"NOVEMBER SPAWNED A MONSTER"-THE ELEVENTH CIRCUIT WRESTLES WITH RETROACTIVE APPLICATION OF THE CIVIL RIGHTS ACT OF 1991

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Since November 21,1991, federal courts throughout the country have struggled with the question of whether or not the Civil Rights Act of 1991[1] has retroactive application. In the words of one judge, "strange as it may seem,"[2] Congress did not directly address the issue. To most courts, the language of the statute is not clear enough to be determinative.[3] To most courts, the legislative history of the statute is not clear enough to be determinative.[4] To most courts, Supreme Court precedents are not clear enough to be determinative.[5] Consequently, most federal district courts have relied upon precedents within their respective circuits that deal with the question of retroactive application of statutes.[6] Courts within the Eleventh Circuit are no exception. However, within the Eleventh Circuit, as is the case with other circuits,[7] the district courts have split on the question. As described by Eleventh Circuit district court judge, the situation is "amazing" and a "tragi

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[1] Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[a] Saltarikos v. Charter Mfg. Co., 57 FEP Cases 1225 (E.D. Wis. 1992).

[3] *See, e.g.,* Futch v. Stone, 58 FEP Cases 28 (M.D. Pa. 1992).

[4] *See, e.g.,* Sample v. Keystone Carbon Co., 58 FEP Cases 650 (W.D. Pa. 1992).

[3] *See, e.g.,* Smith v. Fulton County, 59 FEP Cases 683 (N.D. Ga. 1992).

[6] *See, e.g.,* Hansel v. Public Service Co. of Colorado, 57 FEP Cases 858, 866 (D. Colo. 1991) (citing the Tenth Circuit's adoption of *Bcnven)*-, Van Meter v. BarT, 57 FEP Cases 769, 770 (D. D.C. 1991) (citing the D.C. Circuit's adoption of *Bowen).*

[7] *Compare* Stevens v. Mann, 57 FEP Cases 1290 (S.D. Tex. 1992) (no retroactive application), *with* Tarver v. Functional Living, 59 FEP Cases 134 (W.D. Tex. 1992) (retroactive application).

comedy of confusion."[8] Or, in the words of another, "November Spawned a Monster."[9]

The Civil Rights Act of 1991 [hereinafter cited as the Act] was passed after several years of controversy and debate.[10] A previous attempt by Congress in 1990 to enact such legislation had met with a Presidential veto, in part because of retroactivity provisions deemed by President George Bush to be unfair.[11]

The Act as passed amends several civil rights statutes, including Title VII of the Civil Rights Act of 1964[12] [hereinafter cited as Title VII] and Section 1981 of the Civil Rights Act of 1866[13] [hereinafter cited as Section 1981]. Among its stated purposes are "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace" and "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights protections to victims of discrimination."[14]

As a means of accomplishing its purposes the Act provides for compensatory and punitive damages in some cases involving employment discrimination under various civil rights statutes, and provides that in such cases the plaintiff may demand a jury trial.[15] Additionally, among other provisions, the Act reverses or modifies a series of Supreme Court decisions that hindered plaintiffs in employment discrimination cases.[16]

At no place does the Act address retroactive application of the statute as a whole. However, the following provisions have been cited by courts within the Eleventh Circuit in their attempts to determine whether or not the statute has retroactive application.

1. The Enactment Provisions. Section 402(a) states that "except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Section 402(b) states that "[notwithstanding any other provisions of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." Section 402(b) is commonly known as the *Wards Cove* exception

[!] King v. Shelby Medical Center, 58 FEP Cases 435, 436 (N.D. Ala. 1991).

[9] Joyner v. Monier Roof Tile, 58 FEP Cases 830, 836 (S.D. Fla. 1992).

[10] *See* discussion in Doe v. Bd., Palm Beach County, 58 FEP Cases 809, 812 (S.D. Fla. 1992).

[11] *Id*

[12] 42 U.S.C. § 2000e *et seq.* [IJ] 42

U.S. C. § 1981.

[14]1991 Civil Rights Act § 3.

[13]1991 Civil Rights Act §§ 102(a) & (b).

[16] *See, e.g.,* 1991 Civil Rights Act §§ 101, 107, 108, 109, 112, & 113. Among the Supreme Court cases affected by the Act are EEOC v. Arabian American Oil Co.,_____ U.S.___ ,111 S. Ct. 1227 (1991); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); and Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

inasmuch as *Wards Cove Packing Co.* v. *Atonio*[11] [hereinafter cited as *Wards Cove]* is the only one that meets the statutory description.[15]

2. The Complaining Party Definition. Sections 102 and 104 include' in the definition of a complaining party "a person who may bring an action or proceeding."

3. The Damages and Jury Trial Provisions. Section 102 provides for compensatory and punitive damages for violations of various civil rights statutes and also provides for a jury trial in those cases.

4. The Overseas Provisions. Section 109(c) extends Title VII and certain other civil rights statute protections to U. S. citizens working abroad for American employers or companies controlled by American employers; however, the provision does not apply to conduct occurring before the date of enactment. This is referred to as the *Arabian American* exception by some courts which maintain that this enactment provision was intended to eliminate the possibility of further litigation in the case of *EEOC v. Arabian American Oil Co.*[19]

In instances in which the language of a statute does not clearly indicate how it is to be interpreted, courts sometimes use legislative history as an aid. However, Congress was bitterly divided on the question of retroactivity.[20] Even the sponsors of the legislation disagreed.[21] In general, the Democrats supported retroactive application and the Republicans opposed it.[22] Thus, statements can be found in the Congressional Record to support both positions.[23]

In instances in which the language of a statute does not clearly indicate how it is to be interpreted and legislative history is unclear, courts often rely on Supreme Court precedents. However, Supreme Court precedents dealing with retroactive application of statutes serve only to complicate the question. In *Bradley* v. *Richmond School Board*[24] [hereinafter cited as *Bradley*], decided in 1974, the Supreme Court unanimously held that absent manifest injustice resulting from retroactive application, or a clear statement of legislative intent to the contrary, statutes would be interpreted to

[17] 490 U.S. 642 (1989).

" *See* Khandelwal v. Compuadd Corp., 57 FEP Cases 1308,1310 (ED. Va. 1992).

[19] _ U.S. 111 S. Ct. 1227 (1991). *See* the discussion in Maddox v. Norwood Clinic, 58 FEP Cases at 445, 447 (N.D. Ala. 1992).

[20] See Temple, *Retroactivity of the Civil Rights Act in Title VII Cases,* 43 Lab. LJ. 299, 302-303 (1992).

[21] *See id.* at 303.

[22] *See* Khandehval v. Compuadd Corp., 57 FEP Cases at 1311; Hansel v. Public Service Co. of Colorado, 57 FEP Cases at 866.

[23] *Compare* 137 CONG. Rec. S15.953 (daily ed. Nov. 5,1991) (remarks of Sen. Dole) *with* 137 Cong. Rec. S15,963 (daily ed. Nov. 5, 1991) (remarks of Sen. Kennedy).

[24] 416 U.S. 696 (1974).

have retroactive application. In *Bowen* v. *Georgetown University Hospital*[25] [hereinafter cited as *Bowen],* decided in 1988, the Supreme Court unanimously held that absent clear statutory language to the contrary, statutes would not be interpreted to have retroactive application. *Bradley* is nowhere mentioned in the opinion.

The Supreme Court acknowledged an "apparent tension" between *Bradley* and *Bowen* in *Kaiser Aluminum & Chemical Corp.* v. *Bonjomo*[26] [hereinafter cited as *Kaiser Aluminum],* a 1990 case, but declined to resolve it in that case.[27] The concurring and dissenting opinions in *Kaiser Aluminum* suggest that the Supreme Court is itself divided on the issue.[2]*

The 1991 Act became law on November 21, 1991. In his signing statement, President Bush directed federal agencies to apply the statute prospectively only[29] and that is the position being taken by the Department of Justice and the EEOC.[30] However, other federal agencies have disagreed with that position.[31]

It is within this context that courts all over the country are determining whether or not the Act has retroactive application. The district courts are divided on the issue and have used greatly differing approaches to resolving it. Four circuits have ruled on the question, all deciding against retroactive application.[32] However, in three of those circuits, the appellate court judges were divided.[33]

The Eleventh Circuit has not yet ruled on the question of whether or not this statute has retroactive application. However, over twenty district courts within the circuit have. As is the case within the other circuits, these courts have split on the question and have engaged in a variety of types of analysis.

[23] 488 U.S. 204 (1988).

" 494 U.S. 108 L. Ed. 84Z 853 (1990).

[27] *See id.,* 494 U.S. at 108 L-Ed. at 854.

[28] *See id.,* 494 U.S. at____ , 108 L.Ed. at 856, 865-66 (Scalia, J., concurring), for the proposition that the two cases are in outright contradiction and that *Bowen* is the better rule, and 494 U.S. at __ , 108 L.Ed. at 867, 871-74 (White, J., dissenting), for the proposition that *Bradley* remains viable.

[25] *See ",Retroactivity Tally Begins27* FEP NEWSLETTER, BNA 145 (Dec. 19, 1991).

[30] *Id; "Retroactivity Issue Heats Up,"* 28 FEP NEWSLETTER BNA 6 (Jan. 16,1992).

[51] *See "Retroactivity Stand Criticized,"* 28 *FEP NEWSLETTER* BNA 41 (April 9, 1992), in which the viewpoints of the Department of Housing and Urban Development and the United States Commission on Civil Rights are outlined.

[52] *See* Johnson v. Uncle Ben's, Inc., 59 FEP Cases 483 (5th Cir. 1992); Mozee v. American Comm. Marine Service Co., 58 FEP Cases 1201 (7th Cir. 1992); Fray v. Omaha World Herald Co., 58 FEP Cases 786 (8th Cir. 1992); Vogel v. City of Cincinnati, 58 FEP Cases 402 (6th Cir. 1992); Luddington v. Indiana Bell Tel. Co., 58 FEP Cases 18 (7th Cir. 1992).

[35] *See* dissenting opinions in Mozee v. American Comm. Marine Serv. Co., 58 FEP Cases 1201, 1210; Fray v. Omaha World Herald Co., 58 FEP Cases 786, 792; Vogel v. City of Cincinnati, 58 FEP Cases 402, 407.

By far the most frequent way in which the courts within the Eleventh Circuit have been presented with the question is through consideration of amendments to complaints to add requests for damages and jury trials in cases arising under Title VII,[34] and to add new substantive claims under Section 1981.[35]

The starting point in the interpretation of statutes usually is the language of the statute itself.[36] Absent clearly expressed intent to the contrary, the statutory language is normally conclusive.[37] In analyzing the issue of retroactive application of the Act, most of the courts within the Eleventh Circuit are in agreement that the language of the statute is not clear enough to make a determination about retroactivity.[3]®

Some courts, however, have used the language of the Act to support a finding of retroactivity. One court, in three opinions issued on the same date, quoted language from the enactment provisions, noted that the overseas and *Wards Cove* provisions were the only stated exceptions, and concluded that since Congress was silent as to the other provisions, they "must be read in accordance with the plain language of the Act--that where it is not specifically provided, the Act shall take effect upon enactment and be applied retroactively."[39]

Another court relied upon the language of the statute to apply the Act to a pending case. Looking at the enactment, complaining party, and damages and jury trial provisions, the court determined that those provisions contained nothing to indicate that they were only to apply to actions filed or conduct occurring after enactment.[40] Rather, when applied to conduct that was already unlawful under Title VII, the court concluded that a request for damages and a jury trial actually involved a prospective application.[41]

Whereas those two courts used statutory language to support application of the Act to the cases before them, others have viewed the same passages and used them to support their conclusions that the Act should not

[34] *See, e.g.*, Smith v. Fulton County, 59 FEP Cases 633 (N.D. Ga. 1992) (compensatory damages and a trial by jury); Gilbert v. Milliken & Co., 59 FEP Cases 381 (N.D. Ga. 1992) (compensatory and punitive damages and a trial by jury).

[33] *See, e.g.*, King v. Shelby Medical Center, 58 FEP Cases 435; Doe v. Bd., Palm Beach County, 58 FEP Cases 809.

[36] Haynes v. Shoney's, 59 FEP Cases 169, 171 (N.D. Fla. 1992) (citing *Kaiser Aluminum*, 494 U.S. at 852).

[37] Joyner v. Monier Roof Tile, 58 FEP Cases at 835.

[38] *See, e.g.*, Toney v. State of Alabama, 59 FEP Cases 138,142 (MD. Ala. 1992); Long v. Carr. 58 FEP Cases 102 (N.D. Ga. 1992).

" See Desai v. Siemens Medical Systems, 59 FEP Cases 145, 146 (M.D. Fla. 1992); Suss man v. Salem, Saxon and Nielsen, 59 FEP Cases 143, 144 (M.D. Fla. 1992); Assily v. Tampa General Hospital, 59 FEP Cases 41, 42-43 (MD. Fla. 1992).

[40] *See* Langston v. Daniels, Micheals & Assoc., 59 FEP Cases 56, 58 (N.D. Ala. 1992).

[41] *See uL*

be applied. One, addressing the *Wards Cove* and *Arabian American* overseas provisions, contended that those provisions dealt with two specific cases and, at most, allowed only an inference of retroactivity with respect to the remainder of the statute.[42] Another court examined the enactment, *Wards Cove* and overseas provisions and concluded that they carried conflicting inferences.[43] The court rejected the argument that the enactment provision implied a sense of urgency and determined that the provision actually indicated prospective application.[44] It also rejected the argument that prospective application would render the *Wards Cove* provision superfluous, in violation of statutory interpretation guidelines.[45] In so doing, the court pointed to the "political maneuvering" associated with that provision and observed that the provision appeared to be a "'scotch-block'" designed to deal with uncertainty about statutory interpretation.[46] In a similar manner, it rejected the argument that prospective application would render the overseas provision superfluous.[47] Finally, the court pointed to the complaining party provisions as supporting prospective application because those provisions refer to a person who *may bring* an action as contrasted to a person who already has brought one.[48]

Another court reviewed the "nebulous" enactment provision, and the overseas and *Wards Cove* provisions, and decided that the latter two provisions demonstrate, "at most, that where Congress wished to express any intent concerning the application of the Act, it took the initiative to state so specifically."[49]

Still another court quoted the enactment provision and concluded that because the amendments to Section 1981 and Title VII did not state otherwise, "the plain language of the statute indicates that its effective date is November 21, 1991" and not before.[50]

Thus, while most courts within the Eleventh Circuit have regarded the statutory language as inconclusive, a few have maintained that the language is plain, both to support and oppose retroactive application.

When the language of a statute is not conclusive, courts look to legislative history for guidance. Most of the courts within the Eleventh Circuit are in agreement that the legislative history is not clear enough to make such

[42] *See* Maddox v. Norwood Clinic, 58 FEP Cases at 447.
[45] *See* Haynes v. Shoney's, 59 FEP Cases at 171-72.
[44] *See id.* at 171 and 171 n.7.
[45] *See id* at 171.
[44] *See id.* at 171-72.
[47] *See id.* at 172.
« 5« *id*. at 172 n.9.
[49] *See* Joyner v. Monier Roof Tile, 58 FEP Cases at 831-32.
[30] *See* Doe v. Bd,, Palm Beach County, 58 FEP Cases at 812.

a determination.[51] In fact, one commented on "the remarkable lack of clarity of legislative intent revealed by the pertinent history of the 1991 Act."[52] In addressing the legislative history, several have commented on legislative attempts to "build" a history[53] and on the partisan nature of the debates.[54]

Although the courts have not found the Congressional debates on the 1991 Act persuasive, several have been influenced by the legislative history surrounding the 1990 vetoed version of the statute and the early drafts of the 1991 Act containing retroactivity provisions, and used that history to support a finding of prospective application.[55] One reasoned that deletion of the retroactivity provisions contained in the "failed" versions from the final enacted version "suggests a collective intent on the part of Congress to have the final Act apply only prospectively,"[56] and concluded that the 'legislative history demonstrates that Congress knew how to provide for retroactivity when it intended to do so."[57] Although several courts discussed the role played by the President through his veto power, one also pointed to the signing statement issued by the President and concluded that "the essential role played by the executive branch in this Act becoming law has to be construed as unequivocally weighing in favor of prospective-only application."[58]

Although most courts discussing the 1990 legislative history and the threat of a Presidential veto have ultimately decided against retroactive application, others have noted it but gone on to apply the Act retroactively.[59]

While the President's stance on retroactivity has been important to courts within the Eleventh Circuit, the EEOC'S position has not, even though, as one court noted, the interpretation of an executive branch administrative agency charged with administering an act is usually entitled to great deference.® With the exception of one Magistrate, who maintained that the EEOC had "unanimously" ruled that the Act was not retroactive,[61] most courts within the Eleventh Circuit have not viewed the EEOC position as persuasive,

[31] *See, e.g.,* Toney v. State of Alabama, 59 FEP Cases at 142; Joyner v. Monier Roof Tile, 58 FEP Cases at 831, 833; Long v. Carr, 58 FEP Cases at 102.

[32] Haynes v. Shoney's, 59 FEP Cases at 172.

[53] *See, e.g.,* Haynes v. Shoney's, 59 FEP Cases at 172-73; Joyner v. Monier Roof Tile, 58 FEP Cases at 833; Ihedioha v. Emro Marketing Co., 58 FEP Cases 106 (N.D. Ga. 1992).

[34] *See* Haynes v. Shoney's, 59 FEP Cases at 172; Joyner v. Monier Roof Tile, 58 FEP Cases at 833.

[33] *See* Haynes v. Shoney's, 59 FEP Cases at 172-73; Doe v. Bd., Palm Beach County, 58 FEP Cases at 812; Maddox v. Norwood Clinic, 58 FEP Cases at 447-49.

[34] *See* Maddox v. Norwood Clinic, 58 FEP Cases at 447.

[37] *See id.* at 449.

[31] Haynes v. Shoney's, 59 FEP Cases at 172.

[39] *See, e.g.,* Joyner v. Monier Roof Tile, 58 FEP Cases 830.

[40] *See* Haynes v. Shoney's, 59 FEP Cases at 173.

" *See* Holman v. Mac^s South, 57 FEP Cases 1405 (N.D. Ga. 1992).

mainly because the EEOC's reliance on *Bowen* conflicts with perceived Eleventh Circuit precedent.[62]

In addressing legislative history, one court examined the purpose of the Act. The court noted that statutes are sometimes interpreted as having retroactive application if their purpose is to correct or alter Supreme Court interpretations, and that Congress in the 1991 Act clearly intended to change the effect of a number of Supreme Court decisions.[63] Nevertheless, the court decided that Section 1981 was so greatly altered as to create new rights and obligations, thus rendering that presumption of retroactivity inapplicable.[64]

One court found clear legislative intent in support of retroactive application. That court, in three almost identical opinions, decided that by including specific enactment language in the *Wards Cove* and overseas provisions, "Congress made clear its intention that under all other provisions, the Act should apply to pending cases."[6S]

Thus, while courts within the Eleventh Circuit generally have believed that legislative intent is not clear enough to be determinative on the question of retroactive application of the 1991 Act, some have found intent, both in support of and in opposition to such application. Or, as one court simply concluded, "Congress decided not to decide."[66]

Most courts within the Eleventh Circuit also are in agreement that Supreme Court precedents are not clear enough to use in making a determination concerning retroactivity.[67] As stated by one: " [a]t the heart of the controversy ... lie two competing presumptions on retroactivity, arising from two obviously conflicting Supreme Court decisions. This legal conundrum places the issue of the 1991 Act's retroactivity squarely on the courts."[68]

A critical factor to the federal district courts faced with the question is the stance of their respective circuits on retroactive application of statutes. The relationship between the adoption by a circuit of the *Bradley* or *Bowen* presumption and a finding by a district court on the retroactivity issue is so close that one court felt comfortable in stating: "Virtually all [cases considering the Act's retroactive application] were decided by the application of either the *Bradley* or *Bowen* rule of construction (citations omitted). Except for two decisions (citations omitted), the question of which line of divergent

[a] *See e.g.,* Haynes v. Shoneys, 59 FEP Cases at 173 and 176 n.19.

° *See id* at 172.

[64] *See id*

[43] *See* Desai v. Siemens Medical Systems, 59 FEP Cases at 146; Sussman v. Salem, Saxon and Nielsen, 58 FEP Cases at 144; Assily v. Tampa General Hospital, 55 FEP Cases at 43.

" Goldsmith v. City of Atmore, 58 FEP Cases 712 (S.D. Ala. 1992).

[67] *See, e.g.,* Haynes v. Shoney's, 59 FEP Cases at 173-74; Carmichael v. Fowler, 58 FEP Cases 646 (N.D. Ga. 1992); Long v. Carr, 58 FEP Cases at 104. *See also.* Goldsmith v. City of Atmore, 58 FEP Cases at 713.

" Doe v. Bd., Palm Beach County, 58 FEP Cases at 811-12.

authority to apply was determined by whether the circuit, in which the district court sat, had adopted either *Bradley* or *Bowen."*[w] The two exceptions were within the Eleventh Circuit.[70] Since that time other courts within the Eleventh Circuit have differed from the norm.

Overwhelmingly, courts within the Eleventh Circuit cite *United States v. Peppertree Apartments*[71] [hereinafter cited as *Peppertree],* as reflecting the circuit's position on retroactivity of statutes and the *Bradley* and *Bowen* debate. *Peppertree* dealt with the following factual situation. The owner of four multifamily housing projects in Alabama was found to have violated a regulatory agreement with the Secretary of Housing and Urban Development [hereinafter referred to as "HUD"] through misuse of project funds. The agreement provided that if such a violation occurred, HUD could apply to any court for several specific types of relief "or for such other relief as may be appropriate."[72] Subsequently, the United States filed suit to recover project funds and statutory damages. A federal district court awarded double damages and costs authorized by the statute. The owners appealed, among other things, the award of double damages, on the grounds that the statute authorizing the award of double damages was passed two years after the violations of the regulatory agreement occurred, and, therefore, should not be applied retroactively.

A three-judge panel in *Peppertree* upheld the award of damages. First, the court held that the statute in question was remedial in nature and that such statutes have retroactive application.[73] The court cited *Lussierv. Dugger*[74] [hereinafter cited as *Lussier*] and *United States* v. *Femandez-Toledo*[75] [hereinafter cited as *Femandez-Toledo*] as Eleventh Circuit authority for that holding.[76]

Second, the court quoted language from *Bradley* that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[77] The court noted in a footnote the confusion surrounding the Supreme Court precedents.[78] However, it observed that the Eleventh Circuit had applied the *Bradley* analysis in the past to determine the retroactive application of statutes and, therefore, the court was required by

® Joyner v. Monier Roof Tile, 58 FEP Cases at 836.

[70] *Set id.* at 836 n.22 and accompanying text.

[71] 942 F.2d 1555 (11th Cir. 1991).

[72] *Id.* at 1557 (quoting from the agreement).

[73] *See id.* at 1560.

[74] 904 F.2d 661 (Uth Cir. 1990).

[73] 749 F.2d 703 (11th Cir. 1985).

[74] *See* Peppertree, 942 F.2d at 1560.

[77] *Id.* (quoting Bradley, 416 U.S. at 711).

[n] *See id* at 1561 n3.

precedent to apply *Bradley* to the case before it unless otherwise directed by the Supreme Court or the Eleventh Circuit en banc.[79]

Applying the *Bradley* analysis to the case before it, the court reviewed the three factors outlined in *Bradley* to determine whether or not retroactive application of a statute would result in manifest injustice. These factors are: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights."[80]

The first factor, the court stated, arose from the distinction made between private disputes and disputes involving great national concerns.[81] Because the *Peppertree* case involved a government agency and an issue of national concern, consideration of this factor supported retroactive application in the case before it.[82]

The second factor, the court noted, considered the refusal "to apply an intervening change to a pending action where [a court] has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional."[83] The court determined that application of the statute would not affect any substantive right of the project owner, because the change in the statute was remedial.[84] Additionally, the court observed, the regulatory agreement explicitly stated that the government could seek any appropriate relief.[85]

The third factor, the court continued, required it to consider whether "a new and unanticipated obligation [] [would be] imposed upon a party without notice or an opportunity to be heard."[86] The court held that the statute did not impose a new obligation on the project owner; rather, "it imposes an additional remedy on already proscribed conduct," and, quoting from the district court's opinion, merely reinforced an existing obligation.[87]

The court concluded that application of the statute to the case before it would not result in manifest injustice, and went on to follow the *Bradley* requirement that it "determine from the statute itself and its legislative history whether Congress intended the statute to apply prospectively only."[88] The court determined that the language of the statute and the legislative history were silent on that question.[89] Consequently, the court held that the project

[79] *See id* (citing cases).

" *Id* at 1560-61 (quoting Bradley, 416 U.S. at 717).

[11] *See id* at 1560-61 (quoting United States v. Marengo County Commission, 731 F.2d 1546, 1554 (11th Or. 1984)).

[c] *See id*

[n] *Id* (quoting Bradley, 416 U.S. at 720).

[M] *See id* at 1561.

[15] *See id*

[w] *Id* (quoting Bradley 416 U.S. at 720).

[v] *Id*

"Id

[n] *See id*

owner was correctly held responsible for double damages as provided for in the statute.[90]

Although federal district courts within the Eleventh Circuit clearly recognize *Peppertree* as the appropriate authority to follow, several other Eleventh Circuit cases have been important to district courts considering the retroactivity question. The most commonly relied upon case other than *Peppertree* is *Femandez-Toledo.*

Femandez-Toledo dealt with a situation in which the government had appealed an order of a district court granting bail at a time when such an appeal was not allowable. While the appeal was pending, a statute was passed that made changes in conditions authorizing release and also allowed the government to appeal orders granting bail. While noting the *Bradley* rule, the Eleventh Circuit stated that "new statutes that affect antecedent rights will not apply retroactively while those that affect only procedure or remedy will apply retroactively."[91] It maintained that the right to bail had vested and was an antecedent right existing before the changes in law.[92] The court refused to apply the statute retroactively, stating that it would be "manifestly unjust to apply [a] new substantive law" to parties who had been released by the district court under the previous law.[93] It held that the act contained contemporaneous substantive and procedural changes and so declined to give the act partial retroactivity.[94]

Another case relied upon by some courts is *Wright* v. *Director, FEMA*[95] [hereinafter cited as *Wright].* In *Wright,* the Eleventh Circuit considered a district court award of flood insurance benefits to a homeowner for losses that were excludable prior to a statutory amendment. The three-judge panel cited *Bowen* and observed that *Bradley* "appears to conflict with the ... longstanding rule of statutory construction restated in *Bowen,* that favors the prospective application of statutes and regulations."[96] Although the court clearly favored *Bowen,* it saw no conflict in the case before it and concluded that it would arrive at the same result under either rule.[97] The court referred to the manifest injustice exception under *Bradley* and reasoned that "where a [statutory or] regulatory change interferes with matured or vested rights, the *Bradley* analysis coincides with the principle of prospective statutory application."[98] It cited a Supreme Court case, *Bennett* v. *New Jersey,*" for that

[50] *See id.*

[91] Femandez-Toledo, 749 F.2d at 705.

[92] *See id*

[95] *Id*

[94] *See id.*

[93] 913 F .2d 1566 (11th Or. 1990).

[96] *Id* at 1572-73.

[97] *See id* at 1573.

" *Id* at 1574.

proposition and for the principle of statutory construction that statutes affecting substantive rights are presumed to apply prospectively.[100] The court determined that the contractual relationship in the case "created unconditional and matured rights upon which the parties relied," and thus declined to apply the statute retroactively.[101] "In sum," the court concluded, "on the facts of this case, we agree with the Supreme Court's pronouncement that statutes (and regulations) 'are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.'"[1]®

An additional Eleventh Circuit case cited by the district courts is *Lussier.* In *Lussier,* the court applied the Civil Rights Restoration Act retroactively on the grounds that the act had the express purpose of restoring longstanding interpretations of four civil rights statutes which the Supreme Court had construed more narrowly.[103] The court classified the statute as remedial in nature, because it was enacted to aid in eliminating discrimination.[104] The court contended that it did not change law, but merely corrected judicial interpretations, and distinguished the case from other cases, including *Bennett v. New Jersey,* in which defendants possessed statutory rights that had matured or become unconditional.[105]

A few district courts within the Eleventh Circuit have resolved the retroactivity issue without any reliance on circuit court precedents dealing with retroactivity. In one, the court simply held that the Act was effective on November 21,1992, and did not apply to cases arising before that date.[106] In another, the court utilized a *Bowen* analysis to find that the Act did not have retroactive application, with no references to any Eleventh Circuit case.[107]

Still another maintained that the language of the enactment, damages, and complaining party provisions was determinative and were actually prospective provisions.[108] The court distinguished the case from one in which a judgment had been rendered or in which the conduct was lawful at the time the statute was passed.[109] The court was convinced that such an application was not unfair; rather, the fact that a defendant prior to passage of the Act

[99] 470 U.S. 632 (1985).

[100] Wright, 913 F.2d at 1573.

[101] *Id.* at 1574.

[102] *Id.* at 1574 (quoting United States v. Magnolia Petroleum, 276 U.S. 160, 162-63 (1928)).

[103] *See* Lussier, 904 F.2d at 665-66.

[104] *See id.* at 665.

[105] *See id.* at 665-66.

[106] *See* James v. American International Recovery, 57 FEP Cases 1226 (N.D. Ga. 1991).

[107] *See* Williams v. Healthcare Serv. Group, Inc., Case No. 87-8659-CIV-ZLOCH (S.D. Fla. Jan. 22, 1992).

*" *See* Langston v. Daniels, Micheals & Associates, 59 FEP at 58-59.

[105] *See id.* at 58 n.6.

did not face the possibility of damages or a jury trial "was an anomalous fortuity borne from judicial interpretations . . . and hardly a matter of entitlement to a defendant."[110]

One court, while acknowledging *Peppertree* and applying it without analysis to a request for damages, maintained that the accompanying jury trial request could be decided without reference to *Peppertree.*[111] In so doing, the court relied upon the following: rules of statutory construction interpreting jury trials as procedural provisions entitled to retroactive application; the Seventh Amendment right to trial by jury; and the restoration of Section 1981 to its *pre-Patterson* v. *McLean Credit Union*[112] [hereinafter cited as *Patterson]* status.[113]

The same court in a subsequent decision elaborated on its prior holding that the question of entitlement to a jury trial could be resolved without reference to the retroactivity dilemma.[114] Additionally, the court extensively addressed its belief that the amendment to Section 1981 also could be resolved under rules of statutory construction unrelated to retroactivity. The court cited several sources on statutory construction for their discussion of amendments designed to change law as opposed to amendments designed to interpret an ambiguous provision.[113] It concluded that the amendment to Section 1981 fell into the latter category.[116] Since Congress did not change the law, there was no need to consider rules on retroactivity.[117]

Courts basing their decision on Eleventh Circuit precedent have primarily relied on *Peppertree's* use of a classic *Bradley* analysis. One exception is a decision by a Magistrate who followed *Wright.*[116] The Magistrate believed that the Eleventh Circuit had applied both the *Bradley* and *Bowen* rules.[119] He acknowledged the holding in *Peppertree,* but found the *Bowen* language and the holding in *Wright* persuasive.[120] Citing as precedent another case within the district that denied the 1991 Act retroactive application, he followed suit.[121]

Another exception is a case in which the court acknowledged *Peppertree* in a footnote, but based its analysis in large part on *Femandez- Toledo,*[m] The court characterized the law in the Eleventh Circuit as follows:

[110] *Id* at 58.
[111] *See* King v. Shelby Medical Center, 58 FEP Cases at 436.
[IX2] 491 U.S. 164 (1989).
[115] *See* King v. Shelby Medical Center, 58 FEP Cases at 434-35.
[114] *See* Watkins v. Bessemer State Technical College, 58 FEP Cases at 439-40.
[115] *See id* at 440.
[114] *See id* at 441.
[1,7] *See id* at 440-41.
"* *See* Ihedioha v. Emro Marketing Co., 58 FEP Cases 106.
[1,9] *See id* at 107.
[120] *See id*
[121] *See id*
[122] *See* Maddox v. Norwood Clinic, 58 FEP Cases 445.

All have held that the first *Bradley* factor in determining whether application of the statute would constitute manifest injustice, the nature and identity of the parties, supported retroactive application. This has been the case whether or not the parties were public or private entities.[140] Almost all have noted the "great national concerns" and public interest inherent in discrimination cases.[141] Only a couple of courts have not been entirely convinced by the "great national concerns" argument, although they both ultimately found that this factor supported retroactive application.[142]

The courts have been more divided on the second and third factors. A major determinant has been the particular provision of the 1991 Act in question. Courts considering motions related to the addition of a request for damages or a jury trial in a Title VII action have been far more likely to find that these two factors support retroactive application than courts considering motions related to Section 1981.

In analyzing the second factor, the nature of the parties' rights, most of the courts addressing Title VII utilized the *Peppertree* reasoning as applied to the damages provisions, holding that the provisions were remedial rather than substantive in nature.[143] As expressed by one court

> [i]n light of the Eleventh Circuit's holding in *Peppertree* that a defendant has no unconditional right to limit the amount of a plaintiffs damages, the court holds that a defendant also has no unconditional right to limit a plaintiff to a particular type of damages. A statutory change in either the amount or the type of damages available to a plaintiff is remedial in nature.[144]

Another, addressing both the damages provision and the jury trial provision, noted that the defendant retained the "right to introduce all admissible evidence and to fully present his case at trial."[143] One, in discussing the jury trial provision, held that "the parties do not have a substantial right

[140] *See, e.g.*, Smith v. Fulton County, 59 FEP Cases at 684; Goldsmith v. City of Atmore, 58 FEP Cases at 713.

[141] *See, e.g.*, Smith v. Fulton County, 59 FEP Cases at 684; Desai v. Siemens Medical Systems, 59 FEP Cases at 146-47; Suss man v. Salem, Saxon and Nielsen, 59 FEP Cases at 144; Assily v. Tampa General Hospital, 59 FEP Cases at 43; Joyner v. Monier Roof Tile, 58 FEP Cases at 834; Goldsmith v. City of Atmore, 58 FEP Cases at 713.

[142] *See* Haynes v. Shoney's, 59 FEP Cases at 175; Toney v. State of Alabama, 59 FEP Cases at 142.

[143] *See, e.g.*, Smith v. Fulton County, 59 FEP Cases at 684; Desai v. Siemens Medical Systems, 59 FEP Cases at 147; Sussman v. Salem, Saxon and Nielsen, 59 FEP Cases at 144-45; Assily v. Tampa General Hospital, 59 FEP Cases at 43; Joyner v. Monier Roof Tile, 58 FEP Cases at 835.

[144] Smith v. Fulton County, 59 FEP Cases at 684.

[143] *See* Long v. Carr, 58 FEP Cases at 106.

to a bench trial, whereas the right to a trial by jury, even if statutorily granted, is entitled to substantial protection (citation omitted). The distinction between trial by jury or trial by the court is simply one of procedure."[146] Several courts analyzed the jury trial provisions under the rule of statutory construction holding jury trial provisions to be procedural in nature and thus entitled to retroactive application.[147]

In evaluating the third factor, the nature of the impact of the change in law upon the rights of the parties, most of these courts concluded that the application of the damages provisions would not impose a new and unanticipated obligation upon the parties. One court observed that the provision did not "alter the defendant employer's constitutional responsibility to refrain from discriminatory practices in its relations with employees."[148] Several observed that the Act merely imposes an additional remedy on already proscribed conduct,"[145] and that the defendant has no matured or vested right in a previously existing remedial scheme.[150] "Moreover," noted one court, "allowing plaintiff to try this case before a jury permits plaintiff to exercise her statutory rights. Defendant still has an opportunity to be heard and to introduce evidence in support of his case."[151]

One court considering a motion to add claims for damages under Section 1981 analyzed factors two and three in a similar fashion. The court observed the following: the conduct occurred at a time when it was considered unlawful under Section 1981; *Patterson* was decided after the conduct occurred; and the conduct was even at the time of *Patterson* unlawful under Title VII.[152] Consequently, the court determined that "the Act neither deprives defendants of a matured right nor imposes a new and unanticipated obligation," and thus could be applied retroactively.[153]

However, another court in an action involving Section 1981 and Title VII also considered factors two and three simultaneously but came to a different conclusion. This court concluded that the Act greatly expanded

[144] Joyner v. Monier Roof Tile, 58 FEP Cases at 835.

[147] *See, e.g.*, Smith v. Fulton County, 59 FEP Cases at 684 n.1; Desai v. Siemens Medical Systems, 59 FEP Cases at 147; Sussman v. Salem, Saxon and Nielsen, 59 FEP Cases at 144; Assily v. Tampa General Hospital, 59 FEP Cases at 43.

[141] Smith v. Fulton County, 59 FEP Cases at 684.

[149] *See* Smith v. Fulton County, 59 FEP Cases at 684 (quoting *Peppertree*, 942 F.2d at 1561); Long v. Carr, 58 FEP Cases at 106, (quoting *Peppertree*, 942 F.2d at 1561). *See also*, Desai v. Siemens Medical Systems, 59 FEP *Cases* at 147; Sussman v. Salem, Saxon and Nielsen, 59 FEP Cases at 145; Assily v. Tampa General Hospital 59 FEP Cases at 43; Joyner v. Monier Roof Tile, 58 FEP Cases at 835.

[130] *See* Desai v. Siemens Medical Systems, 59 FEP Cases at 146; Sussman v. Salem, Saxon and Nielsen, 59 FEP Cases at 145; Assily v. Tampa General Hospital, 59 FEP Cases at 43; Joyner v. Monier Roof Tile, 58 FEP Cases at 835.

[U1] Long v. Carr, 58 FEP Cases at 106.

[132] *See* Goldsmith v. City of Atmore, 58 FEP Cases at 713.

[155] *Id.*

potential liability under Section 1981 by creating new causes of action, "effectively altering the rights and liabilities of the contractual relationship," exposing employers to liability for conduct that was previously not unlawful, and "upsetting legitimate contract expectations."[154] The court concluded that because of the substantive changes in the law, retroactive application would result in manifest injustice.[155] The court's finding that the Act altered substantive rights under Section 1981 determined its resolution of the Title VII issues. Although the court agreed that the damages and jury trial provisions were arguably procedural, "[w]hen both substantive changes affecting antecedent rights and changes affecting only procedure or remedy are involved in the same legislation, the legislation should not be given either full or partial retroactive application," citing *Femandez-Toledo* in support.[154]

Yet another court considering a Section 1981 claim considered factors two and three together and agreed that application of the Act retroactively would constitute manifest injustice.[157] The court determined that Congress had made a substantive change in Section 1981 by creating a cause of action where none existed previously and that the 1991 Act "dramatically[1'] altered the contractual relationship between the parties by creating the cause of action, thereby allowing the plaintiff to bypass the administrative procedures under Title VII.[15]® The court refused to conclude that the 1991 Act merely clarified Section 1981, for "[t]o so hold is to find that the majority of the Supreme Court in *Patterson* was wrong-something which a district court has no authority to do."[159] As the cases discussed above illustrate, federal district courts within the Eleventh Circuit are deeply divided on the retroactivity of the 1991 Act. Neither the Eleventh Circuit nor the Supreme Court has yet to resolve the issue. However, the Supreme Court has sent cases back to the circuit courts for consideration in light of the Act.[1]®

Federal district courts within the Eleventh Circuit have even differed on the significance of such a return. In *Gersman v. Group Health Association, Inc.,*[161] the Supreme Court was presented with the decision of a circuit court that barred a plaintiff's Section 1981 claim under *Patterson.* The Supreme Court vacated and remanded the case for consideration in light of the 1991 Act.[162] One federal district court within the Eleventh Circuit interpreted that action in the following manner: This court can conceive of no reason for the

[154] Haynes v. Shoney's, 59 FEP Cases at 175.
[U3] *See id.* at 175 and tm.16 & 17.
[M] *Set id.* at 176-77.
[137] *See* Toney v. State of Alabama, 59 FEP Cases 138,142.
" *See id.* at 141
[159] *Id.* at 142 n5.
[l]® *See "Retroactivity Still at Issue"* 28 FEP NEWSLETTER BNA 29 (March 12, 1992).
_U.S. 112 S. Q. 960 (1992).
[la] *See id.*

Supreme Court to vacate and remand *Gersman* unless the Supreme Court believes, as does this court, that the Civil Rights Act of 1991 effectively eliminates the effect of *Patterson* even in cases which preceded that Act."[163] However, another federal district court, also within the Eleventh Circuit, came to a different conclusion. That court stated that the Supreme Court did not address the retroactivity question and that the mere remanding of the case did not signify the position of the Supreme Court on that question.[164]

The uncertainty has affected the way in which the federal district courts have handled the cases. One expressed a willingness to certify an interlocutory appeal.[165] One decided to submit separate verdict forms or special interrogatories to the jury to distinguish between the various forms of relief.[166] One employed an advisory jury and issued alternative non-jury findings and conclusions.[167] A couple of courts have justified their outcomes under both a *Bradley* and a *Bowen* analysis.[168]

The precedents within the Eleventh Circuit are such that it is difficult to predict which way the court of appeals will ultimately hold. As evident by the district court opinions, current precedents can be cited to support both retroactive application and prospective application. An analysis relying on *Peppertree* and L Miner would favor retroactive application, whereas an analysis relying on *Wright* and *Femandez-Toledo* would favor prospective application. The court could treat Title VII provisions and Section 1981 provisions differently and decided in favor of partial retroactivity, or could refuse to engage in a piecemeal approach. Given the complexity of the Act, and the consistent holdings by the circuits that have ruled on the issue, it is likely that the Eleventh Circuit will decline to apply the Act retroactively. Until it rules, however, the federal district courts within the Eleventh Circuit will continue to wrestle with the monster.

Watkins v. Bessemer State Technical College, 58 FEP Cases at 441-42.

[164] *See* Haynes v. Shoney's, 59 FEP Cases at 176 n.20.

[163] *See* King v. Shelby Medical Center, 58 FEP Cases at 434.

See Watkins v. Bessemer State Technical College, 58 FEP Cases at 439.

[147] *See* Langston v. Daniels, Micheals & Associates, 59 FEP Cases 56.

[‘] *See* Haynes v. Shoney’s, 59 FEP Cases 169; Maddox v. Norwood Clime, 58 FEP Cases 445.