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Title VII Class Actions: A New Era?

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Comment

Title VII Class Actions: A New Era?

I. INTRODUCTION

Much litigation under title VII of the Civil Rights Act of 1964,[1] involves class actions.[2] This result was a consequence of the Civil Rights Act of 1964[3] which placed the primary enforcement mechanisms of the Act in the hands of private parties.[4] Reinforcing this result was the conclusion by most federal courts that title VII actions were by definition class actions and that the requirements of rule 23(a) of the Federal Rules of Civil Procedure[5] could be met

1. Civil Rights Act of 1964 §§ 701-718, 42 U.S.C. §§ 2000e through 2000e-17 (1976 & Supp. IV 1980) [hereinafter cited as title VII].
2. In fact, class action boilerplate allegations have become so common in title VII actions that they have been criticized by some courts. *See* Belcher v. Bassett Furniture Indus., 588 F.2d 904, 906 (4th Cir. 1978); Shelton v. Pargo, Inc., 582 F.2d 1298, 1311 (4th Cir. 1978).
3. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified in scattered sections of 5, 28, & 42 U.S.C.).
4. The private charging party was given the opportunity to bring suit under section 706(f)(1) of title VII, 42 U.S.C. § 2000e-5(f)(1) (1976), along with a possibility of court appointed attorneys, *id.*, and authorization to get attorney fee awards, § 2000e-5(k). The 1964 version of title VII only gave public enforcement powers in pattern and practice suits to the attorney general upon recommendation by the Equal Employment Opportunity Commission (EEOC). Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 706(d), 707(a), 78 Stat. 260, 261 (1964) (current versions at 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6(a) (1976)). Legislative history indicates that Congress was fearful of giving too broad enforcement powers to the EEOC. *See* 110 CONG. REC. 1518, 1521 (1964) (remarks of Rep. Celler); Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 436-37 (1966).
5. FED. R. CIV. P. 23 provides in relevant part:

   > (a) Prerequisites to a Class Action. 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.
   >
   > (b) Class Actions Maintainable. An action may be maintained as a

with broad allegations in a complaint.[6] These courts also liberally construed rule 23(a) to allow what was termed an "across-the-board" attack on an employer's employment policies. This doctrine permitted an employee, who was allegedly discriminated against by an employer policy, to represent in a class action other employees who were subject to different employment policies.[7] This view of title VII class actions was limited by the Supreme Court in *East Texas Motor Freight v. Rodriguez*[8] and, more recently, was rejected by the Supreme Court in *General Telephone v. Falcon*[9] which held that all the requirements of rule 23(a)[10] must

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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 any 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.

The vast majority of title VII suits are brought under rule 23(b)(2) since title VII is an equitable remedy and backpay is ancillary.

6. *See, e.g.*, Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975); Barnette v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Tipler v. E. I duPont deNemoures Co., 443 F.2d 125 (6th Cir. 1971); Johnson v. Georgia Highway Express Inc., 417 F.2d 1122 (5th Cir. 1969).
7. *See, e.g.*, Barnette v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975) (black former employee would be a proper representative of all persons who were victims of discriminatory employer policies despite how they experienced the discrimination); Long v. Sapp, 502 F.2d 34 (5th Cir. 1974) (plaintiff who suffered promotion discrimination can represent a broad class of persons who suffered other types of discrimination).
8. 431 U.S. 395 (1977).
9. 102 S. Ct. 2364 (1982).
10. The requirements of rule 23(a) are usually referred to respectively as (a)(1) numerousity, (a)(2) commonality, (a)(3) typicality, and (a)(4) adequacy. *See supra* note 5. Along with meeting these four require-

be met to certify a title VII class action.[11]

These Supreme Court decisions should cause legal theorists and practicing attorneys to wonder how the circuit courts went

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ments a plaintiff wishing to certify a class must meet one of the subdivision (b) requirements. Civil rights class actions are normally brought under subdivision (b)(2) because of the equitable nature of the civil rights remedy,and it is administratively easier for plaintiffs since there is no opt out provision and no notice requirement as there is in subdivision (b)(3). *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir. 1975); 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.40(1) (2d ed. 1982) (Because of older case law in the civil rights area seeking declaratory and injunctive relief, the 1966 Advisory Committee Note referred to civil rights litigation to illustrate the scope of subdivision (b)(2).); Bridgesmith, *Representing the Title VII Class Action: A Question of Degree*, 26 WAYNE L. REV. 1413, 1425 (1980) (rule 23(b)(2) is preferable because rule 23(b)(3) requires mandatory notice to be given to absent class members which "can be expensive and problematic where a large putative class is alleged"). The mandatory notice provision for rule 23(b)(3) is found in subdivision (c)(2) which provides:

> (2) In 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.

FED. R. CIV. P. 23(c)(2).

Any notice ordered to be sent in a subdivision (b)(2) class action would be discretionary and ordered pursuant to subdivision (d) which allows for court discretion in conducting the class action. Rule 23(d) provides:

> (d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) 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; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under rule 16, and may be altered or amended as may be desirable from time to time.

An extreme use of this discretion occurred in Miller v. Central Chinchilla Group, Inc., 66 F.R.D. 411 (S.D. Iowa 1975), where the court ordered notice sent to prospective class members informing them of their right to intervene because the class failed to be certified. *But see* Pan Am. World Airways v. United States Dist. Court, 523 F.2d 1073 (9th Cir. 1975); Cherner v. Transition Elec. Corp., 201 F. Supp. 934 (D. Mass. 1962).

11. 102 S. Ct. at 2373.

astray by liberally construing rule 23 requirements and how the enforcement mechanisms of title VII will operate after *Falcon* and *Rodriguez*. This Comment will address these questions and examine the policy basis of the Supreme Court decisions.

II. LEGAL PERSPECTIVE

A. Legislative History

The Civil Rights Act of 1870[12] guaranteed blacks the right to contract and to possess and convey property while the Civil Rights Act of 1871[13] guaranteed blacks the right to be free of racial discrimination by the authority of state and local law. By 1960, however, these acts seemed clearly inadequate to deal with racial discrimination.[14] Congress responded by passing the Civil Rights Act of 1964 which included title VII.[15] The general purpose of the Civil Rights Act of 1964 was to hasten the elimination of discrimination;[16] the purpose of title VII was to eliminate discrimination in employment.[17]

A major issue which Congress faced in enacting title VII was how to enforce it. Several enforcement alternatives were considered.[18] One alternative recommended that a body similar to the National Labor Relations Board be established with a commission divided into an investigating and prosecuting office and a quasi judicial board.[19] The House version of title VII did not accept this

12. Act of May 31, 1870, ch. 114, § 16, 16 Stat. 1144 (1870) (codified at 42 U.S.C. § 1981 (1976)).
13. Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (1976)). Congress sought to reach conspiracies with the Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1985 (1976)). The Supreme Court has interpreted § 1983(3) so as to reach conspiracies between solely private parties. Griffin v. Breckenridge, 403 U.S. 88 (1971).
14. *See infra* note 16 and accompanying text; *see generally* U.S. COMM'N ON CIVIL RIGHTS, EMPLOYMENT 1961 REPORT (1961); *see also* Report of U.S. Comm'n on Civil Rights, 48 L.R.R.M. (BNA) 103 (1961).
15. *See supra* note 1.
16. This was part of the general statement in the judiciary committee report on the House bill which became the Civil Rights Act of 1964. The report states: "[I]n the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need which becomes ever more obvious." 1964 U.S. CODE CONG. & AD. NEWS 2391, 2393.
17. H.R. 7152, 88th Cong., 1st Sess. § 701(a) (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2401.
18. *See generally* Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV., 688, 692-96 (1980) (discusses the legislative debate on enforcement alternatives).
19. In discussing this alternative, Vaas states:

> H.R. 405 . . . provided for an administrative agency, comparable to the NLRB, with the authority to hold hearings and issue cease-and-desist orders, enforceable in court, after a finding of discrimination in

alternative, but it did give the Equal Employment Opportunity Commission (EEOC) enforcement powers to bring civil suits.[20] A Senate amendment, however, eventually stripped these powers allowing the Commission only the power to recommend to the Attorney General that suit be instituted.[21] This congressional background made it clear that once title VII was passed the primary enforcement mechanism of the Act would be charging parties in private civil suits. Class actions as an enforcement mechanism were not explicitly sanctioned in the statute or its legislative history.[22]

Some legislative history regarding title VII class actions is, however, evident in Congress amendment of title VII with the Equal Employment Opportunity Act of 1972.[23] The original House amendment of title VII prohibited class actions.[24] This House bill, however, did nto survive in the Senate.[25] In the Senate's Labor

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> hiring or union membership. The administrative agency would have been an "Equal Employment Opportunity Commission" consisting of an "Equal Employment Opportunity Board" and an "Office of the Administrator of the Equal Employment Opportunity Commission." The Board would have been responsible for the judicial function of hearing and deciding the complaints brought before it by the Office of the Administrator.

Vaas, *supra* note 4, at 435.

20. H.R. 7152, 88th Cong., 1st Sess. § 707(b) (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2404. *See* Vaas, *supra* note 4, at 436-37.
21. *See* Vaas, *supra* note 4, at 452-53.
22. *See* Rutherglen, *supra* note 18, at 695-96. Rutherglen discussed the reasons for this lack of legislative history:

> Class actions escaped congressional notice in part because they did not attain prominence until the 1966 revision of rule 23, but more significantly, because Congress expressly dealt with the issue of class-wide litigation by granting authority to the Attorney General to bring pattern-or-practice actions. Congress also denied authority to private persons to file administrative charges on behalf of others, suggesting that, far from endorsing class action, it intended at that time to preclude private authority to litigate on behalf of others.

Id. (footnote omitted).

23. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (amending 42 U.S.C. §§ 2000e through 2000e-17 (1976)) [hereinafter cited as 1972 Act].
24. H.R. 1746, 92d Cong., 1st Sess. § (e) (1971), *reprinted in Hearings on S. 2515, S. 2617, H.R. 1746 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare,* 92d Cong., 1st Sess. 40-46 (1971) [hereinafter cited as *Hearings*]. The relevant portion of the bill read:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement or promotion of an individual as an employee, or the payment to him of any backpay, if such individual . . . neither filed a charge nor was named in a charge or amendment thereto . . . .

Id. at 46. *See* Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 838-39 (1972).
25. *See* Sape & Hart, *supra* note 24, at 840-45.

and Public Welfare Committee, Senator Dominick introduced a bill which also prohibited class actions,[26] but the bill was not accepted by the committee.[27] Instead, the final Senate committee report rejecting the House bill affirmed the committee's belief in class actions. The report stated: "The committee agrees with the courts that title VII actions are by their very nature class complaints, and that any restriction on such actions would greatly undermine the effectiveness of title VII."[28] The final bill adopted in 1972[29] did not mention class actions[30] but did do the following: granted the EEOC the power to sue, extended the period for filing individual suits and filing with the EEOC, and expanded the Act to cover more employers.[31] The legislative history shows that there was some support for the use of class actions, but, at most, it indicates that Congress by enacting the 1972 Act[32] did not wish to restrict the use of private class actions. Such legislative history is a weak hook on which to hang a claim that Congress endorsed a liberal construction of rule 23 in the title VII setting.[33]

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26. S. 2617, 92d Cong. 1st Sess. § (e) (1971), *reprinted in Hearings, supra* note 24, at 33-39. Senator Dominick's bill was identical to the House bill. *See* Sape & Hart, *supra* note 24, at 840-41.
27. *See* Sape & Hart, *supra* note 24, at 843-44.
28. S. REP. No. 415, 92d Cong., 1st Sess. 27 (1971), *reprinted in* SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG. 2D SESS. LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 436 (1972).
29. *See supra* note 23.
30. In regard to class actions, Senator Harrison Williams explained the enforcement provisions of the 1972 Act:

> [I]t is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure . . . . [L]eading cases in this area to date have recognized that Title VII claims are necessarily class action complaints and that, accordingly, it is not necessary that each individual entitled to relief under the claim be named in the original charge or in the claim for relief.

118 CONG. REC. 4942 (1972). This statement is an explanation of the Senate amendment, S. 2515, 92d Cong., 1st Sess. (1971), authorizing private persons to file charges on behalf of a person claiming to be aggrieved.

31. *See* Rutherglen, *supra* note 18, at 719-20.
32. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 4(a), 5, 86 Stat. 104, 107 (1972) (codified at 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6(c) (1976)). Generally, this Act increases EEOC enforcement powers.
33. In fact, the plaintiff's brief in *Falcon* did not claim that Congress endorsed the liberal use of class actions; instead, it stated: "In the face of such explicit Congressional intent and endorsement of the *role and importance* of class actions in combatting employment discrimination, this Court should not adopt a procedural limitation that would destroy the utility of the class action as a device to effectuate title VII's broad remedial purposes." Brief for Respondent at 21, General Tel. Co. v. Falcon, 102 S. Ct. 2364 (1982) (emphasis added).

B. Case Authority

1. Focus on the Effects of the Relief Sought

Unlike the murky legislative history, case law under the Civil Rights Acts and title VII has dealt directly with the class action issue. Many cases brought under the Civil Rights Acts and decided prior to the 1964 Act dealt with claims by plaintiffs for classwide relief.[34] These cases commonly focused on the effect of the relief sought by the plaintiff in deciding the class action issue.

In *Bailey v. Patterson*[35] black plaintiffs sought to bring a class action challenging Mississippi's segregation statutes as they applied to common carriers.[36] The Fifth Circuit in *Bailey* avoided the class action issue, finding that the relief sought by the representative plaintiffs would run to the class. The court stated: "[T]he very nature of the rights appellants seek to vindicate required that the decree run to the benefit not only of appellants but also for all persons similarly situated."[37]

This focus on the effect of the relief sought to decide if an action should be considered a class action was also important in *Brunson v. Board of Trustees*.[38] In *Brunson*, black plaintiffs challenged a school district's biracial method of assigning students. On appeal, the Fourth Circuit faced the issue of whether the plaintiff could bring the suit as a class action. The court concluded that there were common questions of fact such that the action could proceed as a spurious class action under rule 23(a)(3).[39] In so holding, the court noted that if classwide relief was given, problems within the segregated school system would not be as obscured and would become more apparent to school administrators.[40]

This policy of allowing class actions in discrimination suits focusing on the effect of the relief sought was endorsed in the key

34. *See, e.g.*, Bailey v. Patterson, 323 F.2d 201 (5th Cir. 1963); Potts v. Flax, 313 F.2d 284 (5th Cir. 1963); Brunson v. Board of Trustees, 311 F.2d 107 (4th Cir. 1962).
35. 323 F.2d 201 (5th Cir. 1963).
36. One of the challenged statutes applicable to railroads read: "If . . . a railroad shall fail . . . to divide the passenger cars by partition, to secure separate accommodations for the white and colored races . . . or . . . fail to assign each passenger to the car used for the race to which the passenger belongs, he or it shall be guilty of a misdemeanor . . . ." MISS. CODE ANN. § 2351 (1942).
37. 323 F.2d at 206.
38. 311 F.2d 107 (4th Cir. 1962).
39. Prior to the 1966 revision of the Federal Rules of Civil Procedure, rule 23(a)(3) provided for spurious class actions. In reality this type of class action was a permissive joinder device which would not bind persons who were not parties to the action. The device was designed to be used when there were many persons interested in a common question of law or fact and the persons were interested in resolving "a litigious situation." *See* 2 J. MOORE & J. FRIEDMAN, MOORE'S FEDERAL PRACTICE ¶ 23.04 (1938).
40. 311 F.2d at 109.

title VII class action case, *Hall v. Werthan Bag Corp*.[41] In *Hall*, the court extended the customary judicial doctrine of allowing class actions when challenging facially discriminatory employer policies,[42] to actions where the discriminatory practice occurs apart from an avowed policy of discrimination.[43] The court allowed this extension focusing on the remedy sought. The court stated: "For purposes of allowing a class action for injunctive relief, however, this court is unable to perceive any real distinction between a policy which is discriminatory on its face and a policy which is shown to exist and to be discriminatory only by analysis of its application . . . ."[44] The court went on to say that "[r]acial discrimination is by definition class discrimination. If it exists, it applies throughout the class."[45] This point made in *Hall* led to a circuit court doctrine of liberally certifying title VII class actions and extending this certification to across-the-board attacks on an employer's employment policies.[46]

2. Focus on Alleged Act and Title VII Purposes

The Fifth Circuit, relying on *Hall*, was the first circuit to endorse a policy of liberally certifying title VII class actions and became the most adamant circuit in justifying its approach. In *Johnson v. Georgia Highway Express, Inc.*,[47] the Fifth Circuit held that an employee alleging that he was discriminatorily discharged and not seeking reinstatement could be a class representative of employees allegedly harmed by discrimination in hiring, firing, promotion, and use of company facilities.[48] The court justified its

41. 251 F. Supp. 184 (M.D. Tenn. 1966).
42. *See* Reddix v. Lucky, 252 F.2d 930, 938 (5th Cir. 1958) (class action inappropriate due to factual differences in denying blacks the right to vote); Johnson v. Yeilding, 165 F. Supp. 76, 79 (D.D.C. 1958) (class action appropriate where blacks challenge denial of application forms and right to take the police exam for possible hire); *see also* Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956).
43. 251 F. Supp. at 186.
44. *Id.* The court held that class certification was proper for injunctive relief but not for compensatory relief for past discrimination. Cases since *Hall* have bifurcated proceedings with one focusing on individual liability and relief, and the other on class liability and relief. International Bd. of Teamsters v. United States, 431 U.S. 324, 358-62 (1977). The point of the textual quote, however, is that in order to determine if there were common questions of law or fact the court focused on the effect of the relief sought. *See infra* notes 52-53 and accompanying text.
45. 251 F. Supp. at 186. The statement seems to be a truism.
46. *See* Rutherglen, *supra* note 18, at 709 ("[T]he Fifth Circuit transformed the reasoning of *Hall* into a doctrine supporting certification of 'across-the-board' title VII class actions.").
47. 417 F.2d 1122 (5th Cir. 1969) (interlocutory appeal).
48. In *Johnson*, 417 F.2d 1122 (5th Cir. 1969), the plaintiff worked for defendant, Georgia Highway Express, for many years. When the company held a meet-

position stating:

> While it is true, as the lower court points out, that there are different factual questions with regard to different employees, it is also true that the "Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question common to all members of the class."[49]

Johnson marked the beginning of a court doctrine[50] which allowed an employee, allegedly discriminated against in some manner, to maintain an across-the-board attack challenging all of an employer's employment policies by representing all employees who would have been subject to such policies.[51]

The Fifth Circuit in adopting this doctrine failed to note an important distinction made in *Hall*. In *Hall* the court noted that the commonality requirement of rule 23(a) was met by focusing on the effect of the relief sought.[52] The *Hall* court stated:

> The Court is of the opinion therefore, that a significant question of fact common to all members of the class exists in this case insofar as the complaint seeks the removal of the alleged discriminatory policies. To the extent that it seeks redress for past effects of the alleged discrimination, however, the controlling questions of fact are not common to the entire class.[53]

This focus on the effect of the relief sought was not discussed in *Johnson*. The *Johnson* opinion can be seen as the beginning of liberally certifying title VII class actions without focusing on the ef-

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ing of its black employees to hear their grievances, Johnson inquired as to when blacks could apply for jobs not then held by blacks. Several weeks after this meeting Johnson was discharged. Defendant claimed Johnson was discharged for failure to regularly report to work. The district court limited the class to persons discharged because of race. *Id.* at 1123-24.

49. *Id.* at 1124 (quoting Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966)).

50. Among the cases leading up to the *Johnson* decision included Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968), which held that membership in a class action was not restricted to individuals filing charges with the EEOC. The court held that to bring such a class action the plaintiff had to meet the requirements of rule 23(a) and rule 23(b)(2), and had to have standing to raise the issues considered in the suit. *Oatis* was subsequently relied upon in Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968), where the court held that a subsequent acceptance of a promotion by a plaintiff did not render his suit moot as to himself individually or the class he represented. The Fifth Circuit based its decision on the remedies still available to the class and the employee, including backpay and injunctive relief.

51. *See, e.g.*, Rich v. Martin Marietta Corp., 522 F.2d 33 (10th Cir. 1975); Barnette v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Mack v. General Elec. Co., 329 F. Supp. 72 (E.D. Pa. 1971).

52. *See supra* note 44 and accompanying text.

53. 251 F. Supp. at 186. The quote not only indicates that the court was following a judicial doctrine which did not allow classwide compensatory relief, but also indicates that the court realized that the rule 23 requirements were met because the relief sought would remove the employer's discriminatory policies.

fect of the remedy sought but, instead, focusing on the alleged act of discrimination.[54]

Many other courts soon followed the *Johnson* approach. Some, however, rationalized liberal certification based on the remedial policy of title VII.[55] In *Rich v. Martin Marietta Corp.*[56] the Tenth Circuit focused on the purposes of title VII in allowing an across-the-board attack stating:

> Class actions are generally appropriate in title VII employment discrimination cases. The reason for this is that although these suits are self-help . . . actions, they also have a broad public interest in that they seek to enforce fundamental constitutional principles as well as advance the rights of individual plaintiffs who bring the action.[57]

In sum, many courts began to liberally grant class certification in title VII actions, basing their decisions on the nature of discrimination and the purposes of title VII.[58]

3. Rodriguez *and* Falcon

In 1977, the United States Supreme Court attempted to limit this liberal certification doctrine in *East Texas Motor Freight v. Rodriguez*.[59] In *Rodriguez*, Mexican-American plaintiffs were city truck drivers for an employer who had a division of city truck drivers and a division of line truck drivers. The employer had a policy which disallowed transfers between the two divisions. The plaintiffs brought a title VII action claiming to represent all of the employer's black and Mexican-American city drivers and all black and Mexican-American applicants for line driver positions. At trial the plaintiffs failed to move for class certification,[60] and the trial

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54. *See supra* notes 34-45 and accompanying text.
55. *See, e.g.*, Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir. 1975); Barnette v. W.T. Grant Co., 518 F.2d 543, 547-48 (4th Cir. 1975); Bormann v. Long Island Press Publishing Co., 379 F. Supp. 951, 954 (E.D. N.Y. 1974); McBroom v. Western Elec. Co., 7 Emp. Prac. Dec. (CCH) ¶ 9347, at 7573 (M.D.N.C. 1974); Batiste v. Furnco Constr. Corp., 350 F. Supp. 10, 13 (N.D. Ill. 1972), *rev'd on other grounds*, 503 F.2d 447 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975).
56. 522 F.2d 333 (10th Cir. 1975).
57. *Id.* at 340.
58. Some district courts refused to allow such liberal certification, instead requiring the plaintiff to meet all the rule 23(a) requirements. In Harriss v. Pan Am. World Airways, 74 F.R.D. 24, 38-46 (N.D. Cal. 1977), the court set out different factors which are relevant in looking at each rule 23 requirement. *See also* Elliott v. Sperry Rand Corp., 16 Fair Emp. Prac. Cas. (BNA) 1557 (D. Minn. 1976); Williams v. Wallace Silversmith, Inc., 75 F.R.D. 633 (D. Conn. 1976), *appeal dismissed*, 566 F.2d 364 (2d Cir. 1977).
59. 431 U.S. 395 (1977).
60. In *Rodriguez*, 431 U.S. 395 (1977), the Supreme Court described the district court proceeding:

> Following trial, the District Court dismissed the class action allegations. It stressed the plaintiffs' failure to move for a prompt determi-

court found that the employer's seniority and no transfer policies were not discriminatory. On appeal the Fifth Circuit certified a class of all Mexican-American and black city drivers included in the collective bargaining agreement.[61] The appellate court also reversed the trial court's finding of no liability, concluding that the union and employer were liable for hiring discrimination and for maintaining discriminatory seniority[62] and no transfer policies.[63] The Supreme Court disagreed with the Fifth Circuit, finding that the district court did not err.[64] The Court first found that the plaintiffs were not members of the class they wished to represent because: (1) they were not qualified to be hired as line drivers[65] and (2) each plaintiff stipulated that he was not discriminated against when initially hired.[66] Second, the Court found that the plaintiffs were not adequate class representatives because they failed to move for class certification prior to trial,[67] and a "conflict [existed] between the vote by members of the class rejecting a merger of the city- and line-driver collective bargaining units, and the demand in

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> nation of the propriety of class certification, their failure to offer evidence on that question, their concentration at trial on their individual claims, their stipulation that the only issue to be determined concerned the company's failure to act on their applications, and the fact that, contrary to the relief sought, . . . a large majority of the membership of Local 657 had recently rejected a proposal calling for the merger of city-driver and line-driver seniority lists with free transfers between jobs.

Id. at 400. The Fifth Circuit felt that the responsibility for determining class certification rested with the trial court. 505 F.2d 40, 50 (5th Cir. 1974).

61. 505 F.2d at 52. Note that the Fifth Circuit did not allow the class to include all black applicants for the line driver positions. The court stated: "The plaintiffs never pursued the action on behalf of these individuals, and the district court's dismissal of the class action on their behalf was proper." *Id.*
62. The Fifth Circuit only found the local and the Southern Conference of Teamsters liable for establishing separate seniority lists. *Id.* at 60-61.
63. *Id.* at 52-61.
64. East Texas Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403 (1977). As to liability with regard to the representative plaintiffs, the Court stated: "The District Court found upon abundant evidence that these plaintiffs lacked the qualifications to be hired as line drivers. Thus, they could have suffered no injury as a result of the alleged discriminatory practice . . . ." *Id.* at 403-04 (footnote omitted).
65. *Id.* at 403 n.9. In footnote nine, the Court listed the qualification problems with the representative plaintiffs. The problems included lack of experience, poor driving records, poor work records, and poor physical conditions.
66. *Id.* at 403-04. The Court stated, "[E]ach named plaintiff stipulated that he had not been discriminated against with respect to his initial hire. In light of that stipulation they were hardly in a position to mount a classwide attack on the no-transfer rule and the seniority system . . . ." *Id.* at 404.
67. *Id.* at 405. In pertinent part, rule 23(c)(1) states: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." FED. R. CIV. P. 23(c)(1).

the plaintiff's complaint for just such a merger."[68] This combination of factors was sufficient to deny class certification despite the Court's assertion that it was "not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits involving classwide wrongs."[69]

Various interpretations of the impact of *Rodriguez* on title VII class actions soon emerged in the circuit courts.[70] One line of cases distinguished *Rodriguez* as only mandating that where a representative plaintiff's claim lacks merit, he cannot bring a classwide attack.[71] Some post-*Rodriguez* cases took a view of liberally reading the rule 23 requirements only when a representative plaintiff could point to a discrete discriminatory employer policy.[72] Other cases liberally read the requirements once the representative plaintiff demonstrated that he was an adequate class representative.[73] Finally, a significant line of cases felt that *Rodriguez* signaled an end to across-the-board attacks and required a repre-

68. 431 U.S. at 405 (footnote omitted).

69. *Id.*

70. *See* Note, *How Far Across the Board: The Permissible Breadth of Title VII Class Actions*, 24 ARIZ. L. REV. 61 (1982) (The author advocated the "intermediate" interpretation of *Rodriguez* to allow an across-the-board attack if the plaintiff demonstrates a clearly identifiable employer policy which is discriminatory.).

71. *See, e.g.*, Satterwhite v. City of Greenville, 578 F.2d 987, 993 n.8 (5th Cir. 1978) (en banc), *vacated and remanded on other grounds*, 445 U.S. 940 (1980) (plaintiff must suffer discrimination in some respect but it is not necessary for the discrimination to be suffered in the same way); Gilchrist v. Bolger, 89 F.R.D. 402, 405 (S.D. Ga. 1981) (plaintiff must make a showing of a sufficient nexus with the putative class and its interests); Bartelson v. Dean Witter & Co., 29 FED. R. SERV. 2d (Callaghan) 302, 309 (E.D. Pa. 1980) (*Rodriguez* only bars across-the-board class suit where plaintiff is discriminated against); Beasley v. Griffin, 81 F.R.D. 114, 116 (D. Mass. 1979) ("*Rodriguez* holds simply that a court may not certify a class action where trial on the merits has shown the named plaintiffs have no claim"); Arnett v. American Nat'l Red Cross, 78 F.R.D. 73, 77 n.6 (D.D.C. 1978) (in *Rodriguez* the "Supreme Court intended to preclude maintenance of a class action by one *who was not discriminated against at all*").

72. *See, e.g.*, Jordan v. County of Los Angeles, 669 F.2d 1311, 1322 (9th Cir. 1982), *vacated*, 103 S. Ct. 35 (1982) (employer practice of denying employment to persons with certain types of criminal records); Stastn v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 280 n.20 (4th Cir. 1980) (in a multi-facility class action plaintiff cannot only rely on systemwide disparities); Hauck v. Xerox Corp., 78 F.R.D. 375, 378 (E.D. Pa. 1978) (identifiable employer policy which is obviously applicable to others in like status with the plaintiff must be shown or the employer must admit that the policy identified was applied to all employees).

73. *See, e.g.*, Doe v. First City Bankcorp of Texas, Inc., 81 F.R.D. 562, 570 (S.D. Tex. 1978) (Under *Rodriguez* the plaintiff must show a nexus with the class he hopes to represent.); Wajda v. Pennsylvania Mut. Life Ins. Co., 80 F.R.D. 303, 308 (E.D. Pa. 1978) (*Rodriguez* does not reject the across-the-board approach but only involved class membership, standing, and adequacy).

sentative plaintiff to meet all the rule 23 requirements to represent a class.[74]

To the extent that this latter line of cases held that a representative plaintiff had to meet all the rule 23(a) requirements,[75] it was validated by the Supreme Court in *General Telephone Co. v. Falcon*.[76] In *Falcon*, a Mexican-American employee of the defendant was discriminated against by being refused a promotion.[77] The issue was whether Falcon could maintain a class action on behalf of both Mexican-American employees who were denied promotions and Mexican-American applicants who were denied employment.[78]

The district court in *Falcon*, without conducting an evidentiary hearing, certified a class including Mexican-American employees and Mexican-American applicants for employment who had not been hired.[79] As to liability, the district court found that the plaintiff was not discriminated against when hired but was discriminated against by being denied a promotion.[80] With regard to the class, the district court found no discrimination in promotion but did find discrimination in the defendant's hiring process.[81] At a liability hearing after the trial, the district court awarded thirteen applicants backpay.[82] The Fifth Circuit Court of Appeals affirmed

74. *See, e.g.*, Abron v. Black & Decker, 654 F.2d 951, 954 (4th Cir. 1981) (*Rodriguez* expressly discredits the across-the-board approach); Patterson v. General Motors Corp., 631 F.2d 476, 480 (7th Cir. 1980) (under *Rodriguez* a plaintiff must satisfy all the rule 23(a) requirements); Tuft v. McDonnell Douglas Corp., 581 F.2d 1304, 1308 (8th Cir. 1978) (district court did not err in denying class certification based on *Rodriguez*).

75. The cases, however, were not validated to the extent they held that across-the-board suits were no longer permitted under rule 23. *See infra* notes 107-111 and accompanying text.

76. 102 S. Ct. 2364 (1982).

77. The plaintiff was originally hired as part of an affirmative action program of the defendant. He was promoted twice, first to lineman and then to lineman-in-charge. During 1971 and 1972, Falcon sought a promotion to field inspector. He did not receive the promotion but other non-Mexican-Americans did. Brief of Petitioner at 2, General Tel. Co. v. Falcon, 102 S. Ct. 2364 (1982).

78. 102 S. Ct. at 2366.

79. In Falcon's EEOC charge and in his complaint he never alleged that he was discriminated against when hired. Brief of Petitioner at 3.

80. The district court based its decision on its finding that General Telephone's reasons for promoting other men were "insufficient and subjective." Falcon v. General Tel. Co., 626 F.2d 369, 373 (5th Cir. 1980).

81. In finding there was hiring discrimination the district court relied on statistics which showed that Mexican-Americans represented 5.24% of the work force in the relevant area while, in 1972, only 1.22% of General's employees were Mexican-American. 626 F.2d at 372.

82. At the liability hearing, the district court found most of the applicants had been properly rejected, but most of the defendant's liability arose from its

the district court's class certification.[83] The court stated: "[T]his Court permits an employee complaining of one employment practice to represent another complaining of another practice, if the plaintiff and members of the class suffer from essentially the same injury. In this case, all of the claims are based on discrimination because of national origin."[84] The Fifth Circuit asserted that while similarity based on national origin discrimination was not dispositive in this case it weighed toward allowing class certification given the "similarity of interests based on job location, job function and other considerations."[85]

The Supreme Court reversed the Fifth Circuit's approval of class certification.[86] The Court felt that the district court erred in certifying the plaintiff's proposed class based merely on allegations in the complaint instead of requiring a showing that all rule 23(a) requirements had been met.[87] While the Court reiterated that it agreed with the rationale of the across-the-board doctrine that "racial discrimination by definition is class discrimination,"[88] it could not agree that allegations of discrimination were sufficient to meet the requirements of rule 23(a).[89]

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practice of only keeping applications active for 90 days. Falcon v. General Tel. Co., 463 F. Supp. 315, 317 (N.D. Tex. 1978).

83. 626 F.2d at 375.

84. *Id.*

85. *Id.* at 376. The court did not explain this similarity analysis but only cited Crawford v. Western Elec. Co., 614 F.2d 1300 (5th Cir. 1980). In *Crawford* the district court denied certification because the plaintiffs did not show that the discrimination extended beyond the promotion system into the hiring practices. It is hard to see how *Falcon* is reconciled with *Crawford*.

86. 102 S. Ct. at 2371-73. The Court identified the problem with the class certification stating:

> Respondent's complaint provided an insufficient basis for concluding that the adjudication of his claim of discrimination in promotion would require the decision of any common question concerning the failure of petitioner to hire more Mexican-Americans. Without any specific presentation identifying the questions of law or fact that were common to the claims of respondent and the members of the class he sought to represent, it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner by Mexican-American employees and applicants.

Id. at 2371 (footnote omitted).

87. *Id.* at 2372-73. The Court stated: "[W]e reiterate today that a title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of rule 23(a) have been satisfied." *Id.*

88. *Id.* at 2370-71.

89. *Id.* at 2371. The Court set out this proposition stating:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the indi-

III. GUIDANCE

Three main concepts which the Supreme Court believes should govern title VII class actions are evident in *Rodriguez* and *Falcon*. These include:

(1) Rule 23 policies must be read together with title VII policies.[90]
(2) If all rule 23(a) requirements are met, a plaintiff can represent employees discriminated against by employer policies even though the discrimination was manifested in differing ways, *e.g.*, promotions versus hiring.[91]
(3) The Court believes that primary inquiries in title VII class actions involve judicial economy and adequacy of representation.[92]

The first concept delineated above is evident in both *Falcon* and *Rodriguez*. The Court recognized the dual policies of rule 23 and title VII in *Falcon* when it stated that "actual, not presumed, conformance with rule 23(a) remains . . . indispensable."[93] Likewise, in *Rodriguez*, it stated that "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable."[94] In both cases the Court was faced with the problem of how to read two policy determinations, one in rule 23[95] and the other in title VII,[96] together. The Court in both instances seemed, at least facially, to choose an approach which read rule 23 as limiting the antidiscrimination policy of title VII. Therefore, the question posed is why the Court chose this approach rather than reading each statute in harmony. Indeed, the federal rules are designed so that they do not limit meritorious claims with procedural obstacles,[97] and in title VII Congress sought to provide a

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vidual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Id. (footnote omitted).

90. *See infra* notes 93-105 and accompanying text.
91. *See infra* notes 107-11 and accompanying text.
92. *See infra* notes 112-20 and accompanying text.
93. 102 S. Ct. at 2372.
94. 431 U.S. at 405.
95. For a good discussion of the theories behind the use of class actions, see *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976) [hereinafter cited as *Developments*]. In *Developments*, the authors contend that the revised rule 23 was drafted around the two problems of due process and res judicata. *Id.* at 1323.
96. *See generally supra* notes 12-17 and accompanying text.
97. Rule 1 of the Federal Rules of Civil Procedure states that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Professor Moore commented on the construction of the rules stating:

remedy for discrimination in all phases of employment by allowing private litigants to bring suit.[98] Notwithstanding, the Court's result could be premised on these two assumptions: First, the policy behind rule 23(a) is to allow class actions as a form of representative litigation,[99] and it is difficult to determine whether a plaintiff will be an adequate class representative without a showing similar to what rule 23(a) requires;[100] and second, a policy behind title VII is to give those individuals injured by discrimination a means to redress that injury.[101] Therefore, if a court cannot be guaranteed that a plaintiff will be able to fully and adequately litigate class claims, it should not permit class certification because a member of a class so certified would be bound by an adverse finding and thereby could be denied redress for an injury suffered.[102] This preclusive effect of an adverse class finding can seldom be avoided since most class actions under title VII are brought under rule 23(b)(2)[103] which does not permit opting out of the class.[104] So it

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All such provisions, considered as a whole, and particularly with rule 61 on harmless error, temper the discretionary power of the court with instructions as to the liberality of its application, "to the end that controversies may be speedily and finally determined according to the substantive rights of the parties."

2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 1.13(1), at 281-82 (2d ed. 1982) (footnote omitted). The construction called for in the text focuses on the federal rules in general and not just rule 23.

98. *See supra* note 4 and accompanying text; *supra* text accompanying notes 18-22.

99. *See Developments, supra* note 95, at 1321-22. A discussion of the 1966 amendments to the federal rules by Professor Kaplan clearly indicates the purpose of rule 23 is to provide a method whereby representative litigation can be had. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 376-400 (1967). *See generally* 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.02(1), at 41-42 (2d ed. 1982).

100. *See generally* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1973) ("To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents.").

101. *See supra* notes 16-17 and accompanying text.

102. This is based on the assumption that the suit is brought under rule 23(b)(2) as most civil rights suits are. *See supra* note 10, and *infra* note 103 and accompanying text.

103. Almost all title VII class actions are brought under rule 23(b)(2). Advisory Comm. Note, 39 F.R.D. 98, 102 (1966). *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3rd Cir. 1975).

104. FED. R. CIV. P. 23(c)(3). This rule provides in pertinent part: "The 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." If a class is certified as a rule 23(b)(3) class, opting out is permitted. FED. R. CIV. P. 23(c)(2); *see also* 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE § 23.40(3), at 300-02 (2d ed.

seems that given the rule 23 representative litigation policy and the title VII policy of providing redress for injury, it could be argued that the Court in *Rodriguez* and *Falcon* did attempt to read these somewhat different interests in harmony.[105] The problem with such a conclusion is that it ignores the adverse impact on unnamed class members which results from denying class certification. While these unnamed class members will not be bound by an adverse class finding, they also will have reduced means to redress their injury since their opportunity to file a timely charge will have passed[106] and the named plaintiffs can no longer vindicate their interests. The failure of the Court to recognize this adverse impact could be the result of the Court putting undue emphasis on the preclusive effect of judgments in a rule 23(b)(2) class action.

A second notable aspect of *Falcon* and *Rodriguez* is that they do not bar a plaintiff from representing members of a class discriminated against in ways different from those alleged by the representative plaintiff.[107] To bring such an action, however, the plaintiff would have to point to a general employment policy which affected both him and the class.[108] The Court in *Falcon* addressed this issue: "Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes."[109] Therefore, plaintiffs who wish to bring such suits will have to identify general policies which affect both the plaintiff and the class members he seeks to represent. It is clear that simply alleging a policy of discrimination will not meet this burden.[110] Contrary to what many courts after *Rodriguez* believed, the above statement from *Falcon* indicates that across-the-board attacks are not pro-

1982) (courts should be more reluctant to certify (b)(2) classes due to the res judicata impact); *supra* note 10.

105. This seems clear since rule 23 allows class litigation where a plaintiff is representative of class members and his litigation of such claims would be manageable, and it would be contrary to title VII policy to bar private employees from litigating their claims when their claims were not represented adequately in a class suit.

106. *See infra* notes 146-148 and accompanying text.

107. *See supra* note 7 and accompanying text.

108. This requirement to bring forth evidence indicating that the employer has a general discriminatory policy is similar to the holdings of some post-*Rodriguez* cases. *See supra* note 72 and accompanying text. The requisite showing after *Falcon* is, however, more stringent since the plaintiff must also show that all the rule 23(a) requirements are met.

109. 102 S. Ct. at 2371-72 n.15.

110. This is because a plaintiff must show the policy affected both him and the class he seeks to represent. The plaintiff will also have to show that he meets all the rule 23 requirements.

hibited by rule 23. The point is that a plaintiff now will have to make a showing of a common discriminatory policy that both he and the class are subject to and also meet the rule 23(a) requirements.[111]

Finally, after *Falcon* and *Rodriguez*, a plaintiff's primary focus in seeking class certification should be on judicial economy and adequacy of representation. In *Falcon*, the Court noted that judicial economy was not advanced as evidenced by the district court's bifurcated liability findings.[112] Quoting from *American Pipe & Construction Co. v. Utah*,[113] the Court found that the plaintiff's class action "did not advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.' "[114] Similarly, the Court stated that one factor bearing on the rule 23 typicality and commonality requirements was judicial economy.[115] This emphasis on judicial economy is consistent with a primary purpose of rule 23: to avoid multiple suits.[116]

Adequacy of representation also is a primary requirement within rule 23 after the Court's focus on this requirement in *Rodriguez* and its discussion of adequacy in *Falcon*. In *Rodriguez* the Court held that the plaintiffs were not adequate representatives of the class they sought to represent due to their lack of diligence in moving for class certification and due to their possible conflicts of interest.[117] Similarly in *Falcon*, the Court noted the importance of adequacy of representation in meeting the rule 23 requirements:

> The commonality and typicality requirements of rule 23(a) . . . serve as guideposts for determining . . . whether the named plaintiff's claim and class claims are so interrelated that the interests of the class members will be fairly and adequately represented in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about competency of class counsel and conflicts of interest.[118]

This statement is indicative of a Court belief that evidence of

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111. Apparently some courts are struggling with this issue in light of *Falcon*. *Female Group Certified As Class in Bias Suit*, Nat'l L. J., Nov. 8, 1982, at 6, col. 3.
112. *See supra* notes 79-80 and accompanying text.
113. 414 U.S. 538, 553 (1974).
114. 102 S. Ct. at 2372 (quoting American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974)).
115. 102 S. Ct. at 2371 n.13. The Court stated: "The commonality and typicality requirements . . . [b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical . . ." *Id.*
116. *See* 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.02(1), at 35 (2d ed. 1982); Bridgesmith, *supra* note 10, at 1420. Given that class actions are harder to certify, the Court could be taking inconsistent positions on judicial economy.
117. *See supra* text accompanying notes 67-68.
118. 102 S. Ct. at 2371 n.13.

whether a plaintiff will be an adequate class representative is not only relevant to the rule 23(a)(4) requirement of adequate representation but is also relevant to the rule 23(a)(2) and rule 23(a)(3) requirements of commonality and typicality.[119] Therefore, adequacy of representation seems to be emphasized by the Court in both *Rodriguez* and *Falcon*. This is consistent with the representative litigation purpose of rule 23.[120]

While the above three propositions are easily discerned from *Falcon* and *Rodriguez*, they add a judicial gloss to title VII class actions which litigators cannot afford to ignore.[121] Overall, the Court requires plaintiffs to meet all rule 23(a) requirements, but the Court will not let rule 23(a) limit title VII when an employee is affected by a general discriminatory employer policy which also affects other employees.[122] The Supreme Court doctrine of allowing such class actions is consistent with *Hall v. Werthan Bag Corp*.[123] and prior cases which focused on the effect of the remedy sought by the plaintiff.[124] In reality this focus on the remedy mandates an inquiry into whether the representative plaintiff and the class are affected by a general discriminatory policy such that a remedy given to some members of the class will bring classwide relief. The step that was taken in *Johnson v. Georgia Highway Express, Inc*.[125] and subsequent cases[126] was where the federal courts went astray[127] from both the mandates of rule 23 and title VII.[128] The

119. It is important to note that in both *Falcon* and *Rodriguez* the Court indicated the adequacy requirement of rule 23(a)(4) turned on whether counsel had adequately handled the case and whether there were any conflicts between the representative plaintiff and the class members. In *Rodriguez* these two factors were relied on to find that representation was not adequate, 431 U.S. at 404-05, and in *Falcon* the Court noted that this inquiry distinguished rule 23(a)(4) from rule 23(a)(2) and rule 23(a)(3).

120. *See generally* Bridgesmith, *supra* note 10, at 1432 ("[R]ule 23(a)(4) adequacy of representation is the touchstone by which title VII class action maintainability should be gauged."). Because most title VII class actions are brought under rule 23(b)(2), which does not provide for opting out, res judicata will bar all absent class members from pursuing discrimination claims under similar circumstances. It is therefore imperative that representation be adequate. *See* 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.07(1) (2d ed. 1982); *see generally* Hansberry v. Lee, 311 U.S. 32 (1940).

121. Using *Falcon* and *Rodriguez* as precedent, considerations of judicial economy and adequacy of representation could be very important, especially in a marginal class action certification case.

122. 102 S. Ct. at 2371-72 n.15. *See supra* notes 107-111 and accompanying text.

123. 251 F. Supp. 184 (M.D. Tenn. 1966). *See supra* notes 41-46 and accompanying text.

124. *See supra* notes 35-40 and accompanying text.

125. 417 F.2d 1122 (5th Cir. 1969). *See supra* notes 47-49 and accompanying text.

126. *See supra* notes 55-56 and accompanying text.

127. *See supra* notes 53-54 and accompanying text.

128. *But see* 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.02(1), at

relevant inquiry now is what impact this new Supreme Court doctrine will have on title VII enforcement.

IV. IMPACT

What impact will *Rodriguez* and *Falcon* have on the enforcement of title VII? It cannot be disputed that private enforcement of title VII has been limited by the Supreme Court's refusal to allow across-the-board attacks without a showing that all the requirements of rule 23(a) have been met.[129] An analysis of the magnitude of this impact, however, requires focusing on the prospective plaintiff's incentive and ability to bring suit and also the effect that these cases will have on unnamed class members.

In some instances *Falcon* and *Rodriguez* will affect the plaintiff's incentive to bring suit. One such instance will arise when a plaintiff individually has relatively small damages but together with other class members the damages make the suit viable. Another instance will be when public interest groups such as the NAACP have standing to sue and wish to attack a discriminatory policy. In many cases, however, *Falcon* and *Rodriguez* will not affect the plaintiff's incentive to sue since they do not affect the remedies available to the plaintiff. In such circumstances these cases will only affect the plaintiff's incentive to sue if that incentive is built on a desire to assist other employees who are subjected to the employer's discrimination.[130]

While the effect of *Falcon* and *Rodriguez* on a prospective plaintiff's incentive to bring suit is uncertain, the effect of the two cases on the plaintiff's ability to bring suit is more obvious. This impact will manifest itself in the prospective plaintiff's inability to obtain competent counsel to prosecute his action. Moreover, because of the large amounts of money necessary to prosecute a lawsuit, it will often be impractical to maintain an action. Such inability will ultimately be a function of the settlement value of his suit, the possible damage award, and the attorney fee awards.

The settlement value of a plaintiff's suit has definitely been limited by *Rodriguez* and *Falcon*. Prior to these decisions, a defendant faced with a class action complaint knew that a plaintiff could easily get a class certified. Class certification increased the employer's possible liability exposure and gave the plaintiff a tool to

43 (2d ed. 1982) (Rule 23 has been broadly interpreted for use by private attorney generals to vindicate substantive policies.).

129. Courts seem to be taking *Falcon* seriously and are requiring plaintiffs to meet the rule 23 requirements. *See* Grant v. Morgan Guar. Trust Co., 548 F. Supp. 1189 (S.D.N.Y. 1982); Warren v. ITT World Communications, Inc., 95 F.R.D. 425 (S.D.N.Y. 1982).

130. *But see supra* note 128.

conduct extensive discovery into an employer's operation.[131] Defendants feared this increased scope of discovery, reasoning that discovery was bound to uncover a few employer policies having a discriminatory impact. Such fear of increased exposure and wide-open discovery gave plaintiff's attorneys settlement leverage because defendants were fearful of a full blown trial.[132] Such settlement leverage made it much easier for a plaintiff to find a willing attorney.[133]

However, there are problems with using class allegations for settlement leverage. One problem is whether it is ethical to include class allegations in a complaint only for the purpose of coercing the defendant to settle. In a class action it can be argued that a plaintiff's attorney making class allegations assumes an obligation to unnamed class members to protect their interests.[134] The issue is whether unnamed class members are clients of the attorney before the class is certified.[135] If they are seen as his clients then the plaintiff's motive to settle the individual claims without regard to the class claims would involve the attorney in representing differing interests in violation of canon 5 of the Code of Professional Responsibility.[136] In addition to this ethical dilemma, the inclusion of class claims merely for settlement leverage could be a violation of canon 7[137] since the attorney is asserting a legal position merely to harass the defendant.[138] Another problem with using class

131. *See* FED. R. CIV. P. 26(b) (parties may discover any matter *relevant* to the subject matter involved in the pending action).

132. Defendants also are seldom awarded attorney fees given the Supreme Court standard that the plaintiff's action must be frivolous, unreasonable, and without foundation. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978). This increases the plaintiff's settlement leverage with a class action.

133. Class allegations can also make it more difficult to find an attorney competent to prosecute the case.

134. In a class setting, the attorney is faced with a set of clients that change periodically. If a class is certified, the attorney definitely represents all members of the class. But if part of the class is later decertified, are those individuals who are no longer within the class the attorney's clients?

135. Maybe this issue should turn on whether the unnamed class members relied on the class action such that any settlement of the individual claims would prejudice their interest.

136. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1981). Disciplinary Rule 5-105(A) provides in pertinent part: "A lawyer shall decline proffered employment . . . if it would be likely to involve him in representing different interests . . . ."

137. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981).

138. Disciplinary rule 7-102(A)(1) provides in pertinent part: "In his representation of a client, a lawyer shall not: File a suit, assert a position, . . . or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass . . . another." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1981).

claims for settlement leverage is rule 23(e)[139] which requires that a court approve any settlement made in a class action and that notice be sent to absent class members. Before refusing to approve such settlements or requiring that notice be sent courts usually require a showing that the unnamed class members could be prejudiced by the settlement.[140] Nonetheless, commentators and courts have noted the frequent abuse of class action allegations.[141]

Another factor limiting the plaintiff's ability to successfully sue is the lower total damage award with an individual suit as compared to a class action suit. This lower possible damage award places a ceiling on the amount a plaintiff can spend for trial preparation, including discovery, research, expert testimony, and appeals. When a prospective plaintiff is faced with a defendant employer who engages in extensive discovery, with depositions and interrogatories, and files motions to limit the plaintiff's cause of action, economic considerations weigh heavily in the plaintiff's decision to continue the suit. The problem is also present at trial when the plaintiff's expected damage award does not allow for full development of his case, though he is faced with a defendant who has developed every possible avenue to rebut the plaintiff's case. Overall, lower possible damage awards can have a major impact on a plaintiff's ability to successfully sue individually.

A bottom line reason why easy class certification made it easier for plaintiffs to find competent counsel was the attorney fee awards. Under section 706(k)[142] of title VII, a plaintiff's attorney is allowed to collect attorney fees.[143] With class actions, the possible amount of fees recoverable increases while the extent of work often may not increase proportionately.[144]

In addition to these limitations on the prospective plaintiff's

139. FED. R. CIV. P. 23(e) provides: "A class action shall not be dismissed or compromised without approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

140. In Shelton v. Pargo, 582 F.2d 1298, 1310-13 (4th Cir. 1978), the court noted that after a pre-certification settlement the judicial role should be modest since it is unlikely class members will have relied on the suit and courts can inquire as to whether there was prejudice to absent class members. *See* Magna v. Platzer Shipyard Inc., 74 F.R.D. 61 (S.D. Tex. 1977).

141. *See, e.g.*, Shelton v. Pargo, Inc., 582 F.2d 1298, 1311 (4th Cir. 1978); Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 389-91 (1972).

142. 42 U.S.C. § 2000e-5(k) (1976).

143. Prevailing plaintiffs are normally awarded attorney fees in all but special circumstances. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417 (1978).

144. This could be because courts also consider a risk premium in awarding attorney fees. With class actions the class attorney fee is ordinarily contingent upon an award to the class, therefore, the attorney has a higher risk of receiving no fee. *Developments, supra* note 95, at 1612-17.

ability and incentive to sue, *Falcon* and *Rodriguez* also will limit the remedies available to unnamed class members. Once a plaintiff's suit is found not to be a certifiable class action, unnamed class members are no longer parties to the suit and must seek redress on their own. A major problem confronting the unnamed class members is that they would not have filed with the EEOC within the 180- or 300-day period required by statute.[145] Two questions which then arise are: (1) whether the filing period is tolled during the period before a representative plaintiff's class is decertified or fails to become certified and (2) whether unnamed class members have to exhaust their administrative remedies before being allowed to join or intervene in the representative plaintiff's individual suit.

As to tolling of the 180-day or 300-day filing period with the EEOC, a district court in *Green v. United States Steel Corp.*,[146] held that the 180-day filing period was tolled for a class member during the pendency of the class action. In *Green* the plaintiff was a member of a class which two years after certification was decertified in part. After decertification the plaintiff filed a charge with the EEOC. The court in *Green* held that the filing period should be tolled under authority of *American Pipe & Construction Co. v. Utah*,[147] where the Supreme Court held that commencement of a class suit tolled the running of the statute of limitations for putative class members from the time the original suit is instituted until it is decertified.[148] The *Green* court seemed to limit its holding, however, stating that the defendant in this case would not be prejudiced since decertification was ordered only because of the unmanageability of a broader class. Using the *Green* precedent, in many decertification instances the putative class members could file with the EEOC after decertification and not be barred by the filing requirements. The readiness of courts to accept the *Green* analysis will probably vary depending on the unfairness to the defendant inherent with such a tolling rule.

The tolling issue will not arise, however, if putative class members of a decertified class do not have to exhaust their administrative remedies. In *Foster v. Gueory*[149] the District of Columbia Circuit held that unnamed class members of a class which was not

145. *See supra* note 1; Title VII § 706(e), 42 U.S.C. § 2000-e5(e) (1976 & Supp. IV 1980).
146. 481 F. Supp. 29 (E.D. Pa. 1979).
147. 414 U.S. 538 (1974).
148. An issue not being litigated in the courts is whether the time period under *American Pipe* is tolled only for those who file their own suit. *See* Parker v. Crown, Cork & Seal Co., 677 F.2d 391 (4th Cir. 1982), *cert. granted*, 103 S. Ct. 338 (1982).
149. 655 F.2d 1319 (D.C. Cir. 1981).

certified did not have to exhaust their administrative remedies to intervene in the individual suit of the named plaintiffs. In so holding the District of Columbia Circuit followed the Fifth Circuit case of *Wheeler v. American Home Products Corp.*[150] and the rationale of the Eighth Circuit which had allowed intervention without exhaustion of administrative remedies in a non-class setting.[151] The test for not requiring exhaustion set out in *Foster* required that the claims of the parties be similar enough that "no conciliatory purpose would be served by filing separate EEOC charges."[152] These cases indicate that some unnamed class members can protect their interests by intervening or joining in the resulting individual suit after a class is decertified or fails to be certified. The problems faced by the representative plaintiff's attorney in this circumstance is how to ethically give notice to the unnamed class members of these alternatives and how to meet the requirements of joinder and intervention.[153]

To send notice to these unnamed class members, an attorney can attempt to rely on rule 23(d)(2)[154] which allows the court to send notice to class members in appropriate circumstances. At least one court, in *Miller v. Central Chinchilla Group, Inc.*[155] allowed the sending of such a notice informing former class members of their right to attempt to intervene. The Ninth Circuit, however, in *Pan American World Airways v. United States District Court*,[156] indicated that the notice provisions of rule 23 only apply to plaintiffs who have shown they meet the prerequisites for a class action.[157] To the extent that notice is allowed to be sent, intervention and joinder can be practical alternatives in smaller

150. 563 F.2d 1233 (5th Cir. 1977).

151. Allen v. Amalgamated Transit Union Local 788, 554 F.2d 876 (8th Cir. 1977), *cert. denied*, 434 U.S. 891 (1977).

152. 655 F.2d at 1322. The *Foster* court went on to state:

> However, where the two complaints differ to the extent that there is a real possibility that one of the claims might be administratively settled while the other can be resolved only by the courts, then the rationale of *Oatis* does not apply. In such a case each plaintiff should be required to separately file an EEOC charge in order to effectuate the purpose of Title VII's provisions for administrative relief.

Id.

153. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1981).

154. *See supra* note 10. In Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981), the Supreme Court struck down a district court injunction which limited communication between a plaintiff's attorney of a prospective class and the potential class members. The Supreme Court held that the district court's order exceeded the court's authority under the Federal Rules of Civil Procedure.

155. 66 F.R.D. 411 (S.D. Iowa 1975).

156. 523 F.2d 1073 (9th Cir. 1975).

157. The court, therefore, would not allow notice to be sent to former class members informing them of their right to intervene.

class actions. These alternatives can ameliorate the adverse impact on unnamed class members from the failure to get a class certified. The plaintiff, of course, must meet the requirements of joiner and intervention.

Joinder requires a complaint filed by joined plaintiffs[158] or a motion by the plaintiff to amend his complaint to add parties.[159] Under rule 20 the requirements for joinder are: (1) a showing that there is a right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences and (2) a showing that a common question of law or fact will arise in the action.[160] One line of cases indicates that a general policy of discrimination cannot meet the commonality requirement nor the same transaction requirement.[161] Another line of cases indicates that the commonality and same transaction requirements are met when plaintiffs allege they are injured by a general policy of discrimination.[162] Therefore, reliance on this alternative depends on the facts developed and the line of authority the court chooses to follow.

With the intervention alternative a primary consideration is whether a court will grant permissive intervention[163] or intervention of right.[164] Some courts have held that in a title VII setting

158. FED. R. CIV. P. 20(a).

159. Leave to amend is freely granted "when justice so requires." FED. R. CIV. P. 15(a).

160. FED. R. CIV. P. 20(a).

161. The leading case in this line is Smith v. North Am. Rockwell Corp., 50 F.R.D. 515 (N.D. Okla. 1970). It has been followed by Martinez v. Safeway Stores, 66 F.R.D. 446 (N.D. Cal. 1975) and Webb v. Westinghouse Elec. Corp., 15 Fair Emp. Prac. Cas. (BNA) 364 (E.D. Pa. 1977). In *Webb* the court stated:

> Plaintiffs cannot simply invoke a claim of across the board discrimination to satisfy these two requirements . . . . No showing has been made that discrimination against a salaried employee or a job applicant arises out of the same facts or occurrences as the alleged discrimination against the class representatives, members of production and maintenance unit who work on an hourly basis.

Id. at 365.

162. The leading case in this line is Mosley v. General Motors Corp., 497 F.2d 1330 (8th Cir. 1974). It has been followed by Resnick v. American Dental Assoc., 90 F.R.D. 530 (N.D. Ill. 1981) and Vulcan Soc'y v. Fire Dept. of White Plains, 82 F.R.D. 379 (S.D.N.Y. 1979). Because *Mosely* relied on the across-the-board class action cases in analyzing the commonality requirement, its continued authority could have been somewhat undermined by *Falcon*.

163. FED. R. CIV. P. 24(b). The requirements of rule 24(b) are: (1) the applicant's claims must have a question of law or fact in common with the original case, and (2) permitting the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

164. FED. R. CIV. P. 24(a). The requirements of rule 24(a) are: (1) the individual's motion for intervention is timely, (2) the individual claims an interest relating to the property or transaction which is the subject of the action, (3) the individual is so situated that disposition of the action may as a practical mat-

intervention is of right.[165] Most courts, however, only discuss permissive intervention in a title VII setting.[166] Courts which focus on permissive intervention vary as to their liberality in construing the intervention requirements. In most across-the-board situations the requirements for permissive intervention may be difficult to meet, but some courts liberally construe these requirements in a title VII setting.[167] As with joinder, a plaintiff's intervention success depends on how the facts fit the intervention requirements and which line of authority a court chooses to follow.

Given these alternatives available to plaintiffs and the ability of a plaintiff's attorney to recover attorneys fees, some of the adverse impact on title VII enforcement from *Falcon* and *Rodriguez* is mitigated. In smaller class actions, the major impacts on a title VII enforcement involve the effects of the recent Supreme Court decisions on a plaintiff's settlement leverage and the time bar imposed on members of the class which was not certified. The settlement effect, however, is not all bad because in many instances it will prevent an abuse of process.[168] In larger class actions, most of the above procedural alternatives are not viable and the Supreme Court decisions will definitely adversely affect the prospective plaintiff's ability to successfully bring such suits.

V. CONCLUSION

Rodriguez and *Falcon* have limited the private enforcement mechanism of title VII. Congress has the last word in deciding whether the Court correctly read the policies evidenced by rule 23 and by title VII. If Congress feels title VII enforcement has been unduly hindered, it is up to Congress to provide a rule governing class actions separate and distinct from rule 23 or provide for more rigorous public enforcement of title VII by the EEOC. Neither alternative, however, should be prematurely acted upon by Congress until the full effects of *Falcon* and *Rodriguez* can be discerned. In smaller class actions, backpay awards, attorney fee awards, and

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ter impair or impede his ability to protect his interests, and (4) the individual is not adequately represented by the existing parties.

165. *See, e.g.*, Foster v. Gueory, 655 F.2d 1319 (D.C. Cir. 1981); Underwood v. New York, 20 Fair Emp. Prac. Cas. (BNA) 1713 (S.D.N.Y. 1979).

166. *See, e.g.*, Webb v. Westinghouse Elec. Corp., 15 Fair Emp. Prac. Cas. (BNA) 364 (E.D. Pa. 1977); Martinez v. Safeway Stores, 66 F.R.D. 446 (N.D. Cal. 1975).

167. Most of the cases discussing permissive intervention break down along the same lines as they do with joinder since the commonality requirement of rules 20 and 24 is the same. *See* cases cited *supra* notes 161-162. In light of the possible effects *Falcon* could have on the *Mosely* line of cases, intervention could be more difficult in the future.

168. *See* Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1972).

the procedural devices of intervention and joinder could mitigate much of the limiting effect of these decisions. In larger class actions, the Supreme Court decisions may have a more limiting effect on title VII enforcement. In these latter cases, however, the prospective plaintiff may be able to identify a general discriminatory employer policy and meet the rule 23 requirements to bring an across-the-board attack.

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