INJUNCTIVE AND MONETARY RELIEF IN CLASS ACTIONS IN THE FIFTH CIRCUIT

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I. Introduction

Understanding the distinction between injunctive and damages relief in class actions depends largely on the type of case because of the underlying substantive law as well as wildly divergent types of circumstances. Both injunctive and damages relief can be available in class actions involving employment, antitrust, patents, bankruptcy, securities, and consumer fraud, to name a few.

Nevertheless, questions of "remedy" tend to dominate class certification at both the trial and appellate level. To some extent, the focus on "remedy" reflects the procedural realities of the application of Rule 23. The threshold questions of class certification under Rule 23(a) – numerosity, commonality, typicality, and adequacy – are usually not seriously disputed. By contrast, the core dispute in most class actions focuses on the question of whether a proposed class action satisfies Rules 23(b)(1), (b)(2), or (b)(3).[1]

The easiest distinction in injunctive versus damages relief in class actions can be found in the distinction between (b)(2) (injunctive and declaratory relief), and (b)(3) (common questions "predominate" and class device is "superior"). The basic rule of thumb is that if the class action fundamentally seeks injunctive relief, it should proceed under (b)(2), but if the case fundamentally seeks damages or other monetary relief, then it should proceed under (b)(3).[2] This distinction reflects "different presumptions with respect to the cohesiveness and homogeneity of interests among members" of different types of classes.[3] The drafters of the Federal Rules considered classes seeking injunctive relief as more "cohesive" than classes seeking "monetary relief."[4]

The drafters concluded that because an injunctive-relief class has "cohesive" interests, a court certifying such a class need not require "notice" and "opt out"

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[1] Class actions under Rule 23(b)(1) involve circumstances in which proceedings outside of the class action context would create the risk of incompatible adjudications or deprive absent parties of representation. Few such class actions appear in the reported decisions of the Fifth Circuit. Moreover, the distinction between injunctive and monetary relief typically arises in (b)(2) and (b)(3) classes. Consequently, this Outline does not address (b)(1) classes.

[2] *See generally Amchem Prods. Corp. v. Windsor*, 117 S. Ct. 2231, 2246 (1997) (different categories of Rule 23 correspond to type of relief sought); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, 387-92 (1967).

[3] *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 412 (5th Cir. 1998); *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1155-56 (11th Cir. 1983).

[4] *Allison*, 151 F.3d at 412-13.

rights to the class.[5] By contrast, the drafters concluded, the divergent nature of a "monetary relief" class should require "notice" and "opt out" rights to class members.[6]

However, some cases in which the plaintiffs seek injunctive relief can (and perhaps should) proceed as a class action under (b)(3). Similarly, some "monetary relief" cases can (and perhaps should) proceed as class actions under (b)(2). Indeed, the Fifth Circuit's recent class action cases demonstrate precisely this kind of interplay of (b)(2) and (b)(3) in the contexts of injunctive versus monetary relief. This outline addresses that interplay.

II. Overview of Injunctive Relief and Rule 23(b)(2): Conduct "Generally Applicable to the Class"

A. ***Text of Rule 23(b)(2)***: "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief to the class as a whole"

B. ***Liability***:

1. Defendant's acts: "on grounds generally applicable to the class"

2. This is similar to the threshold question of "commonality" under Rule 23(a)(1). In and of itself, this aspect of Rule 23(b)(2) should not be difficult to meet. The problem is whether class-wide relief based on such "grounds generally applicable to the class" is "***appropriate.***"

C**.** ***Relief/Remedy***:

1. Rule: "Thereby making ***appropriate*** final injunctive relief or corresponding declaratory relief to the class as a whole."

2. In a little plainer English, the question becomes: Is final injunctive relief or corresponding declaratory relief to the class as a whole is ***appropriate***?

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[5] *Id.* (citing Rule 23 advisory committee notes) ("[i]n the degree there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum.").

[6] *Id.* (citing *Holmes*, 706 F.2d at 1155-56 (citing Rosen, *Title VII Classes and Due Process: To (b)(2) Or Not to (b)(3)*, 26 Wayne L. Rev. 919, 923 (1980); Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule (b)(2)*, 88 Yale L.J. 868, 875-76 (1979)).

a. What effect does the connecting word "thereby" have on the "appropriateness" inquiry? Does it exclude the possibility of also including damages or other monetary relief in a (b)(2) class?

b. Fifth Circuit's solution: in deciding whether to certify a class under (b)(2), courts must determine whether injunctive relief "predominates" over monetary relief. *See, e.g., Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998).

(1) **"Predominate": A concept based in legislative history, not the text of Rule 23.** The term "predominate" appears nowhere in the text of Rule 23(b)(2). The term appears only in the legislative history:

> [Rule (b)(2)] does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages.

Rule 23(b)(2) (advisory committee notes). However, courts should not feel themselves bound by this legislative history given the seemingly broader scope of the "appropriateness" test.[7] Given that the "appropriateness" test gives courts far more discretion than the

[7] As Justice Scalia has made clear, legislative history should never trump plain meaning. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (Scalia, J., concurring in the judgment). There, Justice Scalia observed:

> Although it is true that the Court in recent times has expressed approval of this doctrine [that legislative history can sometimes trump plain meaning], that is to my mind an ill-advised deviation from the venerable principle that if the language of the statute is clear, that language must be given effect – at least in the absence of a patent absurdity.

Id. The Supreme Court has made clear such principles of statutory construction apply to the rules of procedure as well as substantive statutes. *See, e.g., Amchem Prods., Inc v. Windsor*, 117 S. Ct. 2231, 2235 (1997) ("Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure shall not abridge any substantive right."). Moreover, the court should choose the interpretation that "does least violence to the text" of the statute, *Green v. Bock Laundry*, 490 U.S. 504, 529 (1989) (Scalia, J.). In the class-action context, the Fifth Circuit's application of the "predomination" test amounts to the adoption of a rule outside the process that Congress ordered that needlessly violates the district courts' discretion under (b)(2).

"predomination" test, the Fifth Circuit has unnecessarily restricted the trial court's broad discretion under Rule 23.

(2) The Fifth Circuit further elucidates on the "predominance" standard by quoting the dictionary, observing that the term means "controlling, dominating, or prevailing." *Id.* at 411. Such analysis of the language of the legislative history is misplaced. The court should devote its textual analysis to the text of the rule. *See Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring), note 7, *supra*.

D. Examples of Rule (b)(2) Classes[8]

1. Civil-rights claims: For example, under Title VII of the Civil Rights Act of 1964, Rule (b)(2) classes were common because the relief in such classes involved equitable remedies such as back pay, front pay, pre-judgment interest, and attorney's fees. However, and as explained in greater detail in the discussion of *Allison* in section III, *supra*, after the Civil Rights Act of 1991, which expands remedies under Title VII to include compensatory and punitive damages, the Fifth Circuit has been less willing to grant class certification under (b)(2). *See, e.g., Allison*, 151 F.3d at 407; *see also Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001) (reversing district court's certification of claims under Title VII under (b)(2)), *vacated*, 2002 WL 131415 (5th Cir. Feb. 1, 2002).

2. Price discrimination/antitrust claims: For example, (b)(2) certification may be appropriate in case by a group of retailers against a supplier who gave another group of retailers preferential pricing in violation of the antitrust laws.

3. Patent cases: Certification under (b)(2) may also be appropriate in a case in which a patent holder "ties" licenses for his patent with ancillary unpatented equipment. A licensee may be able to obtain class certification in a claim on behalf of similarly situated licensees to test the legality of the "tying" condition.

4. "Pattern or practice" cases. The Fifth Circuit cases addressing whether the defendant's conduct was "generally applicable to the class" tends to focus on so-called "pattern or practice" cases, both in employment discrimination and otherwise. Recent examples include *Allison*, (employment) *Bertrulli* (employment), and *Bolin* (violations of Bankruptcy Code).

[8] *See* Rule 23(b)(2) Adv. Comm. Notes (1966 amendment).

III. *Allison*: Fifth Circuit's "Sliding Scale" of Injunctive Relief Versus Monetary Relief

A. ***Facts***: Plaintiffs, a class of black employees at Citgo Petroleum's facility in Lake Charles, Louisiana, alleged that Citgo discriminated against them through a set of policies that relied on, among other things, subjective evaluations, racially biased tests, and a "word of mouth only" system for informing employees of openings to apply for higher-paying jobs.

B. ***Holding***: The Fifth Circuit affirmed the district court's denial of certification under (b)(2).

1. Although courts have traditionally permitted (b)(2) employment classes, such classes have limited the non-injunctive or declaratory relief to back pay, an equitable remedy triggered by the injunctive/declaratory relief traditionally afforded under Title VII. It is true that back pay is usually addressed in separate hearings. *Id.* at 409. However, the availability under the Civil Rights Act of 1991 ("CRA") of compensatory damages and a jury trial makes such hearings infeasible. *Id.* at 409-10. The CRA "added to the complexity and diversity of the issues to be tried and decided." *Id.* at 410.

2. The Fifth Circuit reasoned that (b)(2) requires a "cohesiveness" of the class and "homogeneity" of interests. *Id.* at 410. In *Allison*, the court observed that "[t]he underlying premise of the (b)(2) class – that its members suffer from a common injury properly addressed by class-wide relief – 'begins to break down when the class seeks to recover back pay or other forms of ***monetary relief to be allocated based on individual injuries***.'" *Id.* at 413 (quoting *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997))(emphasis added).

3. Accordingly, the Fifth Circuit introduced a sort of "sliding scale" of injunctive relief versus monetary relief:

> Thus, as claims for individually based money damages begin to predominate, the presumption of cohesiveness decreases while the need for enhanced procedure safeguards to protect the individual interests of class members increases, thereby making class certification under (b)(2) less appropriate. We know, then, that monetary relief "***predominates***" under Rule 23(b)(2) when its presence in the litigation suggests that procedural safeguards of notice and opt-out are necessary, that is when the monetary relief being sought is less of a group remedy and ***instead depends more***

> ***on the varying circumstances and merits of each potential class member's case.***

The court further observed:

> Because it automatically provides the right of notice and opt-out to individuals who do not want their monetary claims decided in a class action, Rule 23(b)(3) is the appropriate means of class certification when monetary relief is the predominant form of relief sought and the monetary interests of class members require enhanced procedural safeguards.

Id. at 413 (emphasis added). As such,

> [W]e reach the following holding: monetary relief predominates in (b)(2) class actions unless it is ***incidental to requested injunctive or declaratory relief***. By incidental, we mean ***damages that flow directly from liability to the class*** as a whole ***on the claims forming the basis of the injunctive or declaratory relief.*** *See* Fed. R. Civ. P. 23(b)(2) (referring only to relief appropriate "with respect to the class as a whole").
>
> Ideally, the incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established.
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> That is, the recovery of incidental damages should be typically ***concomitant with***, ***not merely consequential to***, class-wide injunctive or declaratory relief. Moreover, such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's cases; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations. Thus, incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) actions.

Id. at 415 (emphasis added).

C. Problems with the Fifth Circuit's analysis:

1. Judge Dennis's dissent points out the question-begging or "circuitous" rationale of the *Allison* majority:

a. A claim for monetary relief automatically predominates and defeats certification of a (b)(2) class unless it is "incidental" to requested injunctive or declaratory relief;

b. "Incidental" damages are those that flow directly and automatically from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief;

c. "Incidental" damages are those that do not require additional hearings to resolve the merits of individual cases;

d. "Incidental" damages are those that do not require additional hearings to resolve the merits of individual cases;

e. **except that**, a request for individual back pay awards under Title VII may be included without defeating certification of the class.

2. **End of bifurcation?** The Fifth Circuit casts into doubt viability of bifurcated proceedings by which common issues of liability can be decided but individualized issues can be bifurcated. As such, the majority's decision attempts to preclude such bifurcated proceedings despite the fundamental principle of class actions "to promote judicial economy and efficiency by obviating the need for multiple adjudications of the same issues."[9] The majority's reasoning is contrary to long-standing Fifth Circuit precedent. *Id.* at 433-34 (Dennis, J., dissenting) (citing, *inter alia*, Manual for Complex Litigation, Third § 33.54 (1995) ("Individual [class members] are permitted to present their individual claims of injury.").

3. **Court's holding exceeds the text of Rule 23**: "The rule plainly does not say that a (b)(2) class may not be certified if the parties seeking injunctive relief or corresponding declaratory relief also pray for individual compensatory or punitive damages." *Id.* at 428. Yet, as Judge Dennis argues, "if civil-rights plaintiffs combine their otherwise (b)(2) class-worthy claim with claims for compensatory or punitive damages, even if the damages claims are small and do not predominate, the rule formulated by the majority would deny (b)(2) certification." *Id.* at 429. Moreover, and as discussed in Section II of this outline, *supra*, the court's reasoning

[9] *Id.* at 427 (Dennis, J., dissenting) (quoting 5 Moore's Federal Pracice § 2302 (3d ed. 1998) (citing *General Tel. Co. v. Falcon*, 457 U.S. 147, 156), and *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974))).

ignores the text of Rule 23(b)(2) in favor of the legislative history's "predominance" requirement.

4. **Hostility to *any* monetary relief**. The court assumes that monetary relief by its very nature is "less of a group remedy" and necessarily involves "the varying circumstances and merits of each potential class member's case." As such, the court not only is limiting monetary relief in class actions without any credible basis in the rules, the court is also sending a strong signal that it frowns upon ***any*** claim for monetary relief in a class action. If monetary relief is "the predominate form of relief sought," and if claims for monetary relief "depends . . . on the ***varying circumstances and merits of each potential class member's case***," then the court seems unlikely to grant relief even under Rule 23(b)(3), given the requirement there that common questions "predominate" over individual ones.

5. **Mischaracterization of "monetary relief."** The court incorrectly equates "monetary relief" and "damages" and also incorrectly suggests that under any circumstances monetary relief requires individualized factual determinations.[10] This is simply not the case. Under many circumstances, class members may be entitled to "monetary relief" that require no individualized factual determinations:

   a. **Statutory damages**. For example, under the Truth in Lending Act and the Fair Debt Collection Practices Act, class-action plaintiffs in such cases are entitled to "statutory damages" capped at $500,000 for the class.

   b. **Restitution**.

      (1) Under such a remedy, a plaintiff is entitled to void a contract or transaction and obtain a return to the *status quo*.

[10] The *Allison* court reasoned that the Supreme Court's decision in *Ticor Title Insurance Co. v. Brown*, 114 S. Ct. 1359, 1361 (1994) (per curiam), casts doubt on whether class actions seeking "monetary damages" can be certified under (b)(2). *Allison*, 151 F.3d at 411. However, this assertion is somewhat doubtful. *Ticor Title* was a per curiam opinion in which the Court dismissed as improvidently granted writ of certiorari to the court of appeals in a case involving the question of whether certification under (b)(2) in which the plaintiffs sought monetary relief was an unconstitutional denial of due process to absent plaintiffs who might wish to "opt out" of the class. Because the Court's opinion by its very nature did not examine the merits of the question presented, the opinion has little precedential value.

Restitution is an equitable remedy, and unlike damages, provides for monetary relief flowing as a "legal incident" of a declaration voiding a contract. *See, e.g., Transamerica Mortgage Advisors, Inc. v.Lewis*, 444 U.S. 11, 19 (1979) ("[W]hen Congress declare[s] that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution.").[11]

(2) In many transactions, this simply requires a calculation of the money that the plaintiffs paid to the defendant and an order compelling the defendant to return those funds. *See, e.g., SEC v. Manor Nursing Homes*, 458 F.2d 1082, 1104 (2d Cir. 1972) (restitutionary disgorgement in securities fraud); *SEC v. Texas Gulf Sulfur Co.*, 446 F.2d 1301, 1308 (same). As such, in cases involving the voiding of contracts, restitution is precisely the kind of monetary relief that "flow[s] directly from liability to the class as a whole forming the basis of the injunctive or declaratory relief." *See Allison*, 151 F.2d at 415.

c. **Back pay**. As Judge Dennis observed in his dissent in *Allison*, the Fifth Circuit has long provided for the remedy of back pay when coupled with declaratory or injunctive relief:

> All that need be determined is that conduct of the party opposing the class is such as makes such equitable relief appropriate. This is no limitation on the power of the court to grant other relief to the established class, especially where it is required by Title VII.

Allison, 151 F.3d at 432 (Dennis, J., dissenting) (quoting *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir. 1974)).

d. **Presumed reliance**. Again, in securities fraud cases, plaintiffs are often entitled to class-wide damages based on a presumption that the plaintiffs relied on the defendants' misrepresentations in purchasing their securities. *See, e.g.,*

[11] *See also Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946). There, the Court observed that "[r]estitution, which lies within [the court's] equitable jurisdiction, is consistent with and differs greatly from [an award of damages]. . . . [Such award restores] the status quo and order[s] the return of that which rightfully belongs to the purchaser and tenant. Such action is within the highest tradition of a court of equity."

Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54, 92 S. Ct. 1456, 1472-73 (1972). Frequently, such cases proceed under the so-called "fraud on the market" theory, under which a seller of securities makes a public misrepresentation (i.e., to the "market") that can be presumed to have caused the market participants to rely on the misrepresentation. As a result of the "fraud on the market," the defendants' misrepresentation has fraudulently inflated the price. *See, e.g., Basic, Inc. v. Levinson*, 485 U.S. 224, 247 (1988) ("It has been noted that it is hard to imagine there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?").

6. **"Drastic curtailment" of civil rights remedies.** The majority's rule threatens a "***drastic curtailment***" of the use of (b)(2) class actions in Title VII cases, contrary to long-standing expressions of Congressional intent as well as the original understanding of Rule 23. *Id.* at 431-32 (Dennis, J., dissenting) (emphasis added). The expansion of the rights of Title VII plaintiffs under the 1991 Civil Rights Act hardly justifies the majority's efforts to constrict those rights in the context of the class action device.

D. Possible limits to scope of the *Allison* court's holding: *Allison*'s sliding scale does not commit the Fifth Circuit to a per se rule distinguishing cases in which injunctive/declaratory relief "predominates" over monetary relief:

> [This determination] involves "pragmatic ramifications of adjudication" and the effect of the relief sought, rather than any special attributes of the class involved. . . We recognize that, ***as a matter of degree***, whether a given monetary remedy qualifies as incidental damages will not always be capable of precise determination. . . . ***The 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 (b)(2) class action.

Id. at 416 (emphasis added).[12]

[12] The Fifth Circuit followed *Allison* in *Smith v. Texaco, Inc.*, 263 F.3d 394 (5th Cir. 2001) (Smith, J.). Judge Reavley filed a dissenting opinion analogous to Judge Dennis in *Allison*. However, in February 2002, the case settled and the Fifth Circuit withdrew its opinion. *See Smith v. Texaco, Inc.*, 2002 WL 131415 (5th Cir. Feb. 2, 2002).

IV. *Bolin v. Sears Roebuck & Co.*[13]: Fifth Circuit Applies *Allison* to Commercial/Consumer Cases

A. ***Facts***: Plaintiffs, a class of bankrupt Sears credit card customers, alleged that Sears engaged in a pattern and practice of illegal acts in all Chapter 7 bankruptcies that Sears systematically deployed via its internal policies, which include knowing and systematic inflation of collateral values in violation of the automatic stay and discharge injunction. Sears intentionally designed its policies to enhance the collection of prepetition debt in knowing violation of the letter and the spirit of the Bankruptcy Code. Plaintiffs sought relief under §§ 362 and 524 of the Bankruptcy Code as well as under RICO and the Truth-in-Lending Act.

B. ***Holding***: Fifth Circuit vacated district court's certification under (b)(2) and remanded.

1. The court agreed that Sears' conduct, as alleged, was wrongful and generally applied to the class of bankrupt debtors as a whole. However, the Fifth Circuit vacated the district court's certification of the class under (b)(2) because Plaintiff's claim for monetary relief – i.e. for restitution of all monies paid to Sears – "predominated" over the plaintiff's claim for relief. As such, the Fifth Circuit reasoned, the case should be remanded for consideration of certification under (b)(3) as to plaintiff's "damages" claims; (b)(2) relief would apply only to debtors from whom Sears had not yet collected money.

2. The court amplified aspects of *Allison*, observing that its holding there "reflects our concern that plaintiffs may attempt to shoehorn damages actions into the Rule 23(b)(2) framework, depriving class members of notice and opt-out protections [which are required in (b)(3) classes]." *Id.* at 976. The court reasoned that "[w]hen monetary damages vary as to the individual plaintiffs, class members may determine that they would rather have direct rather than class representation." *Id.* at 976 n.29.

C. ***Analysis and Criticism***: The Fifth Circuit's analysis demonstrates the effect of application of the "predominance" test with respect to injunctive or corresponding declaratory relief under (b)(2).

1. Here, the Fifth Circuit minimized plaintiffs' claim that Sears' conduct in obtaining payments from debtors in violation of the automatic stay was fundamentally injunctive in nature because

[13] 231 F.3d 970 (5th Cir. 2000).

Sears' policies were ongoing and therefore should have been enjoined.

2. To the extent that the class consisted of debtors who had already paid Sears money, the Fifth Circuit reasoned that injunctive relief would mean little to them. *Id.* at 978. However, the court ignored the fact that relief to these debtors would be "corresponding declaratory relief" – in other words, these debtors were entitled to a declaration entitling them to restitution that would correspond to the injunction issued against Sears to continue its policies. That award of restitution, prior to *Allison*, clearly would be the kind of "incidental" monetary relief that would "flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *Bolin*, 231 F.3d at 976 (quoting *Allison*, 151 F.3d at 415).

3. Of course, this declaration would also entitle the plaintiffs to monetary relief, but, under even *Allison*, such relief is "purely incidental" to the injunction and declaration relating to Sears' conduct. Each debtor is entitled to a return of all money paid to Sears because of Sears' systematic violation of the automatic stay and discharge injunction. Nevertheless, *Allison*'s hostility toward monetary relief of any kind led the *Bolin* court to erroneously conclude that such relief would not be "incidental" for most of the class.

4. Such a class, of course, also fits the requirements of Rule 23(b)(3), which is the residual class-action category. *Allison*, 151 F.3d at 412 (characterizing (b)(3) as the category "intended to dispose of all other cases in which a class action would be "convenient and desirable, including those involving large-scale, complex litigation for money damages.").

V. Bifurcation Lives Under (b)(3): *Mullen v. Treasure Chest Casino*[14]

A. ***Facts***: Group of employees of "floating casino" who worked on M/V Treasure Chest brought class action alleging that the boat's improperly maintained air-conditioning system caused respiratory problems in violation of Jones Act.

B. ***Holding***: Court affirmed district court's certification under (b)(3).

[14] 186 F.3d 620 (5th Cir. 1999).

1. **Predominance**: Common issues included seaman status, vessel status, negligence, and seaworthiness. The Fifth Circuit affirmed the district court's finding that these common issues "are not only significant but also pivotal." *Id.* at 626.

   The court distinguished *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2250 (1997), because there the allegation of asbestos exposure included many different sources, locations, and time periods, including a variety of states with different legal standards. The court also distinguished *Castano v. American Tobacco Co.*, 84 F.3d 734, 741-45 (5th Cir. 1996), because, once again, the plaintiff class of cigarette smokers invoked the laws of many states and involved a novel "addiction as injury" claim, which was a "premature" tort with no track record from which a court could determine which issues were "significant."

2. **Superiority**: The court concluded that class-wide adjudication was superior to individual lawsuits, at least for the initial determination of liability. With respect to inquiries about causation and damages, the court concluded that such inquiries could be bifurcated from the initial liability determination. Assuming there is a determination of liability with respect to some or all of plaintiffs' common claims, the court can proceed to the "phase-two" jury for such determinations. Clearly, the majority did not share the *Allison* court's hostility toward bifurcation.

C. ***Dissent***: Judge Emilio Garza disputed the majority's conclusion that class-wide adjudication of these personal-injury claims was "superior" to individual actions. Judge Garza observed that because the majority's ruling permitted bifurcation, the defendant's Seventh Amendment jury trial rights were infringed since the determinations of "liability" were intertwined with determination of "causation." *Id*. at 631-32.[15]

[15]Judge Garza's reasoning hearkens to the minority rule, not followed in Texas, of *Palsgraf v. Long Island R.R. Co*., 162 N.E. 99 (N.Y. 1928) (Cardozo, C.J) . There, then-Chief Judge Cardozo laid down the peculiar rule that "[t]he question of liability is always anterior to the question of the measure of the consequences that go with that liability." In other words, "[n]egligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all." This rule has been the subject of much criticism, and the notoriety of the decision stems more from Cardozo's later fame than from the merits of the opinion itself. *See* Richard A. Posner, *Cardozo: A Study in Reputation* 41 (1990).

VI. More (b)(3) Treatment Even When (b)(2) Could Apply: *Bertulli v. Independent Ass'n of Continental Pilots*[16]

A. ***Facts***: Group of 1,700 Continental Airline pilots sued their union and Continental for a corporate-wide change in seniority rankings. The plaintiffs sought injunctive relief (restoration to original rank) and "incidental" damages (for pay lost as a result of the change). The pilots filed their claims under Railway Labor Act and the Labor-Management Reporting and Disclosure Act.

B. ***Holding***: Court affirmed district court certification of class under (b)(3).

1. **Predominance**: The court ruled that the pilots' common claims "predominated" under (b)(3) because, other than damages, "virtually every issue prior to damages is a common issue." *Id.* at 298. "The plaintiffs' suit boils down to one basic factual claim: the Pilots' Association took a single act that caused every plaintiff to lose seniority. Every aspect of liability involves this common issue." The district court may need to reconsider whether class treatment is appropriate for damages determinations, but "there is no abuse of discretion in the district court's determination that common issues predominated." *Id.*

   In other words, *Bertulli*, like *Mullen*, makes clear that courts can employ bifurcated proceedings despite suggestions in *Allison* to the contrary.

2. **Superiority**: The court observed that the damage awards for most pilots would be very small. As such, "the economies of class treatment of the numerous common issues weigh in favor of class treatment." *Id.* at 299. The court noted that to demonstrate abuse of discretion by the trial court, "defendants must demonstrate not only that individual actions are not only ***feasible***; they must show that individual class members have an interest sufficient to make individual actions ***desirable***." *Id.* (emphasis in original).

C. ***Analysis***: *Bertulli* clearly could have been certified under (b)(2) prior to *Allison* because the injunctive relief "predominated" over monetary relief. However, the district court certified under (b)(3) only; the plaintiffs apparently had not sought certification under (b)(2). In any event, *Bertulli* demonstrates that a party seeking certification for damages under (b)(3) should be mindful of the construct under (b)(2) and *Allison*'s restrictive reading of it. Even under (b)(3), the Fifth Circuit will be more likely to affirm certification if the damages claims "flow directly from liability to

[16] 242 F.3d 290 (5th Cir. 2001).

> the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *Allison*, 151 F.3d at 415, *quoted in Bolin*, 231 F.3d at 976.

VII. Conclusion

The interplay of injunctive and damages relief under Rules 23(b)(2) and (b)(3) has been the focus of much of the Fifth Circuit's recent class action jurisprudence. *Allison v. Citgo Petroleum* established the court's framework for the analysis in many cases, but its other recent decisions strongly suggest that not all the members of the Fifth Circuit embrace fully *Allison*'s effort to restrict the use of class actions remedies – both injunctive and monetary.