be superior to other methods for a fair and efficient adjudication of the matter.[117] The court held that individual issues predominated since liability for compensatory and punitive damages could only be determined through the "examination of each plaintiff's individual circumstances."[118] The court also found that predominance of individual-specific issues detracted from the superiority of a class action in resolving the disputes. The court affirmed the district court's refusal to certify claims under Rule 23(b)(3).[119]

Finally, the court upheld the district court's denial of a partial certification of the disparate impact claim and the first stage of the pattern and practice claim and reserving judgment on whether to certify the other issues.[120] The court disagreed with this approach, holding that

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114. *See id.* The court was mostly concerned with the different levels of maliciousness that might have been exposed to each member. *See id.* The more malicious the activity, the more punitive damages that member might receive. *See id.* The very nature of punitive damages is that they are determined after individual liability has been assessed, not general liability against a class. *See id.* at 417-18.

115. *See id.* at 418.

116. *See id.* at 418. The court had already found that the case could be certified under (b)(2) if only injunctive and equitable relief were sought. *See id.* at 411.

117. *See id.* at 419. The factors important to this analysis include:

> (A) the interests of the members of the class in individually controlling prosecution or defense of separate actions (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) concentrating the litigation of the claims in particular forum; and, (D) the difficulties likely to be encountered in management of a class action.

Id.

118. *Citgo*, 151 F.3d at 419. The court was also concerned about bifurcated proceedings before multiple juries and how that might produce Seventh Amendment problems. *See id.* at 420.

119. *See id.* The court relied on *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1006 (11th Cir. 1997), a case alleging racial discrimination in renting motel rooms.

120. *See Citgo*, 151 F.3d at 421.

there would be no reason to do this when there is no "foreseeable likelihood" that the compensatory and punitive damages claims would be certified.[121] The court refused to strip away claim by claim until a certifiable issue remained.[122] The court next considered certifying the disparate impact claims only. The court determined that this was not a viable alternative because of the Seventh Amendment right to jury trial.[123] In an action in which claims for legal damages are joined with an equitable claim, the factual issues common to these claims must be decided by a jury before the district court can consider the merits of the disparate impact claim.[124]

B. United States Court of Appeals for the Seventh Circuit

In *Jefferson v. Ingersoll International, Inc.*,[125] the Seventh Circuit Court of Appeals granted an interlocutory appeal under Rule 23(f) from a district court decision certifying a 23(b)(2) class of African-Americans who had applied for employment and been turned down.[126] The Seventh Circuit adopted the reasoning of the Fifth Circuit in identifying a problem with certification of a case seeking damages under Rule 23(b)(2).[127] The *Jefferson* court focused on the fact that since under Rule 23(b)(2) there is no notice to class members with an opportunity to opt out, a judgment is subject to collateral attack by dissatisfied class members.[128] The court had support from the Supreme Court's 1999 ruling in *Ortiz v. Fibreboard Corp.*,[129] which stresses that in actions for money damages, class members are entitled to personal notice and an opportunity to opt-out.[130]

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121. *See id.*
122. *See id.*
123. *See id.* at 423.
124. *See id.* at 423.
125. 195 F.3d 894 (7th Cir. 1997).
126. *See id.* at 886. The defendant contended that certification should be under Rule 23(b)(3) because this subsection of the rule allows for notice and an opportunity to opt out. *See id.*
127. *See id.* at 898. *See also* Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, 216 F.3d 577, 580 (7th Cir. 2000) ("In *Jefferson*... we adopted the Fifth Circuit's reasoning on this point from *Allison*."). Where the district court had certified a Rule 23(b)(2) class of minority and females who challenged the union's operation of referral hall, the Seventh Circuit remanded in light of *Jefferson*. *See id.* at 582.
128. *See Jefferson*, 195 F.3d at 896-97.
129. 527 U.S. 815 (1999).
130. *See Jefferson*, 195 F.3d at 897.

The court raised, but did not decide, whether Rule 23(b)(2) could ever be used to certify a class when compensatory or punitive damages are in issue.[131] This issue is an open question in the Seventh Circuit as well as at the Supreme Court.[132]

The *Jefferson* court provided several alternatives for dealing with the Rule 23(b) determination when damages are sought: certification of a class under Rule 23(b)(3) for all purposes; divided certification, using Rule 23(b)(2) class for the injunctive aspects of the case and Rule 23(b)(3) for the damage aspects; or certification of a Rule 23(b)(2) class as if it were under Rule 23(b)(3) with notice and opportunity to opt out under the authority of Rule 23(d)(2).[133]

C. United States Court of Appeals for the Eleventh Circuit

Although the Eleventh Circuit Court of Appeals has not addressed the issue in the context of employment discrimination cases, that court's decisions in other civil rights actions indicate that circuit would follow the Fifth Circuit. In *Jackson v. Motel 6 Multipurpose, Inc.*,[134] the United States District Court for the Middle District of Florida certified a class of customers allegedly denied equal treatment in the rental of motel rooms.[135] The Eleventh Circuit issued a writ of mandamus[136] decertifying the class[137] because the plaintiffs' claim required "distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination" and "[e]ven more variegated issues would certainly be present in the claims of hundreds or even thousands of members of an improperly certified class."[138] The *Citgo* court relied on *Jackson* in its extensive analysis of Rule 23(b).[139]

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131. *See id.* at 899.

132. *See id.* at 897. *See also* City Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121 (1994).

133. *See Lemon*, 216 F.3d at 582; *Jefferson*, 195 F.3d at 899.

134. 175 F.R.D. 337 (M.D. Fla. 1997).

135. *See id.* at 346. The district court did not rule on whether former employees, the *Petaccia* plaintiffs, could represent a class of employees who witnessed discrimination against customers who were retaliated against for refusing to participate. *See id.*

136. *See* Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1007 (11th Cir. 1997).

137. An appellate court may issue a writ of mandamus directing a district court to decertify an improperly certified class when the certification is a clear abuse of discretion. *See id.* at 1004. *See also* Cooten & Gele v. Hartman Corp., 496 U.S. 384, 405 (1990).

138. *Motel 6*, 130 F.3d at 1006.

139. *See Citgo*, 151 F.3d at 420.

In *Rutstein v. Avis Rent-A-Car Systems, Inc.*,[140] the Eleventh Circuit Court of Appeals reversed a district court's certification of a class of Jewish customers who contended that Avis had a policy and practice which discriminated against them in the administrative corporate leasing program.[141] The appellate court held that Rule 23(b)(3) could not be met because every member of the class would have to prove actual damages to receive the compensatory and punitive damages sought; thus the Yeshiva policy or practice could not "possibly predominate over all the other issues in the case that are necessarily capable of only individualized resolution."[142]

D. Courts Requiring Strict Compliance with Rule 23(b)

In essence, the *Citgo* ruling requires that a putative class action under Title VII seeking compensatory and punitive damages and a jury trial must be reviewed under Rule 23(b)(3). A determination that an action must meet the more stringent requirements of Rule 23(b)(3) will generally result in denial of class certification.[143] Courts addressing the predominance factor find that the question common to the putative class, i.e., whether the defendant has a policy or practice of discrimination, does not predominate over the various factual or legal issues that will arise in the plaintiffs' and class members' individual claims.[144]

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140. 211 F.3d 1228 (11th Cir. 2000)

141. *See id.* at 1231. The district court had found that Rule 23(b)(2) was not appropriate because plaintiffs sought compensatory and punitive damages under 42 U.S.C. § 1981, but certified the class under Rule 23(b)(3) finding that the common issue of Avis's centralized "Yeshiva" policy predominated. *See id.*

142. *Id.* at 1241.

143. *See, e.g.*, Reap v. Continental Cas. Co., 199 F.R.D. 536 (D.N.J. 2001) (refusing to certify a Title VII class action under either rule 23(b)(2) or (3), citing extensively to *Citgo*). *See also* Adams v. Henderson, 197 F.R.D. 162, 171 (D. Md. 2000) (refusing to certify a class of African-American postal workers under either Rule 23(b)(2) or (3), relying on *Citgo* and *Jefferson*).

144. *See generally* Miller v. Hygrade Food Prods. Corp., No. 99-1087, 2001 WL 74773 (E.D. Pa. Jan. 29, 2001) (discussing plaintiffs' request to represent a broad-based class of African-American employees who were treated differently than similarly situated white employees; holding that monetary relief predominated, and therefore precluded Rule 23(b)(2) certification; and finding that Rule 23(b)(3) certification was barred because individual factual issues predominated over class issues.); Bostick v. SMH, Inc., 78 Fair Empl. Prac. Cas. (BNA) 1092 (N.D. Ga. 1998) (deciding not to certify a 23(b)(3) class of former and present female employees because individual issues were predominate); Zapata v. IPB, Inc., 167 F.R.D. 147 (D. Kan. 1996) (discussing Mexican workers' allegations of a hostile environment and discrimination in initial assignment and denying class certification under Rule 23(b)(2) and (3) because neither the superiority or the predominance elements were met).

Other courts have denied certification because those cases would be unmanageable.[145] This is not limited to employment actions seeking class certification, but extends to other causes of action.[146]

E. Hybrid Certification Under Both (b)(2) and (b)(3)

Some district courts have applied the Seventh Circuit's hybrid alternative [147] of divided certification of a class action pursuant to Rule 23(b)(2) for equitable relief and pursuant to Rule 23(b)(3) for monetary relief.[148] This dual certification has not been limited to employment discrimination cases, but also extends to consumer actions brought under the Fair Credit Reporting Act ("FCRA").[149]

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145. *See* Ramirez v. DeCoster, 194 F.R.D. 348, 353 (D. Me. 2000). In *Ramirez*, a class action brought under 42 U.S.C. § 1981 and the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872, on behalf of current and former Mexican workers could not be certified under Rule 23(b)(2) where the workers sought primarily compensatory and punitive damages and demanded jury trials. *See id.* at 351. *See also* 29 U.S.C. §§ 1801-1872 (1994 & Supp. V 1999). The court held that even if it bifurcated the liability and damages phases, the case would be unmanageable. *See Ramirez*, 194 F.R.D. at 353.

146. *See* Butler v. Sterling, Inc., 210 F.3d 371 (6th Cir. 2000) (affirming district court's refusal of certification of a Truth in Lending Act claim where the case could not be certified under Rule 23(b)(2) because the primary relief sought was monetary damages, nor under Rule 23(b)(3) because the individualized issue of when each class member discovered the alleged misconduct would predominate over common questions of law and fact). *See also* Woodell v. Proctor & Gamble Manuf. Co., No. 3:96-CV-2723-H, 1998 WL 686767 (N.D. Tex. Sept. 29, 1998) (denying certification in a products liability action involving the drug Aleve and seeking injunctive relief and damages where the case could not be certified under Rule 23(b)(2) because the monetary damages were incidental nor under Rule 23(b)(3) because the "individual causation and damages issues weigh[ed] decisively against the superiority of a class action").

147. *See* Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, 216 F.3d 577, 582 (7th Cir. 2000); Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 898 (7th Cir. 1997).

148. *See* Smith. v. Texaco, Inc., 88 F. Supp. 2d 663, 679-80 (E.D. Tex. 2000); Shores v. Publix Super Market, No. 95-1162-CIV-T-25E, 1997 WL 714787 (M.D. Fla. Jan. 27, 1997) (involving a proposed consent decree which dually certified what appears to be an across-the-board class of all female management and non-management employees in Florida or South Carolina Publix Super Market from 1991 through 1996 where class members were advised that they could opt out with respect to monetary damages).

149. *See* Washington v. CSC Credit Systems, Inc., 180 F.R.D. 309, 312-16 (E.D. La. 1998) (certifying alternatively a class of consumers under Rule 23(b)(2) and Rule 23(b)(3). The Circuit Court of Appeals in *Washington v. CSC Credit Systems* reversed certification under Rule 23(b)(2) because the FCRA does not allow a private cause of action for injunctive relief and vacated the Rule 23(b)(3) certification based on the district court's misreading of the FCRA. *See* Washington v. CSC Credit Sys., 199 F.3d 263, 269 (5th Cir. 2000). The district court had improperly held that each consumer

F. Post-1991 Cases Considered Under Rule 23(b)(2)

When addressing whether a case seeking both injunctive relief and monetary damages can be certified under Rule 23(b)(2), the inquiry is whether the monetary damages are incidental to the injunctive and declaratory relief.[150] Stated another way, an action seeking monetary damages cannot be certified under Rule 23(b)(2) unless the final injunctive or declaratory relief is the primary relief sought.[151] Some courts and commentaries have viewed this analysis on which form of relief actually predominates as a counterproductive task that should be avoided.[152] These courts would allow an action which met the Rule 23(a) prerequisites and which requested injunctive or declarative relief to proceed under Rule 23(b)(2) and would treat those aspects not falling within Rule 23(b)(2) as incidental.[153]

Courts deciding cases prior to *Allison v. Citgo* routinely applied Rule 23(b)(2) where monetary damages were not incidental to the equitable relief sought.[154] Some courts have continued to certify these cases under Rule 23(b)(2).[155] Other courts have denied certification under 23(b)(2) because the predominant relief sought was economic—compensatory and punitive damages—rather than injunctive and declaratory.[156] A plaintiff seeking to cure the Rule 23(b) problem may consider waiving

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need not show that their reports were improperly disclosed. *See id.* at 267-68.

150. *See* Sibley v. Diversified Collection Serv., Inc., No. 3:96-CV-0816-D, 1998 WL 355492, at *10 (N.D. Tex. June 30, 1998). *See also* McKnight v. Circuit City Stores, 70 Fair Empl. Prac. Cas. (BNA) 1681, 1686 (E.D. Va. 1996); Griffin v. Home Depot, Inc., 168 F.R.D. 187, 190 (E.D. La. 1996); Sondel v. Northwest Airlines, 63 Fair Empl. Prac. Cas. (BNA) 415, 424-25 (D. Minn. 1993).

151. *See* Cox. v. American Case Iron Pipe Co., 784 F. 2d 1546, 1554 (11th Cir. 1986).

152. *See* Orlowski v. Dominick's Fine Foods, 172 F.R.D. 370 (N.D. Ill. 1997) (certifying a class of female employees); WRIGHT, *supra* note 27, § 1776, at 470.

153. *See Orlowski*, 172 F.R.D. at 374 (citing WRIGHT, *supra* note 27, § 1775). The Court in *Orlowski* did not elaborate on why it found the damages to be incidental nor did it specify the type damages sought. *See id.* at 370.

154. *See, e.g.*, Morgan v. United Parcel Serv. of Am., Inc., 169 F.R.D. 349 (E.D. Mo. 1996); Stewart v. Rubin, 948 F. Supp. 1077 (D.D.C. 1996).

155. *See, e.g.*, Hoffman v. Honda of Am. Mfg., 191 F.R.D. 530, 536 (S.D. Ohio 1999).

156. *See* Faulk v. Home Oil Co., Inc., 186 F.R.D. 660, 662 (M.D. Ala. 1999) (denying certification under Rule 23(b)(2) due to the presence of monetary damages and individualized issues); Abrams v. Kelsey-Seybold Med. Group, Inc., 178 F.R.D. 116, 134 (S.D. Tex. 1997) (considering certification of a class of African-American employees and unsuccessful job applicants pursuant to Rule 23(b)(2) only and not considering alternative certification under Rule 23(b)(3) where there was no indication that plaintiffs had sought an alternative method of certification).

monetary damages in order to fit within subsection (b)(2). At least one district court has held that a class representative's decision not to seek money damages prevented class certification because it created a potential conflict with putative class members.[157]

Another district court certifying a class under Rule 23(b)(2) has followed the suggestion made by the Seventh Circuit [158] and provided notice and an opportunity to opt out under the authority of Rule 23(d)(2).[159] Rule 23(d)(2) provides:

> In the conduct of actions to which this rule applies, the court may make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action . . . .[160]

In *Robinson v. Sears, Roebuck & Co.*,[161] nine former and current employees alleged disparate impact and disparate treatment based on race.[162] The plaintiffs alleged that they received less pay than their white counterparts at the Little Rock Sears store because of Sears's subjective and discriminatory decision-making process with respect to placement, transfer, and promotion.[163] The plaintiffs sought to represent a class of 932 current and former minority employees whom they claimed were discriminated against by Sears's employment practices in hiring/initial job assignment and placement, pay, and promotion.[164] The plaintiffs sought certification under Rule 23(b)(2).[165]

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157. *See* Zachery v. Texaco Exploration & Prod., Inc., 185 F.R.D. 230, 244 (W.D. Tex. 1999) (reasoning that class representative who did not bring claims for money damages has a potential conflict with putative class members and the unnamed class members could lose their right to bring claims for money damages).

158. *See* Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 897 (7th Cir. 1997).

159. *See* Robinson v. Sears, Roebuck & Co., 111 F. Supp. 2d 1101, 1126 (E.D. Ark. 2000).

160. FED. R. CIV. P. 23(d).

161. 111 F. Supp. 2d 1101 (E.D. Ark. 2000).

162. *See id.*

163. *See id.*

164. *See id.* at 1107.

165. The court noted that plaintiffs requested that the action be maintained only under Rule 23(b) without addressing or acknowledging the complex issues raised by their request for compensatory and punitive damages. *See id.* at 1126.

The court had little difficulty in finding that the case was maintainable as a class action under Rule 23(b)(2), noting the plaintiff charged Sears "with unlawful, class-based discrimination and [sought] declaratory and injunctive relief of a type contemplated by Rule 23(b)(2)."[166] The court, however, did find the plaintiffs' request for compensatory and punitive damages problematic.[167] The court acknowledged that the compensatory and punitive damages are not "merely incidental" to a prayer for declaratory and injunctive relief, relying on the Fifth and Seventh's Circuits definitions.[168] The *Robinson* court adopted the third alternative suggested by the Seventh Circuit and certified under Rule 23(b)(2), while providing notice and opportunity to opt out under Rule 23(d).[169]

V. CONCLUSION

Some courts are giving employment discrimination class action special treatment with regard to meeting the requirements of Federal Rule of Civil Procedure 23(b)(3). Applying the Rule 23(b)(3) standard after the 1991 Act does not always result in denial of class certification. Some district courts, despite the *Falcon* admonition that class actions alleging employment must be held to the same standards as other class actions, have relaxed the requirements of Rule 23(b)(3) in discrimination suits. For instance, *Carter v. West Publishing Co.*[170] rejected any implication that the 1991 amendments to the Civil Rights Act mandate a bright-line rule which would deny a district court the discretion to certify a class under Rule 23(b)(3) in every Title VII class in which the plaintiffs seek compensatory and punitive damages and a jury trial.[171] In *Carter*, former and present employees asserted a claim of gender discrimination in territory assignment and sale of stock to women employees, and sought certification under Rule 23(b)(3).[172] The court

166. *Id.* at 1125.

167. *See Robinson*, 111 F. Supp. 2d at 1126.

168. *See id.* at 1126-27 (citing Lemon v. Int'l Union of Operating Eng'rs, Local No. 139, 216 F.3d 577, 580 (7th Cir. 2000) and Allison v. Citgo Petroleum Corp., 151 F.3d 402, 425 (5th Cir. 1998)).

169. *See id.* at 1127.

170. 79 Fair Empl. Prac. Cas. (BNA) 1494 (M.D. Fla. 1999), *rev'd on other grounds*, 225 F.3d 1258 (11th Cir. 2000).

171. *See id.*

172. *See id.* at 1497 (precluding plaintiffs from seeking injunctive relief under Rule 23(b)(2) because stock purchases were no longer available as the result of a merger between West and a purchasing corporation and opining that "plaintiffs should not be penalized by having to proceed under Rule 23(b)(3)," although it is not clear exactly

certified a narrowly-drawn class[173] in order to avoid problems posed by the "predominance" element of Rule 23(b)(3) and in order to distinguish otherwise controlling circuit court precedent,[174] while recognizing "potential problems with the individuality proof necessary to establish compensatory and thereafter perhaps punitive damages."[175]

The Supreme Court's holdings in *Rodriguez* and *Falcon* made it clear that a class representative in an employment discrimination case must meet the requirements of Rule 23(a) despite the fact that discrimination is, by its nature, often class-wide. As the post-1991 Act cases make their way to the circuit courts of appeals, the Supreme Court may soon be faced with the same issue with regard to Rule 23(b). There is no reason to believe that the Court would require strict compliance with Rule 23(a) and not require the same strict compliance with Rule 23(b). Courts have required such strict compliance in non-Title VII cases attempting to be maintained under 23(b)(3). For instance, a strict rule of compliance has been applied in mass tort class actions involving plane crashes,[176] nuclear utility plant accidents,[177] and environmental hazards,[178] as well as in consumer class actions.[179]

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how this could influence the legal requirements of that subsection).

173. The class involved a maximum of 144, unlike the thousands in *Allison*. The court deemed the allegations of retaliation, sexual harassment, and hostile environment as "explanatory facts in support of the claims of disparate treatment and disparate impact based on gender discrimination in territory assignments and sale of stock only." *See id.* at 1495 n.2. The court contrasted these claims with the broader claims in *Jackson* and *Allison*. *See id.*

174. The court recognized that *Allison*, *Jackson*, and rulings from the middle district of Alabama could cause a problem in certification under Rule 23(b)(3). *See id.* at 1494-1500.

175. *Id.* at 1500.

176. *See, e.g.*, Causey v. Pan Am. World Airways, Inc., 66 F.R.D. 392, 397 (E.D. Va. 1975) (denying class certification due to the predominance of individual issues in an airplane crash).

177. *See, e.g.*, *In re* Three Mile Island Litig., 87 F.R.D. 433, 441-42 (M.D. Pa. 1980) (denying certification because each plaintiff must have their injury causation and damage analysis done on an individual basis).

178. *See, e.g.*, Boughton v. Cotter Corp., 65 F.3d 823, 827-28 (10th Cir. 1995) (denying certification because each plaintiff was exposed to different levels of emissions from an uranium mill); *In re* Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990) (denying class certification because the plaintiffs' exposure and extent of injury due to asbestos exposure was in different degrees); Thomas v. FAG Bearing Corp., 846 F. Supp. 1400, 1404 (W.D. Mo. 1994) (denying certification to plaintiff in a groundwater contamination case because individual issues predominated over common issues to the group).

179. *See, e.g.*, Andrews v. American Tel. & Tel., 95 F.3d 1014, 1023 (11th Cir. 1996) (denying certification as to claims by plaintiffs that certain "900" number services were gambling establishments because individual claims were predominate);

One can speculate as to the continuing viability of class action lawsuits brought under federal employment discrimination statutes. The challenges to certification of pattern and practice class actions alleging intentional discrimination are reaching the circuit courts of appeals more rapidly due to the availability of the Rule 23(f) interlocutory appeal. It is just a matter of time before the Supreme Court[180] grants certiorari to resolve the issue of whether the actions seeking monetary damages and jury trials are appropriate for class certification.

Despite the uncertain future of class actions alleging intentional employment discrimination, there are some areas where the right to bring a class action will not be affected. Class action lawsuits brought by the Equal Employment Opportunity Commission on behalf of a group of employees are authorized by the statute and not subject to the requirement of Rule 23.[181] Class actions brought under the Age Discrimination in Employment Act ("ADEA") and under the Equal Pay Act are subject to the procedures of the Fair Labor Standards Act, which requires that party plaintiffs consent in writing, i.e., basically an opt in provision, and that those who opt-in are bound by any judgment.[182] Most courts have held that because of these specific requirements, an ADEA action may not be maintained under Rule 23.[183] Finally, cases alleging disparate impact discrimination can still be maintained under Rule 23(b)(2) because compensatory and punitive damages and jury trials are not available under this theory.[184]

Marcial v. Coronet Ins. Co., 880 F.2d 954 (7th Cir. 1989) (denying certification of class denied oral presentations concerning insurance policy were different as to each class member); Butt v. Allegheny Pepsi-Cola Bottling Co., 116 F.R.D. 486, 492 (E.D. Va. 1987) (denying certification because a proof of damages analysis would require a customer-by-customer assessment under each offer of purchase).

180. The Supreme Court has expressed serious reservations about the propriety of certifying a 23(b)(2) class where compensatory or punitive damages are an issue. *See* Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 120-21 (1994).

181. *See* General Tel. Co. of the Northwest v. EEOC, 446 U.S. 318, 324 (1980).

182. Section 216(b) of 29 U.S.C. provides that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which the action is brought." 29 U.S.C. § 216(b) (1994).

183. *See* Sperling v. Hoffman-La Roche, Inc., 118 F.R.D. 392, 399 (D.N.J. 1988), *aff'd*, 862 F.2d 439 (3d Cir. 1988), *aff'd*, 493 U.S. 165 (1989). Even if actions under ADEA were subject to Rule 23, there should not be the problem with maintaining the action under Rule 23(b)(2) because compensatory and punitive damages are not an element. Instead, ADEA authorizes backpay and liquidated damages which can be calculated on the basic of a formula. 29 U.S.C. § 626(b) (1994).

184. 42 U.S.C. § 1981a(a)(1) (1994).