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The Class Action Device in Title VII Civil Suits

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NOTES

THE CLASS ACTION DEVICE IN TITLE VII CIVIL SUITS

I. INTRODUCTION

The increased use of the class action device in title VII[1] civil suits reflects the burgeoning belief that no more efficient way exists to eradicate wide-spread discriminatory employment practices. Unfortunately, title VII class action litigants and the courts have often proceeded with an unawareness of the manner in which the interaction of title VII with rule 23 of the Federal Rules of Civil Procedure[2] can alter the normal course of a title VII suit. This note seeks to provide a general survey of some of the more common procedural problems which arise in title VII class actions. However, before that task may be undertaken, it is first necessary to discern the substantive policies underlying the use of class actions in title VII litigation. This can best be achieved by tracing the evolution of title VII enforcement procedures up to their inclusion of the class action device.

II. THE EVOLUTION OF CLASS ACTION PROCEDURES IN THE STATUTORY ENFORCEMENT SCHEME

The enactment of title VII of the Civil Rights Act of 1964[3] represented a strong congressional policy to eliminate specific types of discriminatory employment practices which had long plagued employees in the private sector.[4] With the amendment

1. 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. II 1972).

2. FED. R. CIV. P. 23. This rule sets forth the prerequisites a plaintiff must establish to the court's satisfaction before he will be allowed to conduct his action as a class action. In addition, the rule sets forth the types of class actions which may be maintained and the criteria which a court is to apply in determining which type of class action, if any, is before it. Other provisions deal with the conduct of the action, the powers of the court to certify that a class action is appropriate, the powers of the court to direct the course of the action, and the effect that a class action judgment will have on the class members.

3. 78 Stat. 253-66 (1964) (current version at 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. II 1972)).

4. The report of the House of Representatives which accompanied the Civil Rights Act contained a brief statement of the purpose behind title VII: "The purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, dis-

of that title in 1972 by the Equal Employment Opportunity Act,[5] the coverage of title VII was completed by Congress' setting forth specific proscriptions against discriminatory employment practices by state and local governments[5.1] and by the federal government.[6] In addition, those amendments sought to remove certain

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crimination in employment based on race, color, religion, or national origin." H. R. REP. No. 914, 88th Cong., 1st Sess. 26, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2401.

This same legislative history noted, however, that the degree of success which the Civil Rights Act might obtain in its mammoth undertaking to eliminate much of the discrimination plaguing American society in 1964 would be limited to some extent. Nevertheless, the House Report noted that the legislative effort was necessary and not entirely without merit:

> No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.
>
> It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination. This [the bill] would achieve in a number of related areas. . . . H.R. 7152, as amended, is a constitutional and desirable means of dealing with the injustices and humiliations of racial and other discrimination. It is a reasonable and responsible bill whose provisions are designed effectively to meet an urgent and most serious national problem.

H.R. REP. NO. 914, 88th Cong., 1st Sess. 18, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2393-94.

Similarly, it has been noted that antidiscrimination legislation in the employment opportunity context is also limited in the role it can play in uplifting disadvantaged minorities to an improved socio-economic status. *See* Cooksey, *The Role of Law in Equal Employment Opportunity,* 7 B.C. INDUS. & COM. L. REV. 417, 418 (1966). The general consensus of the commentators, however, has been that any effort to eliminate the impact of discrimination on the socio-economic status of the historically disadvantaged would have been incomplete if no attention had been given to the need for equal employment opportunity. As cogently explained by one commentator:

> In constructing the hierarchy of important matters in the Great Society, equal employment is not only near the top, but many will urge nothing is more important. It will be of little avail to a Negro to have the right to enter a restaurant if he cannot afford to pay for the meal; and the right to stay at a fine hotel or sit in a theatre are [*sic*] of no importance to a man without money. . . . While not deprecating the importance of education, nevertheless, unless that education helps the underprivileged achieve a better economic position, there is almost a cruel quality in giving an education which spreads false dreams.

Rachlin, *Title VII: Limitations and Qualifications,* 7 B.C. INDUS. & COM. L. REV. 473, 473 (1966).

5. Equal Employment Opportunity Act of 1972, 86 Stat. 103-13 (current version at 42 U.S.C. § 2000e to 2000e-17 (Supp. II 1972)).

5.1. *See* Equal Employment Opportunity Act of 1972 § 701(a), 42 U.S.C. § 2000e(a) (Supp. II 1972).

6. *See* Equal Employment Opportunity Act of 1972 § 717, 42 U.S.C. § 2000e-16 (Supp. II 1972). This provision was primarily a reaction to what Congress perceived to be an unsatisfactory record by the federal government in resolving its equal employment

deficiencies which had become apparent in the procedures for enforcing the title.[7]

Under the original provisions which set forth the means of enforcing title VII's proscriptions against employment discrimination, it was contemplated that the emphasis would be on "private settlement and the elimination of unfair practices without litigation."[8] Congress sought to implement this purpose by establishing the Equal Employment Opportunity Commission[9] (hereinafter EEOC) and by empowering it to conduct investigations and seek conciliation pursuant to a charge filed with it by an aggrieved party.[10] While this process was not without features which rendered it attractive to the parties concerned, weaknesses

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opportunity problems. *See generally* H.R. REP. No. 92-238, 92d Cong., 1st Sess. 23 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2158. The root causes of this unsatisfactory record were determined to be the lack of a uniform enforcement process and, more specifically, the existing difficulties in obtaining an impartial forum in federal district court due to the oft asserted defense of sovereign immunity. These were the shortcomings which Congress sought to correct. *See id., reprinted in* [1972] U.S.C. CODE CONG. & AD. NEWS at 2158; Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,* 40 GEO. WASH. L. REV. 824, 853-57 (1972).

7. For a discussion of the specific changes proposed and eventually adopted, see Sape & Hart, note 6 *supra.* Congress apparently was concerned that gaps in the enforcement mechanisms of title VII as originally enacted had rendered the title less than effective. Exemplary of this dissatisfaction with the effectiveness of the original act were statements contained in the House Education and Labor Committee report which accompanied the House version of the 1972 amendments [H.R. 1746]:

> Despite the commitment of Congress to the goal of equal employment opportunity for all our citizens, the machinery created by the Civil Rights Act of 1964 is not adequate.
>
> Despite the progress which has been made since passage of the Civil Rights Act of 1964, discrimination against minorities and women continues. The persistence of discrimination, and its detrimental effects require a reaffirmation of our national policy of equal opportunity in employment.

H.R. REP. No. 92-238, 92d Cong., 1st Sess. 3 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2139.

8. Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968). Similarly, it was noted in Jenkins v. United Gas Corp., 400 F.2d 28, 30 (5th Cir. 1968) that title VII's emphasis was on "voluntary conference, persuasion, and conciliation as the principal tools of enforcement."

9. *See* 42 U.S.C. § 2000e-4 (1970) (current version at 42 U.S.C. § 2000e-4(a) (Supp. II 1972)).

10. *See* Title VII of the Civil Rights Act of 1964 § 706(a), 78 Stat. 259 (1964), *as amended by* 42 U.S.C. § 2000e-4(b) (Supp. II 1972). Under that section, the EEOC was required to notify the charged party upon its receipt of a properly executed charge. The Commission would conduct an investigation pursuant to that charge and make a finding of reasonable cause or no reasonable cause to believe the charge was true. If it determined that reasonable cause existed to believe the charge, the Commission would then "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." *Id.*

inherent in its voluntary nature proved it to be inadequate to ensure equal employment opportunity.[11] Congress apparently had anticipated this to some extent since it included a provision in the original title for private suits in federal district court in those instances where conciliation proved fruitless.[12] The availability of a civil suit in federal district court was contingent, however, upon the complainant's exhausting the conciliation processes. This meant that a complainant must have filed a charge with the EEOC and the Commission must have been unable, despite conciliation, to obtain satisfactory results from the charged party.[13] Once the charge was filed and conciliation was not forthcoming or the charge was dismissed by the EEOC, the aggrieved party was entitled, upon receiving notice of his right to sue from the Commission, to file a civil action within the statutory time limit.[14]

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11. For a detailed analysis of the EEOC's inability to obtain conciliation under the original title, see *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1200 & n.39 (1971)[hereinafter cited as *Developments*].

12. *See* Title VII of the Civil Rights Act of 1964 § 706(e), 78 Stat. 260 (1964), *as amended by* 42 U.S.C. § 2000e-5(f) (Supp. II 1972). This was not the only civil action authorized by title VII's original provisons, nor was the aggrieved party the only party allowed to conduct such an action. Under § 706(e), the Attorney General was permitted to intervene in an aggrieved party's civil action upon certifying that the action was one of general public importance. In addition, § 707(a) of the 1964 Act authorized the Attorney General to file a suit in federal district court when he had reasonable cause to believe that a person or persons were engaging in a "pattern or practice" of discriminatory conduct in violation of the title. *See* 42 U.S.C. § 2000e-6(a) (1970), *as amended by* 42 U.S.C. § 2000e-6 (Supp. II 1972).

13. *See* Stebbins v. Nationwide Mut. Ins. Co., 382 F.2d 267 (4th Cir. 1967) (affirming district court's grant of summary judgment to defendant in case where plaintiff sought to file his civil suit without first exhausting EEOC procedures). The nature of these jurisdictional prerequisites has been the subject of much litigation. While a detailed discussion of those cases is beyond the scope of this note, the following quotation from a leading work in this field is illuminating as to the purpose of these requirements and their treatment by the courts:

> The various jurisdictional prerequisites to suit are designed to allow the EEOC to perform its conciliatory function. Although conciliation inevitably delays prompt judicial vindication of Title VII rights, Congress apparently decided that the objectives of the Act could best be served by giving the informal measures of conciliation and persuasion a chance to work. But since at least some of the jurisdictional requirements formulated in deference to conciliation are not unambiguously declared in the Act, courts are often free to determine for themselves whether conciliation is really serving the ends intended for it, and thus to give the conciliation policy as much force as experience warrants.

Developments 1199-1200.

14. *See* Title VII of the Civil Rights Act of 1964 § 706(e), 78 Stat. 260 (1964) (current version at 42 U.S.C. § 2000e-5(f)(1) (Supp. II 1972)).

The procedures set forth above in elementary form were basically retained by the 1972 amendments, although with certain significant alterations.[15] Most important, Congress provided the EEOC with the power to sue in federal district court if the Commission had determined with regard to a charge before it that reasonable cause existed to believe a violation had occurred and it had unsuccessfully sought conciliation from the charged party.[16] This extension of the power to sue to the EEOC was occasioned by Congress' realization that the reliance on civil suits by private individuals to augment the conciliation process was misplaced since most discriminatees "are largely unable or unwilling to effectively prosecute their claims, in the absence of a strong helper."[17] In addition, by allowing the EEOC to sue a charged party once conciliation had failed, Congress sought to provide the EEOC with the muscle which the Commission formerly lacked under the 1964 Act.[18] Conciliation was thereby made a much more attractive alternative to a charged party inasmuch as it was now apparent that obstinancy in the conciliation process would lead only to the rigors of defending a civil suit brought either by the EEOC or by the aggrieved individual in federal district court.

By the language of the title, these rather complex enforcement procedures seemed to focus on remedying only that discrimination which had been practiced against the aggrieved individuals invoking the processes.[19] In this regard, the processes appeared

15. Most of the changes made concerned parties able to sue in federal district court and the extension of various statutory time limits. The exact changes made by the 1972 amendments are detailed in the Conference Reports presented to both houses of Congress. *See* 118 CONG. REC. 7166-69 & 7563-67 (1972). *See also* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,* 40 GEO. WASH. L. REV. 824 (1972), in which the authors detail the history of the 1972 amendments and explain the changes rendered by the amendments' enactment.

16. *See* 42 U.S.C. § 2000e-5(f)(1) (Supp. II 1972). The EEOC was also given the authority to intervene in cases of "general public importance," a power which had formerly resided in the Attorney General. *See id.* The amendments further made provision for the transfer of the Attorney General's authority to bring suit in "pattern or practice" situations to EEOC, effective two years from the date of enactment. *See* 42 U.S.C. § 2000e-6(c) (Supp. II 1972).

17. G. GINSBURG, CASES AND MATERIALS ON EQUAL EMPLOYMENT 258 (3d ed. 1976).

18. *Id.*

19. A prime example can be found in the private civil action provided for under both the original version and amended versions of the title. *See* title VII of the Civil Rights Act of 1964 § 706(e), 78 Stat. 260 (1964) (current version at 42 U.S.C. § 2000e-5(f)(1) (Supp. II 1972)). Such a suit is made available only to the person or persons aggrieved who filed a charge with the EEOC or on whose behalf the EEOC filed a charge.

to be misdirected. Rarely would a charge brought or a complaint filed focus only on an alleged individual incident. On the contrary, the allegations brought were, by and large, directed at a general policy of discrimination, of which the complainant's situation was but a single manifestation.[20] This was to be expected, given the nature of that discrimination which title VII proscribes. Title VII's prohibitions are not concerned with discriminatory treatment based on characteristics peculiar to individuals. Rather, those prohibitions are directed against discriminatory treatment based on characteristics such as race, sex, national origin and religion which are found in classes of people. The courts and the EEOC recognized this, and title VII discrimination was described accordingly as being class discrimination by its very nature.[21]

While Congress made provision under § 2000e-6 for a broader attack against discriminatory employment practices through pattern or practice suits brought by the Attorney General and later by the EEOC, that procedure proved somewhat less than successful in extending the protections of the title beyond a limited number of individuals. The problems underlying the ineffectiveness of this procedure have been summarized as follows:

> The reluctance of the Justice Department to commence pattern or practice suits and its failure to seek affirmative relief in those which were brought in the years following passage of the 1964 Act precluded the effective utilization of that procedure to productive affirmative relief to large numbers of discriminatees.

Comment, *Back Pay in Class Actions and Pattern or Practice Suits Under Title VII of the Civil Rights Act of 1964,* 23 EMORY L.J. 163, 166 (1974).

20. *See, e.g.*, Johnson v. Georgia Highway Express, 417 F.2d 1122, 1123 (5th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28, 31 & n.5 (5th Cir. 1968).

21. *E.g.*, Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968); Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966); *Developments* 1218-19; Comment, *Employment Opportunity: Class Membership for Title VII Action not Restricted to Parties Previously Filing Charges with EEOC,* 1968 DUKE L.J. 1000, 1003; Comment, *Back Pay in Class Actions and Pattern or Practice Suits Under Title VII of the Civil Rights Act of 1964,* 23 EMORY L.J. 163, 166 (1974).

The discussion of the *Hall* court with regard to the nature of race discrimination has often been cited by courts and authorities dealing with this point. It is worth relating again here:

> Racial discrimination is by definition a class discrimination. If it exists, it applies throughout the class. This does not mean, however, that the effects of the discrimination will always be felt equally by all the members of the racial class. For example, if an employer's racially discriminatory preferences are merely one of several factors which enter into employment decision, the unlawful preferences may or may not be controlling in regard to the hiring or promotion of a particular member of the racial class. But although the actual effects of a discriminatory policy may thus vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class.

251 F. Supp. at 186. This same analysis is applicable also to the other forms of discrimination which title VII prohibits.

Since the orientation of the title's prohibitions was obviously against class discrimination, those charged with enforcing the title were required to disregard any literal reading of the statute and to take, instead, a perspective which looked beyond individual manifestations of discrimination.[22] Thus, their remedial efforts were focused on eliminating general policies of class discrimination which were the real causes of an aggrieved person's or persons' injuries. One need only look to the practices of the EEOC in investigating charges of discrimination,[23] or to the concomitant tendency of the EEOC to expand charges beyond their original scope to encompass the charged party's conduct toward a class,[24] to find examples of the broad remedial perspective taken by the EEOC in enforcing the title.

In a manner consistent with the EEOC's efforts, the courts made available means by which the statutorily authorized civil suit could be broadened to effectuate in the best possible way the policies of the title. Recognizing that private civil suits under title VII were inherently affected with the public interest in eliminating employment discrimination and that a private litigant in such suits by necessity represented interest beyond his own, given the class-wide nature of title VII discrimination, the courts engrafted the class action device onto the enforcement provisions of title

22. The court in *Hall* recognized the problem as follows:

> [There is a] dichotomy in the philosophy underlying the enforcement provisions of Title VII: emphasis is placed primarily on protection of persons subject to discrimination rather than on protection of the public interest, but for the protection of persons subject to discrimination, Congress apparently envisioned a rather broad scope of relief similar to that which would be necessary for the protection of the public interest.

Hall v. Werthan Bag Corp., 251 F. Supp. 184, 187 (M.D. Tenn. 1966).

23. The investigations of the EEOC are generally limited only by the admonition that the EEOC not engage in "fishing expeditions." This can be interpreted as meaning that the evidence which the EEOC seeks in an investigation must at least be related to some charge before it, or in other words, that the evidence be of a nature that will assist the EEOC in conducting its investigation. *See* Motorola, Inc. v. McLain, 484 F.2d 1339, 1342-43 (7th Cir. 1973).

24. This expansion of charges by the EEOC should be read as flowing from the Commission's authority to investigate those matters reasonably related to the specific allegations raised in the charge. EEOC v. General Elec. Co., 532 F.2d 359 (4th Cir. 1976). However, a more specific justification may be seen in the following:

> [The] expansion of charges is not attributable to any Commission policy of avoiding narrow complaints as such. The idea, as the Commission views it, is to deal with the "underlying causes" of alleged discrimination rather than to confine itself to resolution of the one particular complaint.

Gardner, *The Development of the Meaning of Title VII of the Civil Rights Act of 1964*, 23 ALA. L. REV. 451, 472 (1971).

VII.[25] Under this procedure, an aggrieved party who had exhausted his remedies before the EEOC could timely file a civil action seeking relief on behalf of himself and all others "similarly situated."[26]

With the enactment of the 1972 amendments to title VII,[27] the availability of the class action device to title VII litigants became firmly established. Although no specific statutory treatment was accorded to class actions,[28] the legislative history contains specific language expressing the intent of Congress that courts sitting in title VII civil actions should continue to provide liberal access to the class action device. Significant are the statements by Senator Harrison Williams, a principal author of the 1972 amendments, in his section-by-section analysis of the bill as reported from the Conference Committee and subsequently enacted into law:

> In establishing the enforcement provisions under this subsection and subsection 706(f) [42 U.S.C. § 2000e-5(f)] generally, it is not intended that any of the provisions contained therein shall affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that many Title VII claims are necessarily

25. *Developments* 1218-19. As noted before, the court in Hall v. Werthan Bag Corp., 251 F. Supp. 184, 187 (M.D. Tenn. 1966) characterized the enforcement provisions of title VII as containing an apparent dichotomy since the emphasis of those provisions is on protecting aggrieved persons and the apparent intent of Congress was that relief be broad in order to protect the public interest. *See* note 22 *supra.* In resolving this problem, the court concluded that "[a] privately instituted class action is unique in its adaptability to Title VII's split personality." 251 F. Supp. at 187.

26. Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968). Participation in the class action, however, is not restricted to those who have filed with the EEOC. It is enough that one member of the class has exhausted the remedies at that level and that the issues raised by the class action are reasonably related to those which the filing member raised before the EEOC. *Id.* at 499. This applies even though the relief sought by the class action is "make whole" in nature, such as back pay. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975). *See also* notes 86-92 and accompanying text *infra.*

27. *See* notes 5-7 & 15-18 and accompanying text *supra.*

28. The House bill [H.R. 1746], as passed, contained an amendment which specifically pertained to class actions but which was eventually rejected by the Conference Committee. *See* note 92 and accompanying text *infra.*

> class action complaints and that, accordingly, it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief.[29]

This statement constituted, in effect, a congressional ratification of the judicially developed viewpoint which had long before recognized the efficacy of the class action device in title VII litigation.[30]

Although the propriety of the class action device has been secured in title VII litigation, the availability of that device to a title VII litigant is dependent on procedural requirements which must be read in conjunction with the requirements and policies of title VII. Thus, before a prospective class representative will be allowed to prosecute his title VII civil action as a class action, he must first satisfy the court not only that he has fulfilled the jurisdictional prerequisites under title VII,[31] but also that his action is procedurally correct under rule 23 of the Federal Rules of Civil Procedure.[32] This is not a burden to be taken lightly since the class representative will be usually required to demonstrate affirmatively those facts needed to satisfy the standards of rule 23. It is not sufficient for him to make conclusory pleadings along the guidelines of that rule.[33] It should, therefore, be understood that even though the predominant approach has been to read the rule liberally in favor of allowing a complainant's action to proceed as a class action,[34] it is still necessary that the class repre-

29. 118 CONG. REC. 7168 (1972).

30. It is interesting to note that the approach to class actions which Senator Williams endorsed in his section-by-section analysis had been developed under a remedial scheme which had placed primary responsibility for the conduct of a civil action with the individual complainant. *See, e.g.*, Title VII of the Civil Rights Act of 1964 § 706(e), 78 Stat. 260 (1964) (current version at 42 U.S.C. § 2000e-5(f)(1) (Supp. II 1972)); Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968); Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184 (E.D. La. 1968); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966).The language of the conference report indicates, however, that the obvious intent of Congress was that the "liberal reading of class actions . . . [should] be continued, even though the litigation [might] be conducted by the government [EEOC] rather than individual plaintiffs." Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 877 (1972).

31. *See* notes 39-41 and accompanying text *infra.*

32. *See, e.g.*, Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968); Doctor v. Seaboard Coast Line R.R., 13 FEP Cases 133 (M.D.N.C. 1974); 2 A. LARSON, EMPLOYMENT DISCRIMINATION § 49.52, at 10-84 (1975) [hereinafter cited as LARSON]; Miller, *Class Actions and Employment Discrimination Under Title VII of the Civil Rights Act of 1964*, 43 MISS. L.J. 275, 278 (1972).

33. *See* Doctor v. Seaboard Coast Line R.R., 13 FEP Cases 133, 134 (M.D.N.C. 1974).

34. Rodriguez v. East Tex. Motor Freight, 505 F.2d 40, 50 (5th Cir. 1974); United States v. Terminal Transp. Co., 13 FEP Cases 1284, 1290 (N.D. Ga. 1976).

sentative carefully present his case in order to avoid difficulties.[35] The remainder of this note will discuss some of the more common issues which arise in title VII class actions.

III. THE CLASS REPRESENTATIVE AND THE SCOPE OF THE ACTION WHICH HE MAY BRING

It has been suggested previously in this note that the class action device was judicially engrafted onto the enforcement provisions of title VII as a means of enhancing the efficiency of title VII civil actions in eliminating general policies of discrimination.[36] Questions remained, however, concerning who was qualified to bring such an action and what scope the action brought should be permitted to take. By and large, the courts have shown great liberality in resolving these questions, and this tendency has, in turn, affected the manner in which the requirements of rule 23 have been applied to title VII class actions.[37]

A. The Class Representative

Upon filing a proper civil action contesting discriminatory employment practices, the title VII complainant is usually accorded a special status by the courts.[38] To the extent that the title VII plaintiff is important to the enforcement of the title, the complainant's status is further enhanced when he files his title

35. *See* 2 LARSON § 49.51, at 10-80:

> [N]o question or issue is as simple as it may seem in isolation, for in Title VII class actions, as nowhere else, the requirements of Rule 23 and Title VII interact to create a flexible but sensitive judicial apparatus wherein any one statement of an issue, determination of class size or composition, or fulfillment of a necessary prerequisite may depend upon or in turn affect a second factor.

36. *See* text accompanying notes 25 & 26 *supra.*

37. *See* 2 LARSON §§ 49.51-.52 (1976).

38. Complainants filing civil suits under title VII frequently have been referred to as "private attorneys general." *See* Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968). That characterizaton has general applicability to all plaintiffs suing under antidiscrimination legislation. Its origin may be traced to the following discussion by the Supreme Court concerning the nature of suits brought under title II of the Civil Rights Act of 1964:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone, but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.

Newman v. Piggie Park Enterprises, 390 U.S. 400, 401-02 (1967) (citations omitted).

VII suit in the form of a class action. This does not mean, however, that an employee with frivolous or nonexistent claims may champion the cause of his peers by filing a class action. Rather, an employee bringing a title VII class action, as any other person filing suit in federal district court, must establish his right to be there.

1. Plaintiff's standing to represent the class. — The named plaintiff's standing to represent the class hinges on two requirements. First, the class representative must establish that he has fulfilled the jurisdictional prerequisites to a civil suit by showing that he filed a proper charge and exhausted his administrative remedies.[39] This requirement applies even though the courts have held generally that participation in a title VII class action is not restricted to those who have filed with the EEOC.[40] Should the named plaintiff fail to fulfill this requirement, sufficient grounds will exist for the court to dismiss the class action since the court will be without jurisdiction over the class representative.[41]

Second, the class representative must be able to demonstrate his standing to invoke the federal judicial power. To do this, the representative's individual claims must present a case or controversy within the meaning of article III, section 2 of the United States Constitution.[41.1] The class representative's "minimal requirement . . . is that he or she must [have been] personally aggrieved by the discrimination."[42] This requirement remains a

39. *See* notes 13 & 14 and accompanying text *supra.*

40. *See* note 26 *supra.*

41. *Cf.* Dartt v. Shell Oil Co., 10 FEP Cases 844, 850-51 (N.D. Okla. 1975) (plaintiff who failed to comply with jurisdictional requirements of Age Discrimination in Employment Act, 29 U.S.C. § 626(d) (1970), had no standing to sue on her own behalf and therefore was precluded from maintaining an action on behalf of a class of persons with like claims under the Act). *See generally* note 13 and accompanying text *supra.* Similarly, where the class includes persons who would have been unable to file on their own behalf because of the running of the statutory time limit as to their claims, the class will be restricted to those members capable of filing at the time the action was brought. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 246 (3d Cir. 1975), *vacated on other grounds,* 424 U.S. 737 (1976); Muller v. Curtis Publishing Co., 57 F.R.D. 532, 535-36 (E.D. Pa. 1973); Hecht v. Cooperative for Am. Relief Everywhere, Inc., 351 F. Supp. 305, 310 (S.D.N.Y. 1972). This latter situation, however, should be distinguished from those instances in which members of the class (other than the class representative) have not exhausted the available administrative remedies but are not yet precluded from proceeding against the employer by the statutory time limit. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d at 246.

41.1. U.S. CONST. art. 3, § 2; *see, e.g.,* Muskrat v. United States, 219 U.S. 346, 356-57 (1911).

42. 2 LARSON § 49.51, at 10-81. For a thorough discussion of how standing requirements are to be applied to title VII class action plaintiffs, see Senter v. General Motors Corp., 532 F.2d 511, 516-20 (6th Cir. 1976).

very real one even though the courts have generally applied the requirement in an undemanding fashion.[43] Where the class representative is unable to show that he is "a person claiming to be aggrieved"[44] within the meaning of the title, he will not be allowed to represent the class and the class action will be dismissed,[45] regardless of any liberal tendency to view the requirement as satisfied.

2. The continuation of the class action when the class representative's individual claim is mooted or dismissed before trial. — Once the class representative has established that, at the time of his instituting the action, he is a person claiming to be aggrieved, he may proceed to conduct his suit as a class action, provided the case has been certified as appropriate for class action treatment by the court pursuant to rule 23(c)(1).[46] Difficult problems arise, however, where the class representative's justifiable individual claims are mooted or dismissed at any time before a determination on the merits.[47] Those problems may be capsulized under two basic points of inquiry that a court confronted with such a situation must resolve. First, the court must decide whether or not the class aspects of the plaintiff's suit should be allowed to continue. Second, if the court does decide to allow the class aspects of the case to continue, the court must then decide whether or not the original class representative should be allowed to continue in his representative capacity.[48]

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43. The liberal tendency of the courts in seeing this requirement as met by title VII plaintiffs is demonstrated by the following analysis contained in a Third Circuit opinion:

> The national public policy reflected . . . in Title VII of the Civil Rights Act of 1964 . . . may not be frustrated by the development of overly technical judicial doctrines of standing or election of remedies. If the plaintiff is sufficiently aggrieved so that he claims enough injury in fact to present a genuine case or controversy in the Article III sense, then he should have standing to sue in his own right and as a class representative.

Hackett v. McGuire Bros., Inc., 445 F.2d 443, 446-47 (3d Cir. 1971). It seems apparent from the *Hackett* court's analysis that much of this liberal attitude is grounded in judicial deference to the strong public interest in eliminating employment discrimination which underlies title VII.

44. 42 U.S.C. § 2000e-5(f)(1) (Supp. II 1972).

45. Causey v. Ford Motor Co., 8 FEP Cases 353 (M.D. Fla. 1974); Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573, 599 [hereinafter cited as 1974 DUKE Comment].

46. FED. R. CIV. P. 23(c)(1) provides as follows: "As soon as practicable after the commencement of the action, the court shall determine by order whether it is to be so maintained."

47. This encompasses the mooting or dismissing of a justiciable claim on either factual or legal grounds. 1974 DUKE Comment 579.

48. *Id.* at 575. These questions

An assessment of the propriety of allowing the class aspects of the representative's action to continue is integrally related to a determination of the point in the proceedings when the class aspects of the action have attained an independent existence apart from the representative's personal claims.[49] The most obvious approach is to view such an existence as attained once the class action is certified by the court under rule 23(c)(1) and at no other point in time.[50] There are, however, situations where a rigid application of this general rule of thumb for determining the propriety of class continuation would be inappropriate. These instances arise whenever the policies favoring class actions under title VII dictate that the class aspects of the action be allowed to continue.

The first such instance exists whenever dismissal of the class aspects of the action would be likely to result in the claims of the class never being adjudicated.[51] Such a situation would exist, for

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usually [arise] when only one named plaintiff is involved. If other representative plaintiffs remain before the court, then, regardless of the dismissal of one of them, the ability of the remaining representatives to continue representing the class action is unimpaired.

Id. at 575 n.8.

49. *Id.* at 582-83; *see* Franks v. Bowman Transp. Co., 424 U.S. 747, 755-57 (1976) (although the sole named representative's claim was dismissed, an independent adversary relationship existed between the class and the defendant sufficient to sustain the suit as a live controversy).

50. This reliance solely on the granting of a motion to certify as the point at which the class aspects of a case acquire an independent existence has been defended as follows:

> Both the assertion that the plaintiffs' rights to a 23(c)(1) determination are unconditional and the related view that an action in favor of the class may, merely on the basis of the pleadings, be presumed to exist prior to the certification of that action are deficient . . . . [F]or the court to continue the proceeding on behalf of an unrecognized class of plaintiffs beyond the named plaintiff's loss of his individual cause of action usually would violate the case or controversy requirement of article III of the Constitution. During the period between filing and certification, a class action is supported solely by the pleadings, which may or may not have a foundation in fact compatible with the requirements of rule 23(a) and (b). Since this class has not yet been found to exist by the court, it is merely thought or assumed to exist hypothetically for the limited purpose of enabling the plaintiff to prove its actual existence. If, subsequent to filing the action, the plaintiff's cause of action is lost, there is no longer any actual party before the court with a claim against the defendant. The representative no longer has a claim, and the class, since it has not yet been actually recognized, cannot yet support an action before the court . . . . Accordingly, if a class representative loses his personal cause of action prior to the entry of a court order for certification, the court would appear to be barred . . . from further entertaining the class action.

1974 DUKE Comment 596-97.

51. *Id.* at 599-600.

example, when a defendant attempts to avoid class litigation by giving the individual representative everything he wants, thereby mooting the representative's personal cause of action. Since it is clear that the defendant could continually avoid class litigation in this manner, the courts usually balance the equities against a strict application of the case or controversy requirement and allow the class aspects of the case to continue.[52] The importance of this exception is obvious in the title VII context.[53]

The second instance in which an exception to the general rule is warranted arises when the absence of certification is due to the court's failure to heed its mandate under rule 23(c)(1).[54] The federal rules require that certification issue "as soon as practicable after the commencement of [the] action."[55] This mandate does not contemplate inquiries into the merits of either the class representative's individual claims or the claims raised on behalf of the class.[56] Thus, a court which delays certification pending extensive hearings on the merits should not be permitted to disallow continuation of the class aspects of the case when the representative's personal claims are dismissed or mooted prior to issuance of the certification order.[57]

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52. *See* Jenkins v. United Gas Corp., 400 F.2d 28, 32-33 (5th Cir. 1968); 1974 DUKE Comment 599-600.

53. In Jenkins v. United Gas Corp., the Fifth Circuit characterized the situation in the following manner:

> With so much riding on the claim of the private suitor, the possibility that in this David-Goliath confrontation economic pressures will be at work toward acceptance of preferred post-suit jobs and the equal possibility that an employer would devise such a resist-and-withdraw tactic as a means of continuing its former way calls for the trial court to keep consciously aware of time-tested principles paticularly in the area of public law. Such actions in the face of litigation are equivocal in purpose, motive and permanence.

400 F.2d 28, 33 (5th Cir. 1968).

54. *See* 1974 DUKE Comment 600-01.

55. FED. R. CIV. P. 23(c)(1).

56. In a landmark decision concerning class action procedure, the Supreme Court stated the following:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action . . . . This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such "as soon as practicable after the commencement of [the] action . . . ."

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974). A similar holding had been reached previously in the context of a title VII class action. *See* Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. 1973).

57. *See* 1974 DUKE Comment 601. This is, in essence, a form of estoppel invoked against the court.

A third such instance, and the most significant one in the context of title VII class actions, arises when the class representative's action would perforce involve the assertion of interests beyond his own. The dismissal or mooting of the representative's individual claims in this situation should not affect the viability of the class aspects of the case, whether or not certification has occurred prior thereto.[58] Given the courts' almost unanimous characterization of title VII discrimination as inherently class discrimination,[59] it seems entirely proper that the independent existence of the class should be recognized from the very beginning of the action.[60] It has thus been held that the continuing interests of the class members in a title VII class action will present that concrete adverseness necessary to satisfy case or controversy requirements on behalf of the class, whether or not the representative himself is still asserting viable personal claims.[61]

Once a court has determined that the class aspects of the case may properly continue despite dismissal or mooting of the class representative's individual claims, it must then assess whether or not the class representative should be allowed to continue his representation on behalf of the class.[62] In making this assessment, the court should apply the criteria of rule 23(a)(4).[63] Thus, before the court permits the class representative to continue in his representation of the absent class members, he should be required to show that he has a continuing ability to represent the class interests in a fair and adequate manner.[64] Even if the

58. *See id., citing* Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968).

59. *See* note 21 and accompanying text *supra.*

60. *See* 1974 DUKE Comment 601 n.121.

61. Franks v. Bowman Transp. Co., 424 U.S. 747, 755-57 (1976); *see* Jenkins v. United Gas Corp., 400 F.2d 28, 32-33 (5th Cir. 1968).

62. *See* 1974 DUKE Comment 592.

63. The representativity requirement contained in rule 23(a)(4) requires that a class representative be able to protect the interests of the class in a fair and adequate manner. FED. R. CIV. P. 23(a)(4). *See also* text accompanying notes 125-38 *infra.*

64. *See* 1974 DUKE Comment 598. This approach, however, has not been followed uniformly. Of particular interest here is the tendency of courts confronted with this question in a title VII class action suit to neglect to evaluate the status of the class representative as of the time his personal claims were dismissed. The general approach taken in title VII cases has been that if the class representative satisfied the representativity requirement at the time the action was commenced, then the dismissal of his individual claims will have no affect on his status as the class representative. Thus in Moss v. Lane Co., the Fourth Circuit stated:

> If the plaintiff [class representative] were a member of the class at the commencement of the action and his competency as a representative of the class then determined or assumed, the subsequent dismissal or mootness of his indi-

court determines that the class representative is capable of providing continued fair and adequate representation at the time his individual claims are dismissed, the interests of the absent class members dictate that the inquiry not cease at that point in time. Rather, the court should undertake a constant reevaluation of the plaintiff's representative status in order to ensure that subsequent events do not affect adversely the plaintiff's capacity to supply adequate representation.[65] Only in this manner can the interests of the absent class members be safeguarded adequately.

B. The Scope of the Action Which a Class Representative May Bring

Probably no more significant determination is made in a title VII class action than the determination of the scope of the action. No other determination has as significant a bearing on the application of rule 23 standards to a title VII class action. Nevertheless, the courts have shown great liberality in making this determination, often to the detriment of absent class members and defendants alike. The following discussion presents an overview of the manner in which this determination of scope is usually made.

1. The breadth of the action. — The courts have generally circumscribed the breadth of title VII class actions only by the requirement that the allegations contained in the class representative's complaint be reasonably related to those which he raised before the EEOC.[66] Apart from that minor limitation, the courts

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vidual claim, particularly in a discrimination case, will not operate as a dismissal or render moot the action of the class, or destroy the plaintiff's right to litigate the issues on behalf of the class.

471 F.2d 853, 855 (4th Cir. 1973). This approach might well be explained by the characterization of a title VII plaintiff as a private attorney general, representing interests which go beyond his own. *See* note 38 *supra*. Yet another reason for this approach may be that the courts desire to give great leeway to those willing to prosecute title VII class actions in order to further the national policy of eradicating widespread discrimination.

Each of these justifications, however, seems lacking. The important point to remember, and that seemingly overlooked by the courts, is that without the assurance that the class is receiving continuing, effective representation, the possibility exists that the absent class members will be denied their day in court. *See also* note 127 and accompanying text *infra*.

65. 1974 DUKE Comment 602 n.122; *see* Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 533 (W.D. La. 1976) (holding that unless adequate representation is present at every stage of the case, the court will be powerless to bind the absent class members consistent with due process).

66. Jackson v. Cutter Labs., Inc., 338 F. Supp. 882, 886 (E.D. Tenn. 1970); *see* Gard-

have permitted class representatives to sue on behalf of broadly defined classes almost as a matter of course.[67] The only criterion normally required to be met in framing the class is that the class be defined to the extent that some point of reference exists by which membership in the class can be tested.[68] However, that requirement need not be met with such specificity that each potential member in the class may be ascertained in the initial stages of the suit.[69]

Recognizing this liberal attitude, a title VII class action plaintiff will frequently frame his suit as an "across the board" attack on a defendant's discriminatory employment practices.[70]

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ner, *The Development of the Meaning of Title VII of the Civil Rights Act of 1964*, 23 ALA. L. REV. 451, 519-20 (1971); *Developments* 1221.

67. *See, e.g.*, Dickerson v. United States Steel Corp., 64 F.R.D. 351, 353 (E.D. Pa. 1974) (defining class as "all blacks now employed or who might be employed in the future by [the defendant-company] . . .; all blacks who were employed by the [defendant-company] . . . [as of the effective date of title VII] but who are no longer employed there; all blacks who unsuccessfully sought employment with the [defendant] . . . at any time between [the effective date of title VII and the granting of the court's order] . . ." and "all blacks who are represented or who might be represented in the future by defendant labor organization . . . [or] who were represented by defendant labor organization . . . from [the effective date of title VII to the date of the court's order] . . . ."); Sanders v. Shell Oil Co., 10 FEP Cases 941, 942 (E.D. La. 1974) (defining class as all black or female applicants, employees and former employees of defendant from 1966 to date of court's final order in the case); Comment, *The Class Action and Title VII—An Overview*, 10 U. RICH. L. REV. 325, 328 (1976) [hereinafter cited as *Overview*]. *But cf.* EEOC v. Detroit Edison Co., 515 F.2d 301, 310-12 (6th Cir. 1975) (limiting class to defendant's employees because of technical mistake by the district court but stating that a broader class would probably have been improper anyway).

68. *Overview* 328 n.24, *see* Jiron v. Sperry Rand Corp., 10 FEP Cases 730, 740 (D. Utah 1975) (postponing class certification until such time as plaintiff amends class action complaint to give a more detailed description of the proper class and to outline "with greater particularity the factual justification" for his class).

69. *Overview* 328 n.24. This does not mean, however, that a class action plaintiff will be permitted to maintain a class action when he is unable to show that persons within the defined class have suffered from the discrimination alleged. Such an inability on the part of the plaintiff will result in a denial of class certification. *See* Wright v. Stone Container Corp., 524 F.2d 1058, 1062 (8th Cir. 1975); Thompson v. Sun Oil Co., 523 F.2d 647, 649 (8th Cir. 1975); Parker v. Kroger Co., 14 FEP Cases 75, 82 (N.D. Ga. 1976). The basis for the requirement that the class representative be able to make this showing can be found in the typicality requirement of rule 23. *See* FED. R. CIV. P. 23(a)(3); *accord*, Wright v. Stone Container Corp., 524 F.2d at 1062.

70. The across the board class action had its genesis in Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). Upon the initiation of a class action civil suit by the plaintiffs, the defendant in *Johnson* moved to have the class narrowed on the grounds that the plaintiff, as a "discharged Negro employee, could only represent other discharged Negro employees." *Id.* at 1124. The district court granted the motion. On appeal the Fifth Circuit reversed, indicating that the plaintiff's action should have been treated as an across the board attack on a company-wide policy of discrimination. The

A complaint framed in this manner makes a broad attack on employment policies throughout a defendant's operations. Such a wide-ranging attack on a defendant's employment practices has its advantages. As one commentator has noted:

> The plaintiff can attack a pattern of discrimination and the variety of forms in which it appears without the necessity of combining with others who may be reluctant to join him, and through the class action he can join others without the necessity of their pursuing Title VII remedies themselves . . . . At the very least this approach enhances the plaintiff's bargaining power with the defendant during litigation or even prior to instituting suit by the mere threat of bringing a broad class action.[71]

While concern for the remedial policy behind title VII has tended to invoke from the courts a receptive attitude toward across the board actions,[72] the courts should not lose sight of the countervailing interests dictating that a court be careful in setting the dimensions of the class. A court confronted with an across the board suit should be aware of the problems the breadth of the class will cause for the court in its efforts to provide an expeditious hearing of the case.[73] More important, however, the court should not lose sight of the interests of the absent class members.[74] Given the res judicata effect of a class action adjudi-

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court was willing to admit that individual questions of fact existed with regard to different employees. The court went on to point out, however, that the proper focus was on the impact of the discriminatory policy upon the members of the class. When this focus was taken, the existence of a common question of law and fact was apparent. In this context the plaintiff was permitted to represent all present Negro employees of the defendant and all Negro employees who had been discharged by the defendant. *Id.*

71. Miller, *Class Actions and Employment Discrimination Under Title VII of the Civil Rights Act of 1964*, 43 MISS. L.J. 275, 282 (1972).

72. *See, e.g.*, Parham v. Southwestern Bell Tel. & Tel. Co., 433 F.2d 421, 425 (8th Cir. 1970).

73. This manageability problem is brought even more sharply into focus when one considers the interstate character of many of the nation's businesses. Allowing an across the board challenge to the employment practices of such a business could well prove extremely burdensome upon even the most resourceful of judges.

74. The most cogent statement of this need for concern for the interests of the absent class members in across the board actions is found in the concurring opinion to the *Johnson* decision:

> An over-broad framing of the class may be so unfair to the absent members as to approach, if not amount to, deprivation of due process. Envision the hypothetical attorney with a single client, filing a class action to halt all racial discrimination in all the numerous plants and facilities of one of America's mammoth corporations. One act, or a few acts, at one or a few places, can be charged to be part of a practice or policy quickening an injunction against all racial discrimination by the employer at all places. It is tidy, convenient for the

cation on all those included in the class for judgment purposes,[75] due process demands that care be taken to ensure that the plaintiff provides a fair and adequate representation of all the diverse interests on behalf of which he purports to act.[75.1] It is important, therefore, that across the board class actions not be allowed by the courts in perfunctory fashion. Rather, "the reasonable and proper dimensions of the class should be evaluated carefully on a case-by-case basis."[76]

2. The type of relief which the representative may seek on behalf of the class. — Because of an apparent conflict between substance and procedure, determining the various types of relief available was long one of the most perplexing questions in title VII class action litigation. In the formative period of such litigation, most often this question was resolved in favor of preserving the pristine quality of the title's procedural requirements. More

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courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?

Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring).

75. The basis for this assertion can be found in FED. R. CIV. P. 23(c)(3), which provides that

> [t]he judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice [required in those actions under] subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

The intricacies of rule 23(b)'s subdivisions will be discussed later. *See* notes 140-85 and accompanying text *infra*. It is sufficient at this point to recognize that rule 23(c)(3) requires a class action judgment to include all those persons determined to be members of the class.

75.1. *See* Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 533 (W.D. La. 1976) (stating that "[i]f absent parties' interests are not protected adequately, for the Court to attempt to bind them in judgment would deprive them of their day in court.").

76. Gardner, *The Development of the Meaning of Title VII of the Civil Rights Act of 1964*, 23 ALA. L. REV. 451, 518 (1971). One other commentator has been more specific in his description of the certifying court's obligation:

> What the court must do is make a compromise between the right of the plaintiff to bring the class action, the right of the defendant to adequately defend the law suit, the right of the court to manage the law suit and the right of the absent class members to have a representative that will fairly and adequately represent them.

Miller, *Class Actions and Employment Discrimination Under Title VII of the Civil Rights Act of 1964*, 43 MISS. L.J. 275, 285 (1972).

recent decisions, however, were marked by a shift in focus to give more attention to the "make whole"[76.1] character of title VII remedies. The question has now been resolved by the Supreme Court in line with this latter trend. To understand why this ultimate resolution was reached, one must survey the various approaches taken in the past by the courts and ascertain for what reasons such approaches eventually were discarded.

As previously mentioned, title VII's enforcement mechanisms were designed to accommodate a congressional preference for voluntary settlements as a means of eliminating discrimination.[77] Toward this end, Congress established the EEOC as a conciliatory agency designed to conduct those processes necessary to procure an amicable resolution of all charges of title VII discrimination.[78] The statutory scheme contemplated that the right to a civil action would accrue to an aggrieved party only after the conciliation processes had proved fruitless.[79] Hence, exhaustion of the conciliation remedy was established as a jurisdictional prerequisite to maintaining a civil action by the aggrieved party or by the EEOC on his behalf.[80]

This strong policy in favor of pursuing voluntary settlements had a marked effect on the scope of relief which might be sought during the formative years of title VII class action litigation. Early decisions in this area accordingly showed an obvious distaste for granting any relief to those who had not properly exhausted their administrative remedies. Hence, it was held at times that the plaintiff class could not include persons who had not filed with the EEOC.[81]

76.1. The term "make whole" refers to relief which seeks to restore particular discriminatees to the position they would have been in had there been no discrimination.

77. *See* note 8 and accompanying text *supra.*

78. *See* notes 9 & 10 and accompanying text *supra.*

79. *See* text accompanying note 12 *supra.*

80. *See* text accompanying notes 13 & 14 *supra.*

81. In Mondy v. Crown Zellerbach Corp., the basis for this restriction imposed on the class was explained as follows:

> [Allowing a class action to include members who have not filed with the EEOC] would permit circumvention of the administrative remedy provided by Title VII through the Commission in violation of § 2000e-5(e). In addition to allowing circumvention, the recognition of the class plaintiffs seek to represent would directly encourage aggrieved parties to avoid proceeding through the E.E.O.C. By virtue of such a holding, aggrieved persons could escape the necessity of going through administrative remedies provided by Title VII simply because they happen to be members of the same race or sex and are employed in the same plant as an individual who has followed the procedures required by

The courts eventually realized, however, that this analysis was nonsensical when the class action sought only injunctive relief from the defendant's discriminatory employment practices. An injunctive action brought on behalf of a class was regarded as involving no questions of fact apart from those allegations the named plaintiff had raised before the EEOC. In viewing the action in this manner, the courts generally held that inasmuch as the defendant had already refused to conciliate on the issues when they were raised before the EEOC by the named plaintiff, it was impractical to think that he would now change his mind and conciliate merely because a different person might raise the same issues before the EEOC again.[82]

The courts took a more restrictive approach, however, when the class action sought make whole relief, such as back pay. It was felt that claims for make whole relief would present varying fact situations pertinent to individual entitlement " 'so that failure of voluntary compliance with one complainant would not necessarily mean that voluntary compliance would fail as to all complainants.' "[83] Thus, before such claims could be dealt with in a title

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the law before filing suit. Obviously, this short-cut into the courts would be a great temptation, and many fellow employees of a person who filed suit after going through the E.E.O.C. will seek to be joined as members of his class if they are members of the same race as the plaintiff who has exhausted his administrative remedies.

271 F. Supp. 258, 265 (E.D. La. 1967), *rev'd sub nom.*, Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

82. *See, e.g.*, Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184, 190 (E.D. La. 1968):

> [When a charge of discriminatory employment practices is raised before the EEOC], the Commission's conciliation efforts [will] undoubtedly [be] directed to the overall eradication of the discriminatory employer policies. At that time the employer [would have] the opportunity to comply with the provisions of the Act as to the individual and as to all the issues he raised. Where the employer has refused that opportunity, [it would be safe to assume] that if all the other individuals who might raise those same issues [were to file] complaints with the Commission, the employer would still refuse to voluntarily comply with the Act . . . . Not requiring these certainly purposeless administrative proceedings [would deprive] the employer of nothing—he cannot be heard to say that he might have decided to bow to the persuasive powers of the Commission if other complaints had been filed, for the opportunity to voluntarily comply was not only presented once and refused, but [would remain] always open during the pendency of the judicial proceedings.

Accord, Hall v. Werthan Bag Corp., 251 F. Supp. 184, 188 (M.D. Tenn. 1966).

83. Comment, *Back Pay in Class Actions and Pattern or Practice Suits Under Title VII of the Civil Rights Act of 1964*, 23 EMORY L.J. 163, 170 (1974) (quoting Gerstle v. Continental Airlines, Inc., 50 F.R.D. 213, 218 (D. Colo. 1970), *aff'd*, 466 F.2d 1374 (10th Cir. 1972) (dictum explaining reasoning of those courts not allowing back pay awards in title VII class actions)).

VII class action, the courts required that each class member desiring such relief file with the EEOC.[84]

The imposition of these restrictions on the availability of make whole relief in class actions squarely conflicted with the substantive purpose underlying the remedial provisions of title VII. Congress had included provisions in title VII providing make whole relief to discriminatees as a means of restoring those persons to that position in which they would have been but for the defendant's discrimination.[85] To the extent that this relief was denied to non-filing class members, the courts apparently were placing preeminent importance on matters of procedural integrity, to the detriment of that policy which favored making whole the victims of unlawful discrimination.

It now seems clear that this conflict finally has been resolved in favor of respecting the substantive purpose underlying the title's remedial provisions. This move away from the restrictive approach discussed above was first initiated in the various courts of appeals. With virtual unanimity, those circuit courts confronted with the issue have upheld awards of back pay and other forms of make whole relief in title VII class actions.[86] Thus, in *Bowe v. Colgate-Palmolive Co.*,[87] the court stated:

> We are . . . unable to perceive any justification for treating such a suit as a class action for injunctive purposes, but not treat it so for purposes of other relief. The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it. To permit only injunctive relief in the class action

84. *See, e.g.*, Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966), *discussed in Developments* 1221.

85. *See* 118 CONG. REC. 7168 (1972) (Senator Williams' section-by-section analysis of the 1972 amendments to title VII):

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

Accord, Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-22 (1975).

86. *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719-20 (7th Cir. 1969).

87. 416 F.2d 711 (7th Cir. 1969).

> would frustrate the implementation of the strong Congressional purpose expressed in the Civil Rights Act of 1964. To require that each employee file a charge with the EEOC and then join in the suit would have a deleterious effect on the purpose of the Act and impose an unnecessary hurdle to recovery for the wrong inflicted.[88]

In *Albemarle Paper Co. v. Moody*,[89] the Supreme Court ratified the mandate of the courts of appeals by indicating that back pay (and, by implication, other forms of make whole relief) is a proper award in title VII class action cases. The defendants in *Moody* had based their objection to the award of back pay to the plaintiff class on several grounds, one of which was that unnamed parties in the class should not be the recipients of such an award where they had not filed with the EEOC. The Court rejected this contention and cited with approval, among other cases, *Bowe v. Colgate-Palmolive Co.*[90] The Court went on to note that the approach in *Bowe* and other circuit court opinions apparently had been ratified by Congress upon its enactment of the 1972 amendments to title VII,[91] since the Conference Committee Report accompanying the final version of those amendments expressly had rejected a provision in the House-passed bill which would have limited back pay awards to those who filed a charge with the EEOC.[92] With this holding and discussion, the Supreme Court apparently has laid the matter to rest.

C. Commentary

As indicated, the policies underlying title VII have greatly affected the manner in which courts view title VII class actions.

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88. *Id.* at 720.

89. 422 U.S. 405 (1975).

90. *Id.* at 414 n.8.

91. *Id.*

92. *See* 118 CONG. REC. 7168 & 7565 (1972) (section-by-section analysis of H.R. 1746 by the Conference Committee). The provision rejected had been contained in the substitute proposal of Congressman Erlenborn. This substitute proposal, in turn, had been incorporated into the final version of the original House bill. Had the bill been enacted in this amended form, it would have limited drastically the scope of class actions under title VII by restricting remedial orders in such cases to persons who either filed a charge or had been named in a charge or amendment to a charge. *See* H.R. 1746, 92d Cong., 1st Sess. § 3(e) (1971) (as passed by the House). For a discussion of this bill and its rejection by the Conference Committee, see Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975). *See also* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 875-77 (1971-72).

Thus, the courts have recognized that once the class representative has asserted a justifiable claim on behalf of himself and the class, the class aspects of the case will have an independent existence apart from the class representative's individual claims since title VII discrimination is, by nature, class discrimination. Additionally, the courts have given wide latitude to title VII class action plaintiffs to frame their suits broadly and to request a broad spectrum of make whole relief for all class members. This latitude has been accorded in the belief that broad class actions promote the eradication of widespread employment discrimination and that the availability of a wide array of make whole relief is necessary to compensate fully the discriminatees for their injuries. By permitting these advantages to title VII class action plaintiffs, the courts have provided an awesome weapon with which to attack employment discrimination. A title VII plaintiff who files his civil suit as a class action will be able to assure that his suit will survive any deficiencies in his individual claims, to amass support for his cause from others similarly situated, and, most significantly, to dangle the threat of an enormous monetary judgment over the head of the defendant as an inducement to settle or conciliate.

This liberal deference given by the courts in title VII class actions to the policies underlying title VII may result in problems, however. An awareness that broadly framed class actions usually are liberally allowed may induce the title VII plaintiff to bring a very broad across the board class action in order to enhance his bargaining power over the defendant during settlement and conciliation talks. However, such actions often are framed without any regard to whether or not the plaintiff can fairly and adequately represent the class. Furthermore, such actions easily can become unmanageable, thereby eliminating the judicial efficiency which the class action device was intended to provide. Thus, while broad class actions may be an effective means of attacking widespread employment discrimination, the courts still must maintain close judicial supervision over the use of such actions to ensure that they will be judicially manageable and procedurally fair. It is in this context that the requirements of rule 23 have significance.

IV. The Conduct of Title VII Class Actions Under Rule 23

The strictures of rule 23 have usually not been a stumbling block to titleVII plaintiffs desiring to bring their civil actions on

behalf of a class of persons similarly situated. The liberal reading which the courts generally have given this rule in title VII class actions reflects not only the belief that the class action device is an efficient method of resolving all the individual claims of discrimination arising from an employer's employment practices in one proceeding,[93] but also the notion that the class action suit constitutes the most effective means of advancing the causes of the disadvantaged.[94] In addition, this relaxed application of rule 23's requirements may be said to represent a byproduct of the courts' tendency to allow across the board class actions by title VII plaintiffs.[95]

Nevertheless, an aspiring title VII class action plaintiff should be careful to frame his action with due regard to the specific elements of the rule. The courts are becoming increasingly unrelenting in their demand that title VII class actions comply with the letter of rule 23. This contraction of the courts' previously liberal attitude may be the product of a judicial realization that class actions are susceptible to abuse in the absence of close judicial supervision.[96] Furthermore, this more demanding stance in adjudging compliance with rule 23 represents an increased concern for the interests of the unnamed class members who will be bound by a court's judgment in a class action, regardless of the outcome.[97] An examination of the operation of rule 23's provisions in title VII class actions follows.

A. The Requirements of Rule 23(a)

Before conducting his title VII civil action as a class action, a prospective class action plaintiff first must establish that he is

93. *See generally* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 185 (1974) (Douglas, J., concurring in part, dissenting in part).

94. In Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 186 (1974), Justice Douglas best expressed this notion in his partial dissent:

> The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of making a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.

See also Note, *Requests for Information in Class Actions*, 83 YALE L.J. 602, 609-10 (1973).

95. *Overview* 328-29.

96. *See id.* at 326.

97. *Id.; see* Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 530-41 (W.D. La. 1976) (making a very in-depth assessment of the adequacy of representation accorded the absent class members and revoking class certification because the representation had not been adequate in each important phase of the action).

a proper representative[98] of a proper class under rule 23(a).[99] This is not a requirement to be taken lightly, for the rule explicitly states that a representative may sue on behalf of the class only if the specific elements of a proper class are present.[100] These elements may be denominated as the requirements of (1) numerosity, (2) commonality, (3) typicality and (4) representativity. Each requirement will be discussed separately as each has its own peculiarities and its own significance, particularly in the title VII context.

1. Numerosity. — The initial prerequisite of rule 23(a) necessitates the prospective class action plaintiff's showing that the class which he purports to represent is so numerous that bringing all of its members before the court as coplaintiffs by the process of joinder is impracticable.[101] The burden of showing the impracticability of joinder is squarely on the class representative.[102] While the representative plaintiff will not be required to prove the exact number of the absent class members,[103] he clearly will not have met the requirement by making a bare allegation that numerosity is present.[104] Rather, he should allege and prove that the impact of the discriminatory employment practice or policy which he attacks was so broad that a number of others "were similarly affected . . . and that together they define an identifiable class too numerous for mere joinder."[105] Exactly how large a class must be before it is considered too numerous for mere joinder cannot be predicted with any fair amount of accuracy, however. What is or is not a sufficiently numerous class to make

98. Some of the many significant problems confronting a class action plaintiff in his efforts to establish himself as a proper class representative have been discussed previously in this note. *See* notes 38-65 and accompanying text *supra.*

99. FED. R. CIV. P. 23(a) states the following:

> One or more members of a class may sue or be sued as representative parties on behalf of all *only if* (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(Emphasis added).

100. *Id.*

101. FED. R. CIV. P. 23(a)(1).

102. Mason v. Calgon Corp., 63 F.R.D. 98, 106 (W.D. Pa. 1974); 2 LARSON § 49.52(a), at 10-85. *See generally* text accompanying notes 32 & 33 *supra.*

103. McDonald v. General Mills, Inc., 387 F. Supp. 24, 39 (E.D. Cal. 1974).

104. Mason v. Calgon Corp., 63 F.R.D. 98, 106 (W.D. Pa. 1974).

105. 2 LARSON § 49.52(a), at 10-85.

joinder impracticable will almost always depend on the facts of each particular case.[106]

2. *Commonality.* — More so than with any other requirement under rule 23(a), the requirement that there be "questions of law or fact common to the class"[107] is influenced by the nature of title VII discrimination. As is particularly evident in those cases decided under an across the board approach, most courts have treated title VII discrimination as inherently class discrimination.[108] Where a court takes this approach, any class action attacking discriminatory employment practices will be seen as presumptively satisfying the commonality requirement.[109] This presumption accrues from the fact that the action is seen as focusing on the defendant's alleged discriminatory policy that, in its effect on the members of the class, presents common questions of law and fact as to all members of the class.[110] Under this analy-

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106. This flexibility was noted in Moore v. Louisville Downs, Inc.:

> It is well settled that "sheer quantitative measurement is not the test of impracticability; rather, the circumstances surrounding each case are determinative in conjunction with the number [of class members] involved." . . . The decisions reflect a practical judgment based on the particular facts of the case by considering such factors as geographical area of the group, the number in the group, manageability of the parties, nature of the action and the relationship of the parties to all others in the class.

6 FEP Cases 1274, 1274-75 (W.D. Ky. 1973), *aff'd,* 487 F.2d 1402 (6th Cir. 1973) (citations omitted).

Probably the most important factor with regard to whether or not numerosity will be found is the scope permitted to the plaintiff's civil suit. Thus one commentator has noted that

> where the ultimate issue and the scope of the class are broad . . . the size of the class may be so great that numerosity is not an issue. Where the court takes an "across the board" approach to discrimination or includes prospective employees or applicants within a class, numerosity is almost invariable [*sic*] assured. On the other hand, where prospective employees are excluded from the class, or the issue narrows the class to a small and easily identifiable number or the class is limited to a specific geographical area, the courts more readily deny class action status for lack of necessary numerosity.

2 LARSON § 49.52(a), at 10-85 to -86.

107. FED. R. CIV. P. 23(a)(2).

108. *See* note 70 *supra; accord,* Senter v. General Motors Corp., 532 F.2d 511, 524 (6th Cir. 1976). *See also* text accompanying note 21 *supra.*

109. *See* Rich v. Martin Marietta Corp., 522 F.2d 333, 340-41 (10th Cir. 1975); Alaniz v. California Processors, Inc., 13 FEP Cases 720, 726 (N.D. Cal. 1976); Women's Comm. for Equal Employment Opportunity v. National Broadcasting Co., 71 F.R.D. 666, 669 (S.D.N.Y. 1976); Jones v. United Gas Improvement Corp., 68 F.R.D. 1, 20-21 (E.D. Pa. 1975); Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184, 187-88 (E.D. La. 1968); Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966); 2 LARSON § 49.52(b), at 10-87; note 70 *supra.*

110. *See* Smith v. Missouri Pac. R.R., 13 FEP Cases 887 (W.D. La. 1975); Waters v. Heublin, Inc., 12 FEP Cases 617, 621 (N.D. Cal. 1975).

sis, it generally would make no difference that there may be varying individual factual circumstances present throughout the class.[111]

Nevertheless, some courts have held that a merely conclusory allegation of across the board discrimination will not be sufficient to establish the common question of law or fact which rule 23(a)(2) requires.[112] In this context, the commonality requirement necessitates an examination of "each instance of hiring, firing, promotion and the like to determine whether or not the action was justified before any conclusions [can] be reached as to a general practice of the defendant."[113] Under this approach, once it is determined that a general discriminatory practice is present, the class action will then proceed on behalf of those who were aggrieved by that practice.[114] Where it is shown, however, that "the defendant [did not act] in a generally discriminatory manner, so that the issues involved [are] individual rather than class

111. *See* Senter v. General Motors Corp., 532 F.2d 511, 523-24 (6th Cir. 1976); Rich v. Martin Marietta Corp., 522 F.2d 333, 340-41 (10th Cir. 1975); Women's Comm. for Equal Employment Opportunity v. National Broadcasting Co., 71 F.R.D. 666, 669 (S.D.N.Y. 1976); Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184, 187-88 (E.D. La. 1968); Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966). In *Hicks* the court was confronted at the outset with the defendant's contention that given the plaintiff's across the board challenge against the company's hiring practices, seniority system, promotion practices, and discharge practices, different factual circumstances pertained to each member of the class. The defendant contended that, in light of this situation, class action treatment would be "improper because each member of the class [would] have to present his particular problem to the Court." 49 F.R.D. at 187. In rejecting this contention, the court stated the following:

> The class action is not sought in order to bring in many different factual grievances; rather, it seeks to put the Court in position to render a broad remedial order in the event that the defendant has an established discriminatory policy or policies which operates as to all Negroes, *apart from and regardless of* the individual circumstances of each. Thus, the existence and operation of a pervasive policy affecting all Negroes is the question of law or fact common to all members of the class. The elimination of a discriminatory policy would not affect the employer's right to deal with each person individually on the basis of circumstances peculiar to that person . . . . Under this appreciation of the class action, the objection based on the differing status of each member of the class does not negate there being questions of law and fact common to the class.

Id. at 187-88 (emphasis in original).

112. *See* Hyatt v. United Aircraft Corp., 50 F.R.D. 242, 246-47 (D. Conn. 1970); *accord,* Beasley v. Kroehler Mfg. Co., 406 F. Supp. 926, 931 (N.D. Texas 1976), *aff'd,* 538 F.2d 897 (5th Cir. 1976); White v. Gates Rubber Co., 53 F.R.D. 412, 413 (D. Colo. 1971); 2 LARSON § 49.52(b), at 10-89.

113. White v. Gates Rubber Co., 53 F.R.D. 412, 413 (D. Colo. 1971); *accord,* 2 LARSON § 49.52(b), at 10-89.

114. 2 LARSON § 49.52(b), at 10-89.

issues," the action will not be permitted to proceed as a class action.[115]

Given the liberal tendency of the courts to favor class actions, it is doubtful that this last-mentioned approach will be applied in the majority of cases, because adopting such an approach would impose an onerous burden on the class representative to make extensive factual inquiries before bringing his action. Most courts probably will choose to postpone the imposition of this burden until a finding of liability has been made since such facts are generally more relevant to a determination of entitlement to relief.[116] It would thus appear, as a general rule, that commonality is not a difficult hurdle for the title VII class action plaintiff to overcome.

3. Typicality. — Once it has been established that a proper class exists under rules 23(a)(1) and (a)(2), attention is shifted to the remaining requirements under rule 23(a). Rules 23(a)(3) and (a)(4) are designed to determine if the named plaintiff is or is not the proper party to represent the class. In this regard, the initial concern of the title VII class representative is to establish that his claims for relief are typical of those asserted on behalf of the class.[117] To the extent that it accepts the across the board approach in title VII class actions, a court is not likely to be overly demanding in its assessment of whether a particular class representative has met the typicality requirement. "Generally these courts reason that if individual differences in the issues of fact do not defeat the class action, neither do individual differences in

115. *Id.*

116. This was clearly demonstrated by the Fifth Circuit in Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437 (5th Cir. 1974):

> A Title VII class action presents a bifurcated burden of proof problem. Initially, it is incumbent on the *class* to establish that an employer's employment practices have resulted in cognizable deprivations to it as a class. At that juncture of the litigation, it is unnecessarily complicating and cumbersome to compel any particular discriminatee to prove class coverage by showing personal monetary loss. What is necessary to establish liability is evidence that the *class* of black employees has suffered from the policies and practices of the particular employer. Assuming that the class does establish invidious treatment, the court should then properly proceed to resolve whether a particular employee is a member of the class, has suffered financial loss, and thus entitled to back pay or other appropriate relief.

Id. at 443-44 (emphasis in original); *accord,* Senter v. General Motors Corp., 532 F.2d 511, 524 (6th Cir. 1976); *cf.* Franks v. Bowman Transp. Co., 424 U.S. 747, 772 (1976) (holding that "individually applicable evidence cannot serve as a justification for the denial of relief to the entire class").

117. *See* FED. R. CIV. P. 23(a)(3).

the claims for relief."[118] Nevertheless, it is still important that the class representative be familiar with the nature of this requirement.

Typicality, for title VII class action purposes, has two components: first, the class representative must have suffered similar, although not identical, discrimination to that of the class; and, second, the class representative must have no individual claims antagonistic to those of the class.[119] With regard to the first component, the extent to which a particular court accepts across the board class actions will significantly affect its determination of whether or not the class representative has suffered discrimination similar to that of the class.[120] Thus,

> [i]f the court embraces the notion that the simple fact of discrimination based on a similar class characteristic creates a viable class, typicality will rarely be an issue. But if the court requires more particularity in the allegation by the named plaintiff of similarity of claims and class membership, differences in the nature of the discrimination (rather than the class characteristic on which it is based) may defeat the class action.[121]

It is, therefore, incumbent upon a prospective class representative to familiarize himself with the approach commonly taken by the district court in which he will file his action. Potential problems may be avoided easily if the representative pleads

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118. Miller, *Class Actions and Employment Discrimination Under Title VII of the Civil Rights Act of 1964*, 43 MISS. L.J. 275, 282 (1972).

119. 2 LARSON § 49.52(c), at 10-90.

120. *Id.* at 10-91.

121. *Id. Compare* Mack v. General Elec. Co., 329 F. Supp. 72, 76 (E.D. Pa. 1971) (holding that an allegation of across the board discrimination will satisfy typicality requirement) *and* Jones v. United Gas Improvement Corp., 68 F.R.D. 1, 21 (E.D. Pa. 1975) (following *Mack*) *with* Kensey v. Legg, Mason, & Co., 60 F.R.D. 91, 100 (D.D.C. 1973) (holding that employer's consideration of divergent factors in deciding whether or not to hire applicants for various positions with its firm precluded plaintiff from satisfying typicality requirement when his class action purported to represent prospective applicants for all job classifications) *and* Bradley v. Southern Pac. Co., 51 F.R.D. 14, 15 (S.D. Texas 1970) (holding that retired employee could not maintain a title VII class action on behalf of past, present, and future employees because, among other reasons, there would be an absence of typicality).

Regardless of whether or not a particular court views the typicality requirement as satisfied by an allegation of across the board discrimination, a title VII class action plaintiff must always provide some evidence that members of the purported class have suffered from the discrimination alleged. The inability or failure to do so is an adequate justification for a court to deny certification. *See* note 69 *supra*.

sufficient facts to make clear that he has suffered discrimination similar to that of the class.

The second component of the typicality requirement, *i.e.*, that no potential antagonism should exist between the claims of the representative and the claims of the class, is often subsumed under the general requirement of representativity contained in rule 23(a)(4).[122] For the purposes of establishing typicality, this component requires only that the respective claims of the class and of the representative not be such that an award in favor of one would entail harm to the interests of the other.[123] Thus, enough leeway remains such that

> the claims of the class representatives [need not] be "co-extensive with" or "identical to" those of other class members. The requirement of typicality may be satisfied even though varying fact patterns support the claims or defenses of individual class members or there is a disparity in the damages claimed by the representative parties and the other members of the class.[124]

Nevertheless, this second component of the typicality requirement may serve as a limiting factor when the class action is inarticulately framed. A prospective class representative should be aware that he will not be permitted to frame his action so broadly that it will encompass potentially antagonistic interests. As remains to be shown, a plaintiff who frames his title VII class action in an overbroad manner will have difficulty not only in meeting the requirement of typicality, but also in satisfying the requirement of representativity.

4. Representativity. — Perhaps the most significant and certainly the most demanding requirement which confronts a title VII class action plaintiff is the requirement of rule 23(a)(4) that he show the ability to provide fair and adequate representation for the interests of the class.[125] The importance of the representativity requirement may readily be appreciated in light of the

122. 2 LARSON § 49.52(c), at 10-92; *see* text accompanying notes 135-36 *infra*.

123. *See* American Fin. Sys. v. Harlow, 65 F.R.D. 94, 109 (D. Md. 1974) (holding that the representative party challenging a pension trust as discriminatory could not represent those members of the class who would be disadvantaged by his proposed remedies).

124. *In re* Four Seasons Sec. Laws Litigation, 59 F.R.D. 667, 681 (W.D. Okla. 1973), *quoted in* American Fin. Sys. v. Harlow, 65 F.R.D. 94, 108-09 (D. Md. 1974).

125. *See* Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 531 (W.D. La. 1976) ("The history of the action points to the requirement of Rule 23(a)(4) as the most important aspect of the class status determination.").

fact that any judgment which issues in a class action is binding on all members of the class.[126] To have their day in court, the absentees are dependent upon the voicing of their claims by the class representative; thus, due process demands that the representative be capable of asserting and defending the class members' interests with forthrightness and vigor and with no inherent conflicts of interest which could temper his enthusiasm.[127] Thus, to avoid constant collateral attacks on a judgment disposing of a class action, a court is apt to be more demanding in requiring the class representative to show representativity than in having him show any other requirement under rule 23(a).[128]

In determining whether or not representativity is present, a court customarily makes a threefold factual inquiry.[129] Initially, the inquiry focuses on whether or not counsel for the representative plaintiff is experienced in the handling of class actions and in civil rights/employment discrimination litigation.[130] Normally, this inquiry may be satisfied with little difficulty since a general showing of competency to conduct such cases will suffice more

126. *See* notes 74-75.1 and accompanying text *supra.*

127. *See* Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23,* 123 U. PA. L. REV. 1217, 1227-28 (1975). *See generally* Hansbury v. Lee, 311 U.S. 32 (1940) (holding that due process would not permit absent class members to be bound by a state class action judgment which did not provide fair and adequate protection for the absent class members' interests).

128. Thus in Johnson v. Shreveport Garment Co., it was noted that

> [t]he doubt as to adequacy of representation and therefore binding effect, may give rise to new suits on the same subject matter by absent class members against the same defendants. The very likelihood of the new actions, even if they are decided against the class on *res judicata* grounds, defeats the historical purpose of the class action, to prevent a multiplicity of suits. Attempting to bind absent parties without adequate representation, then, not only prejudices the absent class members, but also fails to provide a safe harbor in which the party adverse to the class can rest. The protection of the judgment is merely illusory. If the Court has substantial doubt as to the adequacy of representation, it should act pursuant to its protective responsibility to deny or revoke class certification.

422 F. Supp. at 533. Furthermore, even though the other prerequisites of rule 23(a) have been liberally applied, the *Johnson* court made it clear that such was not to be the case with the adequacy of representation requirement:

> The standard [for determining representativity], however it may be articulated, must impose stringent guidelines on prospective class representatives . . . . Thoroughness is essential to insure that absent class members receive their full measure of due process rights.

Id. (citations omitted).

129. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968) (*Eisen* II); *accord,* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

130. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir. 1975), *vacated on other grounds,* 424 U.S. 737 (1976); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); *Overview* 331.

often than not.[131] However, should it appear to the court that counsel for the plaintiff class has a less than thorough knowledge of class action procedure and strategy of federal practice in general, or of the substance and procedures of title VII, denial or revocation of class action status will result unless new, adequate counsel is obtained.[132]

Second, the court inquires as to whether or not the opportunity for collusion is present between the class representative and the defendant.[133] This inquiry is of particular significance given the preclusive effect of a class action judgment upon all members of the class. In light of this effect, the court should be certain that the suit at bar is not being brought with the defendant's encouragement or approval, and thus as a means of minimizing his liability by a single action that will bar any further claims against him.[134]

The third and final inquiry made in determining if representativity is present focuses on whether or not the class representative represents a class containing interests inherently antagonistic to his own.[135] It is, of course, highly unlikely that the representative would pursue the antagonistic interests of other class members with the forthrightness and vigor necessary to provide them a fair and adequate representation. On the contrary, it is more probable that he would be willing to sacrifice those interests not in accord with his own. Where such antagonism can be shown, it will usually result "in a limitation of class scope or a denial of [the] named plaintiff's representation of the class."[136]

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131. 2 LARSON § 49.52(d), at 10-95.

132. *See* Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 541 (W.D. La. 1976); Parker v. Kroger Co., 14 FEP Cases 75, 83 (N.D. Ga. 1976).

133. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968) (*Eisen* II); *accord,* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); *Overview* 331-32.

134. The presence of this danger in title VII class actions was astutely recognized by Judge Godbold, specially concurring in Johnson v. Georgia Highway Express, Inc.:

> An additional risk is that of collusive suit at the indirect and undisclosed behest of the employer, giving him the possibility of a whitewash of systemwide employment practices by a judicial inquiry of narrow scope in a forum far distant from numerous employees who may never have heard of the litigation, or, if they have heard, not in such manner as to impel them to grasp hold of the problem and make decisions about it.

417 F.2d at 1127.

135. *See* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968) (*Eisen* II); *accord,* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); 2 LARSON § 49.52(d), at 10-93; *Overview* 332. The inquiry made on this point may be seen as representing an overlap with the typicality requirement discussed earlier. *See* text accompanying notes 122-24 *supra.*

136. *Overview* 332; *see* EEOC v. Detroit Edison Co., 515 F.2d 301, 311 (6th Cir. 1975);

In its application, the representativity requirement has particular significance for the prospective class action plaintiff who attempts to frame his action as an across the board attack against a defendant's discriminatory employment practices. While in many instances a court may gloss over this requirement in deference to the strong public policy favoring the elimination of discriminatory employment practices,[137] other courts are not apt to be so neglectful of the absent class members' interest in having adequate representation for their claims.[138] While an across the board complaint may presumptively fulfill the requirements of numerosity, commonality, and typicality, it should never be viewed as presumptively satisfying the representativity requirement. The fact that a plaintiff's complaint attacks an underlying policy of discrimination, thereby asserting an issue common to all those aggrieved by discriminatory practices throughout a defendant's operations, does not mean that he will have enough interest or knowledge to litigate effectively all of the instances of unfair conduct subsumed in his cause of action.[139] Thus, before allowing a plaintiff to prosecute or continue to prosecute an across the board class action, the court should make certain that every cognizable interest included within the alleged class will receive the same type of representation which the plaintiff can be expected to give his own individual claims. Where it is doubtful that this guarantee of the same quality of representation can or will be made, the court should either restrict the definition of the class, employ subclasses, or deny or revoke certification. In light of the severe res judicata consequences that might otherwise result from inadequate representation, such actions by the courts are necessary to ensure the absentees due process.

B. Maintaining Title VII Class Actions Under Rule 23(b)

Once the representative in a title VII class action has satisfied the four prerequisites of rule 23(a), he must then demonstrate that his action fits within one of the subdivisions of rule 23(b).[140]

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accord, Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100, 1113-14 (N.D. Ga. 1976).

137. *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124-25 (5th Cir. 1969).

138. *See, e.g.*, EEOC v. Detroit Edison Co., 515 F.2d 301, 311 (6th Cir. 1975); Freeman v. Motor Convoy, Inc., 409 F. Supp. 1100, 1113-14 (N.D. Ga. 1976); Bradley v. Southern Pac. Co., 51 F.R.D. 14, 15 (S.D. Texas 1970).

139. *See Developments* 1220-21.

140. FED. R. CIV. P. 23(b) provides the following:

While this would seem to be an easy enough task to fulfill, its significance should not be underestimated because the manner in which the class representative's action is categorized will, in large part, determine how he will have to conduct his action. In addition, the categorization of his action will be determinative of his responsibilities toward the class and of the extent to which a judgment entered in the action will be binding on the members of the class. It is important, therefore, that the class representative be aware of which category of rule 23(b) likely will govern his action and of what consequences that categorization will hold for his role as the class representative.

A title VII class action generally will not be categorized under subdivision (b)(1),[141] which was designed to handle those situations in which the possible prosecution of multiple individual actions would entail a risk of inconsistent adjudications, to the prejudice of either the individual class members or the party opposing the class.[142] Since the focus of a title VII civil action is on compelling the defendant to conduct its employment practices in a non-discriminatory manner, the risk of inconsistent adjudi-

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An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(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 with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

141. *See* 2 LARSON § 49.53, at 10-96; *Overview* 334 n.55. *But see* Dennison v. Los Angeles Dep't of Water & Power, 10 FEP Cases 1486 (C.D. Cal. 1975).

142. *See* Notes of Advisory Committee on 1966 Amendment to Rules, 28 U.S.C. at 7765-66 (1970).

cations seems minimal at best. Thus, the choice of which subdivision of rule 23(b) to apply in title VII class actions is traditionally one between subdivisions (b)(2) and (b)(3). On the one hand, subdivision (b)(2) is designed to deal with those class actions which seek predominantly injunctive or declarative relief against a defendant who has acted in a manner generally applicable to the class as a whole. Subdivision (b)(3), on the other hand, is designed to apply when common questions of law or fact are predominant and the unifying effect of an injunctive action is absent.

The question of which of these two remaining subdivisions governs is resolved in relatively easy fashion when a title VII class action seeks only class-wide injunctive relief from a defendant's discriminatory employment practices. Since the focus in such an action is on whether or not the defendant's employment practices have general application to the class, subdivision (b)(2) clearly governs.[143] Generally, it has been accepted that this subdivision was drafted especially to govern those civil rights actions "where a party is charged with discriminating unlawfully against a class."[144] If a title VII class action seeks exclusively or predominantly monetary damages,[144.1] the determination of which category will govern is likewise easily resolved. Subdivision (b)(3) would clearly govern in such a case since the Advisory Committee noted that subdivision (b)(2) was not intended to apply "to cases in which the appropriate final relief relates exclusively or predominantly to money damages."[145]

The choice is not so simple, however, when the class representative frames his action with a prayer for class-wide back pay, as well as for class-wide injunctive relief. In essence, the category under which such an action will be placed is determined by the manner in which the court characterizes the prayer for back pay. Thus, if the court views an award of back pay as damages and as

143. *See* Notes of Advisory Committee on 1966 Amendment to Rules, 28 U.S.C. at 7766 (1970); Bennett, *Eisen v. Carlisle & Jacquelin: Supreme Court Calls for Revamping of Class Action Strategy*, 1974 WIS. L. REV. 801, 824.

144. Notes of Advisory Committee on 1966 Amendment to Rules, 28 U.S.C. at 7766 (1970).

144.1. A title VII class action will rarely, if ever, not seek exclusively or predominantly injunctive relief. Such actions will almost always seek some form of injunctive relief since title VII class actions inherently seek to eradicate discriminatory employment practices.

145. Notes of Advisory Committee on 1966 Amendment to Rules, 28 U.S.C. at 7766 (1970).

the primary focus of the plaintiff's class suit, then the action will probably be categorized under subdivision (b)(3).[146]

The consequences of categorizing under subdivision (b)(3) a title VII class action which seeks back pay relief and injunctive relief are great. Unlike the other kinds of class actions authorized by rule 23, a subdivision (b)(3) class action is subject to the notice requirements of subdivision (c)(2).[147] This distinguishing charac-

146. *See* Local 550, Air Line Stewards & Stewardesses Ass'n v. American Airlines, Inc., 490 F.2d 636, 643 (7th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974); *accord,* Chrapliwy v. Uniroyal, Inc., 7 FEP Cases 343, 345 (N.D. Ind. 1974).

147. FED. R. CIV. P. 23(c)(2) provides that

> [i]n any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

See Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23,* 123 U. PA. L. REV. 1217, 1221 (1975). As evident from the language of subdivision (c)(2), subdivision (b)(2) class actions are not subject to mandatory notice requirements. A judgment issued in a subdivision (b)(2) class action is binding on all members of the class, regardless of whether or not notice was given. The same cannot be said of judgments issued in subdivision (b)(3) class actions. *See* FED. R. CIV. P. 23(c)(3).

The reason for this distinction may be explained as follows:

> Class actions under Rule 23(b)(2) . . . are useful and effective tools for the final determination of broad disputes concerning alleged discrimination. The classes involved are capable of exact definition, in the sense that any person coming before the Court, or another Court in subsequent litigation, can with fair ease be seen to be within or without the class for *res judicata* purposes. But the specific identity of every class member is usually impossible to determine. This is one of the reasons notification may be dispensed with . . . . [T]he issue of the existence of a policy of discrimination is one that demands a mechanism for final resolution in our society. To require actual notification of all parties would tend to defeat this. To allow class members to opt out would defeat it entirely. The existence of a policy of discrimination is a group question which must have a mechanism for resolution with group wide finality. This was the *raison d'etre* for the creation of (b)(2) class actions, and no favor would be done to group members to hamstring its effectiveness with notice requirements which are not practically possible.

Paddison v. Fidelity Bank, 60 F.R.D. 695, 699-700 (E.D. Pa. 1973). In a subdivision (b)(3) class action, the focus is still primarily on the group or class but the interests of the individual class members are also significant. Individual claims for relief may vary substantially, as may individual entitlement to relief, in this type of class action. Thus notice is required to ensure that a class member will be provided the opportunities of acquiescing to the class representative's representation, of appearing by counsel to litigate his own claims, or of opting out of the litigation completely. In addition, this notice assures that, where there is a favorable judgment issued to the class, the class members will have

teristic carries with it two consequences of the utmost importance to a (b)(3) class and its representative. First, the class representative is required to give notice to the class absentees;[148] and, second, a subdivision (b)(3) absentee is provided the opportunity to "opt out" of the class prior to judgment and thereby insulate his individual claim from any adverse judgment which may be entered against the class.[149]

With the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin,*[150] the notice requirements of subdivision (c)(2) took on added significance for the subdivision (b)(3) class representative. The *Eisen* Court held that the class representative in a subdivision (b)(3) action is required to bear the full cost of individual notice to all absentees identifiable through reasonable efforts.[151] In reaching this holding, the Court refused to allow this burden to be tailored to fit the class representative's individual financial circumstances[152] or to allow the burden to be shifted in full or in part to the defendant in those instances where a preliminary inquiry into the merits indicated that the plaintiff would be likely to prevail on his claims.[153]

The hardship which the mandates set forth in *Eisen* would work on a title VII class action representative is obvious. The fact that a title VII class representative rarely has sufficient means to afford the costs of class-wide notice,[154] particularly in those actions which are brought as an across the board attack on the discriminatory practices throughout an employer's enterprise, tends to discourage class actions. The courts, however, have en-

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sufficient notice to come forward and establish their entitlement to take part in the award. *See* Notes of Advisory Committee on 1966 Amendment to Rules, 28 U.S.C. at 7767 (1970).

148. *See* note 147 *supra.*

149. *See id.;* Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23,* 123 U. PA. L. REV. 1217, 1221 (1975); *Overview* 335.

150. 417 U.S. 156 (1974).

151. *Id.* at 177.

152. *Id.* at 176.

153. *Id.* at 177-79. For a discussion of the impact that *Eisen* has had on subdivision (b) (3) class actions in general, see Bennett, *Eisen v. Carlisle & Jacquelin: Supreme Court Calls for Revamping of Class Action Strategy,* 1974 WIS. L. REV. 801.

154. *See generally* Bennett, *supra* note 153, at 810. It has been suggested that it may be possible to collect the costs of notice in subdivision (b) (3) class actions from the defendant once the plaintiff succeeds on the merits. *See id.* at 814. Upon the happening of that event, the plaintiff could assert that the expense of notifying the absent class members should be obtainable as court costs supplementing the judgment. *Id.* However, the cost must still be borne by the class representative in the first instance. *See* text accompanying note 151 *supra; accord,* Bennett, *supra* note 153, at 814.

couraged class actions as an effective means of eradicating broad scale discrimination[155] and have similarly made back pay and other affirmative awards freely available to discriminatees in order that they might be made whole.[156] To the extent the notice requirements make it impracticable for a title VII plaintiff to assert his action as a class suit for back pay, they present a very fundamental conflict with these remedial policies.

Recognizing this threat to the continued viability of class actions as a means of achieving the broad remedial goals of the title, the courts have frequently avoided imposing the stringent requirements of subdivision (c)(2) on title VII class actions by opting instead for subdivision (b)(2) treatment.[157] This approach usually has been justified by a two-step analysis. First, the court notes that subdivision (b)(2) usually controls antidiscrimination class actions.[158] The court then seeks to resolve the problems posed by an action which interjects a claim for class-wide back pay in the request for injunctive relief contemplated by the traditional (b)(2) action. In this regard, the court generally notes that the primary thrust of any title VII action is to eliminate the discriminatory employment practices of a particular defendant,[159] a purpose which traditionally requires (b)(2) treatment. Pursuant to this characterization of the statutory civil action, back pay is

155. For a discussion of the judicial engraftment of class actions onto the title VII enforcement procedures to accomodate these policies, see text accompanying notes 25 & 26 *supra.*

156. This is done pursuant to the strong expression of congressional intent that make whole relief be available to the victims of unlawful employment practices. *See* note 85 and accompanying text *supra.*

157. *See, e.g.,* Senter v. General Motors Corp., 532 F.2d 511, 525 (6th Cir. 1976); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 250-53 (3rd Cir. 1975), *vacated on other grounds,* 424 U.S. 737 (1976); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974); Robinson v. Lorillard Corp., 444 F.2d 791, 801-02 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971); Women's Comm. for Equal Employment Opportunity v. National Broadcasting Co., 71 F.R.D. 666, 670-71 (S.D.N.Y. 1976); Taylor v. Vocational Rehabilitation Center, 13 FEP Cases 453, 457-58 (W.D. Pa. 1976); *Overview* 336.

158. *See, e.g.,* Senter v. General Motors Corp., 532 F.2d 511, 525 (6th Cir. 1976). *See also* text accompanying note 144 *supra.*

159. *See, e.g.,* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 250 (3rd Cir. 1975), *vacated on other grounds,* 424 U.S. 737 (1976); *Overview* 336. In this context, one should note that if the defendant corrects the challenged practice or practices on his own prior to litigation, the claim for injuctive relief will be rendered moot. This, in turn, gives rise to the argument that injunctive relief no longer predominates and that (b)(3) status is now more appropriate than (b)(2) status. *See* Baham v. Southern Bell Tel. & Tel. Co., 55 F.R.D. 478 (W.D. La. 1973). *Contra,* Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763, 767-68 (8th Cir. 1971); Women's Comm. for Equal Employment Opportunity v. National Broadcasting Co., 71 F.R.D. 666, 671 (S.D.N.Y. 1976).

then read as an "integral part of the statutory equitable remedy."[160] Thus defined, the action is viewed as one requesting make whole relief ancillary to the granting of injunctive relief from discriminatory employment practices.[161] This assessment serves to refute the contention that the action is one seeking exclusively or predominantly monetary damages and permits the action to be viewed as controlled by subdivision (b)(2). With the action thus governed by (b)(2) requirements, it is no longer necessary that the plaintiff satisfy the notice requirements of subdivision (c)(2).

The above analysis poses some very serious due process problems. As an initial matter, one should note that subdivision (b)(2) treatment means that absent class members will have no opportunity to opt out and thereby to insulate their individual claims from an adverse judgment entered against the class.[162] Yet, simultaneously, the absence of notice requirements for (b)(2) class actions means that even though an absentee will be bound by any judgment entered in the action, he may well be precluded from partaking in a favorable judgment simply because he is never informed of its existence before the running of the statutory time limit. No more astute assessment has been made of the problem than the following:

> [B]ack pay relief is predicated on a showing of individual entitlement and thus requires that each class member come forward and assert his own claim. Accordingly, Rule 23(b)(2) procedures are not appropriate in a title VII class action in which back pay relief is sought, for due process considerations mandate that notice be sent to affected class members so as to provide them an opportunity to supply all information requisite to their indi-

160. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (characterizing back pay award in this manner for purposes of determining whether or not a jury trial was required); *accord, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (applying this characterization of a back pay award to the determination of whether or not back pay can be sought through a (b)(2) action).

161. Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems in Procedure*, 8 GA. L. REV. 781, 791 (1974).

162. Subdivision (c)(3) contemplates that a judgment in a subdivision (b)(2) action will, win or lose, bind all those determined to be members of the class by the court. This should be compared with the last portion of subdivision (c)(3) which limits the binding character of a subdivision (b)(3) judgment to those members to whom notice was provided under subdivision (c)(2) and who did not opt out. FED. R. CIV. P. 23 (c)(3); *see* Case Note, *Class Wide Awards of Back Pay in Suits Under Title VII of the Civil Rights Act of 1964; Johnson v. Goodyear Tire and Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974), 35 OHIO ST. L.J. 1027, 1033 (1974).

> vidual recoveries. Indeed, it would be patently violative of fairness and justice to expect a class member to come forward and assert his claim or to permit his failure to do so to bar a claim in a suit subsequent to a class action judgment or settlement unless he receives some sort of notice.[163]

This lack of notice to the absent class members also poses a particular problem to the party opposing the class. Where no notice is forthcoming to the absent class members, the defendant must be prepared to face frequent relitigation since it is quite probable that any judgment initially entered will be subjected to constant collateral attacks from those claiming to have been denied due process by the lack of notice.[164] This seems diametrically opposed to the belief that class actions are desirable under title VII as a means of resolving common grievances in one lawsuit.

At this juncture, it appears that title VII class actions seeking back pay and injunctive relief simply are not amenable to precise categorization under rule 23(b) without difficult problems arising. In order to avoid these problems, two alternatives which inject flexibility into title VII class action procedure have been pursued. Both of these alternatives are designed to ensure that absent class members are at least notified of the action so that they may come forward and establish their entitlement to back pay, if and when a judgment is entered favorable to the class. However, as remains to be seen, neither alternative is a completely satisfactory solution.

The first alternative provides that the court will continue to view the action as a subdivision (b)(2) class action but will exercise its discretionary powers under subdivision (d)(2)[165] of rule 23 to require the issuance of notice to absent class members.[166] The

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163. Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems of Procedure*, 8 GA. L. REV. 781, 797 (1974).

164. *Id.; Overview* 337; *cf.* Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 533 (W.D. La. 1976) (a judgment issued in an action which did not protect the due process rights of the absent class members does not secure the party adverse to the class from further litigation by the absent class members).

165. FED. R. CIV. P. 23 (d)(2) provides:

> In the conduct of actions to which this rule applies, the court may make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate to intervene and present claims or defenses, or otherwise to come into the action.

166. *See, e.g.*, Women's Comm. for Equal Employment Opportunity v. National

type of notice required under this procedure appears to be within the court's discretion. Thus, if the court believes that notice by publication will sufficiently apprise absent class members of the proceeding or, in any event, that notice by publication is the most feasible notice, the court may limit its order accordingly.[167] By the same token, if the court feels that the situation is one that demands individual notice (*i.e.*, where the class is relatively small and its members readily identifiable, or where individual notice alone will ensure that absent class members are actually notified), the court is free to require individual notice.[168] Moreover, subdivision (d)(2) makes it clear that the content of discretionary notice is for the court to decide.[169]

While this alternative appears attractive, it is deficient in two respects. First, by categorizing a title VII class action seeking back pay and injunctive relief under subdivision (b)(2), this approach will preclude absent class members from opting out of the class.[170] Thus, even though the problems caused by lack of notice are taken care of by ordering subdivision (d)(2) notice, absent class members will still be unable to insulate their individual claims from a potentially adverse judgment.[171]

Second, the type of notice which the court chooses to require can raise very significant problems. Should the court elect to permit notice by publication, its decision will probably assure, at least in large-scale across the board class actions, that actual notice will not be given. The inadequacy of notice by publication has been cogently noted before,[172] and it is doubtful that the

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Broadcasting Co., 71 F.R.D. 666, 671 (S.D.N.Y. 1976); Burwell v. Eastern Airlines, Inc., 68 F.R.D. 495, 499 (E.D. Va. 1975).

167. *See* Ellison v. Rock Hill Printing & Finishing Co., 64 F.R.D. 415, 417-18 (D.S.C. 1974).

168. *See, e.g.*, Women's Comm. for Equal Employment Opportunity v. National Broadcasting Co., 71 F.R.D. 666, 671 (S.D.N.Y. 1976); Burwell v. Eastern Airlines, Inc., 68 F.R.D. 495, 499 (E.D. Va. 1975); Thomas v. Microlab/FXR, Inc., 11 FEP Cases 1167, 1169 (D.N.J. 1975); Kolta v. Tuck Indus., Inc., 11 FEP Cases 142, 144 (S.D.N.Y. 1975) (class action under 42 U.S.C. §1981 (1970)).

169. *See* note 165 *supra.*

170. For a discussion of the problems which arise when title VII class actions seeking injunctive relief and back pay are categorized under subdivision (b)(2), see text accompanying notes 162-64 *supra.*

171. Burwell v. Eastern Airlines, Inc., 68 F.R.D. 495, 499 (E.D. Va.. 1975).

172. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950), the Supreme Court noted the following about notice by publication:

> It would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court

issuance of such notice will be sufficient to resolve due process problems.[173] The problems are no less difficult, however, where the court commands individual notice. If individual notice is ordered, the court must decide who will pay the initial costs. Should the court choose to read *Eisen* as controlling in this context as well as in the subdivision (c)(2) context, the initial costs of notice will be imposed on the class representative.[174] But this approach resurrects the policy justifications invoked against categorizing these actions under subdivision (b)(3).[175] Alternatively, to impose the costs on the defendant prior to a determination on the merits will conflict squarely with *Eisen.*[176] While it might be argued that *Eisen* was concerned with subdivision (c)(2) notice rather than subdivision (d)(2) notice, such a distinction is not only risky, but tenuous as well. The Court in *Eisen* expressly stated, without any reference to subdivision (c)(2) in particular, that "[i]n the absence of any support under rule 23, [the cost of notice may not be imposed on the party adverse to the class prior to a determination on the merits]. *The usual rule is that a plaintiff must initially bear the cost of notice to the class.*"[177]

A court choosing to rely on the ordering of subdivision (d)(2) notice to ensure that due process is accorded absent class members is thus confronted with some very difficult choices that do not appear likely to result in a satisfactory solution. Accordingly,

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on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when . . . the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint.

173. As the Court stated in *Mullane,* "when notice is a person's due, process which is merely a gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315; *accord,* Lynch v. Sperry Rand Corp., 62 F.R.D. 78, 85-86 (S.D.N.Y. 1973).

174. *See* Women's Comm. for Equal Employment Opportunity v. National Broadcasting Co., 71 F.R.D. 666, 671 (S.D.N.Y. 1976); Martinez v. Bechtel Corp., 11 FEP Cases 898, 905 (N.D. Cal. 1975); Kolta v. Tuck Indus., Inc., 11 FEP Cases 142, 144 (S.D.N.Y. 1975) (class action under 42 U.S.C. §1981 (1970)).

175. *See* text accompanying notes 154-56 *supra.*

176. 417 U.S. at 178-79.

177. *Id.* at 178 (emphasis added); *accord,* Martinez v. Bechtel Corp., 11 FEP Cases 898, 905 (N.D. Cal. 1975).

attention must be given to the second alternative available to determine if it provides a more satisfactory solution.

The second alternative proposed envisions a bifurcated approach: notice issues to the absentees after a determination of the defendant's liability has been made on the merits.[178] Under this approach, the initial stage of the action is conducted pursuant to subdivision (b)(2) because the sole issue at that point is the legality of the defendant's conduct toward the class.[179] Accordingly, no notice is required, and all members of the class will be bound by the ultimate determination made. If the court determines that the defendant, by its employment practices, unlawfully discriminated against the class, the action will then convert into a subdivision (b)(3) proceeding for the purposes of determining the defendant's monetary liability for back pay to the class.[180] At this point in time, notice will issue to the absent class members,[181] arguably at the defendant's expense, since *Eisen* prohibited only a shifting of the costs prior to a determination of liability on the merits.[182]

While this bifurcated approach appears to be the better of the two alternatives, it is not without shortcomings of its own. A minor difficulty is that it fails to provide the defendant with a chance to assess his potential liability at an early stage in the proceedings.[183] More significantly, by deeming the initial stage of the action to be controlled by subdivision (b)(2), this alternative still fails to provide absentees an opportunity to opt out before their peculiarly individual claims are cut off by a binding judgment.[184] Nevertheless, it may be argued that the inability of ab-

178. For an extensive discussion of the effect this bifurcated approach has on the issuance of notice in a title VII class action, see Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems of Procedure,* 8 GA. L. REV. 781, 799-803 (1974).

179. *See* Freeman v. Motor Convoy, Inc., 11 FEP Cases 424 (N.D. Ga. 1975) (order granting plaintiff's motion for separate trials on issues of liability and individual entitlement to back pay); Paddison v. Fidelity Bank, 60 F.R.D. 695, 697-700 (E.D. Pa. 1973) (holding that class action first must resolve issues of liability under subdivision (b)(2) before issues of entitlement to damages may be presented).

180. Freeman v. Motor Convoy, Inc., 11 FEP Cases 425 (N.D. Ga. 1975) (order granting plaintiff's motion for separate trials on issues of liability and entitlement to damages); *see* Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437, 444 (5th Cir. 1974); Paddison v. Fidelity Bank, 60 F.R.D. 695, 697-700 (E.D. Pa. 1973).

181. This would be required by FED. R. CIV. P. 23(c)(2).

182. Edwards, *The Back Pay Remedy in Title VII Class Actions: Problems of Procedure,* 8 GA. L. REV. 781, 800 (1974); *see* Polston v. Metropolitan Life Ins. Co., 7 FEP Cases 406, 410 (W.D. Ky. 1974). *See generally* note 154 *supra.*

183. *Overview* 338 n.76.

184. *See* note 162 and accompanying text *supra.*

sent class members to opt out will exist anyway, insofar as the back pay remedy is seen as incidental to the predominant, equitable injunctive remedy constituting the basis of the action and rendering it subject to subdivision (b)(2) treatment. This bifurcated approach, therefore, is the preferred alternative since it not only ensures that notice will be forthcoming to the absentees, but also structures the action in such a manner that when notice becomes mandatory, the costs may be shifted to the defendant who has already been found liable on the merits.

C. Commentary

Rule 23 normally has been construed very liberally in title VII class actions. Most courts have felt that since class actions are the most efficient means of attacking widespread employment discrimination, procedural requirements should not be allowed to inhibit unreasonably the availability of the class action device to title VII plaintiffs. Thus, title VII class representatives usually have established the propriety of their class actions under rule 23 with relative ease.

Nevertheless, rule 23 continues to play a significant role in setting the course title VII class actions will be allowed to take. This is particularly true in the context of ensuring that such actions are conducted in a manner procedurally fair to the absent class members. Thus, while a title VII class representative easily may be able to establish, pursuant to rules 23(a)(1) and (a)(2), that his suit is a proper one for class action treatment, he will not always find it so easy to convince the court, pursuant to rules 23(a)(3) and (a)(4), that he is the proper person to represent the class. Similarly, even though the class representative's action is categorized under rule 23(b)(2), he may still be required to give notice to the absent class members if his complaint seeks make whole relief on behalf of the class.

It is important for the courts in title VII class actions to read strictly those provisions of rule 23 which demand procedural fairness to the absent class members. This should be done even though a strict reading of those provisions will at times appear to conflict with that policy favoring the use of class actions to attack widespread discrimination. Where no compromise or alternative exists to resolve such an apparent conflict, this may mean that certification will have to be denied a prospective class action plaintiff or that the scope of a prospective class action will have

to be drastically reduced. Nevertheless, it is preferable to restrict the number of persons who would be benefited by a favorable judgment rather than to risk the wide-ranging detriment which would accrue from the res judicata effect of an adverse judgment.

V. THE APPLICATION OF RULE 23 TO CIVIL SUITS BROUGHT BY THE EEOC

The 1972 amendments to title VII included provisions which authorized civil suits by the EEOC.[185] The title now permits the EEOC to file a civil action in federal district court after making a finding of reasonable cause on a filed charge and unsuccessfully seeking conciliation from the charged party.[186] Although the EEOC can file a civil suit only when it has an unconciliated charge before it, that suit need not be limited to the grievances of the charging party. Rather, the courts have stated that "when the EEOC sues on its own behalf it is entitled to broad judicial relief that encompasses discrimination against persons other than the charging party, as long as all charges of discrimination are the subject of investigation and conciliation prior to initiation of the judicial action."[187] Thus, an EEOC civil action may at times resemble a title VII class action. The question accordingly arises as to whether or not the EEOC, in conducting such a suit, will have to comply with the requirements of rule 23.

To the present date, the courts have split on this question. On the one hand, some courts have treated the suit not as one brought to vindicate the rights of the class members, but rather as one brought to enforce title VII proscriptions and thereby vindicate the public interest. Courts viewing EEOC civil suits in this manner have generally held that rule 23 is inapplicable even though the action may seek back pay on behalf of aggrieved individuals.[188] On the other hand, some courts have viewed EEOC civil suits as being the same as any other civil suit under title VII. Thus, where the EEOC's complaint attacks a defendant's employment policies for being discriminatory toward a class of persons, these courts require that the EEOC comply with the man-

185. *See* 42 U.S.C. § 2000e-5(f)(1) (Supp. II 1972); note 16 and accompanying text *supra*.

186. *See* note 16 and accompanying text *supra*.

187. EEOC v. Vinnell-Dravo-Lockheed-Mannix, 417 F. Supp. 575, 578 (E.D. Wash. 1976).

188. *See id.* at 577; EEOC v. Lutheran Hosp., 10 FEP Cases 1177, 1178 (E.D. Mo. 1974).

dates of rule 23 in the same way a private class representative must comply.[189]

In any event, the ability of the EEOC to bring such wide-ranging civil suits poses an interesting alternative to persons desiring to attack employment policies which discriminate against a class of persons. Rather than face the rigors of complying with rule 23 requirements (and particularly the rigors of possibly having to notify innumerable absent class members), the aggrieved individual might consider requesting that the EEOC take charge of the litigation.[190] The EEOC will likely have no difficulty in meeting the requirements of rule 23[191] if those requirements are imposed upon it, and the probability is great that the EEOC will be viewed as exempt from compliance with the rule.

VI. CONCLUSION

With the recognition by the courts that class action suits are the most efficient means of attacking widespread discrimination, the class action device has become entrenched in title VII practice. Yet, this marriage of the class action device to title VII civil practice has not been without problems. Too often, the courts have been willing to read class action procedural requirements liberally in order to promote the use of class actions to enforce the title. This has resulted in many class actions which were procedurally incorrect. While such transactions have had an adverse impact on title VII practice in many different ways, three areas in which the impact has been particularly noticeable deserve mention. First, procedurally incorrect class actions have served to prejudice absent class members, who are denied effective representation and notice that the suit has been brought. Second, procedurally incorrect class actions have had an adverse impact on defendants, who are forced to expend great sums of money in litigating procedural issues in an effort to limit the action to its proper dimensions. Finally, procedurally incorrect class actions have impaired judicial efficiency by requiring courts to expend great amounts of time resolving procedural problems or by requiring courts to struggle with unmanageable class actions.

189. *See, e.g.*, Niedhart v. D.H. Holmes Co., 13 FEP Cases 449 (E.D. La. 1976).

190. However, since the EEOC is burdened by a continually heavy caseload, it is probable that the Commission will have to be shown some justification for taking control of the action other than a simple desire to avoid the difficulties of rule 23.

191. *See generally* note 30 *supra.*

It is important, therefore, that more attention be given to class action procedural requirements whenever a title VII plaintiff files a class action civil suit. The courts must recognize their obligation to ensure that the absent class members have proper representation at every phase of the suit and that the action is manageable. Attorneys on both sides should avoid relying on conclusory pleadings and motions to justify or attack the action; rather, pleadings and motions should be factual in nature. Both sides should set forth facts which will enable the court to determine whether or not the class representative is properly invoking the federal judicial power and whether or not the procedural requirements of title VII and rule 23 have been met. This, of course, does not mean that inquiries into the merits of the complaint should be made. Even though it admittedly is impossible to segregate completely facts pertinent to the merits from facts pertinent to procedural issues, inquiries into the merits are to be avoided. But the parties should be sure, and the courts should demand, that sufficient facts are before the court to allow it to determine the propriety of a class action under the class representative's direction. While the policies underlying title VII should condition this determination to the extent those policies are promoted by class actions, a court should not forget its responsibility to ensure procedurally fair lawsuits.

Robert S. Phifer

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*Editor's Note—A recent ruling of the Supreme Court mandates that named plaintiffs in a title VII class action must strictly fulfill the requirements of rule 23(a); compliance with these requirements will no longer be assumed. In *East Texas Motor Freight System, Inc. v. Rodriguez*, 45 U.S.L.W. 4524 (May 31, 1977), the Court ruled that the named plaintiffs were not proper class representatives under rule 23(a) (*see* § IV, A *supra*). In overruling the decision of the Fifth Circuit Court of Appeals (*see* note 34 and accompanying text *supra*), the Court held that plaintiffs did not "possess the same interest and suffer the same injury" (45 U.S.L.W. at 4527) as did the class members; further, it noted that plaintiffs' failure to move for class certification bore on the adequacy of representation of class members (*see* § IV, A, 4 *supra*).