

**TITLE VII CLASS ACTIONS AFTER  
ALLISON v. CITGO PETROLEUM, INC.**

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**I. INTRODUCTION**

A. Procedural History

On May 15, 1998, a sharply divided panel of the Fifth Circuit issued an opinion, *Allison v. Citgo Petroleum Corp.*, 1998 WL 244989 (5th Cir., May 15, 1998), that could have a dramatic impact on the use of class actions in Title VII and other civil rights litigation where plaintiffs seek compensatory and/or punitive damages. Upon review of a petition for rehearing *en banc* that was gaining support among the Fifth Circuit judges, the original Fifth Circuit panel issued a “substituted” opinion on August 27, 1998, published at 151 F.3d 402 (5th Cir. 1998).<sup>1</sup> While the panel retreated somewhat from the more extreme positions adopted in the earlier opinion, the decision is still of enormous concern. A subsequent suggestion for rehearing *en banc* was denied; however, the petition apparently was sufficiently persuasive to prompt the inclusion of some limiting language about the earlier panel decision in the Court's decision on rehearing. 151 F.3d 434.

B. The August 1998 Decision

In *Allison v. Citgo*, a group of black employees sued Citgo, alleging a pattern and practice of race discrimination in hiring, promotion, compensation, and training. The complaint sought injunctive, declaratory, and monetary relief, including compensatory and punitive damages. Although the district court found that plaintiffs satisfied the strictures of Rule 23(a), it denied plaintiffs' motion to certify a class under either Rule 23(b)(2) or (b)(3). *Celestine v. Citgo*, 165 F.R.D. 463, 465 (W.D. La. 1995). On appeal, the Fifth Circuit ostensibly decided only that the district judge had not abused his discretion. In fact, however, the circuit court decision speaks in far broader terms, and may be read to suggest that certifying the class would have been an abuse of discretion. *Citgo*, 151 F.3d at 427 (*Dennis, J. dissenting*)

The rationale underlying the Court's decision in *Citgo* is that the Civil Rights Act of 1991, encompassing a host of new and expansive remedies, has fundamentally altered the landscape for class actions brought under Title VII. Before the passage of the Act, monetary relief in Title VII actions had been limited to back pay and other equitable remedies. The Act allowed compensatory damages for disparate treatment claims, including relief for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of

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<sup>1</sup> The majority opinion was written by Judge E. Grady Jolly and joined by Judge Jerry Smith. Judge James Dennis dissented from the opinion, and subsequently also dissented from the denial of rehearing.

enjoyment and other nonpecuniary losses.” *Id.* at 410, *quoting* 42 U.S.C. § 1981a(a)(1). In addition, for the first time, plaintiffs could also seek punitive damages if they could show that the employer discriminated “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C. § 1981a(b)(1)(2). Finally, whereas before the Act, Title VII cases were tried before a judge, now in cases in which the plaintiff sought compensatory and punitive damages, either party could demand a trial by jury. *Id.* at § 1981a(c). These changes, according to the *Citgo* Court, “are not inconsequential...[i]n the class action context,” and may have fundamentally and negatively impacted a plaintiff’s ability to get a class certified under Title VII. *Citgo*, 151 F.3d at 410.

While *Citgo* is one of several decisions evaluating the impact of the expanded remedies made available under the Civil Rights Act of 1991 on the class certification decision, it is the first and only such decision by a Court of Appeals.<sup>2</sup> The availability of compensatory and punitive damages, in addition to the traditional Title VII remedy of equitable relief, including back pay or front pay, has raised issues regarding the appropriateness of Title VII class actions in the wake of the 1991 amendments. While some courts have ruled merely that some of the added procedural protections of 23(b)(3) classes (notice and the opportunity to opt-out) are necessary, *see e.g. Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997) (addressing only whether class members can opt out of 23(b)(2); court did not address propriety of class certification in general), *Citgo* and a few other district courts have indicated that a class action is virtually impossible to certify where class claims for compensatory and punitive damages have been asserted. The Civil Rights Act of 1991 has also triggered issues concerning the impact that the right to a jury trial has on the certification question. These concerns range from basic case management issues to fundamental constitutional questions under the Seventh Amendment. *Citgo*, 151 F.3d at 422-25.

### C. The October Denial of Rehearing

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<sup>2</sup> District courts addressing this issue include: *Orlowski v. Dominick’s Finer Foods*, 172 F.R.D. 370 (N.D. Ill. 1997); *Butler v. Home Depot*, 70 Fair Empl. Prac. Cas. 51 (N. D. Cal. 1996) (certifying liability phase under 23(b)(2) and deferring decision on damages phase); *Griffin v. Home Depot*, 168 F.R.D. 187, 190-91 (E.D. La. 1996) (certifying under b(3) rather than b(2)); *Bremiller v. Cleveland Psychiatric Institute*, 898 F. Supp. 572 (N.D. Ohio 1995); *Neal v. Director, D.C. Department of Corrections*, No. 93-2420, (D.D.C. Dec. 23, 1994 and Feb. 17, 1995) (post-CRA91 certification for all, in bifurcated, *Teamster*-like hearings); *Arnold v. United Artists Theater Circuit*, 158 F.R.D. 439, 452 (N.D. Cal. 1994) (certifying under 23(b)(2) ADA class action which sought monetary damages). Similarly, the EEOC has been permitted to pursue a pattern and practice sexual harassment case, in which compensatory damages for individuals will be determined in *Teamster*-like hearings after the liability determination. *EEOC v. Mitsubishi Motors*, 990 F. Supp. 1059, 1070 (C.D. Ill. 1998).

On October 2, 1998, the Fifth Circuit denied the *Allison* plaintiffs' Petition for Rehearing *en banc*. The Court's *per curium* opinion on rehearing, states in pertinent part:

In denying rehearing, the panel majority makes the following observation: The trial court utilized consolidation under rule 42 rather than class certification under rule 23 to manage this case. We review that decision for abuse of discretion and we find no abuse in this case. We are not called upon to decide whether the district court would have abused its discretion if it had elected to bifurcate liability issues that are common to the class and to certify for class determination those discrete liability issues.

*Citgo*, 151 F.3d at 434.<sup>3</sup> Of course, as noted above, the earlier majority opinion had said nothing about Rule 42 in its opinion, and clearly did express the view that it would have been an abuse of discretion to certify liability issues and bifurcate damages issues under the facts of that case. While the denial of rehearing limits *Citgo's* reach, it provides little comfort.

## II. THE EFFECT OF *CITGO* ON DISCRIMINATION CLASS ACTIONS

In its worst light, *Citgo* precludes the possibility that a Title VII class can be certified under Fed.R.Civ.P. 23(b) in any case in which the putative class seeks compensatory or punitive damages. According to the Court, monetary relief may *only* be obtained in a Rule 23(b)(2) class action where the “predominant” relief sought is injunctive or declaratory, or where the money damages sought are merely “incidental” to the requested injunctive relief. *Citgo*, 151 F.3d at 411, *citing* Advisory Committee Notes on Rule 23 (class certification under (b)(2) “does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages”). On the other hand, if damages are the primary relief sought, then a class can only be certified under Rule 23(b)(3). *Id.* at 413.

While acknowledging that “civil rights are examples of the types of cases generally appropriate for (b)(2) certification,” the Court refused to certify the class proposed by the 130 plaintiffs under Rule 23(b)(2) because compensatory and punitive damages -- available under Title VII since 1991 -- are not “sufficiently incidental to...injunctive and declaratory relief...” *Citgo*, 151 F.3d at 416. The Court concluded that because “the very nature” of compensatory damages “necessarily implicates the subjective differences of each plaintiff’s circumstances,” and the amount of compensatory damages to which any given class member might be entitled “cannot be calculated by objective standards,” compensatory

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<sup>3</sup> Because the panel effectively relegated its earlier decision to *dicta*, plaintiffs did not file a petition for certiorari with the Supreme Court.

damages under Title VII and 42 U.S.C. § 1981<sup>4</sup> are not incidental to class-wide injunctive relief. *Id.* at 417. Punitive damages, which turn on the recovery of compensatory damages and the reprehensibility of the defendant's conduct, are similarly non-incidental, and thus not subject to certification under Rule 23(b)(2). *Id.* at 418. Finally, the Court -- unable to escape the controlling ruling in an earlier Fifth Circuit case entitled *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) -- held that a request for an individualized back pay award under Title VII, as an "equitable" remedy, would *not* defeat certification of a Rule 23(b)(2) class. *Citgo*, 151 F.3d at 415-16 ("If the instant case involved only claims for equitable money relief, *Pettway* would control").

The Court also agreed with the district court's refusal to certify under Rule 23(b)(3) a class limited to the plaintiffs' claims for compensatory and punitive damages, concluding that the predominance of individual-specific issues relating to the plaintiffs' claims for compensatory and punitive damages detracted from the superiority of a class action as a way of resolving these claims. *Id.* at 419-20 ("The plaintiffs' claims for compensatory and punitive damages must therefore focus almost entirely on facts and issues specific to individuals rather than the class as a whole: what kind of discrimination was each plaintiff subjected to; how did it affect each plaintiff emotionally and physically, at work and at home; what medical treatment did each plaintiff receive and at what expense; and so on and so on").

### III. ARGUMENTS AGAINST *CITGO*

The *Citgo* Court's position that a class action cannot be maintained whenever disparate treatment is alleged and the plaintiffs seek monetary damages ignores the legislative history of the Civil Rights Act of 1991, the essential purposes behind Rule 23, and a long history of courts certifying cases brought under both Title VII and 42 U.S.C. § 1981.

#### A. The Legislative History of the Civil Rights Act of 1991 Does Not Support the View that Class Actions Would be Eliminated.

In 1991, Congress expanded the remedies available under Title VII by permitting plaintiffs to seek compensatory and punitive damages. Congress passed this statute with the

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<sup>4</sup> Although the Civil Rights Act of 1991 obviously had no effect on the remedies available to a plaintiff under 42 U.S.C. § 1981 -- which before and after passage of the Act included the right to seek compensatory and punitive damages, and a jury trial -- the *Citgo* Court extended its holding to Rule 23(b)(2) class actions seeking compensatory damages under *Section 1981*, based on the Fifth Circuit's recent decision in *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938-50 (5th Cir. 1996), cert. denied, 117 S. Ct. 767 (1997) (compensatory damages for emotional distress will not be presumed from a violation of a plaintiff's statutory rights; rather, specific individualized proof is necessary).

intention of expanding the available remedies,<sup>5</sup> finding that “additional remedies under federal law are needed to deter unlawful . . . intentional discrimination in the workplace.” 42 U.S.C.A. §1981 Historic and Statutory Notes (West 1994), Sec. 2(1), (2), pp. 611-12. Congress was well aware that by amending Title VII to provide for compensatory and punitive damages, it was expanding the scope of remedies available in class actions under Title VII.<sup>6</sup> The addition of these new remedies, as well as the right to a trial by jury, means that a court must consider additional factors before certifying a class, but in no way precludes certification. Indeed, *Citgo* is not necessarily to the contrary. What the Fifth Circuit considered in *Citgo* was “whether and to what extent” certain factors, including complexity, manageability, and constitutionality “affect a class action *in this case.*” *Citgo*, 151 F.3d at 410. (emphasis added). The Fifth Circuit did not state that the passage of the Civil Rights Act of 1991 precludes class action certification in all cases, only that these factors should be considered and addressed. *Accord Griffin v. Home Depot, Inc.*, 168 F.R.D. 187, 190 (E.D. La. 1996) (“the 1991 amendments . . . do not preclude the possibility of a class action in these types of cases. Such a finding is not supported by the legislative history of the amendments nor logical in light of Congress’ intent”) (citations omitted). Therefore, district courts must now structure any class certification to account for the increased complexity of damages relief.

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<sup>5</sup> Congress passed the act, “to provide appropriate remedies for intentional discrimination . . . in the workplace . . . and expand[] the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.” 42 U.S.C.A. §1981 Historic and Statutory Notes (West 1994), p. 612. *See also, e.g.*, 1991 U.S.C.C.A.N. at 602-603, 607 (need for damages remedy to improve deterrence).

<sup>6</sup> Indeed, the legislative history demonstrates that Congress recognized the value of the class action device. The committee reports refer directly to many important class action cases, and one of Congress’ major concerns in passing the statute was to overturn the Supreme Court decisions in *Wards Cove Packing v. Antonio* and *Martin v. Wilks*, cases involving class action remedies for discrimination. In fact, the amendments contained in the Act to respond to the *Wilks* decision were explicitly patterned on Rule 23. *See* 1991 U.S.C.C.A.N. at 595. Certainly, the minority views on the Act seized on the class action effect as one basis for their opposition. They emphasized how the possibility of class action Title VII cases would make the damages available under the new amendments even more burdensome for employers than individual cases seeking damages. As one report noted, “[n]ot only would H.R. 1 allow the recovery of punitive and compensatory damages in individual disparate treatment cases, it would allow recovery of such damages and jury trials for class action disparate treatment suits.” House Report 102-40(II), Dissenting Views at p. 68 (1991 U.S.C.C.A.N. vol. 2, p. 754); *see also* 1991 U.S.C.C.A.N. at 672. Thus, when debating passage of the Civil Rights Act of 1991, Congress certainly contemplated that class actions could still be certified after the statute was enacted, and intentionally refrained from taking steps to limit them.

B. Historically, Courts Have Certified Proposed Class Actions Under Fed.R.Civ.P. 23(b)(2) In Cases Where the Rule 23(a) Prerequisites Are Met

Contrary to the Court's decision in *Citgo*, the presence of Title VII claims for compensatory and punitive damages now permitted under the Civil Rights Act of 1991 should not be used as a justification for not certifying a proper Rule 23(b)(2) class in an employment discrimination suit. In the past, courts routinely have approved of class certification under Rule 23(b)(2) -- even where the class has sought monetary damages in addition to injunctive relief. See, e.g., *Parker v. Local Union No. 1466*, 642 F.2d 104, 105-07 (5th Cir. 1981) (lower court's decision to certify class and award punitive, compensatory and nominal class damages in addition to equitable relief not error: "Class certification under Rule 23(b)(2) does not automatically preclude an award of monetary damages when the primary relief sought is injunctive or declaratory"); *Jenson v. Eveleth Taconite Co.*, 139 F.R.D. 657, 666 (D. Minn. 1991) (class which sought both punitive and emotional distress damages certified under Rule 23(b)(2) where court found that "the party opposing the class ha[d] acted or refused to act on grounds generally applicable to the class" in refusing to institute effective sexual harassment or affirmative action policies to insure that women were hired and treated fairly in the workplace); see also *Citgo*, 151 F.3d at 432 (Dennis, J., dissenting).

Indeed, while the *Citgo* Court relied on the "added. . . complexity and diversity of the issues to be tried and decided" due to the changes Title VII brought about by the Civil Rights Act of 1991, numerous courts have certified Section 1981 class actions even though they sought *precisely* the same form of monetary damages that are now available under Title VII. See, e.g., *Morgan v. United Parcel Serv.*, 169 F.R.D. 349, 358 (E.D. Mo. 1996) (certifying Section 1981 injunctive and punitive damages claims under Rule 23(b)(2); postponing decision on certifying class-wide compensatory claims under Rule 23(b)(3)); *Barefield v. Chevron U.S.A., Inc.*, 48 Fair Empl. Prac. Cas. 1885, 1893 (N. D. Cal. 1987) and *Barefield v. Chevron, U.S.A., Inc.*, 48 Fair Empl. Prac. Cas. 907 (N.D. Cal. 1988) (Section 1981 and Title VII class certified, under §1981, plaintiff class could seek compensatory and punitive damages); *Kernan v. Holiday Spa*, 54 EPD ¶40238 (D. Md. 1990) (§1981 action for discrimination in public accommodations certified for liability and punitive damages, individual damages would be addressed in later proceedings through intervention); *Harris v. General Dev. Corp.*, 127 F.R.D. 655, 663-64 (N.D. Ill. 1989) (same); *Domingo v. New England Fish Co.*, 727 F.2d 1429 (9th Cir. 1984) (same). These §1981 class actions are particularly germane because they are subsequent to the Supreme Court's ruling that legal damages, such as compensatory and punitive damages, are available remedies in §1981 suits. See *Johnson v. Railway Express*, 421 U.S. 454, 463 (1975).

*Harris, supra*, is particularly instructive, and its reasoning may be applied in both pleading class claims and opposing motions to deny class certification after *Citgo*. In that case, plaintiffs sought certification of a group of black job applicants and potential applicants

under 42 U.S.C. § 1981 and Title VII. The Court found that in addition to meeting all of the requisites of Rule 23(a), the plaintiffs satisfied Rule 23(b)(2):

Despite the explicit reference to injunctive relief, courts have held that section 1981 and Title VII actions seeking monetary damages in addition to injunctive relief, such as this case, are appropriately brought under subdivision (b)(2)...Plaintiffs allege discriminatory conduct on the part of defendants, which affected all of the members of the class similarly. As the primary focus of this litigation is injunctive relief to halt the alleged class-wide discriminatory hiring policy of defendants, plaintiffs' claims are especially suitable for certification under (b)(2).

*Harris*, 127 F.R.D. at 664 (citations omitted). Thus, where plaintiffs have cast their pleadings in such a way that they can argue that the primary class-wide relief they seek is to eradicate the employer's discriminatory policy, any punitive or compensatory damages reflecting injury to the class arising out of that discriminatory conduct may be regarded as "incidental" to the claim for injunctive relief. *Id.* See also, e.g., *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir.), cert. denied, 476 U.S. 1170 (1986) ("Although plaintiffs request money damages in this suit, such a claim is merely incidental to their primary claim for injunctive relief to prohibit the use of sex-based mortality tables"); *Citgo*, 151 F.3d at 432 (Dennis, J., dissenting).<sup>7</sup>

C. Compensatory Damages are no more Individualized than Back Pay.

Finally, the *Citgo* Court's position that the remedies available only after enactment of the Civil Rights Act of 1991 have rendered class certification impracticable due to the "time-consuming inquiry into the varying circumstances and merits of each class member's individual case" and the "complex calculations" required in determining money damages makes little sense in light of the Court's concomitant holding that "equitable" claims for back pay are certifiable under Fed.R.Civ.P. 23(b)(2). *Citgo*, 151 F.3d at 415. Whereas the *Citgo* Court held that compensatory and punitive damages are not certifiable under Rule 23(b)(2) because those damages would "require additional hearing to resolve the disparate merits of

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<sup>7</sup> It should further be noted that many courts have rejected the interpretation of the lower court in *Celestine v. Citgo*, 165 F.R.D. 463 (W.D. La. 1995) as to the viability of class claims under Title VII after the Civil Rights Act of 1991. See, e.g., *Orlowski v. Dominick's Finer Food*, 172 F.R.D. 370, 374-75 (N.D. Ill. 1997) ("if the plaintiffs satisfy Rule 23(a) and request injunctive and declaratory relief, 'disputes over whether the action is primarily for injunctive relief rather than a monetary award...should be avoided' and certification under 23(b)(2) should be granted"); *Griffin v. Home Depot, Inc.*, 168 F.R.D. 187 (E.D. La. 1996) (Civil Rights Act of 1991 did not preclude class certification under Rule 23(b)(2) because such reasoning was not supported by the legislative history or "logical in light of Congress' intent"); *Stewart v. Rubin*, 948 F. Supp. 1077 (D.D.C.), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997) (Court characterized position of lower court in *Citgo* as "extreme" and the "minority" view).

each individual's case," in the same breath, the Court stated that to obtain back pay damages, plaintiffs in the "remedial stage" (i.e., the "additional hearing") of a class action litigation "need *only* prove that they were denied employment opportunities and the extent of their loss, while the burden then shifts to the employer to demonstrate that those class members were denied employment opportunities for legitimate reasons." *Id.* at 409 (emphasis added). Thus, as the *Citgo* dissent noted, functionally there is little, if anything, to distinguish "equitable" back pay damages from compensatory awards, and seeking compensatory and punitive damages should not defeat certification under Rule 23(b)(2) so long as they are "incidental" to the injunctive relief sought. *Id.* at 427 & n.1 (Dennis, J., dissenting).

#### **IV. MAKING THE ARGUMENT ON CLASS CERTIFICATION AFTER *CITGO*: (b)(2) vs. (b)(3)**

##### **A. Pros and Cons of 23(b)(2)**

The advantages of certification under Rule 23(b)(2) include: (1) not having to establish that common issues predominate over class issues; and (2) not being responsible for the cost of sending notice to the entire class. The difficulties in seeking certification under Rule 23(b)(2) are that even courts with a less limited definition of "incidental" than the *Citgo* court might find compensatory and punitive damages predominate over the injunctive relief. In addition, because a Rule 23(b)(2) class is a "non-opt out" class, there are legitimate concerns about protecting class members' individual interests. With respect to concerns about protecting class members' individual interests, some solutions are discussed below under hybrid classes.

With respect to the issue of whether injunctive relief predominates, an argument might be made as follows:

The Advisory Committee notes recognize that Rule 23(b)(2) was intended to apply to civil rights cases, where "final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate." *Advisory Committee's Note to Proposed Rule of Civil Procedure 23*, 36 F.R.D. 69, 102 (1966); *See also Eubanks v. Billington*, 110 F.3d 87, 92 (D.C. Cir. 1997) ("Title VII and other civil rights class actions are frequently certified pursuant to Rule 23(b)(2)"); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1152 (11th Cir. 1983) (civil rights class actions generally certified under subpart (b)(2)); *Kincade v. General Tire*, 635 F.2d 501, 506 & n.6 (5<sup>th</sup> Cir. 1981) (same). Indeed, the Supreme Court has recently cited civil rights class actions as a prime example of an appropriate Rule 23(b)(2) class. *See Amchem Prods v. Ford Motor Co.*, 117 S. Ct. 2231, 2245 (1997).

Injunctive measures to correct longstanding discriminatory practices are key to implementing the protections of civil rights laws, because "the defendant's allegedly discriminatory conduct affects the class as a whole, and makes final injunctive relief

appropriate.” *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal. 1994). In a Title VII case, injunctive relief is usually the predominant form of relief sought, due to its broad impact that persists even after backpay and damages have been awarded. See *Newberg on Class Action (3rd ed. 1992)*, 5 Newberg, §24.117, at 24-385. Courts have used injunctive relief both to correct longstanding problems of discrimination and to ensure that the class is protected in the future. See, e.g., *Edwards v. City of Houston*, 78 F.3d 983, 991-92 (5th Cir. 1996) (remedial promotions, changes to testing procedure and other injunctive relief); *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 626 (5th Cir., 1983) (court-ordered modification of subjective hiring practices); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 354-56 (5th Cir. 1977) (detailed instructions on remand on nature and character of injunctive relief required); *Pettway v. American Cast Iron Pipe Co. (Pettway I)*, 494 F.2d 211, 244-51 (5<sup>th</sup> Cir. 1974) (same).

In a Title VII case, “the prayer for injunctive relief can be characterized as predominant, because ordinarily it will affect more persons and have consequences over a greater period of time than a backpay award.” 5 Newberg *supra*, §24.117, at 24-385. See also *Pettway I*, 494 F.2d 211; *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 250-51 (3d Cir. 1974).<sup>8</sup> The injunctive relief has such an impact because it is necessarily directed to systemic problems, rather than individual incidents of discrimination. It is very difficult to secure systemic reform based on an individual case – usually a class action is needed.<sup>9</sup>

Most importantly, it remains within the court’s discretion to find that the compensatory and punitive damages sought by Plaintiffs are incidental, while the injunctive relief is predominant.<sup>10</sup> In its recent order denying rehearing *en banc*, the Fifth Circuit

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<sup>8</sup> Back pay is considered, even by the *Citgo* majority, to be “incidental” to injunctive relief despite the fact that the courts have expressed a clear preference for individual determinations of backpay rather than class-wide determinations. See, e.g., *Pettway v. American Cast Iron Pipe Co. (Pettway II)*, 576 F.2d 1157, 1213 (5<sup>th</sup> Cir. 1978); *United States v. United States Steel*, 520 F.2d 1043, 1055-56 (5<sup>th</sup> Cir. 1975).

<sup>9</sup> Courts frequently have refused to grant broad prospective injunctive relief in individual cases; see, e.g., *Wallace v. Texas Tech.*, 80 F.3d 1042, 1047 n.3 (5th Cir. 1996); *Meinhold v. Department of Defense*, 34 F.2d 1469, 1480 (9th Cir. 1994, and may even prohibit presentation of pattern and practice case without class certification. See *Lowery v. Circuit City*, 158 F.3d 742 (4th Cir. 1998).

<sup>10</sup> District courts retain the discretion to make the determination as to whether damages are, in fact, incidental, taking into account the “pragmatic ramifications of adjudication.” *Citgo*, 151 F.3d at 416 (quoting *Pettway I*, 494 F.2d at 256). Deciding whether damages are incidental cannot be a “precise determination” in complex cases. *Id.* The Court states further that “district courts, in the exercise of their discretion, are in the best position to assess whether a monetary remedy is sufficiently incidental to a claim for injunctive or declaratory relief to be appropriate in a class action.” *Id.*

reaffirmed the broad discretion of a court to rule on class certification. *Allison v. Citgo Petroleum Corp.*, 1998 WL 681528 (5<sup>th</sup> Cir. Oct. 28, 1998), on suggestion for re-hearing *en banc*. Courts have made such findings in similar Title VII cases. *See, e.g., Orłowski v. Dominick's Finer Foods*, 172 F.R.D. 370, 374 (N.D. Ill. 1997) (distinguishing *Celestine v. Citgo* by finding under facts of the particular case that money damages did not predominate over injunctive relief).

Plaintiffs may be more successful in portraying compensatory damages as incidental, even when they are for emotional distress, where there is no reliance on medical or expert testimony regarding the mental state of class members. For example, plaintiffs who disclaimed any intention to present medical or psychiatric evidence related to their claims for emotional distress were excused from disclosing such information in discovery. *See Burrell v. Crown Central Petroleum*, 177 F.R.D. 376 (E.D. Tex. 1997). As noted by the *Burrell* Court, where the "crux of the case is the work-related income loss resulting from discrimination, damage sought for mental anguish will be incidental to true work-related economic damages like lost wages." *Id.* at 380. The court said that in pursuing "garden variety" emotional distress plaintiffs might have lower damage amounts. Where such a tactic is appropriate, it would help to demonstrate that the compensatory damages sought in these circumstances are incidental to the class-wide injunctive relief.<sup>11</sup>

As discussed above, the individual *Teamster* hearings that might be necessary to address claims for compensatory damages are not so different from those that are necessary to accurately assess back pay claims in many cases. Thus the distinction in remedies does not lead to the conclusion that some cases are appropriate for certification and others are not.

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<sup>11</sup> Another possible avenue for plaintiffs is to seek only punitive damages, and not compensatory damages, where appropriate (such as, perhaps, a promotion claim where there is not strong evidence of emotional distress). The \$300,000 cap under the 1991 Civil Rights Act applies to both punitive and compensatory damages. If the evidence warrants, plaintiffs could recover the full \$300,000 as punitive damages.

B. Pros and Cons of 23(b)(3)

The advantage of Rule 23(b)(3) certification is that it addresses the concern about whether monetary relief predominates over the injunctive relief. However, it gives rise to another question: whether the class-wide issues predominate over the individual issues. In addition, it leads to the practical concern of forcing the plaintiff to pay for notice to the class, since the notice is provided before there is any finding on liability. Of course, the protection of the notice may ease concerns the court may have about binding absent class members who could have substantial claims for compensatory damages, and perhaps some interest in opting out.

Several of the cases which have been certified post-Civil Rights Act of 1991 have been certified either wholly or partially under Rule 23(b)(3). See, e.g., *Shores v. Publix Super Markets, Inc.*, No. 95-1162-CIV-T-25(E), 1996 U.S. Dist. LEXIS 3381 at \*11, 69 EPD ¶44,4 (M.D. Fla. Mar. 12, 1996) (certifying Stage I liability under Rule 23(b)(2) and Stage II damages under Rule 23(b)(3)); *Griffin v. Home Depot*, 168 F.R.D. 187, 190-91 (E.D. La. 1996) (certifying under 23(b)(3) rather than 23(b)(2)); *Butler v. Home Depot*, 70 Fair Empl. Prac. Cas. 51 (N. D. Cal. 1996) (certifying liability phase under 23(b)(2) and *deferring decision* on damages phase); *Morgan v. UPS*, 169 F.R.D. 349 (E.D. Mo. 1996) (certifying liability and injunctive relief under Rule 23(b)(2) and postponing decision on certifying damages as a Rule 23(b)(3) class until after the liability determination); *Alvarado v. Carnation*, 1995 U.S. Dist. LEXIS 10084 (D. Idaho June 23, 1995) (certifying 23(b)(3) class).

To a certain extent these decisions share a logical inconsistency which the *Citgo* court picked up on: by certifying only the damages phase under Rule 23(b)(3), which all of the cases cited above except *Griffin* either did or suggested they would do, it seems as if it is less likely that class-wide issues will predominate over individual issues. In other words, looking at the case as a whole at the outset, one can make a strong argument that class wide issues related to liability predominate over individual issues related to damages. However, once the liability stage has been addressed under Rule 23(b)(2), and only the damages phase remains, it is hard to make the argument that individual issues do not predominate. Indeed, the courts in *Butler* and *Morgan* deferred the decision of what they would do when they got to the damages phase rather than commit to certifying pursuant to Rule 23(b)(3). As a practical matter, if the class is certified even for liability issues only, then a settlement is substantially more likely, if not before the liability trial, then after, so that a decision on how to handle the damages phase might be easier to face.

Nonetheless, it may be more logically consistent to speak of a hybrid class, discussed below, in which the certification is under Rule 23(b)(2), with the use of procedural protections similar to (b)(3) classes at the damages phase, without actually applying (b)(3) standards on predomination of class over individual issues.

C. The "Hybrid" Class

With the additional damages that are now available after the Civil Rights Act of 1991, it is unlikely that a court would certify a class without providing due process protections for potential class members by incorporating at least some of the protections of Rule 23(b)(3). The (b)(3) process can be brought in at the damages phase of the litigation, while still addressing liability as a (b)(2) issue.<sup>12</sup> For example, the D.C. Circuit in *Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1987), 110 F.3d 87, held that when a (b)(2) class seeks monetary as well as injunctive relief, the court may either adopt a “hybrid” approach, certifying the claims for injunctive and declaratory relief under (b)(2) and for damages under (b)(3), or may certify the class under (b)(2), but permit selective opt-out rights. *Id.*

Thus, the determination of defendant’s liability to the class, namely the existence of a pattern and practice of discrimination, can be bifurcated from the issue of damages, with a class certified as a 23(b)(2) class for the determination of liability, and then a subsequent use of (b)(3) procedures at the damages phase.<sup>13</sup>

At Stage I of the bifurcated procedure, the plaintiffs must establish invidious class-based treatment. *Shipes v. Trinity Indus.*, 987 F.2d 311, 318 (5th Cir. 1993). Plaintiffs seeking to prove disparate treatment by showing a pattern and practice have the burden of proving by a preponderance of the evidence “that discrimination was the company’s standard operating procedure – the regular rather than the unusual practice.” *Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 902 (5th Cir. 1987), quoting *Teamsters*, 431 U.S. at 336.

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<sup>12</sup> The “need and efficiency of a class action” must be balanced against the “procedural safeguards” of notice and opt-out provided under (b)(3). *Citgo*, 151 F. 3d at 412.

<sup>13</sup> As the Fifth Circuit recently suggested in its denial of rehearing and denial of rehearing *en banc* of the *Citgo* decision, that decision does not at all foreclose use of such bifurcated proceedings. *See Citgo*, 151 F.3d 434.

If, at the conclusion of the Stage I trial, there is a finding of liability on the pattern and practice issues, then the Court would determine what class-wide injunctive relief is appropriate, and the same jury that brought back the liability finding could be asked to deliberate on the question of whether each named plaintiff was adversely affected by the pattern and practice, and what compensatory and punitive damages are appropriate. At that time, the Court would rule on individual equitable relief for the class representatives, such as relief from the current promotion system. The case could then move on to Stage II for the class members.

At the outset of Stage II, presumably there would be notice and the opportunity to opt out. At Stage II of the bifurcated procedure, the plaintiffs must prove the damages caused to class members by the illegal conduct. *See Shipes*, 987 F.2d at 318. At the start of a Stage II trial, the employer faces a prior adjudication of class-wide discrimination. The procedures thereafter assume that fact and are calculated to identify the individual claimant's relationship to the condemned practices without a second trial of the issue of class discrimination. In a promotion case, the individual claimant must only identify the position she was denied because of discrimination and present an estimate of the amount of backpay.<sup>14</sup> *Richardson v. Byrd*, 709 F.2d 1016, 1021 (5th Cir. 1983) (citing *Teamsters*, 431 U.S. at 362); *Pettway II*, 576 F.2d at 1212-13. The employer then has the burden of proving that the individual claimant was denied an employment opportunity for legitimate reasons. *Id.* at 1211. ("The

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<sup>14</sup> The same two-stage process has been applied in hostile environment class actions, albeit with different issues to consider. *Jenson v. Eveleth Taconite Co.* ("*Jenson II*"), 824 F. Supp. 847, 875-76 (D. Minn. 1993); *Jenson v. Eveleth Taconite Co.* ("*Jenson III*") 130 F.3d 1287, 1299-1300 (8<sup>th</sup> Cir. 1997). The District Court in *Jenson* utilized, and the Eighth Circuit approved, a bifurcated approach under which plaintiffs, in the first stage, established a pattern and practice of sexual harassment, and then, in the second stage, were each required to show only that she was "as affected as the reasonable woman." *Jenson II*, 824 F. Supp. at 876. Thus, in *Jenson*, the plaintiff class first established that the employer engaged in a pattern or practice of exposing women to a sexually hostile environment. *Id.* at 875. In other words, plaintiffs established that: (1) the putative class members belonged to a protected group; (2) there was a pattern or practice of exposing class members to harassment; (3) the harassment was based on gender; (4) the harassment was so severe or pervasive as to alter the working conditions for the class members, and created an environment that a reasonable person would find abusive; and (5) the employer knew or should have known of the harassment and failed to take prompt and effective remedial action (this last factor is modified by the recent Supreme Court decisions in *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S.Ct. 2275(1998)). Once the employer was found to have engaged in a pattern or practice of discrimination by maintaining a hostile environment, in the second stage, each individual had to show by a preponderance of the evidence that she was as affected as the reasonable woman. *Jenson* 924 F. Supp. at 875-876. *See also, EEOC v. Mitsubishi Motors*, 990 F. Supp. 1059, 1070 (C.D. Ill. 1998) (applying same test but creating a rebuttable presumption that each woman was as affected by the environment as a reasonable woman).

company's burden in seeking to rebut the presumption created by the class' prior prima facie showing of discrimination is substantial.”).

As noted above and in the *Citgo* dissent, there is functionally little difference between proving a backpay amount to which the claimant is entitled and proving up compensatory damages. Both are individualized inquiries to be undertaken once the common issue of liability is determined. In *Jenson*, for instance, at the damages phase of the trial, each of the claimants came forward and presented expert and fact witnesses to prove up her damages, which included both wage losses and damages for emotional distress. As noted below, the Eighth Circuit reversed the magistrate judge's damage awards and, upon retrial, the same issues were to be presented to a jury. The district court's trial plan provided that the jury would answer a verdict form for each of the claimants.

The addition of the remedies of compensatory and punitive damages in the 1991 Civil Rights Act thus need not turn on its head the “hybrid” approach that has long been used, even in cases that have provided for compensatory damages.

## V. SEVENTH AMENDMENT CONCERNS

The *Citgo* majority's incorrect ruling that individual compensatory and punitive damage issues always predominate over class-based injunctive relief would not have posed such severe obstacles for employment discrimination class cases if the majority had not also erroneously foreclosed certifying the class claims for equitable relief and bifurcating the liability and relief stages based on Seventh Amendment concerns.

The majority set out to address the viability of bifurcating the case, but did not actually get to the question of whether class-wide liability issues could be certified in a Stage I proceeding. Rather, the majority framed the question as whether the district court could certify the claims for compensatory and punitive damages under Rule 23(b)(3), and certify “the rest of the class action” under Rule 23(b)(2). 151 F.3d at 418. This approach put the cart before the horse by focusing first on only the individual determinations that would have to be made to determine compensatory and punitive damages. *Id.* at 419-420. The majority reasoned that, because individual issues -- such as how the discrimination affected each plaintiff emotionally and physically, what medical treatment each plaintiff received, etc. -- would predominate where the class is seeking punitive and compensatory damages, the case would degenerate into multiple lawsuits; therefore the issues relating to damages could not be certified under Rule 23(b)(3). *Id.*

Judge Jolly stated, without elaboration, that dividing up issues for partial certification was an “end-run” to get around the majority's primary holding that cases in which the plaintiffs seek compensatory and punitive damages cannot meet the standards of Rule 23(b)(2). Relying on *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996)), he ruled that cases cannot be carved up to enable courts to certify only a portion of the case. In

reasoning that is circuitous at best, the majority stated that because a Stage II damages proceeding cannot meet the standards of Rule 23(b)(3), and because the case as a whole cannot be certified under Rule 23(b)(2) due to the predominate individual damages, the case cannot be bifurcated to allow certification of the liability issues alone.

The majority then expressed a concern that permitting the case to move forward as a class action in bifurcated proceedings would require multiple juries, "increas[ing] the probability that successive juries would pass on issues decided by prior ones, introducing potential Seventh Amendment problems." *Citgo*, 151 F.3d at 419-420. The majority did not specify which issues might be re-examined by successive juries.<sup>15</sup>

The Seventh Amendment confers a right "to have jurable issues determined by the first jury impaneled to hear them . . . , and not reexamined by another finder of fact." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995). The Seventh Amendment, however, only prohibits separate trials on the issues of liability and damages if "the question of damages ... is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty...." *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931).

As the *Citgo* dissent pointed out, in bifurcated employment discrimination class actions the issues to be decided at the separate trials are completely distinct. 151 F.3d at 433. At the liability trial, the question would be whether the employer engaged in a pattern or practice of discrimination. Thus, the only fact issue for the jury to decide would be whether unlawful discrimination was the employer's regular procedure or policy. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360 (1977); *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 875-76 (1984). Once this issue has been decided, it is conclusively established. *See Teamsters*, 431 U.S. at 361-62 (proof that the employer had a policy of unlawful discrimination "does not dissipate at the remedial stage of the trial"); *Cooper*, 467 U.S. at 880 (individual class members bound by adverse judgment against class on "pattern-or-practice" claim).

At the damages trial, the question would be wholly distinct: whether the individual class members are entitled to relief. The jury in a Stage II proceeding is not entitled to, or even invited to, reexamine the question of whether there was a pattern and practice of discrimination, but only the issue of whether a particular class member was adversely affected by that practice, and the extent of his or her damages.<sup>16</sup>

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<sup>15</sup> Indeed, if the majority is correct, that would seem to *support* certifying a class to decide those issues under 23(b)(1), if the issues it believes would be re-examined would result in inconsistent findings or results. Avoiding the inefficiencies inherent in presenting the same evidence to support the same claims for all of the individuals also argues in *favor* of a finding of greater manageability under Rule 23(b)(3).

<sup>16</sup> *See, Teamsters*, 431 U.S. at 361-62 (holding that "the force of that proof [from

Judge Dennis recognized this longstanding practice in his dissent:

Therefore, the issues to be decided in the two stages -- class-wide liability at Stage I and individual claims at Stage II -- are separate and distinct and the second jury will not reexamine issues decided by the first jury. Nor does the fact that some of the same evidence may be presented in both phases make the bifurcation unconstitutional, for the “prohibition is not against having two juries review the same evidence, but rather against having two juries decide the same essential issues.”

*Citgo*, 151 F.3d at 434 (quoting *In re Innotron Diagnostics*, 800 F.2d 1077, 1086 (Fed.Cir. 1986)).

Under this established framework, a court can safely sever the liability issues, and then decide how to proceed with the individual relief issues after the liability phase is completed without running afoul of the Seventh Amendment.<sup>17</sup> See, e.g., *Shores v. Publix*, 1996 WL 407850 \*9 (M.D. Fla. 1996); *Butler v. Home Depot, Inc.*, 1996 WL 421436 \*6 (N.D. Cal. 1996); see also, Fed.R.Civ.P. 23(c)(1) and 23(d) (empowering a court to amend a class certification order and make appropriate procedural orders during the course of the action to insure fairness to the parties and absent class members, as well as manageability of the action); Fed.R.Civ.P. P. 16(c)(12), (13) and (16). Regardless, therefore, of whether the damages claims are certified under 23(b)(3) -- or even if they did devolve into a series of “multiple lawsuits” with multiple juries, as the majority fears -- the most that would be implicated is Rule 23(b)(3)’s superiority requirement, not the Seventh Amendment. The subsequent juries would not need to reexamine any of the issues decided in the liability trial,

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Stage I] does not dissipate at the remedial stage of the trial,” and that the only issue at Stage II is whether the defendant can meet its burden of showing that a legitimate, non-discriminatory reason existed with respect to a particular individual, thus avoiding liability to that individual, but not revisiting the issue of liability to the class); *Butler v. Home Depot, Inc.*, 70 Fair Empl. Prac. Cas. 51, 55-56 (N.D. Cal 1996) (same).

<sup>17</sup> The addition of the additional remedies of compensatory and punitive damages under the 1991 Civil Rights Act should not change this paradigm. Compensatory damages, while requiring individual analysis, can be done at Stage II. See, *supra* III.C. Liability for punitive damages still could be decided at Stage I, after hearing the evidence. That evidence would indicate whether the defendant acted with willful indifference. The amount of damages to be awarded to individuals can be fixed at phase II, through a variety of methods. See, e.g., *Barefield v. Chevron, USA, Inc.*, 48 FEP 907, 911-12 (N.D.Cal. 1988). The *Citgo* majority did not foreclose the possibility that punitives may be awarded on a class-wide basis, but suggested that, in order to do so, the plaintiffs must allege that each class member was affected the same way. *Citgo*, 151 F.3d at 417. Whether punitive damages are set by formula or on an individual basis, however, can be decided in the context of bifurcated proceedings.

and the court would simply give an instruction to that effect. As Judge Dennis observed:

Also, in stage II, the court must clearly instruct the jury that it is not to revisit the issues decided by the jury in the first phase as to whether the defendant had an employment policy of unlawful discrimination but must decide only the issues of whether individual plaintiffs are entitled to compensatory or punitive damages.

151 F.3d at 433 (citing *Gasoline Products*, 283 U.S. 494 (1931)).<sup>18</sup>

District courts from other jurisdictions have rejected Seventh Amendment challenges to the bifurcation of liability and damages phases in employment discrimination class actions.<sup>19</sup> See, e.g., *Orlowski v. Dominick's Finer Foods*, 172 F.R.D. 370, 374 (N. D. Ill. 1997) (Title VII class); *Weigmann et al. v. Glorious Foods*, 169 F.R.D. 280, 288 (S.D.N.Y. 1996) (Title VII class); *EEOC v. McDonnell Douglas Corp.*, 960 F. Supp. 203, 204-05 (E.D. Mo. 1996) (ADEA pattern or practice case); *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D. Cal.1994) (ADA class); *Butler v. Home Depot*, 1996 WL 421436 (Title VII class).

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<sup>18</sup> An example is the court's oral introductory instruction to the jury in the retrial of the damages stage *Jenson*:

All of the facts and conclusions I have just described have already been found to be true. Again, in summary, it is already been determined that 1) each of these plaintiffs were subjected to sexual harassment at Eveleth Mines; 2) the work environment at Eveleth Mines was intolerable for women; 3) Eveleth Mines is liable for the sexual harassment of each of these plaintiffs.

You are not to question the truth or accuracy of any of the above factual or legal conclusions. The only question remaining for you to decide is the amount and type of damages to award each of the plaintiffs.

This instruction is slightly different from a typical Stage II hostile work environment instruction in that it was given at a *re*-trial of the Stage II proceedings after the Eighth Circuit reversed the original damages findings. See *Jenson III*, 131 F.3d 1287(8th Cir. 1997). Plaintiffs did not appeal the finding that they each were as affected as a reasonable woman by the hostile environment, so that element was eliminated from the instructions upon re-trial. Because the order containing the introductory jury instruction was unpublished but includes language generally helpful to plaintiffs, it is reprinted at the conclusion of this article.

<sup>19</sup> It is also not uncommon for courts to bifurcate the damages and liability stages in individual employment discrimination actions. See, e.g., *Gafford v. General Electric Co.*, 997 F.2d 150, 171 (6th Cir. 1993).

Courts have also consistently rejected this type of constitutional challenge and bifurcated common and individual issues in cases outside the civil rights arena, including: antitrust (*see, e.g., In re Master Key Antitrust Litigation*, 70 F.R.D. 23, 29 (D. Conn.), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975)); securities fraud (*see, e.g., Arthur Young & Co. v. United States District Court*, 549 F.2d 686, 692-694 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977)); patent (*see, e.g., Mag Instrument, Inc. v. Baxter Brindmann Int'l Corp.*, 123 F.R.D. 543, 545-46 (N.D. Tex. 1988)); mass tort (*see, e.g., In re Copley Pharmaceutical, Inc.*, 161 F.R.D. 456, 463-64 (D. Wyo. 1995)).

The class cases that have been found to violate the Seventh Amendment typically involve mass torts, where the issues certified did not actually or fully decide liability, and must be reconsidered at a later stage. For example, in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), a mass tort case, the proposed trial plan called for certification of only the issue of whether the defendant was negligent. Under the plan, subsequent juries would make determinations as to such elements as causation and comparative negligence. In making those determination, the successive juries would necessarily have to re-visit the issues decided by the first jury. Similarly, in *Castano v. American Tobacco*, 84 F.3d 734 (5th Cir. 1996), the Fifth Circuit held that a plan calling for multiple juries to consider comparative negligence resulted in relitigating the defendant's fault multiple times, thus violating the Seventh Amendment. *See also, Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998) (mass tort asbestos case).

The *Citgo* majority's Seventh Amendment conclusions also overlook the fact that compensatory and punitive damages claims under § 1981 in race discrimination class actions have traditionally been bifurcated between liability and damages, even though the parties possess a right to a jury in those cases. *See, e.g., Bailey, et al. v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990).<sup>20</sup>

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<sup>20</sup> The majority expressed a second Seventh Amendment concern that is frankly confusing. The majority ruled that the Seventh Amendment precluded the court from certifying the disparate impact claim (which is tried to the court) because of the factual overlap with the plaintiffs' disparate treatment case (which is tried to a jury). *Citgo*, 151 F.3d at 423-426. It has long been the rule that, where equitable and legal claims are tried together, the legal claims are submitted to the jury to be resolved first, and the judge makes findings on the equitable claims, ensuring that they conform to the jury's verdict. In bifurcated employment discrimination actions, at the first stage the jury decides all of the issues necessary to a pattern or practice verdict. The judge accepts the jury's fact finding and then makes any other factual findings necessary to determine whether the employer's decision had a disparate impact on the protected group. In this way, the judge and the jury play their constitutional roles and the parties' Seventh Amendment rights are not impinged upon. *See, e.g., Ward v. Texas Employment Comm'n*, 823 F.2d 907, 908-09 (5th Cir. 1987).

Finally, it is important to note that the brief and cryptic October 2, 1998 decision denying rehearing and rehearing *en banc* takes much of the air out of the earlier *Citgo* opinions:

We are not called upon to decide whether the district court would have abused its discretion if it had elected to bifurcate liability issues that are common to the class and to certify for class determination those discreet liability issues.

1991 WL 681528 (Oct. 2, 1998). It is unclear what the majority intended by effectively relegating its earlier Seventh Amendment conclusions to *dicta*. Because it is now *dicta*, the issue of bifurcation between liability and damages is still open. Possibly counsel should argue that the majority recognized it was on shaky ground, given the long-standing history of bifurcation between liability and damages in civil rights and other cases. Indeed, the amended decision significantly retreats from the radical position taken by the initial panel decision on the issue of Seventh Amendment conflicts raised by bifurcated proceedings. In the amended decision, the panel focuses almost solely on the potential conflict between the disparate impact and disparate treatment claims, and underplays issues by the bifurcation of liability and damages. *See*, 151 F.3d at 419-420. Putting to the side the concerns about overlap between the disparate treatment and disparate impact claims, the opinion relies on the manageability problems of the large class and the lack of an adequate trial plan, rather than constitutional barriers to bifurcation. 151 F.3d at 419-420 and n. 14. This suggests that presenting a strong trial plan that ensures that multiple juries will not pass on the same issues would address the majority's concern. This will be an important point to make -- especially in the Fifth Circuit -- when facing the inevitable Seventh Amendment challenges defendants will make.

## VI. CONCLUSION

The *Citgo* majority suggests that plaintiffs in civil rights employment cases must choose between the expanded remedies under the 1991 Civil Rights Act or their right to proceed as a class, thus creating a further roadblock to challenges to systemic discrimination. Thus far, no other circuit has adopted the *Citgo* majority's drastic reasoning or radical departure from years of practice. The Fifth Circuit itself retreated from its own opinion in the panel's October 2, 1998 denial of rehearing *en banc*. The *Citgo* majority opinion must be seen as contrary to the intent of the 1991 Civil Rights Act to expand remedies available to victims of discrimination.