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COMMENTS

THE CLASS ACTION AND TITLE VII—AN OVERVIEW

The class action device and Title VII enforcement go hand in hand. In a proper case, a suit alleging a violation of Title VII is by nature a class action since it attempts to remedy the effects of employment discrimination on the basis of a class characteristic. As in any other case, however, a class action is permitted only if the requirements of Rule 23 of the Federal Rules of Civil Procedure are met. Before certifying an action as a class action the court must determine that (1) the class is so numerous that joinder of its members is impracticable (numerosity); (2) common questions of law or fact exist as to the class (commonality); (3) the claims of the representative parties are typical of the claims of the class (typicality); and (4) the representative parties will adequately protect the interest of the class (representativeness).

Further, in order to maintain the action as a class action the court must determine that (1) the party opposing the class has acted or refused to act on grounds generally applicable to the class so that final injunctive or declaratory relief is appropriate with respect to the whole class, or (2) that questions of law or fact common to the class members predominate over questions affecting only individual members, and that a class action is thereby superior to other available methods for the fair and efficient handling of the case. In addition to the prerequisites of Rule 23, certain juris-

5. The court must determine by order whether an action brought as a class action may be so maintained as soon as practicable after the commencement of the action. However, such an order may be conditional, and may be altered or amended before the decision on the merits. Fed. R. Civ. P. 23(c)(1). The named plaintiff, by way of motion, asks the court that his action be maintained as a class action. The determination may be made on the basis of the pleadings, but generally should be made on the basis of more information than the pleadings afford. See Huff v. N.D. Cass Co., 485 F.2d 710, 713 (5th Cir. 1973). Discovery and a preliminary evidentiary hearing may be appropriate and are authorized with respect to the issues of maintainability. Id. However, this point in the trial is an improper time to decide the merits of the action, although inevitably there will exist some overlap. Id. at 714. See also Dickerson v. United States Steel Corp., 64 F.R.D. 351, 355 (E.D. Pa. 1974).
7. Id. 23(b)(2).
8. Id. 23(b)(3).
dictional prerequisites mandated by Title VII exist which apply in the class action context and affect either the class representative's capacity to maintain the suit in his own right or the definition and scope of the class as a whole.\(^9\)

Commentators agree that the courts are quite liberal in applying the Rule 23 strictures on class actions.\(^10\) This liberality is primarily a function of the remedial nature of Title VII and the undeniable fact that employment discrimination on the basis of a class characteristic is by definition suited to class action treatment.\(^11\) It is recognized that the class action device, with its binding res judicata effect on all class members is an efficient and powerful mechanism for redress of grievances when properly utilized and not abused.\(^12\) On the other hand, because a court's judgment is binding on the class, win or lose, it has been argued that the Rule 23 mandates require strict compliance for the protection of unnamed class members.\(^13\) The courts are becoming increasingly aware of the class action's susceptibility to abuse and are keenly aware that the cost of proceeding by way of class action, not only financially but in respect of valuable court time, requires that Rule 23 be satisfied in all cases.\(^14\)

This article proposes to examine the prerequisites to bringing and maintaining a Title VII class action—those legislatively imposed\(^15\) and those mandated by Rule 23.\(^16\) In addition, the administration of the Title VII class action will be examined, with a particular emphasis on the court's

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11. See cases cited note 3 supra.

12. The court's judgment in an action for injunctive relief is binding on the class as a whole, whether favorable or unfavorable. Fed. R. Civ. P. 23(c)(3); 3B J. Moore, Federal Practice ¶ 23.10-1, at 23-2769 (2d ed. 1974). In a suit claiming individual damages for class members, where class action treatment is appropriate, the court's judgment is binding only on those who fail to "opt out" of the class. Fed. R. Civ. P. 23(b)(3), (c)(2). See also text accompanying notes 56-62 infra.


15. See note 9 supra.

16. See text accompanying notes 5-8 supra.
categorization of a Title VII suit for injunctive relief and back pay under Rule 23(b), and its consequences.

I. FILING WITH THE EEOC—JURISDICTIONAL PREREQUISITE

A party who seeks relief under Title VII from certain employment practices must file a charge with the Equal Employment Opportunity Commission (EEOC) before the institution of a court action, in order that the EEOC might attempt to conciliate the dispute, and, if unsuccessful, bring a civil action in its own right.17 Only when conciliation efforts have been unsuccessful and the EEOC has failed to bring a civil action, or upon a dismissal of the charging party's claim by the EEOC, is the aggrieved person authorized to bring a civil action under Title VII.18

In the class action context this legislative requirement affects not only class definition but the maintenance of the action itself.19 It has been generally held that participation in a Title VII class action is not restricted to those who filed charges with the EEOC.20 Consequently, a named plaintiff who has filed may represent a class of individuals who have not filed and would otherwise not be allowed to maintain the suit. The failure of the class representative to file an EEOC charge is grounds for dismissal of the class action since the court would have no jurisdiction over that individual.21 In addition, if at the time of the class representative's filing of charges with the EEOC there were members of the class who would have been precluded from similar filing with the EEOC due to the running of the time limit within which to file, the court will limit the scope of the class to exclude them and include only those who could have filed.22

II. SCOPE OF THE CLASS AND RULE 23(a)

The remedial policy behind Title VII and the adaptability of the class

18. Id.
19. A class representative's failure to file calls for dismissal of the action. See note 21 infra. Failure of class members to file within the time prescribed may operate to exclude them from membership and so limit the class that the numerosity requirement of Rule 23(a)(1) is not met. See cases cited note 22 infra.
action device to discrimination suits have accounted for the courts' general endorsement of a broad definition of the class on behalf of which a class representative may sue. The landmark decision of the Fifth Circuit Court of Appeals in Johnson v. Georgia Highway Express, Inc. validated what has come to be called the "across the board" class action. An aggrieved employee may maintain a class action for relief against general employment discrimination although he may have been affected by only one aspect of an employer's discriminatory policy. Thus, a discharged employee may sue not only on behalf of those unjustly discharged, but on behalf of those presently employed and those who may be employed in the future. Likewise, an applicant refused employment may represent those currently employed and subjected to the employer's discriminatory policy.

The "across the board" approach and its underpinnings in Title VII policy have accounted in many cases for a relaxed application of the Rule 23(a) prerequisites of numerosity, commonality, typicality and representativeness. It is generally felt, however, that a mere allegation of "across the

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23. 417 F.2d 1122 (5th Cir. 1969).
27. In some cases the courts have expressly chosen Title VII cases for relaxed treatment under Rule 23(a). See, e.g., Barnett v. W.T. Grant Co., 518 F.2d 543, 547-48 (4th Cir. 1975) ("across the board" attack consonant with broad remedial purposes of Title VII); Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 50 (5th Cir. 1974) (when class relief sought in complaint the court should liberally apply the requirements of Rule 23(a)); Moss v. Lane Co., 50 F.R.D. 122, 125 (W.D. Va. 1970), aff'd in part, rev'd in part, 471 F.2d 853 (4th Cir. 1973). Other cases have summarily certified the action as a class action with little or no analysis of the Rule 23(a) prerequisites in cases of alleged "across the board" discrimination. See, e.g.,
board” discriminatory employment policy is not enough to warrant class action certification, but that each case must be put to the test of satisfying each prerequisite of Rule 23(a).  

A. Numerosity

Rule 23(a)(1) specifies that a class action may be instituted only if the membership of the class which the named plaintiff seeks to represent is so numerous that joinder of its individual members is impracticable. In the standard “across the board” discrimination suit the numerosity requirement is often deemed satisfied pro forma. However, it is held that the burden is on the named plaintiff to prove that Rule 23(a)(1) is satisfied.


The plaintiff need not show with specificity the exact number and identity of class members. Obviously, in an “across the board” class action it would be impossible to identify those class members not yet in existence. See, e.g., Ruhe v. Philadelphia Inquirer, 9 E.P.D. ¶ 9984, at 7106 (E.D. Pa. 1975). However, the plaintiff will be required to make some showing that his is more than an individual claim, or that more than a few individuals have been affected. See, e.g., O’Brien v. Shimp, 386 F. Supp. 1259, 1269 (N.D. Ill. 1973) (court was unable to find more than eleven individuals who may have been affected by alleged discrimination and held joinder of individuals not impracticable). See also Dennis v. Norwich Pharmacal Co., 5 E.P.D. ¶ 8599, at 7755 (D.S.C. 1973) (named plaintiff unable to show more than three others similarly situated); Calhoun v. Riverside Research Institute, 4 E.P.D. ¶ 7825, at 6123 (S.D.N.Y. 1972) (named plaintiff attempted to represent a putative class of blacks denied
The plaintiff's evidence may reveal only an individual grievance or one affecting only a few individuals with no showing of a policy to discriminate generally, in which case the numerosity requirement would fail. In such cases it is held that the test of impracticability of joinder is not a quantitative measurement but one that requires the court to consider, in addition to numbers, the geographical area of the group, the manageability of the parties, and the nature of the action and relation of the parties to others in the class.

B. Commonality

Rule 23(a)(2) requires that common questions of law or fact exist with reference to the class as a whole before a class representative may institute a class action. The commonality requirement provides no real obstacle to the named plaintiff in Title VII class actions. Common questions of law or fact are deemed to exist insofar as the suit seeks to remedy discriminatory employment policy. This is so notwithstanding that the effect of past or present discrimination might differ as to individuals.

C. Typicality

The typicality requirement of Rule 23(a)(3) states that the claims of the

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31. Where the numerosity requirement is not met the court will normally offer as justification the fact that plaintiff's averments alleged only individual acts and not a pattern or practice of discrimination. See, e.g., Blankenship v. Wometco Blue Circle, Inc., 59 F.R.D. 308, 309 (E.D. Tenn. 1972). Cf. Walker v. Whitehead & Kales Co., 8 E.P.D. ¶ 9693, at 5893 (E.D. Mich. 1974). In most cases, however, there appears to the court a concrete and numerous class of individuals presently or prospectively discriminated against. In these cases there is no vagueness or doubt about the numerosity or existence of the class, and the discrimination alleged is broad and far-reaching and cannot be construed as an isolated incident. But where the putative class is only speculative, the class action will be dismissed. See Tolbert v. Western Elec. Co., 56 F.R.D. 108, 113 (N.D. Ga. 1972). Cf. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969).


34. See cases cited note 33 supra. To satisfy both the commonality and typicality requirements a court will look for some nexus between the named plaintiff and the class he seeks to represent. See, e.g., Wells v. Ramsay, Scarlett & Co., 506 F.2d 436, 437 (5th Cir. 1975) (named plaintiff not a longshoreman so no nexus exists between him and the putative class of longshoremen).
representative parties must be typical of the claims of the class. Some courts have treated the requirement as synonymous with commonality or representativity. Other courts have adopted a common-sense approach and have required that the only showing which need be made is that there are other class members who have the same or similar grievances, even hypothetically. In any event, as in the case of the commonality requirement, the typicality requirement is relaxed in Title VII cases since a challenge to an employer's policy will, in most cases, reflect common grievances.

D. Representativity

The court must be assured that the class representative will adequately protect the interests of the class. The representative capacity of the named plaintiff is the most frequently questioned of the Rule 23(a) prerequisites. It is also the only one of the four upon which even the most liberal of courts will reflect with other than summary treatment since the representative party's position as a "private attorney general" requires that he represent all of the diverse aspects of an "across the board" attack on employment policy with equanimity.

The representativity requirement is tested on three fronts. First, counsel for the representative plaintiff must be experienced in civil rights and employment discrimination work. Secondly, the suit must not appear

38. See cases cited note 27 supra. In some cases of alleged "across the board" representation the difficulties of assessing diverse considerations as between varying groups of employees will force the court to limit the scope of the class based on a failure to satisfy the typicality requirement. See, e.g., Kinsey v. Legg, Mason & Co., 60 F.R.D. 91, 99 (D.D.C. 1973) (typicality requirement not met where named plaintiff sought to represent applicants for retail and institutional securities sales positions and non-sales positions since diverse considerations existed with respect to qualifications, salaries and duties); Calhoun v. Riverside Research Institute, 4 E.P.D. ¶ 7825 (S.D.N.Y. 1972) (typicality requirement not met where professional employee sought to represent professional and nonprofessional employees due to different problems faced by two groups).
40. This term was employed in Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968), to describe the position of the class representative in a Title VII class action.
collusive.\textsuperscript{42} Thirdly, there must appear no conflicts of interest between the named plaintiff and other class members.\textsuperscript{43} This third criterion is the one most frequently attacked by defendants and consequently results in limitation of class scope or denial of a named plaintiff's representation of the class.\textsuperscript{44} Where a possibility of antagonism exists the court has broad power to narrow the class or separate it into subclasses without dismissing the action.\textsuperscript{45}

An aspect of the Rule 23(a) representativeness requirement which poses recurring problems is the so-called "standing" requirement judicially engrafted upon Rule 23. When most courts speak of "standing" to represent the class they are referring to a putative class representative's competency to represent the class defined by him.\textsuperscript{46} Most attacks on "standing" have involved the situation of a former employee suing on behalf of a class of present and future employees. The objection to his representation of the class revolves about his lack of knowledge of current employment practices and the risk that he will pursue an attack only on those policies which had affected him individually.\textsuperscript{47} The objection is also made that he is not a member of the class he seeks to represent.\textsuperscript{48} It is settled that a discharged

\footnotesize{42. See cases cited note 41 supra.}
\footnotesize{43. Id.}
\footnotesize{44. In American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 94 (D. Md. 1974), the court refused to certify a subclass of current employees in a suit alleging sex bias in the operation of a retirement trust fund where the class representative (a former employee seeking immediate distribution from the funds to a subclass of former employees) was potentially in conflict with that class since an immediate distribution of the funds would diminish the total value of the trust assets. Similarly, in Lynch v. Sperry Rand Corp., 62 F.R.D. 78 (S.D.N.Y. 1973), the court refused to allow a union to represent a class of present and former male employees of the defendant whose pension plan allegedly discriminated against males where the challenged provisions resulted from the union's collective bargaining agreement with defendant, the union might be liable directly to its male members, and the union represented both male and female employees.}
\footnotesize{45. See Rodriguez v. East Texas Motor Freight, 505 F.2d 40, 51 (5th Cir. 1974); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968). See also Fesp. R. Civ. P. 23(c)(4). Likewise, where appropriate, the court may resort to the implementation of subclasses where doubt exists as to whether the commonality or typicality requirements have been met. See Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968). However, the requirements of Rule 23 must be met within each subclass as well. Fed. R. Civ. P. 23(c)(4).}
\footnotesize{46. If a putative class representative appears incapable of prosecuting the suit with authority the class action will be dismissed. See, e.g., Held v. Missouri Pac. R.R., 64 F.R.D. 346, 350 (S.D. Tex. 1974) (named plaintiff's efforts to secure a settlement evidenced his inability to bear the financial costs of adequate class representation).}
\footnotesize{47. See Dickerson v. United States Steel Corp., 64 F.R.D. 351, 356 (E.D. Pa. 1974) for an analysis and rejection of this argument.}
\footnotesize{48. See, e.g., Causey v. Ford Motor Co., 8 E.P.D. ¶ 9700, at 5929 (M.D. Fla. 1974) (dismissing class action on behalf of those denied or discharged from employment on basis of sex where named plaintiff was never dismissed and currently employed).}
employee may sue on behalf of present and future employees since an opposite holding would tend to induce employers to discharge individuals suspected as prospective litigants.50 Likewise, a former employee who voluntarily left his job has been held to have standing where he seeks reinstatement and advancement to the position he would have held were it not for the discrimination practiced against him.51 However, a number of cases involving named plaintiffs long-absent from their former employment have denied the class action device.52

A problem which at one point bothered the courts but which now appears well-settled involved the effect of an unfavorable judgment against the named plaintiff on his individual claim and his standing to continue in his representation of the class. There is little doubt now, after the Fourth Circuit decision in Moss v. Lane Co.,53 that the individual named plaintiff's failure on his own claim does not require dismissal of the class claim, and that, in fact, the class representative may continue in that capacity notwithstanding his own failure.54

A corollary problem is the question of the mootness of the individual class representative's claim. The general rule holds that the fact an individual is no longer subject to discrimination due to an employer's reversal of policy as to him does not destroy the existence of the controversy between the employer and the class. A contrary holding would induce an


employer to "buy off" a prospective litigant and defeat the policy behind Title VII. 54

III. RULE 23(b) AND BACK PAY

After the Rule 23(a) prerequisites to bringing a class action are satisfied, the Rule mandates that a class action may be maintained only if one of the requirements of Rule 23(b) are met. 55 Rule 23(b)(2) specifies that the suit may be maintained only where the party opposing the class has acted or refused to act on grounds generally applicable to the class so that final injunctive or declaratory relief in favor of the class would be appropriate. Rule 23(b)(3) allows maintainability only where common questions of law or fact in respect of class members predominates over questions affecting individuals, thereby offering a superior method of fairly and efficiently handling the class.

By its terms the Rule 23(b)(2) class action would appear limited to the situation where purely injunctive and declaratory relief is the object of the class action. A class action is more properly maintained under Rule 23(b)(3) if individual questions exist, e.g. damages, although common questions of law and fact predominate. It would appear that individual damage suits, although maintained within the context of the broader class action, require that a court maintain the class action under Rule 23(b)(3).

The effect of classifying a class action under either Rule 23(b)(2) or 23(b)(3) is quite important. A Rule 23(b)(3) class action is subject to the notice requirements of Rule 23(c)(2), 56 while a Rule 23(b)(2) suit is not. 57 The landmark Supreme Court decision in Eisen v. Carlisle & Jacquelin 58


55. Rule 23(b)(1) has no applicability to Title VII class actions but was designed to serve other purposes. See Advisory Committee Notes on 1966 Amendment to Rule 23, 28 U.S.C. at 7765-66 (1970).

56. Fed. R. Civ. P. 23(c)(2) reads as follows:
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.


has affirmed this procedural requirement and further has mandated that the named plaintiff must bear the full cost of notice to all members of the class who are reasonably identifiable. This requirement places a very real burden on a Rule 23(b)(3) class representative and arguably operates as a stumbling block to the use of the class action device in such situations. However, the notice requirement is considered necessary to allow class members who have individual claims to “opt out” of the class action in order that they might insulate their claims from the res judicata effects of an adverse judgment.

With class-wide back pay awards in Title VII actions now the rule in most cases, a crucial question to be faced is the proper classification of the Title VII class action seeking injunctive relief and back pay, and the proper administration of the action once that classification has been made. For if back pay were analogized to damages in the traditional

59. Id. at 173. The purpose behind the different treatment stems from the very policy which motivated the federal courts to adopt the class action device. The Rule 23(b)(2) class action must be, by definition, a cohesive class. Consequently, the drafters of the rule contemplated that all members of the class would be bound by the court’s decision. See Advisory Committee Notes to Rule 23, 28 U.S.C. at 7767 (1970). No notice was mandated to individual class members and no opportunity to “opt out” of the class and pursue an individual claim provided because of the innate cohesiveness of the class. It was felt that any potential unfairness to class members was outweighed by the policy behind class actions, i.e., eliminating the possibility of repetitious suits and providing small claimants the means of obtaining redress for claims too small to warrant individual litigation. See Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 249 (3d Cir. 1975). It was not considered as fair in the 23(b)(3) context to bind all class members, since 23(b)(3) actions were, by definition, heterogeneous, with individual interests intervening, particularly since an individual might not want to be included in the class but would prefer to prosecute his individual claim. Id. at 249. Consequently, the drafters provided that 23(b)(3) actions should be subject to the requirement that individual notice and an opportunity to withdraw from the class be given the individual. See Advisory Committee Notes to Rule 23, 28 U.S.C. at 7767 (1970).


62. See Fed. R. Civ. P. 23(c)(2)(B), the text of which is found at note 56 supra.


sense, then Rule 23(b)(2) treatment would seem precluded since the relief sought would not be limited to injunctive or declaratory relief. Rather, the additional factor of individual damage claims would be interjected into the class context and would seem to call for 23(b)(3) treatment, including notice and the privilege of "opting out" of the class.

Consistent with their liberal treatment of the Rule 23(a) prerequisites, the majority of courts, when faced with the issue, have resolved the matter in favor of Rule 23(b)(2) treatment. The basis for this classification seems dictated by the threat that the class device, subjected to the strictures of the Rule 23(b)(3) notice requirements, would be effectively forestalled as an instrument for the effectuation of the broad remedial policies of Title VII. It is recognized that the drafters of Rule 23 considered that the Rule 23(b)(2) class action would be applied primarily in the race discrimination suit. Consequently, back pay relief is considered subsidiary to the primary thrust of the Title VII class action, which is deemed to be the ensuing of discriminatory employment practices.

However persuasive this argument may appear in the abstract, the courts which certify such actions under Rule 23(b)(2) are failing to consider adequately the consequences of such a designation. An individual class member entitled to pursue back pay upon a finding of defendant's liability is required to come forward and prove his claim. No notice requirement attaches to a Rule 23(b)(2) action, so that a class member entitled to back pay, in the absence of a court's exercise of its discretionary authority to require notice pursuant to Rule 23(d)(2), would in many circumstances be precluded because of lack of notice from participating in the fruits of


69. See Edwards, supra note 64, at 797.

70. Fed. R. Civ. P. 23(d)(2) provides in part:
   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 . . . .
his class representative’s victory. Further, since the back pay claim is an individual one, denial of the notice and “opting out” provisions would lock the individual claimant into a binding judgment adverse to the class.\textsuperscript{71}

Not only procedural fairness toward plaintiff class members but a corollary concern for the defendant would also warrant classification under Rule 23(b)(3) of claims for back pay.\textsuperscript{72} The defendant should be given the opportunity to assess prospective back pay claims early in the proceedings so as to weigh the pros and cons of settlement.\textsuperscript{73} In addition, a defendant should not be subjected to relitigation of individual back pay claims, a possibility which would tend to result from Rule 23(b)(2) classification and its consequent lack of notice to individual class members of the existence of the suit.\textsuperscript{74} These arguments have struck a responsive chord in the minds of several courts. Many courts have dismissed the fine distinctions between Rules 23(b)(2) and 23(b)(3) and have required notice in all class actions under the discretionary powers vested in the courts pursuant to Rule 23(d)(2), on the theory that due process requires notification that an individual’s rights are under determination.\textsuperscript{75}

Perhaps the fairest approach to the administration of Title VII class actions for injunctive relief and back pay is the so-called “bifurcated” procedure adopted by many of the courts.\textsuperscript{76} This approach allows the appli-

\textsuperscript{71} See Fed. R. Civ. P. 23(c)(3).

\textsuperscript{72} See Paddock v. Fidelity Bank, 60 F.R.D. 695, 698 (E.D. Pa. 1973) (expressing concern that procedural fairness be accorded losing defendants).


\textsuperscript{74} See generally Edwards, supra note 64, at 797, citing Hansberry v. Lee, 311 U.S. 32 (1940). An absent class member deserving of individual relief will not be estopped from prosecuting his individual claim since the issue of defendant’s liability as to him individually has not been determined. Id.


cation of the full remedial effect of Title VII without sacrificing procedural fairness toward either the plaintiff class or the defendant. The issue of defendant's liability for purposes of injunctive relief proceeds under Rule 23(b)(2) with no notice or "opting out" required. If and when defendant's liability to the class is established a shift to Rule 23(b)(3) treatment occurs for purposes of litigating individual back pay claims. At this point notice to the class is mandated, providing the opportunity for individual applicants to appear and have their claims tested. The flexible bifurcated trial procedure is currently the best alternative available to those courts which are not inclined to adopt either the exclusive Rule 23(b)(2) approach or the more restrictive requirement of notice in all class suits. It is felt that the approaches must ultimately be harmonized by the Supreme Court so as to inject some uniformity into the Title VII class action picture.

IV. Conclusion

The disposition of most courts to relax the Rule 23(a) prerequisites and overlook the real problems of classification under Rule 23(b) is motivated by worthy considerations of policy. However, it is not the province of the courts to abandon, either expressly or by implication, the mandates of the Rules of Procedure legislatively adopted. This diversion has created a good deal of confusion in the Title VII class action arena. The interests of plaintiffs and defendants would best be served by the injection of some uniformity, particularly in the sensitive area of classification under Rule 23(b).

W.R.T.

The bifurcated trial approach still fails to allow the defendant an opportunity to assess liability early in the proceedings. Further, the procedure fails to accommodate the due process argument that would require notice and the opportunity to "opt out" of the class to avoid the binding effect of an unfavorable determination of liability to the class. See cases cited note 75 supra. Under the majority view, however, which interprets back pay as an additional equitable remedy in a cohesive class action, it would be irrelevant whether notice were given to absent class members prior to litigation of a defendant's liability. See Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 250-53 (3d Cir. 1975).

77. At this point, with defendant's liability established, the defendant would arguably carry the burden of paying the costs of notice. See Meadow v. Ford Motor Co., 62 F.R.D. 98, 101-02 (W.D. Ky. 1973) (cost of notice born by defendant where sex discrimination claim established).

78. See cases cited note 65 supra.

79. See cases cited note 75 supra.