

Advanced Class Actions

**ABA Section of Labor and Employment Law
Equal Employment Opportunity Committee
2000 Midwinter Meeting**

ADVANCED CLASS ACTIONS

by
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I. Allison v. Citgo Petroleum and its Siblings

A. The issue:

Since the Civil Rights Act of 1991 made monetary damages available under Title VII (although they had long been available under §1981), there has been a growing trend by courts to scrutinize more closely motions for class certification. The availability of damages “that may vary widely between individuals and be based more on subjective factors like emotional distress rather than objective factors like back pay” has led some courts to question the cohesiveness of class interests, the availability of jury trials for these claims, and the manageability of these cases as class actions. Most commonly, courts have turned to Rule 23(b)(3) certification, with notice and the opportunity to opt-out, instead of using Rule 23(b)(2) certification, which had traditionally used in civil rights actions. However, one circuit court, the Fifth Circuit, has taken a more extreme position suggesting (albeit in *dicta*) that it is rarely, if ever, appropriate to certify a Title VII class action where compensatory or punitive damages are at issue. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), *petition for reh’g denied with clarifying opinion*, 151 F.3d 434. However, *Citgo* has not been followed outside of the Fifth Circuit.

B. *Citgo*:

1. The *Citgo* court held that certification under Rule 23(b)(2) is only proper where injunctive or declaratory relief “predominates” and that compensatory or punitive damage claims must be “incidental” to the injunctive or declaratory relief sought. The court then defined “predominate” and “incidental” so that most monetary relief other than back pay would be held as non-incidental, and would predominate. *Citgo*, 151 F.3d at 413-17. Indeed, an exception was made for back pay claims on the basis of extensive precedent more than logic, since the definition of “incidental” applied by the *Citgo* court would have excluded most back pay claims. *Citgo*, 151 F.3d at 415-16; *see also id.* at 427 n.1 (dissent).
2. With respect to certification under Rule 23(b)(3), the *Citgo* court was also discouraging. The district court ruled that individual issues related to compensatory and punitive damages predominated over common issues, and the Fifth Circuit affirmed. *Citgo*, 151 F.3d at 419-20. With respect to other alternatives, such as certifying a class to address liability only, and deciding damages later, the court disparaged the suggestion as an “end run” around the certification issue. *Citgo*, 151 F.3d at 421-22. The court also expressed concern, toned down in the opinion issued after rehearing was sought from the original opinion, that the Seventh Amendment would be violated if there were successive juries deciding on liability and then

damages. *Citgo*, 151 F.3d at 419-20, 422-24.

3. When rehearing was denied, the Court issued the following opinion, which calls into question the viability of the original panel decision,
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.
4. In addition to a few district courts within the Fifth Circuit, at least one other district court has followed *Citgo*'s analysis, and stated that while it may be possible under some circumstances for a Title VII class to be certified with claims for compensatory and punitive damages, those circumstances will be rare. *Faulk v. Home Oil Co., Inc.*, 186 F.R.D. 660 (M.D. Ala. 1999) (adopting reasoning of *Citgo*)

C. Arguments in favor of Rule 23(b)(2) certification in light of the above:

1. Injunctive relief predominates, for the following reasons:
2. 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. Gen. Tire*, 635 F.2d 501, 506 & n.6 (5th 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. *Amchem Prods v. Ford Motor Co.*, 117 S. Ct. 2231, 2245 (1997).
3. 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. 5 Herbert B. Newberg et al., *Newberg on Class Actions* §24.117, at 24-385 (3d ed. 1992). Courts have used injunctive relief 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 (5th Cir. 1974) (same).

4. 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. 1975). The injunctive relief has such an impact because it is necessarily directed to systemic problems, rather than individual incidents of discrimination. Courts frequently have refused to grant broad prospective injunctive relief to individuals. See, e.g., *Lowery*, 158 F.3d at 766-67; *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).
5. 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. *Citgo*, 151 F.3d at 416. In its recent order denying rehearing *en banc*, the Fifth Circuit reaffirmed the broad discretion of a court to rule on class certification. *Citgo*, 151 F.3d 434. Such findings have been made by courts in similar Title VII cases. See, e.g., *Orlowski v. Dominick’s Finer Foods*, 172 F.R.D. 370, 374 (N.D. Ill. 1997) (distinguishing *Celestine v. Citgo* by finding that money damages did not predominate over injunctive relief in that particular case).
6. Finally, after other courts which have addressed class certification issues after *Citgo* have had no difficulty certifying class actions, as discussed below at D.
7. The issues raised by *Citgo* suggest that the difficulties in securing class certification might be greatest in sexual harassment cases, and least in cases

focusing primarily on back pay for lost promotions. Despite this, there have been several sexual harassment cases that have been certified: *Jenson I*, 139 F.R.D. 657 (D. Minn. 1991) (certifying class pursuant to Rule 23(b)(2)) and *Jenson III*, 130 F.3d 1287, 1290 (8th Cir. 1997) (describing individualized award of compensatory damages for emotional distress made after class-wide liability finding, pursuant to the Minnesota Human Rights Act, since claims pre-dated Civil Rights Act of 1991); *Neal v. Director, D.C. Department of Corrections*, No. 93-2420 (D.D.C. December 23, 1994 and February 17, 1995) slip op, *BreMiller v. Cleveland Psychiatric Institute*, 898 F. Supp. 572 (N.D. Ohio 1995).

D. Other courts have not followed *Citgo*, at least not as to Rule 23(b)(3)

1. *Jefferson v. Ingersoll International Inc.*, 195 F.3d 894 (7th Cir. 1999) The court ruled that where damages were at issue, due process demanded that class members receive notice and the opportunity to opt-out, and thus certification under Rule 23(b)(3) was more appropriate than under Rule 23(b)(2). The district court had certified the class under Rule 23(b)(2) without addressing the due process issues. While the Seventh Circuit did not absolutely rule out use of Rule 23(b)(2) where damages are at issue, it stated it was only permissible where damages were incidental to the injunctive relief, “so tangential . . . that the due process clause does not require notice.” The court did suggest that divided certification was possible, with certification under Rule 23 (b)(2) for the trial of declaratory and injunctive relief claims, and 23(b)(3) certification for the trial of damages issues. The case was remanded for re-consideration
2. *Warnell v. Ford Motor Co.*, 189 F.R.D. 383 (N.D. Ill. 1999) The court certified a class of women alleging a sexually hostile work environment under both Rule 23(b)(2) (for injunctive and declaratory relief) and Rule 23 (b)(3) (for damages). The defendant argued that a sexual harassment case can never be certified as a class action, an argument that the court labeled “bold” but “without merit” and “not persuasive.” The court found that the common issues predominated over individual issues, even taking into account plaintiffs’ burden to show that the sexual harassment was subjectively hostile. The court acknowledged *Citgo* but held that, given the opinion issued on denial of rehearing, the original panel decision was dicta at best, and only for the Fifth Circuit at that.
3. *Carter v. West Publishing Co.*, 79 Fair Empl.Prac. Cas. 1494, 1999 WL 376502 (M.D. Fla. 1999). The court certified a sex discrimination class action on claims of discrimination in a stock purchase program. Certification was sought under Rule 23(b)(3), because a merger had made it impossible to get injunctive relief awarding the stock at issue, so plaintiffs

sought only damages. The court found that certification was appropriate because the common issue - whether defendant had a centralized policy and practice of discrimination - predominated over any individual issues. The court acknowledged *Citgo*, while noting it was not governing precedent in the 11th Circuit, but distinguished that case because the class size was much more manageable (144 vs. over 1000), and subclasses had been proposed which addressed any remaining manageability concerns. Finally, the court noted that it “finds it difficult to imagine that a bright-line rule applies to deny a district court the discretion to grant class certification under Rule 23(b)(3) in every Title VII case in which the plaintiffs seek compensatory and punitive damages and a jury trial.”

4. *Israel v. Avis Rent-a-Car Systems, Inc.*, 185 F.R.D. 372 (S.D. Fla. 1999) A class was certified under Rule 23(b)(3) on allegations of discrimination against Jewish persons seeking to rent cars from Avis. The court ruled that certification under Rule 23 (b)(2) was inappropriate because damages were a significant portion of the total relief requested, issues related to injunctive relief were not the same as issues related to individual damage awards, and “compensatory damages are not common to the entire membership, nor shared by all in equal degree.” However, the court still found that the common issues predominated over individual issues and that certification under Rule 23 (b)(3) was appropriate. The court distinguished the 11th Circuit decision in *Jackson v. Motel 6*, a public accommodations case in which the court found individual issues predominated, by noting that in *Avis* there was undisputed evidence of a discriminatory policy, which bridged the gap between the individual claims and the class allegations, whereas in *Motel 6* plaintiffs sought to infer the discriminatory policy from a series of individual discriminatory incidents. Finally, the court noted that where individual issues primarily related to damages, they would not predominate over the common issue of liability.
5. *Abdallah v. Coca-Cola, Co.*, 1999 WL 527835 (N.D. Ga. 1999) While the court did not rule on class certification, it rejected a motion to dismiss based upon *Citgo*, arguing that there were no circumstances in which a class could be certified, and thus dismissal was appropriate. The court rejected this attempt to short-circuit the normal process of discovery and class certification review.
6. *McClain v. Lufkin Industries, Inc.*, 187 F.R.D. 267 (E.D. Tex. 1999) In this case a class was certified pursuant to Rule 23(b)(2). However, plaintiffs made disparate impact claims, not disparate treatment claims. Thus, there was no monetary relief sought other than back pay, and no jury trial. Thus, this case did not present any of the issues that troubled the court in *Citgo*.

II. Rule 23(f)

- A. Rule 23 was recently amended to allow appeals, within the discretion of the Court of Appeals, from orders granting or denying class certification. This is a change from the general rule that decisions on class certification were not generally appealable. Such appeals were not final and appealable under §1291; they were usually not considered appealable under §1292(a)(1) as the denial or grant of an injunction; and they could only proceed as an interlocutory appeal under §1292(b) if the *district court* certified that there was a controlling question of law regarding which there are substantial grounds for difference of opinion, and interlocutory review would aid the litigation; lastly, review was available under §1651, where a writ of mandamus was issued, only if the district court had seriously abused its discretion. Thus, appeals were rare.
- B. Under the new Rule 23(f), no certification from the district court is required; the party losing the certification decision can appeal within 10 days. The Court of Appeals still has discretion whether or not to take the appeal, but the case need not meet the high standards of Mandamus.
- C. It is too soon to assess the impact of this change. On the one hand, this rule can be helpful to plaintiffs in cases where denial of class certification is effectively the “death knell” of the case. On the other hand, in cases where certification is granted, an immediate appeal may delay the underlying litigation.
- D. It appears that the Seventh Circuit is taking the lead in fleshing out rules governing Rule 23(f).
1. *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999) established procedurally that a Rule 23(f) appeal may be taken from the decision on class certification itself, or from a ruling on a request for reconsideration where the request for reconsideration was filed within the 10 day period permitted for appeals. *Blair* identified three reasons why Rule 23(f) was appropriate: (1) denial of certification can sound the “death knell” of the litigation if the claim of the representative plaintiff is too small to justify the expense; (2) grant of certification can put pressure on defendant to settle in excess of the merits of the claim; and (3) where necessary to permit meaningful review of the certification decision (which rarely happens following final judgment due to settlements), and thus advance the development of the law governing class actions, where the legal question is important, unresolved, and has managed to escape resolution by appeals from final judgments.

2. *Gary v. Shehan*, 188 F.3d 891 (7th Cir. 1999) followed *Blair* by ruling that where a party sought reconsideration of the certification decision or, as in this case, decertification, more than 10 days after the certification decision had been issued, then the party waived its opportunity to appeal under Rule 23(f), and must wait until the end of the case to do so.
3. *Richardson Electronics, Ltd. v. Panache Broadcasting of Pennsylvania, Inc.*, 2000 WL 101202 (7th Cir. 2000) addressed the interrelationship of 28 U.S.C. §1292(b) and Rule 23(f). In that case, a class was certified and no appeal was taken within 10 days. However, the defendant sought and obtained certification from the district judge pursuant to §1292(b) that an interlocutory appeal should be permitted to determine a controlling issue of law. There is no time limit for obtaining §1292(b) certification from the district court. The Court of Appeals ruled that when a class certification ruling may be appealed under Rule 23(f), then the appellants must follow that rule-- including the 10 day time limit. Parties may not seek to use §1292(b) to avoid the 10 day time limit of Rule 23(f).

III. Bifurcation of class action trials

A. Overview

Often class action cases are bifurcated into proceedings on liability (Stage I) and individual relief (Stage II). This frame work was established in *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984) and *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). See also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); and Newberg §24.123. At Stage I, the defendant's liability for discrimination against the class is determined, and individual remedies proceedings are left for Stage II. Damages for the named plaintiffs may also be determined in the liability phase. If the trier of fact in Stage I concludes that the class has proved a pattern and practice by a preponderance of the evidence, class members enter Stage II with a presumption in their favor, and need not start from scratch establishing discrimination under the *McDonnell-Douglas-Burdine-Hicks* analysis.

B. Stage I

1. Plaintiffs seeking to prove disparate treatment by showing a pattern and practice have the burden of proving by a preponderance of the evidence "that racial discrimination was the company's standard operating procedure "the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. The plaintiffs must prove more than the mere occurrence of "isolated" or "sporadic" acts of discrimination. *Id.* The plaintiffs may establish a prima facie case of disparate treatment using statistics alone if the statistics show a "gross disparity" in the treatment of workers based on discriminatory factors. However, if the plaintiffs' statistical evidence is insufficient alone

to establish a prima facie case of disparate treatment, the plaintiffs may combine the statistical evidence with historical, individual or circumstantial evidence. *Id.*; *Mooney v. Aramco Servs., Co.*, 54 F.3d 1207, 1221 (5th Cir. 1995).

2. If the plaintiffs establish a prima facie case that a pattern and practice of discrimination exists, the burden shifts to the employer to defeat that showing by demonstrating that the plaintiffs' proof is either inaccurate or insignificant. *Teamsters*, 431 U.S. at 360; *Trevino*, 811 F.2d at 902. If the employer produces evidence to rebut the inference that arises from plaintiffs' prima facie showing of pattern and practice, the matter is a contested issue of fact for the trier of fact, with the plaintiffs bearing the ultimate burden of persuasion on that issue. *Teamsters*, 431 U.S. at 361.
3. At the conclusion of the Stage I trial, if 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 discriminatory conduct, and what compensatory and punitive damages are appropriate. At that time, the Court would rule on individual equitable relief for the class representatives, and may award relief, such as promotions or other employment actions that were improperly denied. The case then proceeds to Stage II for the class members.

C. Stage II

1. In Stage II, the class members could establish a prima facie case merely by showing "that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination." *Teamsters*, 431 U.S. at 362; *Franks v. Bowman*, 424 U.S. at 773. The reason the class members in the remedial stage do not have to put on a prima facie case under *McDonnell Douglas*, and the reason the burden of persuasion shifts to the employer, is because "proof of the pattern or practice [in Stage I] supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Teamsters*, 431 U.S. at 362. To prevail, the employer must then persuade the trier of fact by a preponderance of the evidence that there was a legitimate nondiscriminatory reason for the employment decision other than the practices found to have been part of the illegal pattern and practice of discrimination. *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625, 637 (4th Cir. 1978). In the Stage II proceeding, the jury is not entitled to, or 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.¹

2. The same two stage process applies 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 III*, 130 F.3d 1287, 1299-1300 (8th Cir. 1997). The District Court held, and the Eighth Circuit approved, a bifurcated approach under which plaintiffs, in a first stage, established a pattern and practice of sexual harassment, and then, in a second stage, each individual class member was required to show only that she was “as affected as the reasonable woman.” *Jenson II*, 824 F. Supp. at 876. In the first stage, the plaintiff class must establish that the employer engaged in a pattern or practice of exposing women and African-Americans to a sexually hostile environment. *Id.* at 875. In other words, plaintiffs must establish (1) that the putative class members belong to a protected group; (2) that there was a pattern or practice of exposing class members to harassment; (3) the harassment was based on race or 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) that 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 *Ellerth v. Burlington Industries, Inc.*, 524 U.S. 742, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998). Where the harassment was caused by a supervisor rather than co-worker, the employer is liable unless it establishes an affirmative defense that it took reasonable steps to prevent and correct harassment). Should the employer be found to have engaged in a pattern or practice of discrimination by maintaining a hostile environment, in the second stage, each individual must show by a preponderance of the evidence that she was as affected as the reasonable woman. *Id.* at 875-876. See also *EEOC v. Mitsubishi Motors*, 990 F.Supp. 1059, 1070 (C.D. Ill. 1998).
3. At Stage II of the bifurcated procedure, each plaintiff must prove the illegal conduct. *Shipes*, 987 F.2d at 318. At the start of a Stage II trial, the employer faces a prior adjudication of class discrimination. The procedures

¹See *Teamsters*, 431 U.S. at 361-62, “the force of that proof [from Stage I] does not dissipate at the remedial stage of the trial,” 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*, 70 Fair Empl. Prac. Cas. at 55-56.

thereafter assume that fact and are designed to identify the individual claimant's relationship to the condemned practices without a second trial of the issue of class discrimination. In a promotions case, the individual claimant must only identify the position she was denied because of discrimination and present an estimate of the amount of backpay. *Richardson*, 709 F.2d at 1021, (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 company's burden in seeking to rebut the presumption created by the class' prior prima facie showing of discrimination is substantial.").

D. Seventh Amendment issues

1. As with the certification decision itself, the decision on how to bifurcate a case may be affected by the availability of jury trials. *See, Citgo, supra*. When bifurcated proceedings first began to be used in Title VII cases, there was no right to a jury trial, so bifurcation was simple. Now that jury trials are available, some courts have expressed concern that having two different juries address issues in two different stages will result in a violation of the Seventh Amendment because the second jury will be re-considering issues decided by the first jury. *Citgo*, 151 F.3d at 419-20, 422-24. However, because the issues to be determined in Stage II are different from those in Stage I, the Seventh Amendment issue is avoided.
2. In *Cooper*, the Supreme Court articulated the "crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination. . . ." *Cooper*, 467 U.S. at 876. In the former, "the inquiry regarding an individual's claim is the reason for a particular employment decision." *Id.* Individual cases are analyzed under the *McDonnell Douglas-Burdine-Hicks* model. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In the latter, "at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking." *Id.* (emphasis added) (quoting *Teamsters*, 432 U.S. at 360 n.46) *See generally, Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575, n.7 (1978).
3. Thus, precisely because of the findings made by the jury in Stage I, the questions presented to the jury in Stage II proceedings are quite limited. Therefore, there is no risk that a second jury would reexamine an issue already decided by the Stage I jury. A finding that an individual was not affected by a pattern of discrimination is not inconsistent with, and is

certainly not a reexamination of, an earlier finding that a pattern of discrimination existed.²

IV. Ex parte Communications

A. Plaintiffs' counsel communications with absent class members

1. Generally, plaintiffs' counsel may communicate with absent class members indeed, arguably there is a constructive attorney client relationship between counsel and putative class members. Archaic rules to the contrary have been struck down. In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), the Supreme Court struck down a bar on communications between plaintiffs' counsel and potential class members because such restrictions inevitably interfere with efforts to vindicate the rights of potential class members, and there was no record evidence supporting a likelihood of serious abuse. *Gulf Oil*, 452 U.S. at 100-104. More recently, a court has ruled that "Plaintiffs and their counsel are entitled to speak freely about this lawsuit with any potential class member that contacts them." *Abdallah v. Coca-Cola Company*, 1999 WL 314119, *5 (N.D. Ga. May 14, 1999) (communications were pre-certification and could include obtaining affidavits and discussing representation).
2. Where specific communications are shown to be intimidating or misleading, such communications could be barred even if made by plaintiffs or class counsel to members of the putative plaintiff class. However, the actual examples of such limitations almost invariably involve communications from an opposing party. *Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. 630, 632-33 (N.D. Tex. 1994); *In re School Asbestos Litigation*, 842 F.2d 671, 683 (3rd Cir. 1988); *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985).
3. In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), the Supreme Court held that orders "limiting communications between parties and potential class members. . . should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties," and must be "carefully drawn" to limit speech "as little as possible, consistent with the rights of the parties under the circumstances." *Id.* at 102.

²See *Teamsters*, 431 U.S. at 361-62; *Lindemann & Grossman, Employment Discrimination Law*, at 1852 (3d Ed. 1996).

4. Some defendants have argued that even non-coercive or misleading speech by counsel may be restrained merely because that speech may have a negative effect upon the defendant, citing *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997), for this proposition. This contention is simply incorrect.
 - a) *Jackson* concerned a local district court rule which barred all communications with potential class members. *Jackson*, 130 F.3d at 1002-03. The district court authorized relief from that rule and permitted plaintiffs' counsel to publish an advertisement, prior to class certification, in nationwide newspapers. *Id.* The Eleventh Circuit reversed, determining that it was an abuse of discretion for the district court to authorize such widespread notice by plaintiffs' counsel, primarily because the class did not appear properly certifiable under Rule 23. *Id.* at 1004. The vast majority of the opinion is directed to class certification standards, and does not discuss *Gulf Oil* or any other precedents governing communications with class members.
 - b) In most cases, there is no local rule prohibiting contact with class members in this case.
 - c) Further, not all communications with class members are of the broad public scale that was at issue in *Jackson*.
5. Courts have generally been more concerned about communications from the employer or other party with coercive power over class members, which plaintiffs counsel do not have. See, e.g., *Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672, 678 (N.D. Ga. 1999); *Shores v. Publix Super Markets, Inc.*, 1996 U.S. Dist. LEXIS 22396, *9 (M.D. Fla. Nov. 25, 1996), *vacated on other grounds*, 1997 U.S. Dist. LEXIS 16778 (M.D. Fla. Jan. 27, 1997).

B. Defendant's communications with absent plaintiff class members

1. It is well established that courts have authority to oversee communications between a defendant and potential class members about the subject of the litigation. "Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981).
2. Orders have been issued restricting and correcting communications to protect prospective class members from intimidating or misleading

communications. *Hampton Hardware, Inc. v. Cotter & Co., Inc.*, 156 F.R.D. 630, 632-33 (N.D. Tex. 1994); *In re School Asbestos Litigation*, 842 F.2d 671, 683 (3rd Cir. 1988); *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1202 (11th Cir. 1985) (defendants barred from soliciting decisions to opt-out of the class).

3. Such protections are also available in collective actions brought pursuant to section 216 (b) of the Fair Labor Standards Act. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170-71 (1989) (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) and noting court's interest in overseeing communications with potential class members in §216(b) actions is similar to Rule 23 actions).
4. Protective orders which restrict or correct communications with prospective class members are warranted where such communications discourage participation in the litigation by either misrepresenting the status or effect of litigation or creating confusion, or by intimidating potential class members. *Hampton Hardware*, 156 F.R.D. at 632; *Reed v. American S.S. Co.*, 682 F. Supp. 333, 338-39 (E.D. Mich. 1988).
5. *Shores v. Publix Super Markets, Inc.*, 1996 WL 859985 (M.D. Fla. Nov. 25, 1996). In *Shores*, the defendant regularly distributed newsletters, e-mail, and postings which contained comments about a discrimination class action that had been filed against Publix. The employer in that case asserted that the union was responsible for and controlled the lawsuit. *Shores*, at *1. Publix attempted to discourage participation in the lawsuit by implying that those who support the suit are pro-union and thus "participation in this suit is traitorous to the company." *Shores*, at *2. Publix also discouraged participation in the lawsuit by "asserting that participants will be hurting themselves and their co-workers." *Shores*, at *2.
6. Class members who have an ongoing economic relationship with the defendant are susceptible to undue influence and communications from the defendant to these potential class members should be carefully monitored. See *Hampton Hardware*, 156 F.R.D. 630; *Rossini v. Ogilvy & Mather*, 798 F.2d 590, 601 (2d Cir. 1986); *Burrell et al. v. Crown Central Petroleum*, 1997 U.S. Dist. LEXIS 16610 (E.D. Tex. October 21, 1997); *Kleiner*, 751 F.2d at 1202 (communications from bank to borrowers were potentially coercive since borrowers depended on bank for financing); *Hodges v. Board of Education of the Wichita Public Schools*, 1997 U.S. Dist. LEXIS 13701, *5 (D. Kan. July 25, 1997) (barring communications from defendant to potential class members). Even where there is no evidence that communications are intentionally misleading or explicitly threatening,

Advanced Class Actions

the existence of an employer-employee relationship is a “simple reality [which] suggests that the danger of coercion is real and justifies the imposition of limitations on [defendant’s] communications with potential class members.” *Abdallah v. Coca-Cola Company*, 1999 WL 314119, *7 (N.D. Ga. May 14, 1999). As *Abdallah* recognized “there is an inherent danger that these types of internal communications could deter potential class members from participating in the suit out of concern for the effect it could have on their jobs.” *Abdallah*, at *7.