

TITLE VII CLASS ACTIONS AND PUNITIVE DAMAGE CLAIMS: A GUIDE TO CLASS CERTIFICATION AND TRIAL

Jocelyn Larkin
The Impact Fund
125 University Avenue
Berkeley, CA 94708
(510) 845-3473
jlarkin@impactfund.org

I. INTRODUCTION

Prior to the passage of the 1991 Civil Rights Act, the only remedies available to Title VII plaintiffs were equitable in nature – injunctive relief, back and front pay and, where appropriate, reinstatement. Consistent with this equitable character, Title VII class actions were traditionally certified under Fed. R. Civ. Proc. 23(b)(2), the certification standard for injunctive relief cases. The 1991 Civil Rights Act amended Title VII to expand the remedies available to victims of discrimination, specifically adding a right to compensatory and punitive damages, subject to a statutory cap. While the new remedies were hailed as a victory for civil rights plaintiffs, the availability of legal damages raised a host of unanticipated questions for Title VII class actions. Most fundamentally, could Title VII class actions that pled compensatory and punitive damages still be certified under Rule 23(b)(2)?

The Fifth Circuit's decision in *Allison v. Citgo Petroleum*, 151 F.3d 402 (5th Cir. 1998), was the first appellate decision to consider the question. The *Allison* court concluded that Title VII class actions that pled compensatory and punitive damages could be certified under *neither* Rule 23(b)(2), the traditional vehicle for civil rights class actions, *nor* Rule 23(b)(3), the certification provision ordinarily used for damage actions. The court reasoned that the presence of compensatory and punitive damages raised so many individual issues that class treatment -- even of common issues -- was inappropriate.

Virtually every element of the analysis in *Allison* decision is flawed. Not surprisingly, other circuits that have considered the questions presented by the 1991 Amendments have declined to adopt the draconian analysis of the Fifth Circuit's controversial decision. *Robinson v. Metro-North Commuter Railroad*, 267 F.3d 147 (2nd

Cir. 2001), *cert. denied*, 535 U.S. 951 (2002); *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003). See *Jefferson v. Ingersoll Int'l*, 195 F.3d 894 (7th Cir. 1999) and *Lemon v. Int'l Union of Operating Engineers*, 216 F.3d 577 (7th Cir. 2000) (adopting the *Allison* (b)(2) predominance test but affirming three alternative methods for certifying Title VII class actions with damage claims). Indeed, even the Fifth Circuit seems to be backing away from the harsh results that a literal reading of the *Allison* opinion produces. See *Monumental Life Insurance Co. v. Western & Southern Life Ins.*, 343 F. 3d 331 (5th Cir. 2003) (reversing denial of certification, appellate court read *Allison* to permit (b)(2) certification in classic “negative value” case, even where calculation of damages would be complicated).

This article addresses only one issue raised by the 1991 Amendments to the Civil Rights Act and by the *Allison* decision – how to certify and try punitive damage claims in a Title VII class action. In *Allison*, the court assumed that compensatory and punitive damages were the same for purposes of the Rule 23 analysis. The panel reasoned that punitive damages required a victim specific inquiry and that “recovery of punitive damages must necessarily turn on recovery of compensatory damages.” *Allison*, 151 F.3d 402, 417 (5th Cir. 1998). The *Allison* court’s analysis is, however, inconsistent with a large body of case law – decided both before and since *Allison* -- about the nature of punitive damages. Punitive damages are, in fact, analytically and legally distinct -- and not dependent upon -- any award of compensatory damages. As the Supreme Court has made clear, punitive damages focus on the conduct of the defendant and the need to deter future corporate misconduct. *Kolstad v. American Dental Assn*, 527 U.S. 526 (1999). When punitive damages are properly understood as a group remedy, their inclusion in a Title VII class action poses no obstacle to Rule 23 certification or trial.¹

This article addresses how the questions surrounding punitive damages should be analyzed in a Title VII class action. It explains why, contrary to the reasoning in *Allison*, punitive damages are consistent with certification under either Rule 23(b)(2) or Rule 23(b)(3). Second, it lays out a blueprint for the jury to determine liability for punitive

¹ While this article deals only with questions surrounding punitive damage claims in Title VII class actions, it should not be inferred that compensatory damages necessarily present problems for certification as the *Allison* court assumed. Compensatory damages, which raise different legal and practical issues, are beyond the scope of this article.

damages. Finally, it suggests ways that the punitive damage awarded should be allocated among class members.

II. THE NATURE OF THE PUNITIVE DAMAGE REMEDY AND HOW *ALLISON* GOT IT WRONG

A. The *Allison* Analysis of Punitive Damages

In *Allison v. Citgo Petroleum*, 151 F.3d 402 (5th Cir. 1998), the panel was called upon to determine whether, for purposes of Rule 23(b)(2), the monetary damages sought – compensatory and punitive damages -- were incidental to the injunctive relief. It defined “incidental” damages as those “that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief.” It further explained that “incidental damages” should be: 1) those that the class members are “automatically” entitled to once liability is established; 2) “capable of computation by means of objective standards and not dependent . . . on the intangible subjective differences of each class member’s circumstances;” and 3) “should not require additional hearings to resolve the disparate merits of each individual’s case.”² *Allison*, 151 F.3d at 415.

Applying its newly formulated standard, the *Allison* majority concluded that neither compensatory nor punitive damages met the incidental damages standard. While the court acknowledged that (b)(2) certification was appropriate for cases that involve “uniform group remedies,” it concurred with the district court’s conclusion that “recovery of compensatory and punitive damages required particularly individualized proof of injury, including how each class member was personally affected by the discriminatory conduct.” *Allison*, 151 F. 3d at 414, 416. The court’s ‘logic’ went as follows: compensatory damages are “an individual, not class-wide, remedy,” punitive damages are “dependent on” compensatory damages, therefore punitive damages must be an individual, non-incidental remedy.

² Among its many flaws, this formulation of incidental damages entirely ignores 30 years of Title VII class action jurisprudence in which complex Stage II hearings determined individuals’ entitlement to retroactive seniority, reinstatement and back pay. See *Teamsters v. United States*, 431 U.S. 324 (1977). The dissenting judge in *Allison* provides a cogent and forceful analysis of the problems with the majority opinion. See *Allison*, 151 F.3d at 426 (Dennis, J. dissenting).

[B]ecause punitive damages must be reasonably related to the reprehensibility of the defendant's conduct and to the compensatory damages awarded to the plaintiffs, recovery of punitive damages must necessarily turn on the recovery of compensatory damages. Thus, punitive damages must be determined after proof of liability to individual plaintiffs at the second stage of a pattern or practice case, not upon the mere finding of general liability to the class at the first stage. Moreover, being dependent on non-incidentally compensatory damages, punitive damages are also non-incidentally – requiring proof of how discrimination was inflicted on each plaintiff, introducing new and substantial legal and factual issues, and not being capable of computation by reference to objective standards.

Allison, 151 F.3d at 417-18 (citations omitted).

In *dicta*, the *Allison* court acknowledged that punitive damages might arguably be awarded on a class-wide basis, but concluded that the plaintiffs in *Allison* had not alleged a class-wide injury.

Assuming punitive damages may be awarded on a class-wide basis, without individualized proof of injury, where the entire class or subclass is subjected to the same discriminatory act or series of acts, no such discrimination is alleged in this case. The plaintiffs challenge broad policies and practices, but they do not contend that each plaintiff was affected by these policies and practices in the same way.

Allison, 151 F.3d at 417. As discussed below, this reasoning wrongly assumes that, in order to award punitive damages, a jury must effectively determine and add up the impact of the discrimination on each individual class member. The court's approach misconceives the purpose of punitive damages.

B. Punitive Damages Based on Evidence of Employer Conduct, Not Victim Specific Evidence

The problem with the *Allison* court's analysis is that punitive damages are not determined based upon individualized proof of harm nor are they dependent on the determination of compensatory damages. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Supreme Court underscored the purpose of punitive damages and the difference between compensatory and punitive damages:

Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The

former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. . . . The latter, which have been described as 'quasi-criminal,' operate as 'private fines' intended to punish the defendant and deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.

Cooper Industries, 532 U.S. at 432 (citations omitted); *State Farm Mutual Automobile Ins. v. Campbell*, 538 U.S. 408, ___, 123 S. Ct. 1513, 1519 (2003) ("punitive damages. . . are aimed at deterrence and retribution"). The Supreme Court has similarly affirmed that the "focus" of the punitive damage inquiry under Title VII is the employer's state of mind. *Kolstad v. American Dental Association*, 527 U.S. 526, 535 (1999).

Judge Henderson reached the same conclusion in *Barefield v. Chevron*, 48 F.E.P. Cases 907, 911 (N.D. Cal. 1988), when he considered how the availability of punitive damages would affect the class certification and trial of a Section 1981 race discrimination class action.

Because the purpose of punitive damages is not to compensate the victim, but to punish and deter the defendant, any claim for such damages hinges, not on the facts unique to each class member, but on the defendant's conduct toward the class as a whole.

Id. Interestingly, in reaching this conclusion, Judge Henderson relied on earlier Fifth Circuit precedent in an asbestos personal injury class action. *Jenkins v. Raymark Industries*, 782 F.2d 468, 474 (5th Cir. 1986) ("[t]he purpose of punitive damages is not to compensate the victim but to create a deterrence to the defendant. . . . and to protect the public interest. The focus in on the defendant's conduct, rather than on the plaintiff's."). The *Allison* court failed to cite, or even mention, the *Jenkins v. Raymark* decision.

C. Punitive Damages Not Predicated on an Award of Compensatory Damages

A separate line of authority has established that punitive damages in a Title VII action are not dependent on an award of compensatory damages. Instead, punitive damages can be justified based upon the evidence of harm and/or tied to nominal or back pay damages. The Fifth Circuit has not yet addressed the issue.

In *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998), the Seventh Circuit ruled that a jury may award punitive damages in a sex discrimination action, even if no compensatory or nominal damages are awarded. See *Hennessy v. Penril*

Datacomm Networks, Inc., 69 F.3d 1344, 1352 (7th Cir. 1995). The First Circuit has held that a punitive damage award can be supported by back pay or nominal damages alone. *Provencher v. CVS Pharmacy*, 145 F.3d 5, 17 (1st Cir. 1998). In *EEOC v. W & O, Inc.*, 213 F.3d 600, 615 (11th Cir. 2000), the Eleventh Circuit ruled that compensatory damages need not be awarded to sustain a punitive damage award and instead evaluated the ratio between back pay and punitive damages. Most recently, in *Corti v. Storage Technology Corp.*, 304 F.3d 336 (4th Cir. 2002), the jury awarded no compensatory damages and \$100,000 in punitive damages. The judge subsequently awarded back pay and interest over \$300,000. The Fourth Circuit concluded that the punitive damage award was supported by the evidence as well as the judge's back pay award. The absence of a compensatory damage award by the jury did not undermine the punitive damage award. *Corti*, 304 F.3d at 342 – 343.

In reaching its conclusion that punitive damages were dependent on compensatory damages, the *Allison* court apparently relied on the Supreme Court's decision in *BMW v. Gore*, 517 U.S. 559, 580 – 81 (1996), which addresses whether a large punitive damage award is so excessive as to violate due process. In *Gore* and earlier cases, the Supreme Court has identified the ratio of actual to punitive damages as one of several factors in determining "excessiveness." While the Supreme Court has repeatedly declined to dictate a bright line mathematical formula, it recently said that "few awards exceeding a single-digit ratio between punitive and compensatory damages" will satisfy due process. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, ___, 123 S. Ct. 1513, 1524 (2003).

The *Allison* court misread *Gore* when it assumed that the ratio requirement meant that the jury must first consider and decide compensatory damages and use it as a basis for calculating punitive damages. The Supreme Court's jurisprudence on punitive damages identifies the ratio of compensatory and punitive damages as one factor that a reviewing court (either the trial judge or the appellate court) should consider in determining whether the jury punitive damage award comports with due process. See generally *Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424 (2001). In other words, the *Gore* ratio is a hindsight evaluation for constitutional purposes. The Supreme Court has never held either that: 1) a jury must first award compensatory damages before

considering punitive damages; or that 2) a court must instruct a jury to determine punitive damages as a ratio of compensatory damages. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 781 (9th Cir. 1996)(no requirement that jury decide compensatory damages before punitive damages or be instructed to base award on reasonable relationship between the two). *See also EEOC v. Dial Corp.*, 259 F. Supp. 2d 710 (N.D. Ill. 2003). This, however, is what the *Allison* court wrongly assumed was required to award punitive damages.

As further discussed below, a jury sitting in a Title VII class action can determine the employer's liability for punitive damages based upon evidence of the reprehensibility of the conduct and/or the amount of back pay.

III. CERTIFICATION OF CASES WITH PUNITIVE DAMAGE CLAIMS: THE ALTERNATIVES

When punitive damages in a Title VII class action are correctly analyzed as a group remedy independent of compensatory damages, certification is appropriate under either Rule 23(b)(2) or Rule 23(b)(3). However, given that the Supreme Court has yet to resolve definitively whether notice and opt-out are required in any class action adjudicating legal damages, a trial court certifying a Title VII class action under Rule 23(b)(2) should exercise its discretion under Rule 23(c)(1)(2) and Rule 23(d) to order notice and opt-out.

A. Certification Under Rule 23(b)(2)

Rule 23(b)(2) was designed for cases involving primarily injunctive relief. The premise underlying Rule 23(b)(2) is that class members, who share an interest in obtaining injunctive relief, are sufficiently “cohesive” and “homogenous” that class treatment is justified. *Robinson v. Metro-North Commuter Railroad*, 267 F.3d at 164-165. Because of the unified nature of their interest, Rule 23(b)(2) class members are not necessarily provided with the opportunity to opt-out of the action.³ Rule 23 was recently amended and now includes a provision for notice in Rule 23(b)(2) actions at the discretion of the trial court. Fed. R. Civ. Pro. 23(c)(1)(b). Moreover, trial courts may

³ The drafters of Rule 23(b) considered the civil rights class action as the paradigm of a Rule 23(b)(2) class action. Fed. R. Civ. P. 23 Advisory Committee's note, 1966 amend, *Proposed Amendments to Rules of Civil Procedure*, 39 F.R.D. 69, 102 (1966).

also provide an opportunity to opt-out in Rule 23(b)(2) actions under its Rule 23(d) authority to issue discretionary orders.

The presumption of cohesiveness necessary to Rule 23(b)(2) certification is not undermined by the inclusion of punitive damages. *See Barefield v. Chevron*, 48 F.E.P. Cases 907, 911 (N.D. Cal. 1988) (“A class claim for punitive damages does not detract from the homogeneity or cohesiveness of the class.”) Indeed, quite to the contrary, all class members have an interest in maximizing the punitive damage award. The evidence of class-wide discrimination is, in most cases, far more likely to support a large punitive damage award than the evidence proffered in an individual discrimination case. A punitive damage award based upon evidence of widespread systemic discrimination is less likely to run afoul of the Supreme Court’s punitive damages jurisprudence.

Since *Allison* was decided, several circuits have rejected the “bright line” approach in *Allison*, which as a practical matter precludes Rule 23(b)(2) certification for any case in which compensatory and punitive damages are pled.⁴ Instead, the Second and Ninth Circuits have adopted an “ad hoc” approach, which gives the trial court far greater discretion to determine whether the presence of compensatory or punitive damages undermines the presumption of “cohesiveness.” *Robinson v. Metro-North Commuter Railroad*, 267 F.3d 147, 163 - 65 (2nd Cir. 2001); *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003). The focus of the inquiry is instead on the actual importance of the injunctive relief to the particular case.⁵

The Second Circuit made clear that the trial court may, in its discretion, allow for notice and an opportunity to opt out in order to address due process concerns raised by the presence of money damages. “[A]ny due process risk posed by (b)(2) class certification of a claim for non-incident damages can be eliminated by the district court

⁴ In addition, the Fifth Circuit recently suggested that complex calculations of damages, so long as they are based upon objective factors, would not prevent Rule 23(b)(2) certification. *Monumental Life Insurance Co. v. Western & Southern Life Ins.*, 343 F. 3d 331 (5th Cir. 2003). The panel reversed the district court’s refusal to certify a Rule 23(b)(2) action challenging racially discriminatory insurance practices. “[T]he monetary predominance test does not contain a sweat-of-the-brow exception.” *Monumental Life*, 343 F.3d at 343.

⁵ The district court should determine “(1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought; and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits.” *Robinson*, 267 F.3d at 165.

simply affording notice and opt out rights to absent class members for those portions of the proceedings where the presumption of class cohesion falters – i.e. the damages phase of the proceedings.” *Robinson*, 267 F.3d at 166. *See also Eubanks v. Billington*, 110 F.3d 87, 92-94 (D.C. Cir. 1997). Taking a middle ground, the Seventh Circuit has also authorized the certification of Title VII class actions under Rule 23(b)(2) with damage claims, but *only if* notice and opt-out are provided. *Jefferson v. Ingersoll Int’l*, 195 F.3d 894, 897 (7th Cir. 1999); *Lemon v. Int’l Order of Operating Engineers*, 216 F.3d 577, 580 (7th Cir. 2000).⁶

Unfortunately, none of these appellate opinions analyzes the differences between compensatory and punitive damages and the implications for certification under Rule 23(b)(2). One district court recently tackled the question of whether a Title VII class action with punitive damage claims, but without compensatory damages, could be certified under Rule 23(b)(2).⁷ Its analysis of the issues and the case law is instructive.

In *Palmer v. Combined Insurance Co.*, 217 F.R.D. 430, 438 (N.D. Ill 2003), the employer made the *Allison* argument that, since punitive damages must bear a reasonable relationship to compensatory damages, punitive damages could not be awarded without compensatory damages. The district court rejected this argument, relying on authority (discussed above) that punitive damages under Title VII can be awarded without compensatory damages. *See e.g. Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1352 (7th Cir. 1995).

However, the *Palmer* court did appear to accept the premise of the *Allison* argument that an award of punitive damages *ordinarily* requires a fact-specific inquiry into an individual plaintiff’s circumstances. However, the court distinguished the facts of the case against Combined Insurance and concluded that the case presented “one of the

⁶ The Seventh Circuit’s due process concern derived from its reading of the Supreme Court’s decision in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), a Rule 23(b)(1) limited fund class action. While the *Ortiz* case dealt with a completely different issue, the Seventh Circuit concluded that its analysis “leads to the conclusion that in actions for money damages class members are entitled to personal notice and an opportunity to opt out, ” unless to provide this opportunity “would confound the interest of other plaintiffs.” *Jefferson*, 195 F.3d at 897.

⁷ Class certification was denied in a virtually identical class action against the same defendant pending before another judge in the same district. *Radmonovich v. Combined Insurance*, 216 F.R.D. 424 (N.D. Ill. 2003). The key difference was that the putative class plaintiffs in *Radmonovich* sought compensatory damages, while the plaintiffs in *Palmer* did not. *Palmer*, 217 F.R.D. at 436.

rare exceptions to existing case law” where punitive damages could be awarded without the necessity of individual inquiries. *Id.* at 439.

Yet, in apparent conflict with *Allison’s* analysis, the court underscored that punitive damages were, by their nature, a group remedy, which were consistent with certification under both Rule 23(b)(2) and (b)(3).

The essential purpose of Ms. Palmer’s request for punitive damages is in no way meant to compensate or make the class members whole. The very nature of punitive damages is to punish “evil motive or intent, or . . . reckless indifference to the federally protected rights of others.” [citation omitted] Because the focus of punitive damages is on the defendant’s conduct, not the class members, it is possible to fashion a punitive damages award that would punish Combined for past wrongdoing, if such wrongdoing was proved, and not require individualized inquiry. The other purpose of this punitive damages award would be to deter future wrongdoing, which may also have the effect of encouraging compliance with any awarded injunctive relief by ensuring that Combined understands the adverse monetary consequences of disobeying the injunction. This purpose could also be served without having to assess each class member’s circumstances.

Palmer, 217 F.R.D. at 440. The court concluded that punitive damages were “incidental” to the injunctive relief and thus Rule 23(b)(2) certification was appropriate, subject to notice and opt-out which is required in the Seventh Circuit. *See Jefferson*, 195 F.3d at 898. As discussed below, the court concluded that certification was also appropriate under Rule 23(b)(3).

B. Certification under Rule 23(b)(3)

Rule 23(b)(3) is intended for certification of damage class actions and already includes mandatory notice and opt-out. As such, Title VII class actions with punitive damage claims may be appropriate for certification under this provision. *See Jefferson*, 195 F.3d at 899; *Palmer v. Combined Insurance*, 217 F.R.D. at 440 (Rule 23(b)(3) certification would be appropriate in part because punitive damages can be awarded to the class as a whole)(*dicta*).

For certification under Rule 23(b)(3), the trial court must determine whether the common issues predominate over the individual issues and whether class treatment is superior to individual adjudication. Fed. R. Civ. Proc. 23(b)(3). The latter includes an inquiry as to whether the class trial will be manageable. As a group remedy, punitive damages should be treated and analyzed as a *common* issue supporting the finding of

predominance. Moreover, since the evidence is not focused on the individual but the employer conduct, the inclusion of punitive damages does not undermine manageability.

Even if punitive damages are treated as individual issues in the predominance calculus, courts have repeatedly concluded that the need for proof of individual damages does not preclude a finding that common issues predominate and that the case is manageable. “[T]o deny a class determination on the ground that the computation of damages might render the cause unmanageable would encourage corporations to commit grand acts of fraud instead of small ones with the thought of raising the spectre of unmanageability to defeat a class action.” *In re Memorex Securities Litigation*, 61 F.R.D. 88, 96 (N.D. Cal. 1973); Rules Advisory Committee Notes to 1966 Amendments to Rule 23 (proof of individual damages does not preclude a finding that common issues are predominant); *Palmer v. Combined Insurance*, 217 F.R.D. at 439 (“[d]ifficulty in correctly awarding damages to a class alone cannot defeat a motion for class certification”).

Notwithstanding this consistent line of authority, the *Allison* court concluded that the plaintiffs’ compensatory and punitive damages claims presented too many individual issues, thereby precluding Rule 23(b)(3) certification. As discussed above, the *Allison* court misperceived the nature of punitive damages and, as a group remedy, it would not undermine Rule 23(b)(3) predominance.

C. Hybrid Certification

The Seventh Circuit has also endorsed the use of a hybrid approach to certification, certifying liability under Rule 23(b)(2) and money damages under Rule 23(b)(3). See *Jefferson*, 195 F.3d at 897-98.⁸ This approach permits liability to be resolved on a class basis and, if liability is found, permits opt-out rights prior to the resolution of damages. This two-stage model tracks the traditional bifurcated approach of *Teamsters v. United States*, 431 U.S. 324 (1977), discussed further below.

⁸ Interestingly, the Seventh Circuit’s opinion suggests that the *Allison* court’s per curiam opinion denying rehearing also supports this bifurcated approach. *Jefferson*, 195 F.3d at 898. In the per curiam opinion, the *Allison* court noted “[w]e are not called upon to decide whether the district court would have abused its discretion if it had elected to bifurcate liability and issues that are common to the class and to certify for class determination those discreet liability issues.” See *Allison v. Citgo Petroleum*, 1998 U.S. App. LEXIS 24651 (5th Cir, October 21, 1998) (rehearing denied *per curiam*)

The district court in *Barefield v. Chevron* adopted a slightly different hybrid approach to certification in a race discrimination action under Section 1981. The court certified liability, back pay and punitive damages under Rule 23(b)(2) and certified compensatory damages under Rule 23(b)(3). As noted above, the court concluded that punitive damages, as a group remedy, did not undermine class cohesiveness under Rule 23(b)(2). *Barefield*, 48 F.E.P. Cases at 911.

D. Partial Certification

Certification of some but not all issues under Rule 23(c)(4)(a) presents a fourth alternative. In *Robinson v. Metro-North Commuter RR.*, 267 F.3d 147, 165 (2nd Cir. 2001), the Second Circuit held that the district court abused its discretion when it refused to certify the liability phase of a Title VII class action. “[L]itigating the pattern-or-practice liability phase for the class as a whole would both reduce the range of issues in dispute and promote judicial efficiency.” *Robinson*, 267 F.3d at 168.

While the *Robinson* court did not consider whether a partial certification of pattern-and-practice liability could include punitive damage liability as well, at least one district court has. In *Butler v. Home Depot*, 1996 U.S. Dist. LEXIS 3370 (N.D. Cal. 1996), a gender discrimination class action, the trial court certified “classwide claims, e.g. whether a defendant has in fact engaged in discriminatory employment practices.” The court noted that a favorable jury verdict for the plaintiffs “at that phase would result in injunctive and declaratory relief, and possibly, punitive damages.” *Butler*, 1996 U.S. Dist. LEXIS 3370 at *18-19. The court chose to defer ruling on the second phase of the class certification, i.e. compensatory damages. *See also In re Ann. M Veneman*, 309 F.3d 789 (D.C. Cir. 2002)((b)(2) certification of equitable claims only; remanded for further briefing).

The Seventh Circuit recently endorsed the use of partial certification of common legal questions in an environmental mass tort case. Even though the facts concerning property owners’ damages were highly individualized, the court concluded that the question of causation could properly be certified for class treatment. *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910 (7th Cir. 2003).

IV. DETERMINATION OF PUNITIVE DAMAGE LIABILITY

A. Trial Plan for Class Actions Including Punitive Damages

For decades before 1991, courts conducted Title VII class action trials using the bifurcated approach set forth in *Teamsters v. United States*, 431 U.S. 324 (1977). Because the only remedies available under Title VII were equitable, there was no right to a jury trial. Instead, in Stage I, the court would first hear and determine liability – whether the employer had engaged in a pattern and practice of discrimination. If liability was not found, the case was over. If liability was found, the court could then order immediate injunctive relief. At Stage II, class members were entitled to a rebuttable presumption that they had been the victims of the discriminatory practice. *Teamsters*, 431 U.S. at 361-62. The court or, often, special masters would determine class members' individual entitlement to back pay, front pay or reinstatement. These determinations were made in a variety of ways, including individual hearings, claims procedures or formula distributions. See e.g. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974).

The 1991 Amendments permitted plaintiffs to seek compensatory and punitive damages and made a jury trial right available to either party, when such damages were pled. Back pay and front pay, as well as injunctive relief, remain the province of the judge. See *Pollard v. E.I. Du Pont*, 532 U.S. 843 (2001); *Gotthardt v. Amtrak*, 191 F.3d 1148, 1153-54 (9th Cir. 1999).

The decision in *Barefield v. Chevron*, 48 F.E.P. Cases 907, 912 (N.D. Cal. 1988), provides a useful trial plan blueprint where punitive damages are sought. The district court ordered that Stage I would include pattern and practice liability to the class and liability and remedies for the class representatives. In addition, the jury would determine liability for punitive damages and the amount, if any, of punitive damages to the class.

[B]ecause punitive damages are awarded for purposes of punishment and deterrence, the focus is solely on the defendant's conduct. . . . Consequently, where the plaintiffs allege that the defendant acted in a manner applicable to the class as a whole, the issue whether that conduct is sufficiently culpable to support punitive damages is identical for each class member.

Id. See *Butler v. Home Depot*, 1996 U.S. Dist. LEXIS 3370 at *18 (jury would resolve liability and punitive damages at Stage I). See also *Stender v. Lucky Stores*, 803 F. Supp. 259 (N.D. Cal. 1992) (pattern-and-practice liability and punitive damage liability resolved at Stage I in Title VII class action court trial). The *Barefield* court recognized that there are also strong practical and equitable considerations favoring this one-time assessment of punitive damages. Specifically, it avoids the possibility of inconsistent and/or excessive results.

Requiring each class member to litigate the appropriate amount of punitive damages due him or her in stage two proceedings would not only be inefficient but could also result in claimants with comparable actual damages receiving substantially unequal punitive awards. There is also the risk that punitive damages will be awarded to initial claimants and then reduced or eliminated for later class members on the assumption that the defendant has already been sufficiently punished. Conversely, defendants risk having the individual punitive awards cumulate into an excessive amount.

Barefield, 48 F.E.P. Cases at 912.

The proof offered by plaintiffs on punitive damages should, of course, *not* focus on individual class member incidents but upon the conduct of high level executives who either implemented the discriminatory policy with reckless indifference or failed to respond to evidence that its employment practices were resulting in discrimination. Such evidence further undercuts defense arguments that punitive damages must be rebutted individual by individual.

At Stage II, the court can then determine back pay and front pay liability to the class. Statistical models of the defendant's total back pay and front liability would take into account factors bearing on class members' individual losses, to the extent that such data is both available and relevant. The trial court could then review the jury's punitive damage award in relation to these actual damages. If the court determined that punitive damages were excessive under *BMW v. Gore* (i.e. the ratio of back pay to punitive damages was too great), the court could order a remittitur. See *Hilao v. Marcos*, 103 F.3d at 782.

Once the actual and punitive damages are resolved, the punitive damage award can be allocated among the class members, as described below. It is important, however, to first address employers' likely objections to this plan.

B. Ensuring That Punitive Damages Are Not Awarded Based On Non-Injured Class Members

Even if a jury has determined that a company has engaged in a pattern of systemic discrimination and has done so with the requisite malice or reckless indifference, it does not necessarily mean that every member of the class has suffered an injury as a result of the conduct. Employers contend that a class-wide punitive damage award will unfairly punish them for conduct towards the class as a whole, when not all members are injured. Employers rely on the Supreme Court's recent decision in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), which they claim prohibits an award of punitive damages based upon conduct that did not harm the plaintiff. "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *State Farm*, 538 U.S. at ___, 123 S. Ct. at 1523.

The *State Farm* decision does not support this broad reading and, indeed, supports the use of aggregate punitive damage awards, in appropriate class cases. The *State Farm* case involved a single incident of insurance bad faith in Utah. The state court jury awarded the plaintiff \$2.6 million in compensatory damages and \$145 million in punitive damages. The jury had been provided with extensive evidence and argument about 20 years' worth of bad faith claims nationwide, including conduct dissimilar and unrelated to that experienced by the plaintiff. The Supreme Court reversed the punitive damage award to the extent that the award was based on out-of-state conduct "that may have been lawful where it occurred" and which "bore no relation" to the plaintiff's harm. *Id.* at 1522.

The Court's concern in *State Farm* was that one plaintiff was receiving \$145 million for conduct against thousands of other individuals who were not parties to the case. That problem is not presented by a class action, particularly in a case involving a federal anti-discrimination statute that uniformly applies nationwide. Indeed, the Court said: "[a]ny proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction." *Id.* Moreover, the Court expressed concern about "multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."

Id. at 1523. As noted above, a class action award of punitive damages ensures that all injured parties are before the Court and that there is a consistent and complete adjudication of the employer's punishment.

Whatever the proper reading of *State Farm*, there are practical ways to ensure that the evidence upon which the jury bases its punitive damage determination is limited to victims who suffered monetary loss. If there is a finding of liability against the employer, the jury will be asked to determine whether the employer acted with malice or reckless indifference and, if so, what the appropriate amount of punitive damages would be. In addition to evidence of the scope and reprehensibility of the conduct and the employer's net worth, the plaintiffs can present evidence of the total back pay liability to the portion of the class who has been injured by the discriminatory practice. That statistical calculation would effectively total up the back pay losses for class members who were, in fact, injured by the practice, but not include any amount for class members who suffered no losses.

For example, if the claim is for sex discrimination in pay, the female class members who were paid less than the average pay for comparably qualified men in the same job would be included in the calculation. Female class members paid at or above comparable males would be excluded from the calculation. Based on the formula, the plaintiffs could highlight for the jury the size of the loss and the percentage of the class injured. In response, the employer would offer differing statistical models and argue that only a small percentage of female employees experienced losses and/or that the losses were *de minimus*. In this way, the jury's award of punitive damages is based on an accurate assessment of the harm to the class, and not on the premise that all class members were injured.

C. Punitive Damages and the Seventh Amendment

While employers continue to argue that bifurcated Title VII class proceedings would violate the Seventh Amendment Reexamination Clause, the argument is clearly wrong and *particularly so* for punitive damage claims. As further explained below, the Supreme Court has held that the jury's determination of punitive damages is not a finding of fact at all.

The Seventh Amendment provides that “no fact tried by a jury shall be otherwise reexamined in any Court of the United States.” U.S. Const. amend. VII. It does not prohibit bifurcation with different juries so long as the second jury does not consider the same issues already resolved by the first. The Seventh Amendment “prohibition is not against having two juries review the same evidence but rather against having two juries decide the same essential issues.” *In Re Innotron Diagnostics*, 800 F.2d 1077, 1086 (Fed. Cir. 1986).

The *Allison* court relied on the Seventh Amendment argument as yet another basis for denying certification under Rule 23(b)(3). Positing that thousands of individual Stage II damage trials would be required, the court cited the “probability that successive juries would pass on issues decided by prior ones, introducing potential Seventh Amendment problems. . .” *Allison*, 151 F.3d at 420. The *Allison* majority never actually articulated or analyzed what those issues might be but, instead, just assumed they existed.

Most other courts have rejected the argument that bifurcated Title VII class proceedings would violate the Seventh Amendment. *See Robinson v. Metro-North Commuter Railroad*, 267 F.3d at 169 n.13 (2nd Cir. 2001); *Butler v. Home Depot*, 1996 U.S. Dist. LEXIS 3370 at *17 – 18 (N.D. Cal. 1996). As the dissent in *Allison* pointed out, “the bifurcated phases of a Title VII class action contemplate separate and distinct issues. The first stage of a Title VII class action focuses exclusively on class-wide claims, . . . whereas the second stage focuses on individual claims.” *Allison*, 151 F.3d 402, 433 (5th Cir. 1998)(J. Dennis, dissenting).

As has been argued above, punitive damages should properly be treated as a class-wide claim. The focus of the evidence is the employer’s conduct, not the damage to the individual class members. The pattern and practice liability evidence will strongly bear on this determination and, for this reason, it is appropriate for the jury that has heard the liability evidence to also determine punitive damages. Obviously, one jury deciding liability and punitive damages presents no reexamination problem.

Even if a different jury determined punitive damages, there would still be no Seventh Amendment issue. The Supreme Court has held that the jury’s determination of the amount of punitive damages is not a finding of fact for purposes of the Seventh

Amendment. *Cooper Industries v. Leatherman Tool Group*, 532 U.S. at 437. At issue in *Cooper Industries* was the standard for review of a punitive damages award and, specifically, an argument that trial or appellate court review of a jury's punitive damage award violates the Reexamination Clause. The Supreme Court rejected this argument. "Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, . . . the level of punitive damages is not really a 'fact' 'tried' by the jury." *Cooper Industries*, 532 U.S. at 437 (citations omitted) quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (SCALIA, J., dissenting).

There is simply no credible argument that the inclusion of punitive damages in a Title VII class action runs afoul of the Seventh Amendment.

V. ALLOCATION OF PUNITIVE DAMAGES AWARD AMONG CLASS MEMBERS

Once the jury has awarded punitive damages to the class, the question becomes how to distribute the money among the class members. This process need not be an adversarial process because the employer no longer has an interest in the allocation among class members. The employer's only interest is in its total monetary exposure, which would have been resolved by this point. See *Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir. 1996).

Where the court has awarded back pay and front pay to class members who have suffered losses as a result of the discrimination, the punitive damage award could be distributed *pro rata* based upon the amount of the back pay award. See *Barefield v. Chevron*, 48 F.E.P. Cases 907, 912 (N.D. Cal. 1988) (reasonable punitive damage fund to be "fairly apportioned among class members in relation to any actual damages they establish in stage two"). See also *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992); *Jenkins v. Raymark Industries*, 782 F.2d 468, 474-475 (5th Cir. 1986).

The district court in *Palmer* recently outlined various options for distribution of punitive damages:

It is conceivable that an award of punitive damages could be awarded *pro rata*. . . . Although it is unusual to award a lump sum class punitive damages award *pro rata*, the nature of this case allows for this possibility. In addition, punitive damages may be allocated by some other formula, to be determined at a later time, which would alleviate the need for individualized analysis. It is also possible that punitive damages could be awarded *cy pres* to an appropriate

organization, in which case the individual differences between class members would be irrelevant. Exactly how an award of punitive damages might be distributed need not be decided at this stage – as long as there are viable options that can adequately address manageability concerns, that is enough for class certification. Difficulty in correctly awarding damages to a class alone cannot defeat a motion for class certification.

Palmer, 217 F.R.D. 430, 439 (N.D. Ill 2003) (citations omitted).

The allocation of any punitive damage award should properly be left to the discretion of the trial court, which is uniquely situated to ensure a fair and appropriate result.

VI. CONCLUSION

While this article has focused on the legal and practical bases for the inclusion of punitive damages in Title VII class actions, it is important not to lose sight of the significant public policy reasons to ensure this outcome. In amending Title VII in 1991, Congress intended to expand the remedies available to victims of discrimination and thereby increase enforcement of anti-discrimination laws. *Allison v. Citgo Petroleum*, 151 F.3d 402, 426 (5th Cir. 1998)(J. Dennis, dissenting). Class actions have historically been an important vehicle for the eradication of systemic discrimination. There is no reason to believe that, in amending Title VII, Congress intended to undermine the critical role that class actions have played. The reasoning of the Fifth Circuit in *Allison* jeopardizes the future viability of Title VII class actions and should be rejected.