The Importance of Being Earnest: Pleading and Maintaining a Title VII Class Action for the Purpose of Resolving the Claims of Class Members

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THE IMPORTANCE OF BEING EARNEST:
PLEADING AND MAINTAINING A TITLE VII
CLASS ACTION FOR THE PURPOSE OF
RESOLVING THE CLAIMS OF CLASS MEMBERS

DAVID G. KARRO*

"It is undoubtedly true that many federal district judges have been careless in their
dealings with class actions, and have failed to comply carefully with the technical
requirements of Rule 23." **

INTRODUCTION

TITLE VII of the Civil Rights Act of 1964† authorizes employees of certain employers, and members of certain
unions, to file civil actions against those employers or unions if they claim to have been the victims of discrimination based on race,
color, religion, sex, or national origin.‡ Rule 23 of the Federal Rules
of Civil Procedure authorizes plaintiffs who can meet certain require-
ments to bring their civil actions on behalf of a class of persons with
claims similar to theirs.§ Neither the statute nor the rule refers to
the other. Early in the history of Title VII, however, the courts noted
an apparent relation between the Title VII requirement that a plain-
tiff establish an injury suffered because of membership in a protected
class and the rule 23 requirement that a putative class representative
establish the existence of a class with claims the court can adjudicate.
"Racial discrimination," the Fifth Circuit held in a 1968 Title VII case
involving rule 23, "is by definition class discrimination." 4 A year
later, the Seventh Circuit concurred, noting that the purpose of a
Title VII action is to end discrimination on the basis of class

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the official position of the United States Postal Service.

** Board of Indianapolis School Comm’rs v. Jacobs, 420 U.S. 128, 133 (Douglas,
J., dissenting).

2. ld. §§ 2000e-5, 2000e-16(c). Section 2000-5 also authorized actions against
state and local governments. For convenience, actions under that section will be
referred to as “private-sector” actions, as opposed to actions under § 2000e-16(c),
which must be against a federal agency.
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characteristics. Most of the other circuits have adopted this reasoning. As a result, it has become routine for Title VII plaintiffs to invoke rule 23. Moreover, it is generally conceded that pleading causes of action under the statute entitles these plaintiffs to invoke the rule—or at least to a sympathetic hearing on their request to do so. Little additional analysis of the nature of the relationship between the statute and the rule appears to be evident.

On its face, such an uncritical attitude toward the use of rule 23 is surprising because of the pervasive influence of class action judgments. When a court allows an action to proceed as a class action, "it is contemplated that all members of the class will be bound by the ultimate ruling on the merits." This suggests that a plaintiff seeking certification of a class is doing something more than merely seeking to enforce Title VII. He is asking to be allowed to act as a spokesman for people who may never have heard of him, and to bind those people through his advocacy whether he prevails or not. If the court allows him to act on their behalf, the named plaintiff acquires a fiduciary obligation to protect the interests of the class that he shares with the class attorney. The trial court also acquires an obligation to ensure that the interests of the class members are protected. It would, therefore, be reasonable to expect that re-

7. E.g., Payne v. Travenol Labs. Inc., 565 F.2d 895, 900 (5th Cir. 1977) ("[a]s parties who have allegedly been aggrieved by some of [their employer's] discriminatory practices, plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies"); cert. denied, 439 U.S. 835 (1978); Crockett v. Green, 534 F.2d 715, 718 (7th Cir. 1976) ("[c]lass action status is particularly appropriate in a case involving class discrimination").
9. A court that permits an action brought as a class action to proceed as such is said to have "certified" the class. See Kremens v. Bartley, 431 U.S. 119, 125 (1976).
10. EEOC v. Datapoint Corp., 570 F.2d 1264, 1288 (5th Cir. 1978).
13. City of Detroit v. Grinnell Corp., 560 F.2d 1093, 1099 (2d Cir. 1977); Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir.), cert. denied,
sponsible lawyers, contemplating acting as fiduciaries for large numbers of people whose actual needs can only be surmised, would proceed by preparing carefully drafted class pleadings that define with precision the persons who will be represented and the claims that will be advocated. Such preparation, however, has seldom been evident in the reported cases.

Given the potential for prejudice in class actions, it seems appropriate to ask whether Congress intended to create a situation in which any person with a claim that he has been the victim of discrimination on the basis of race, color, sex, religion, or national origin is, for that reason alone, entitled to act as a rule 23 fiduciary for any other person alleging a similar injury. The absent members of an alleged class have the same right to be heard on their own behalf that anyone else has. That right should be denied only because a court is satisfied that these class members will not be prejudiced by that denial, not because the named plaintiff’s cause of action arises under a particular statute.

I. Weaving the Net: Construing Rule 23 to Create Classes from Which Class Members Cannot Escape

A. The Purpose of a Class Certification Order

Prior to 1966, rule 23 provided for what was known as a “spurious” class action. The judgment of the court did not bind members of such


14. For an analysis of the legislative history of Title VII on this point, see Rutherglen, Title VII Class Actions, 47 U. Chi. L. Rev. 688, 704-06 (1980).


16. “The broad brush approach of some of the Title VII cases is in sharp contrast to the diligence with which in other areas we carefully protect those whose rights may be affected by litigation. If this were an individual cross-action against an employee at one of appellee’s remote terminals we would turn intellectual handsprings over questions of notice and process to him and opportunity to protect his interests—such issues as whether the marshal dropped the notice at the door or handed it to the child at the front gate. But when the problem is multiplied manyfold, counsel, and at times the courts, are moving blithely ahead tacitly assuming all will be well for surely the plaintiff will win and manna will fall on all members of the class. It is not quite that easy.” Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1127 (5th Cir. 1969) (Godbold, J., specially concurring); accord, Rowe v. Ballar, 20 FEP Cases (BNA) 912, 914 (D.D.C. 1979).
a class unless they agreed to be bound—and they could wait until after judgment to decide. In American Pipe & Construction Co. v. Utah, the Supreme Court characterized this ability of class members to "await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests" as an "abuse." It held that "[t]he 1966 amendments [to the rule are] designed, in part, specifically to mend this perceived defect in the former rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments."

The Court believed that the mechanism for achieving that result is the current rule 23(c)(1), which requires that "a determination whether an action shall be maintained as a class action [be] made by the court 'as soon as practicable after the commencement of an action brought as a class action.'" Thus, when a putative class representative files a complaint indicating his intention to represent a class, his ability to do so must be determined before he can require the defendant to defend on the merits. A defendant need litigate only against those class members who will be bound by the result.

This reading of American Pipe receives considerable support from Eisen v. Carlisle & Jacquelin, in which the Supreme Court reversed a trial court's decision to order a defendant to pay 90% of the cost of pre-judgment notice to the class. The lower court had arrived at that decision following a pre-certification hearing that demonstrated the plaintiff "was more than likely" to prevail on the merits of the class claim. The Supreme Court thought the trial court had erred by allowing the plaintiff to present the merits of the case before certification. The logic of American Pipe suggests that the mistake

19. Id. at 547.
20. Id. (footnote omitted).
21. Id.
22. "In order to give clear definition to the action, [Rule 23(c)(1)] requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained." Proposed Amendments, Advisory Comm. Note to Fed. R. Civ. P. 23, 39 F.R.D. 69, 104 (1966) [hereinafter cited as Proposed Amendments].
24. Id. at 177-78. Specifically, the Court stated that "[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command
of the Eisen trial court was to allow the plaintiff to put in issue the claims of people who were not yet committed to abide by the outcome of the litigation. A putative class representative who can force a preliminary adjudication of the class claim before a determination of his ability to represent the class is in a position to abandon all, or part of, the class if he discovers he may not prevail.

Although the Supreme Court appears to view the primary objective of rule 23 as the simultaneous disposition of multiple claims, regardless of merit, many lower courts view the rule as a device for ensuring that persons with meritorious claims obtain their just due. "Once a court is convinced that a plaintiff's claims are of substantial merit, and that the class action device is the most practicable method of vindication," the Third Circuit has said, "it must not allow encountered procedural difficulties to obviate its responsibility to adjudicate those claims." This view has been widely accepted in Title VII litigation. Because trial courts acting in accordance with that view...
cannot be indifferent to the merits of class claims when they consider certification, they have had to develop techniques that permit compliance with the rule 23(c)(1) requirement for decisions on certification early in the litigation, and still retain the ability to determine class membership after the merits of the class members' claims are known.

This result is commonly achieved through certification of a tentative class that will be modified at a later date. Indeed, it has been said that if a trial court "[chooses] to rule on class certification at an early stage of the litigation before the supporting facts are fully developed, then it should err 'in favor and not against the maintenance of the class action, for [the decision] is always subject to modification.'" The language of rule 23(c)(1) appears to authorize such an approach. Although this subdivision requires an early decision on maintainability, it also states that "[a]n order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." The result, however, nullifies the holding of American Pipe. When an employer successfully defends against the claims of class members only to discover that the class has been decertified, he has been subjected to something very much like a "spurious" class action, even though it is the court that released the class members, not the class members who opt out. The court

leads to the conclusion that only the court must be kept ignorant of the defendant's defenses during certification hearings. The plaintiff continues to have the ability to test the claims of putative class members and shape the class definition accordingly.


32. Fed. R. Civ. P. 23(c)(1). But see Valentino v. United States Postal Serv., 16 FEP Cases (BNA) 242 (D.D.C. 1977). "Although rule 23(c)(1) permits conditional certification, that provision should not be allowed to bypass rule 23(a) requirements. Instead, it is more properly used to redefine or to decertify a class which originally was determined to be proper but which subsequently is found to be improper. The courts should not permit it to be used as a sword by which plaintiff engages defendant in virtually unlimited and burdensome discovery until she succeeds in finding other individuals who have claims similar to hers." Id. at 245. See also Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 42 (1967).

33. See Johnson v. Shreveport Garment Co., 422 F. Supp. 526 (W.D. La. 1976), aff'd, 577 F.2d 1132 (5th Cir. 1979). The district court certified a doubtful class on the theory that "if an error should be made with regard to class status at an early stage, the court should err in favor of maintenance of a class action." Id. at 530. The class representative lost at trial, and the court, dissatisfied with his advocacy of the class claim, revoked certification. Id. at 533, 544.
did not envision that the final ruling on the merits would bind all class members when it certified the class, and it thereby permitted a determination of the merits of the class claims without any assurance that a class action could be maintained.

Another technique that provides for early certification while still postponing final determination of class membership is to define the class in terms of the merits of the claim to be litigated. Instead of certifying a class of all blacks with specific factual claims, the court allows the plaintiff to define the class in terms of broad allegations of discrimination such as all blacks "who have been . . . denied employment . . . because of their race." The representative of such a class is not committed to represent a specific group of applicants with claims of unknown merit, but is allowed to represent any applicants with claims he thinks he can prove. After trial, applicants with claims who have not prevailed cannot be persons found to have been "denied employment . . . because of their race," and, at least in theory, should not be members of the class bound by the judgment of the court.

The most sophisticated technique for certifying broad classes without the risk of binding class members to an unfavorable judgment is to treat the class as a party litigant in its own right, with interests distinct from those of its members. If the class litigant prevails on

34. But see Sosna v. Iowa, 419 U.S. 393, 403 (1975).
36. Crockett v. Green, 534 F.2d 715, 717 (7th Cir. 1976). See also Bolton v. Murray Envelope Corp., 553 F.2d 881, 882-83 (5th Cir. 1977) ("all blacks who 'are barred or terminated or may be barred or terminated from employment or otherwise discriminated against in terms of employment with defendant solely because of their race'"); Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 80 F.R.D. 254, 272 (N.D. Ill. 1978) ("all Latinos who, because of their race, national origin or opposition to defendants' unlawful employment practices have been or are denied equal employment opportunities by the defendants through (1) refusal to consider or hire [qualified] Latinos . . . , (2) discriminatory assignment of Latino employees, and (3) utilization of discriminatory standards"); Arnett v. American Nat'l Red Cross, 78 F.R.D. 73, 78 (D.D.C. 1978) ("all black applicants . . . for supervisory positions and all black supervisory employees of the defendant . . . who have applied for employment or . . . been discriminated against . . . in ways which deprive them of equal employment opportunities on account of their race or color" (footnote omitted)); Valentino v. United States Postal Serv., 18 FEP Cases (BNA) 1376, 1378 (D.D.C. 1978) ("all females . . . who have been accorded disparate treatment because they have been denied advancement on the basis of their sex").
37. See Note, Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2), 88 Yale L.J. 868 (1979) [hereinafter cited as Antidiscrimination Class Actions]. "In [the employment discrimination] area of law, courts do not find a class by molding an aggregate of numerous individuals into a group litigant by the factual identity of their claims against the defendant. Instead, a class is determined to exist in civil rights cases because 'discrimination based on race, sex, or national origin is by definition class discrimination.' The sub-
his claim of classwide discrimination, the members are entitled to establish that they were individually aggrieved by the defendant's unlawful practices.\textsuperscript{33} If the class fails to prove its claim, however, the class members have not lost their individual claims, as was explained in \textit{Dickerson v. United States Steel Corp.}\textsuperscript{29}

The class claims were not examined as a mere aggregation of individual claims. . . . Rather, the district court looked to statistical evidence offered to support the existence of a practice or pattern of discrimination. . . . [N]ot only are the proofs different between class action claims and individual claims of discrimination, but so are the judgments and their binding effect.\textsuperscript{40}

The difficulty with this analysis is that Title VII injuries are suffered by individuals, not classes.\textsuperscript{41} In distinguishing between a class claim and an individual claim, the \textit{Dickerson} court has split one cause of action into two. Even though an individual denied a promotion may establish a violation of Title VII with proof that he was the victim of a company-wide policy of discrimination or with proof that he was subjected to the animus of a particular supervisor, that employee has only one claim, the illegal denial of the promotion.\textsuperscript{42} If in one action he unsuccessfully maintains that he was denied the promotion because of the company-wide policy, res judicata will bar a second action based on the theory of discrimination by his supervisor.\textsuperscript{43}

If courts were to require that putative class representatives establish their representative ability prior to certification, it is likely that

\textsuperscript{33}See \textit{Walton v. Eaton Corp.}, 563 F.2d 66, 70-71 (3d Cir. 1977) (Title VII plaintiff may not simultaneously maintain an individual action and a class action against the same defendant).
far fewer classes would be certified in the future. Their reluctance to reach this result is presumably due to the frequently expressed concern that effective enforcement of Title VII depends on a liberal use of rule 23. The rationale for this belief is unclear. A court's power to award Title VII relief is found in § 706(g) of the statute, not in rule 23. The statutory language suggests that if a plaintiff has standing to attack an unlawful employment practice, the court can

44. E.g., Gay v. Waiters' and Dairy Lunchmen's Union Local 30, 549 F.2d 1330, 1333 (9th Cir. 1977) ("[s]ince the purpose of Title VII is to eliminate ... class based discrimination, class actions are favored in Title VII actions for salutary policy reasons"); Romasanta v. United Airlines, Inc., 537 F.2d 915, 918 (7th Cir. 1976) ("[b]ecause [Title VII ] attacks class based discrimination, it is particularly appropriate that suits to remedy violations of the Act be brought as class actions"), aff'd sub nom. United Airlines v. McDonald, 432 U.S. 385 (1977); Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir. 1975) ("[c]lass actions are generally appropriate in Title VII employment discrimination cases [because such actions] seek to enforce fundamental constitutional principles"). But see Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (Godbold, J., specially concurring) ("[o]ver-technical limitation of classes by the district courts will drain the life out of Title VII"). One appellate court has suggested that an additional reason for allowing class actions is to allow prevailing plaintiffs' attorneys "to receive fees commensurate with time and effort expended on what often are complex and difficult litigations." Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 254 (3d Cir.), cert. denied, 421 U.S. 1011 (1975). Section 706(k) of Title VII, however, authorizes courts to award attorneys fees to the prevailing party. 42 U.S.C. § 2000e-5(k) (1976). Nothing in the statute prevents a court from fully compensating the attorney for a prevailing Title VII plaintiff who has brought an individual action. See Copeland v. Marshall, 488 F.2d 880, 889-91 (D.C. Cir. 1980); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719-20 (5th Cir. 1974).

45. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), is sometimes cited as authority for the proposition that a civil rights plaintiff may invoke rule 23 for the purpose of acting as a "private attorney general." E.g., Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719-20 (7th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968). Although the Newman plaintiff represented a class, nothing in the opinion suggests that his status as a "private attorney general" was dependent on that fact. Rather, it appears that his status reflected that he was seeking an injunction against racially discriminatory conduct. Plaintiffs who had not brought class actions have been allowed to seek broad injunctions under civil rights legislation. See Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1971); cf. Allen v. State Board of Elections, 393 U.S. 544 (1969) (individual plaintiff claiming to have been denied rights guaranteed by the Voting Rights Act of 1965 allowed to seek broad injunctive relief).

46. 42 U.S.C. § 2000e-5(g) (1976). "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate." Id.

47. Contra, Rutherglen, supra note 14, at 704-05.
enjoin it despite his inability to represent a class. Moreover, if a plaintiff lacks standing to attack a practice, he cannot acquire that standing by using rule 23. Article III of the Constitution limits the breadth of the attack a Title VII plaintiff can mount, and rule 23 cannot broaden it. The power to enforce the prohibitions of Title VII is, therefore, not dependent on the use of rule 23.


50. In fact, a plaintiff may have standing to attack more practices in his own right than he can on behalf of a class. In Waters v. Heublein, Inc., 547 F.2d 466 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977), the court held that a white woman's interest in working in a desegregated workforce gave her standing to challenge her employer's alleged policy of denying employment to blacks, Spanish-surnamed Americans, and women. It then remanded the case to the district court to determine whether she could also qualify as a rule 23 representative for each group. Id. at 470. It is not inconceivable that the district court might, on remand, be reluctant to treat her as spokesman for persons of a different race and national origin, in spite of her Article III standing. See Beck v. Mather, 417 F. Supp. 648, 649-650 (W.D. Va. 1976). Compare Gray v. Greyhound Lines, East, 545 F.2d 169, 176 (D.D.C. 1976) (black employee has standing to complain of discrimination against black applicants for employment) with General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 331 (1980) (plaintiff cannot represent both applicants and employees in the same employment discrimination suit when potential conflicts of interest between the two groups arise).

51. Indeed, the use of rule 23 may hinder enforcement of the statute. Resolution of the claim that enforcement is needed must await resolution of the collateral issue of whether certification is appropriate. Compare A. Miller, An Overview of Federal Class Actions: Past, Present and Future 60 (1977) ("the certification question is an extremely difficult one and often takes two or more years to resolve") with 42 U.S.C. 2000e-5(f)(5) (1976) (statute suggests that cases should be tried within 120 days after joinder of issue). Conscientious class representatives, concerned with the danger of overlooking the individual claims raised by the class allegations, may choose to attack fewer practices than they would if they were freed of the burden of protecting the rights of individuals. Finally, when a class representative fails to prevail, the doctrine of res judicata may bring all subsequent enforcement efforts to a halt. See EEOC v. Datapoint Corp., 570 F.2d 1264, 1268 (5th Cir. 1978). One commentator has recently suggested that broad injunctive relief is more effective in class actions than in individual actions because class members are able to initiate contempt proceedings themselves, while third party beneficiaries of a decree would have to depend on the named plaintiff. Note, The "Need Requirement": A Barrier to Class Actions Under Rule 23(b)(2), 67 Geo. L.J. 1211, 1233 (1979). Under modern theories of estoppel, however, it is unlikely that the third-party beneficiary of an injunction will find the need to commence a new action anything more than a minor nuisance. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (a plaintiff can seek to estop a defendant from relitigating issues that the defendant previously litigated and lost in an earlier action involving another plaintiff).
Class certification is necessary only if the multiple victims of an unlawful employment practice are to be made whole. Although an employee may have standing to seek broad injunctive relief against employment practices that have aggrieved him, it is doubtful that he can also demand that his employer award damages to other victims aggrieved by the same practices. If those persons are to be awarded individual relief, they must come before the court as party litigants. Rule 23 is a way of bringing them into the litigation in that capacity. If they are before the court, however, its judgment must bind them. Successful efforts to avoid binding them can only create spurious class actions.

B. The Limits on a Court's Power to Bind Class Members

If the purpose of certifying a class is to bind class members, an action should not be treated as a class action unless the members of the class will be bound. Without the binding effect of the class action judgment, the defendant should not be forced to litigate against persons who are free to reject an unfavorable result. A certifying court, however, cannot ensure the binding effect of its own judgment. Res judicata is an affirmative defense that must be raised and decided in the context of a second lawsuit. When a court certifies a class, it merely states its belief that other judges are not likely to upset the judgment that will eventually be entered. If that belief turns out to be erroneous, the court will have created a situation in which “members of the claimed class [can] await . . . final judgment on the merits in order to determine whether participation [will] be favorable to their interests.”

To evaluate the likelihood that future courts will deny absent class members their day in court, a judge contemplating certification should take at least two considerations into account. First, dissatisfied class members may well command a later judge’s sympathy in their efforts to evade the original judgment. Second, it is an established principle of due process that “the judgment in a class action will bind

54. “It should be noted that the binding force of a particular action cannot be determined accurately by the court which hears the class suit, for that court is ill-equipped to test the adequacy of the representation of absent class members, the sufficiency of notice given, or even the general fairness of the proceeding. Since these questions can best be answered realistically with respect to a particular person, the ultimate effect of the class action judgment will be determined when it is introduced in a subsequent action to bind persons not parties to the original action.” Book Note, 67 Harv. L. Rev. 1059, 1060 (1954).
only those members of the class whose interests have been adequately represented by existing parties to the litigation."

The sympathy with which former members of Title VII class actions are likely to be heard in collateral attacks on adverse judgments stems from both the nature of Title VII classes and the national policy underlying the statute. Title VII classes are usually certified under rule 23(b)(2), and members are generally held to have no right to opt out of the class, or even to receive notice that the class action has been brought. Therefore, when a Title VII class member seeks to relitigate an issue raised by the class complaint, he is likely to be in the position of being able to complain that he had never heard of the previous proceedings until the defendant pleaded res judicata in his action. If the plaintiff has alleged a good cause of action, no conscientious federal judge can be expected to refuse him an opportunity to substantiate the claim that he has been denied the basic

58. Jimenez v. Weinberger, 523 F.2d 689, 700 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976); LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288 n.7 (5th Cir. 1975); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 248-50 (3d Cir.), cert. denied, 421 U.S. 1011 (1975). Members of rule 23(b)(2) classes have been denied leave to opt out of class actions that had been settled by the representative plaintiffs on terms that the dissenting members thought were unfair. See Boyd v. Bechtel Corp., 20 FEP Cases (BNA) 944 (N.D. Cal. 1979); Rogers v. United States Steel Corp., 17 FEP Cases (BNA) 1761 (W.D. Pa. 1978); Mungin v. Florida East Coast Ry., 318 F. Supp. 720 (M.D. Fla. 1970), aff'd per curiam, 441 F.2d 728 (5th Cir.), cert. denied, 404 U.S. 897 (1971).
60. See Grigsby v. North Miss. Medical Center, Inc., 556 F.2d 457, 461 (5th Cir. 1978) ("This class was certified under [rule]b(2), without notice . . . for an opt-out privilege . . . Therefore, the propriety and adequacy of representation accorded to absent class members . . . should be critically evaluated before their rights are foreclosed.").
rights guaranteed by Title VII merely because the defendant assures the court that someone else has already litigated his claim for him. Any doubts in such a case are likely to be resolved in favor of hearing the claim on the merits.  

_Lewis v. Philip Morris, Inc._, a Title VII action brought on behalf of black seasonal workers of a tobacco company, illustrates the point. Philip Morris pleaded that the previous decision in _Quarles v. Philip Morris, Inc._ acted as a bar against the _Lewis_ litigation. _Quarles_ had been a Title VII action on behalf of all blacks employed by the same defendant. Although the class representative had prevailed, the _Quarles_ court had specifically found that the seasonal workers had not been among the victims of race discrimination and had denied them relief. The _Lewis_ court characterized _Quarles_ as "one of the monumental decisions in the area of Title VII law," yet refused to defer to the _Quarles_ court's judgment on the seasonal workers' claims. "Although the class in _Quarles_ did include [seasonal] employees, indeed the named plaintiffs in that case were former [seasonal] employees who had transferred to [permanent status], the claims of the [seasonal] employees were seemingly lost in the breadth and ambition of the class's overall interest." The _Lewis_ court, therefore, rejected the affirmative defense because "the interests of the seasonal employees of Philip Morris were not satisfactorily advanced and litigated" in the _Quarles_ action. Consequently, those employees were entitled to their own day in court as a matter of due process.  

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61. It has been suggested that courts should be slower to accord class action judgments res judicata effect when fundamental rights are involved. _Developments in the Law—Class Actions_, 89 Harv. L. Rev. 1318, 1407-08 (1976) [hereinafter cited as _Class Actions_].


64. _Id._ at 519.

65. 419 F. Supp. at 351.

66. _Id._

67. _Id._ at 352.

68. _Id._; see _Stevenson v. International Paper Co._, 516 F.2d 103 (5th Cir. 1975). In _Stevenson_, the court refused to bar a Title VII class action on the basis of an earlier class action judgment because "[a] careful reading of the . . . transcript" of the earlier proceedings convinced it that the issues that the absent class members were seeking to litigate had been presented to the first court "only as a background" to the claims that were of concern to their class representatives. _Id._ at 111. In the Fifth Circuit, a class representative who fully presents the claims of class members at trial may deny the defendant res judicata by simply declining to appeal an unfavorable judgment. _Gonzales v. Cassidy_, 474 F.2d 67, 75-76 (5th Cir. 1973); _accord_, _Pettway v. American Cast Iron Pipe Co._, 576 F.2d 1157, 1175-80 (5th Cir. 1978), _cert. denied_, 439 U.S. 1115 (1979).
Clearly, the certification of a class is a chancy proposition at best. A trial court's ability to ensure that class claims resolved in the defendant's favor remain resolved is limited to its ability to predict the future course of events and the reaction of other judges to those events. Any perceived failure of the representative class plaintiff to discover and present facts relevant to the claim of a particular member or to press that member's claim will enable that member to repudiate the judgment if he is not satisfied with the results.

Taylor v. Safeway Stores, Inc. is one of many illustrations of the tendency of courts to certify Title VII classes without apparent concern for the need to bind class members and the attendant difficulties and potential unfairness in doing so to absent class members and defendants. The plaintiff, a former employee of a chain of grocery stores, brought his action on behalf of all blacks "who are employed, have been employed, or might have been in the past or will in the future be employed by [defendant] Safeway . . . in its various wholesale, retail, and distribution centers throughout . . . Colorado." He alleged on his own behalf that he had been initially denied employment because of his race, and that, after finally being hired, he was denied training and ultimately discharged for the same reason. On behalf of the class, he alleged that the employer generally discriminated in hiring, training, and firing, and that three specific policies were illegal. The trial court certified the class, apparently because "nothing in the record suggest[ed] that plaintiff has failed to meet any one of [the] standards" of rule 23(a). The class was later narrowed to blacks employed at, or discharged from, the Denver warehouse.

At trial, the plaintiff sought to establish his own claim with evidence that the supervisor responsible for his discharge was racially
prejudiced, and the claims of the class members with statistical evidence. He established his own right to relief, but failed to prove any class claims. In fact, the court dismissed the training claim because "[t]he record [was] devoid of evidence on this claim." The plaintiff then appealed, seeking further relief for himself and certification of the original class alleged in the complaint.

Not surprisingly, the prevailing defendant did not challenge the trial court's certification order, and the appellate court only considered the propriety of expanding certification. The trial record, however, set out several reasons for questioning the propriety of treating the named plaintiff as a representative of any class. A future court, faced with a class member's request for an opportunity to present testimony in support of his own claim of discrimination, might be expected to demand stringent proof that the Taylor plaintiff's decision to rest the class claims on statistical evidence was the product of vigorous advocacy rather than a lack of knowledge, industry, or resources. Plaintiff's unwillingness to risk his own claim on statistical evidence, however, may make such a showing difficult. Moreover, his apparent abandonment of the training claim at trial and of other general claims on appeal suggests a casual approach to his fiduciary obligations that may undercut any claim the defendant later makes that he vigorously protected the interests of the class members at trial.

The court of appeals, however, did not approach the issue in these terms. In its view, "[s]ince [the plaintiff] . . . failed to show the existence of any discriminatory employment practices by Safeway outside the frozen food warehouse or the existence of any similarly aggrieved . . . employee outside the warehouse, the trial court had no alternative than to limit his class claim to warehouse employees." Furthermore, the court affirmed the judgment against the class on the merits. Nothing in the opinion suggests that the trial court's judgment might not bind other blacks with claims against the Safeway warehouse. The trial court's adverse judgment on the merits

76. Id. at 471-74.
77. Id. at 475-77.
78. Id. at 476.
81. 524 F.2d at 270.
82. "It is, of course, far better to utilize appropriate procedures at the first trial, then to throw the burden upon the [class members] who, in the face of a seemingly valid judgment directly on the matter in controversy, must attempt to regroup as a subclass and argue, after-the-fact, that they were not adequately represented." Lewis
apparently bars even blacks with claims against the supervisor who had been found to be racially prejudiced.

The trial court's certification order may make it difficult for dissatisfied class members to find lawyers willing to file actions on their behalf. If such members do manage to file claims ostensibly settled by the Taylor litigation, however, some future judge will be forced to choose between requiring the defendant to submit to a second trial and binding the class members by the representation they received in the class action. That future court's resolution of its dilemma is uncertain; it could rule that the Taylor judgment is either the final resolution of the claims of the dissatisfied class members, or merely a procedural complication to be eliminated before hearing the merits of their case. When a court certifies a class, however, "it is contemplated that all members of the class will be bound by the ultimate ruling on the merits." If a court cannot with some degree of assurance determine whether the putative representative will speak for each of the individual class members, that court cannot find that the requirements for certification have been satisfied and, therefore, cannot certify the class.

II. CASTING THE NET: PLEADING A

TITLE VII CLASS ACTION

If the purpose of a class action is to determine with finality the claims of class members, the sweep of many Title VII class action complaints can only be termed breathtaking. In the Taylor case, for example, the plaintiff alleged that he could represent all blacks in the State of Colorado who had, have, or will have Title VII claims against the defendant involving hiring, training, or firing. Even a cursory


83. The defendant would, of course, have had to prepare complete defenses to each class member's claim at the first trial unless he had determined before trial that some claims would not be seriously pressed.

84. Sosna v. Iowa, 419 U.S. 393, 403 (1975).

85. Stated otherwise, the class allegations of the Taylor complaint were an averment that the named plaintiff believed that his lawsuit would be the last action brought against the defendant in Colorado for violating Title VII in the hiring, training, or firing of blacks. See Taylor v. Safeway Stores, Inc., 524 F.2d 201, 266-67 (10th Cir. 1975). A number of courts have specifically condoned the practice of including persons in a class whose claims will arise in the future. E.g., Phillips v. Joint Legislative Comm., 637 F.2d 1014, 1022 (5th Cir. 1981); Wetzel v. Liberty Mut. Ins. Co., 503 F.2d 239, 254 (3d Cir.), cert. denied, 421 U.S. 1011 (1975). In Gore v. Turner, 563 F.2d 159 (5th Cir. 1977), the court of appeals, sua sponte, redrafted a class definition reading: "all other blacks who have been denied equal access to housing under the defendant's control" to read: "all blacks who, in the future, may be
review of the reported cases, however, suggests that the Taylor plaintiff’s proposed undertaking was relatively modest. Many putative class representatives do not limit their Title VII attacks to specific kinds of discrimination. Rather, they allege a willingness to litigate every Title VII claim of any person in a protected group against a particular employer. Because the allegations in class action complaints are subject to rule 11 of the Federal Rules of Civil Procedure, it is worth examining precisely what a plaintiff and his attorney allege they can do when they file a class action complaint, and why they are required to make the allegation at the time of filing instead of when they move for certification.

A. The Commitment Inherent in an Undertaking to Represent a Title VII Class

When a plaintiff alleges that he can represent a rule 23 class, he necessarily claims that he can satisfy the rule 23(a)(4) requirement that he “adequately represent the interests of the class.” He is, therefore, volunteering to serve in a fiduciary capacity. The plaintiff’s
denied equal access to housing under the defendant’s control.” Id. at 166 (emphasis added). Yet, it is difficult to see how a claim against a defendant can be barred by res judicata before it arises. See Dawkins v. Nabisco, Inc., 549 F.2d 396, 397 (5th Cir.), cert. denied, 433 U.S. 910 (1977).

86. E.g., United States Fidelity & Guar. Co. v. Lord, 585 F.2d 860, 861-62 (8th Cir. 1978) (action by two women against major insurance company on behalf of a nationwide class of past, present, and future female employees and applicants for employment, alleging discrimination in terms broad enough to encompass any Title VII claim any woman might have against the defendant), cert. denied, 440 U.S. 913 (1979); Williams v. TVA, 552 F.2d 691, 693 (6th Cir. 1977) (large, multi-state employer sued on behalf of “all blacks presently employed by [the defendant], or formerly employed and presently laid off, who have allegedly been discriminated against on the basis of race”); Penn v. Schlesinger, 490 F.2d 700, 701 (5th Cir. 1973) (action on behalf of “all blacks in Alabama similarly situated” with employment discrimination claims against any of 17 federal agencies employing persons in the state of Alabama), rev’d en banc per curiam, 497 F.2d 970 (5th Cir. 1974), cert. denied, 426 U.S. 934 (1976); Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 471-73 (N.D. Cal. 1978) (action by eleven plaintiffs in an “across-the-board” challenge to discrimination on behalf of all past, present, and future employees and applicants for employment who are women, blacks, Hispanics, Asians, and Native Americans in defendant’s “San Francisco Retail Division Stores (excluding meat department employees),” a division consisting of over 200 retail stores “from the Oregon border south to King City, California, and from the Pacific Coast inland approximately 35 miles”); Valentino v. United States Postal Serv., 16 FEP Cases (BNA) 242, 243 (D.D.C. 1977) (sex discrimination class action on behalf of “all females who have been employed, who will be employed and who are currently employed by USPS, and all females who have sought or will seek employment with USPS”).

87. The rule states, in pertinent part, that “[t]he signature of an attorney [on a pleading] constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it.” Fed. R. Civ. P. 11.

88. See cases cited note 11 supra.
attorney must ensure that this fiduciary obligation is met and thus shares his client's obligations. Because the individual class members are to be bound by the court's judgment, the fiduciary obligation runs to each class member individually rather than to the class as a whole. Therefore, when a lawyer files a class action complaint, he is asking the court to create something akin to an attorney-client relationship between him and each member of the class. At least one court has suggested that such relationships are subject to the professional canons governing the relations between attorneys and their clients, including the requirement that attorneys "refrain from representation of multiple clients having 'potentially differing interests.'"

The potential difficulties inherent in adequately representing the interests of each member of a broad class are often discounted on the theory that the class representative has undertaken to prove that the employer has a policy of company-wide discrimination. Yet, although proof of such an extant policy may satisfy the attorney's obligation to those class members claiming to have been subjected to an illegal animus, the failure to prove its existence will not. A

89. "Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage [class] actions. Every experienced federal judge knows that any statements to the contrary is sheer sophistry." Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 n.9 (3d Cir. 1973).

90. See note 12 supra and accompanying text.


92. "In certifying a class action, the Court not only confers upon absent persons the status of litigants, but in addition it creates an attorney-client relationship between those persons and a lawyer or a group of lawyers." Kahree v. Western Elec. Co., 82 F.R.D. 196, 199 (D.N.J. 1979); accord, Amos v. Board of School Directors, 408 F. Supp. 765, 774-75 (E.D. Wis.), aff'd sub nom. Armstrong v. Brennan, 539 F.2d 625 (7th Cir. 1976), vacated on curiam, 433 U.S. 672 (1977).

93. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 835 n.4 (9th Cir. 1976); see Chateau De Ville Prod. v. Tams-Whitmark Music Library, Inc., 474 F. Supp. 223, 226 (S.D.N.Y. 1979) (a class attorney's relationship with class members is subject to "Canon 9 [which] provides that 'a lawyer should avoid even the appearance of professional impropriety'").

94. Herbert v. Monsanto Co., 576 F.2d 77, 80 (5th Cir.), vacated on other grounds per curiam, 590 F.2d 178 (5th Cir. 1978).

95. For example, if a class representative establishes that it is the uniform policy of the defendant to restrict women to secretarial positions, he will have thereby established that every woman who applied for a non-secretarial position was subjected to an unlawful animus. The issue of damages, if any, suffered by each woman would be resolved on an individual basis in supplementary proceedings. International Bhd. of Teamsters v. United States, 431 U.S. 324, 357-62 (1977). The representative will have proven a "critical" element of each woman's claim, id. at 335 n.15, and thereby settled the question of the defendant's liability to her. More is not required, as rule 23(c)(4) provides that "[w]hen appropriate, ... an action may be
finding of an absence of plant-wide discrimination is not inconsistent with a claim of isolated acts of discrimination or claims of department-wide discrimination. A lawyer, when representing an individual client claiming to be discharged because of his race, does not limit his advocacy to an effort to show that the discharge was part of a uniform pattern, but uses whatever evidence is at hand to show that the discharge was discriminatory. It is doubtful that the adequate representative of an unnamed class member can do less if that class member is to be bound by an unfavorable judgment of the court.

Furthermore, if the plaintiff has filed an “across-the-board” class action complaint, the class will include persons aggrieved by particular employment practices or job requirements. Proof of a company-wide policy of discrimination is not likely to vindicate their interests, for such claims do not usually turn on the employer’s overall attitude toward minorities or women, but must be established brought or maintained as a class action with respect to particular issues.” Fed. R. Civ. P. 23(c)(4); see Boeing Co. v. Van Gemert, 444 U.S. 472, 479-81 (1980).

66. “It is tidy, convenient for the courts fearing a flood of Title VII cases, and dandy for the employees if their champion wins. But what of the catastrophic consequences if the plaintiff loses and carries the class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?” Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969) (Gibbons, J., specially concurring).

97. Dickerson v. United States Steel Corp., 582 F.2d 827, 830 (3d Cir. 1978); see pt. IV infra.


100. “The ‘across-the-board’ approach has been defined as permitting any person claiming to be aggrieved by any particular discriminatory employment practices of an employer alleged to be part of an overall pattern of class based discrimination to sue to end all forms of discrimination by that employer against the class.” Rosario v. New York Times Co., 84 F.R.D. 696, 698-99 (S.D.N.Y. 1979) (quoting Groves v. Insurance Co. of North America, 433 F. Supp. 877, 883 (E.D. Pa. 1977)) (emphasis added).

independently.\textsuperscript{102} This entails proving that the practice or requirement under attack either was instituted for the purpose of discrimination against a group protected by Title VII\textsuperscript{103} or has the effect of denying them employment opportunities and cannot be justified by business necessity.\textsuperscript{104} Because a particular practice or requirement may be lawful when used to fill one position but not another,\textsuperscript{105} an undertaking to represent all persons with claims against even a single practice or requirement may produce an extremely complicated lawsuit.\textsuperscript{106} Yet, an allegation that the class representative can represent an across-the-board class is an averment that the judgment will bind every person who might have a claim against any requirement or practice of the defendant, as well as every person who claims to have been subjected to an unlawful animus. This allegation is necessarily frivolous in all but the most unusual cases. It, in effect, would require the plaintiff to challenge every personnel decision made by the employer adversely affecting any member of the class, every practice of the employer that might have worked to the detriment of a class member, and every job requirement of the employer that a class member was unable to meet.\textsuperscript{107}

\textsuperscript{102} See Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 n.7 (1978) ("This case did not involve employment tests . . . or particularized requirements such as . . . height and weight specifications . . . and it was not a 'pattern or practice' case. . . ." (citations omitted)); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.14 (1973) ("We note that the issue of what may properly be used to test qualifications for employment is not present in this case.").


\textsuperscript{106} See Cooper v. Allen, 467 F.2d 836, 839 (5th Cir. 1972) (When "the plaintiff contends that a test serves to discriminate in 20 job categories, it would be unreasonable to require the employer, in a single law suit, to show that the test accurately predicts performance in each.").

\textsuperscript{107} See Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979). In Pettway, an action was brought in 1965 as an across-the-board class action on behalf of 2,242 blacks employed at one plant. Thirteen years later, it was before the Fifth Circuit for the fourth time, by virtue of an appeal by dissident members of the class who were dissatisfied with a court-approved settlement of some issues, and a decree disposing of others. The class attorney opposed the appeal, arguing that it was not in the interests of the class as a whole. The court addressed the questions of who makes decisions for a class, the rights of subclasses to appeal orders favorable to other members of the class, and a review of the proceedings below. The result was a partial remand for further proceedings. Noting that it had once expected an earlier 57 page opinion in the third appeal to resolve the issues in the case, the court lamented the difficulties inherent in resolving complex Title VII litigation. \textit{Id.} at 1168. Those difficulties did not lie in Title VII,
B. The Purpose of Requiring Class Action Allegations in the Complaint

It is unlikely that many lawyers who file "across-the-board" class action complaints expect their class averments to be taken at face value. Most such pleadings are so conclusory in nature and commit the plaintiffs' lawyers to such manifestly impossible tasks as to be clearly designed only to serve notice that a class of some sort will be represented in the action. All parties realize that the class to be represented will be described at a later stage in the case—after the plaintiff has been able to conduct his discovery. These complaints do not forthrightly allege an intention to represent a class as soon as one can be uncovered because such candor might result in a dismissal of the class claim, either for failure to define a class or for failure to allege that the requirements of rule 23 are met. When a Title VII plaintiff defines in a complaint a class that he does not intend to represent and avers that the requirements of rule 23 are met, he is not reciting ritual language merely for the purpose of form, but seeking to avoid the consequences of telling the truth.

However, but in the failure of the class attorney and the court to limit the class to a homogeneous group of blacks with one or a few clearly delineated claims. If a lawyer were indiscriminately to enter into 2,242 retainer agreements with as many individual employees of one employer, each of which committed him to litigate all the client's Title VII claims, it would come as no surprise if he found himself mired in conflicts of interest and too busy to represent fully each individual client. A different result should not be expected if a court appoints that lawyer as counsel for those same people, on the same terms, under rule 23.

108. Shelton v. Pargo, Inc., 582 F.2d 1298, 1311 (4th Cir. 1978); see Smith v. Josten's Am. Yearbook Co., 78 F.R.D. 154, 164-67 (D. Kan. 1978) (the judge noted that briefs filed in support of motions to certify Title VII classes in his court were form briefs, couched in conclusory language), aff'd per curiam, 624 F.2d 125 (10th Cir. 1980).

109. "The [plaintiff] has done no more than name the preserve on which he intends to hunt." Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., specially concurring).

110. "[C]lass action relief must be predicated upon a proper class action complaint satisfying all the requirements of Rule 23." Danner v. Phillips Petroleum Co., 447 F.2d 159, 164 n.10 (5th Cir. 1971); accord, Nance v. Union Carbide Corp., 540 F.2d 718, 722-23 (4th Cir. 1976), cert. denied, 431 U.S. 953 (1977); Washington v. Safeway Corp., 467 F.2d 945, 947 (10th Cir. 1972).


112. E.g., Poindexter v. Teubert, 462 F.2d 1096, 1097 (4th Cir. 1972); Cook County College Teachers, Local 1600 v. Byrd, 456 F.2d 882, 885 (7th Cir.), cert. denied, 409 U.S. 848 (1972); Gillibeau v. City of Richmond, 417 F.2d 426, 432 (9th Cir. 1969).

113. "An attempt by plaintiff to dismiss an action, or the class action portions of it, before any discovery has been made raises serious questions about the integrity of
Something is clearly wrong with this practice. If named plaintiffs have the right to hunt for classes that they may properly represent in Title VII actions, their lawyers should not be required to dissemble so that these plaintiffs may exercise that right. On the other hand, if the pleading requirements for class actions serve a legitimate purpose, they should be enforced.

Both the defendant and the alleged class members in a Title VII action need to know at the outset of the litigation whom the pleader intends to represent and what he hopes to prove. The pleading requirements are designed to convey this information and may be considered an adaptation of the rules that govern the filing of individual complaints to the special circumstances of a class action. The class definition satisfies the requirement in rule 10(a) of the Federal Rules that the complaint "include the names of all the parties." The allegations establishing that the pleader can present certain claims on behalf of the class in accordance with rule 23 conform to the requirement of rules 8(a)(1) and 8(a)(2) that the complaint set out facts showing that the court has jurisdiction over the claims to be litigated and a statement of the claim that the defendant will have to defend against. Boiler-plate language in a complaint obviously cannot supply this kind of information to the interested parties.
1. The Defendant's Right to a Complaint Which Provides Him with Notice of the Claims Against Him

When an employer is required to answer to any Title VII charges of any black employee or applicant for employment, he is in the position of a taxicab company sued by a pedestrian on behalf of all other pedestrians injured by the defendant company's negligence. An allegation of "across-the-board" discrimination is too general to provide the employer with adequate notice of the subject matter of the lawsuit. He cannot tell which personnel records to preserve, which job requirements to validate, or from which supervisors to obtain statements while they are still in his employ. Any lawyer who has had to determine why one of several qualified candidates was selected for a position years earlier, or to establish the validity of a written examination that is no longer used, will recognize the unfairness of allowing a class plaintiff to identify the claims to be proved long after the filing of the complaint.\(^7\)

Moreover, Congress clearly intended to protect employers from that kind of unfairness. The limitation periods for filing Title VII administrative complaints and civil actions are extremely short,\(^9\) and the Supreme Court has made it clear that they are to be rigorously enforced.\(^9\) Thus, when Clarence Brown filed a Title VII action forty-

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\(^7\) 5 C. Wright & A. Miller, supra note 12, § 1215, at 112-13; see Fisher v. Flynn, 598 F.2d 663, 665 (1st Cir. 1979) ("[c]omplaints based on civil rights statutes must do more than state simple conclusions; they must at least outline the facts constituting the alleged violation"); Martin v. New York State Dep't of Mental Hygiene, 588 F.2d 371, 372 (2d Cir. 1978) ("[i]t is well settled in this Circuit that a complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)"); Guse v. J.C. Penney Co., 562 F.2d 6, 8 (7th Cir. 1977) (Title VII class action allegation that defendant's discriminatory policies "include, but are not limited to" a particular practice will not support expanding the litigation beyond the specific practice named in the complaint (emphasis omitted)).


\(^117\) With certain exceptions, individuals with claims against private-sector employers have only 180 days to commence administrative proceedings before the EEOC, and only 90 days after notice of termination of those proceedings to file a civil action. 42 U.S.C. § 2000e-5(e), (f)(1) (1976). Individuals with claims against federal agencies are allowed only 30 days from receipt of notice of the termination of administrative proceedings to file a civil action. Id. § 2000e-16(c). The period during which administrative claims may be filed against the federal government is set by regulation, rather than by statute, at either 30 or 90 days, depending on whether an individual claim or a class claim is involved. 29 C.F.R. §§ 1613.214(a)(1)(i), .602(a) (1980).

\(^118\) Delaware State College v. Ricks, 49 U.S.L.W. 4058, 4060-61 (U.S. Dec. 15, 1980) (No. 79-939); Mohasco Corp. v. Silver, 100 S. Ct. 2486, 2496-97 (1980); United
two days after exhausting his administrative remedies, he found his claim time-barred because the statutory period for filing his action was only thirty days. Nevertheless, the lower courts' lax treatment of the rule 23 pleading requirements means the defendant federal agency may not assume that Brown's claim can no longer be litigated. If, during Brown's thirty-day period, some other plaintiff filed a class action complaint alleging in boiler-plate language that he would represent all the agency's black employees, Brown's claim may later surface as a claim that the plaintiff seriously intends to press. By that time, the claim will be far more stale than when Brown first tried to litigate it. No court has explained why individuals who belatedly seek to vindicate their rights should be treated more harshly than class members who have done nothing to help themselves. Nor has any court explained what policy is served by protecting a defendant when the claimant himself advances a stale claim, but not when a rule 23 representative advances that same claim. Without much analysis, the few lower courts that have considered the problem have held that the filing of a class action complaint tolls the limitations period for class members. When the purpose of the complaint is to


121. See Eastland v. TVA, 553 F.2d 364 (5th Cir.), cert. denied, 434 U.S. 985 (1977). The Fifth Circuit sustained dismissal of the claims of four co-plaintiffs whose claims were time-barred, id. at 367-68, but noted that they could not be precluded from participating in the lawsuit as unnamed members of a class if other co-plaintiffs, who had filed timely civil actions, could qualify as class representatives. Id. at 373 n.21.

122. E.g., Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 246 (3d Cir.), cert. denied, 421 U.S. 1011 (1975); Sobel v. Yeshiva Univ., 477 F. Supp. 1161, 1171 n.17 (S.D.N.Y. 1979); NAACP v. City of Corinth, 83 F.R.D. 46, 57 (N.D. Miss. 1979). The only extended discussion of the problem is found in Green v. United States Steel Corp., 481 F. Supp. 295, 299-301 (E.D. Pa. 1979). The court acknowledged that "[u]nder present law, it is possible for an employer [in a Title VII class action] to be faced at trial with claims arising out of events from years past that it may have had no idea occurred," id. at 300, and "that permitting tolling during the pendency of a class action may work a hardship on large corporate defendants who are faced with a task of collecting stale evidence." Id. at 301. It noted that courts created the problem by permitting Title VII classes to include those who have not filed administrative complaints. Id. When Title VII classes were first permitted, however, one of the justifications was that "when any [administrative] charge is filed and a proper suit follows which fairly asserts grievances common to the class to be afforded relief.... [t]here can be no claim of surprise [by the defendant] in such a situation." Buve v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969). Thus, although class actions were once justified on the theory that they would not deprive the defendant of timely notice of the claims against him, they have become the justification for depriving him of that right.
preserve the plaintiff’s right to set out claims at a later date, a tolling rule simply allows the plaintiff to use rule 23 as a means of bypassing the defendant’s statutory right to notice.\(^{123}\)

In view of the purpose of a statute of limitations,\(^{124}\) such a rule makes sense only when a class action complaint adequately defines the class that the plaintiff is prepared to represent and puts the defendant on notice that certain claims will be litigated.\(^{125}\) Thus, the Supreme Court, in *American Pipe*, held that class action complaints may toll the limitations periods for class members,\(^{126}\) in part because the result in that case was “in no way inconsistent with the functional operation of a statute of limitations.”\(^{127}\) The plaintiff’s complaint in *American Pipe* gave the defendants notice as to the size of the class and the subject matter of the claim.\(^{128}\) In a concurring opinion, Justice Blackmun warned that the Court’s decision should not encourage “lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights.”\(^{129}\)

*American Pipe* was followed in *United Airlines, Inc. v. McDonald*,\(^{130}\) a Title VII case in which a member of an alleged class sought to intervene in the action some three years after certification had been denied. The Court rejected the defendant’s limitation defense because the complaint had provided the defendant with the notice necessary to toll the limitations period by alleging a specific class of employees affected by a specific employment practice.\(^{131}\)

Although the Supreme Court has yet to determine whether a class action complaint that does not provide the defendant with any useful

\(^{123}\) Cf. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125-26 (5th Cir. 1969) (after two years of litigation, district court was ordered to define a class so that defendant could prepare a defense).

\(^{124}\) “Statutes of limitations . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

\(^{125}\) See Barthel v. Stamm, 145 F.2d 487, 491 (5th Cir. 1944) (the statute of limitations “is suspended by the filing of a suit because the suit warns the defendant to collect and preserve his evidence in reference to it”), cert. denied, 324 U.S. 878 (1945). See generally Comment, Class Actions and Statutes of Limitations, 48 U. Chi. L. Rev. 106, 111-12 (1981) [hereinafter cited as Statutes of Limitations].


\(^{127}\) Id. at 554.

\(^{128}\) Id. at 554-55.

\(^{129}\) Id. at 561 (Blackmun, J., concurring); see Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969) (Godbold, J., specially concurring).

\(^{130}\) 432 U.S. 385 (1977).

\(^{131}\) See id. at 387.
information can toll the statute of limitations, it appears unlikely that it will answer the question affirmatively. 132

In courts that believe "[a]n intelligent decision on class certification requires 'at least a preliminary exploration of the merits' of the plaintiff's claim," 133 the defendant faced with conclusory allegations of an "across-the-board" class complaint will be denied not only his right to timely notice of the claims against him, but also his right to reasonable limitations on discovery. Rule 26(b)(1) allows discovery of "any matter not privileged, which is relevant to the subject matter involved in the pending action." 134 Despite the liberal scope of this standard, the rule does confine discovery to matters relevant to the issues created by the complaint. A Title VII plaintiff who is allowed to make overbroad allegations, however, renders the restriction in the rule meaningless. For example, the two plaintiffs in Wilson v. Allied Chemical Corp. 135 brought a broad class action in the most conclusory of terms. 136 Prior to certification, the plaintiffs served broad interrogatories involving "information, broken down by gender, concerning personnel and practices for virtually every department and job classification" at the defendant's plant and requiring several hundred hours for the defendant to answer. 137 Nevertheless, reasoning that "discovery, and perhaps even a preliminary evidentiary hearing, must precede a court's ruling on the propriety and/or scope of a purported class action," 138 the court granted the plaintiffs' motion to compel a response to the interrogatories. Obviously, the Allied Chemical interrogatories were far broader in scope than the matters likely to be resolved by the court's judgment. 139 They also appear to go beyond

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132. One commentator has suggested that it will be rare for a class action complaint to be too vague to provide necessary information because "[a] number of federal district courts have adopted local rules requiring any class action complaint to include detailed allegations of fact as to the size and definition of the alleged class, and the common questions . . . that unite the class." Statutes of Limitations, supra note 125, at 113-114. No case has been found, however, in which a Title VII class action complaint has been held violative of those local rules. See notes 156-160 infra and accompanying text.


136. The district court stated that "[t]he plaintiffs seek to maintain this action as a class action on behalf of all females who . . . have been, are presently, or may in the future be employed by Allied at its Chesterfield Fibers Plant and Technical Center. The plaintiffs allege that Allied engages in sexually discriminatory practices with regard to the classification of jobs, hiring, transfers, promotions, discharges, layoffs, compensation, and by failing to take affirmative steps to alleviate the continuing effects of past discrimination." Id. at 47.

137. Id.

138. Id.

the matter at issue in the certification proceeding—whether "it [can be] contemplated that all members of the class will be bound by the ultimate ruling on the merits." 140 Until "the court's ruling on the propriety and/or scope" of the class, there can be no "subject matter" against which relevancy could be measured. 141

In seeking discovery "as broad as the allegations of discrimination," the Allied Chemical plaintiffs and their counsel were not trying to prove that specified practices had injured identifiable class members; rather, they were seeking individuals to represent and claims to present. Not every qualification standard for every position would be ultimately put in issue—only those that discovery revealed were vulnerable to attack. The named plaintiffs were engaging the defendant in "virtually unlimited and burdensome" discovery until they uncovered other individuals who had similar claims. 142 Depending on one's view of the motives of plaintiffs' counsel, the Allied proceedings could be characterized as either an investigatory probe of the defendant's practices by a "private attorney general" charged with ensuring compliance with Title VII, or ambulance chasing through the Federal Rules of Civil Procedure. 143 They cannot, however, be characterized as proceedings commenced by a complaint that provides "the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." 144

141. It has been said that discovery is no more burdensome to a defendant in a class action than in a single action because "'[a]ll evidence showing a policy of discrimination toward [a] class is relevant to show discrimination against [an] individual plaintiff.'" Lamphere v. Brown Univ., 553 F.2d 714, 719 (1st Cir. 1977) (quoting Paddison v. Fidelity Bank, 60 F.R.D. 695, 697 (E.D. Pa. 1973)). This would be true if class membership were confined to persons with claims identical to those of the class representative. In Title VII class actions like Allied Chemical, however, it is not unusual for plaintiffs to use their class action allegations as "a sword for discovery purposes" on the theory that they are representing persons with claims dissimilar to their own. Lim v. Citizens Sav. & Loan Ass'n, 430 F. Supp. 802, 809 (N.D. Cal. 1976).
143. The term "ambulance chasing" may be undeserved in many, or even most, cases; the term "private attorney general", however, is equally unmerited. For the most part, counsel for Title VII classes are simply attorneys who hope to earn a fee by proving a case. To the extent that they are willing to pose as something more—the disinterested arm of the State—they cannot fairly object if they are also labeled as something less. Kline v. Coldwell, Banker & Co., 508 F.2d 226, 238 (9th Cir. 1974) (Duniway, J., concurring), cert. denied, 421 U.S. 963 (1975).
144. Conley v. Gibson, 355 U.S. 41, 47 (1957). The burdens imposed on defendants by the unwillingness of courts to enforce pleading requirements are exacerbated by the fact that the filing of an "across-the-board" class suit is a game any number can play. A large employer may face many overlapping class actions at the same time, with each putative class representative claiming the right to discover the merits of the same claim even though none has assumed an obligation to litigate the
2. The Class Members' Right to Notice of the Pleader's Intentions

Plaintiffs' attorneys are not unaware of the significant financial burdens that ambitious class allegations can create for a defendant. Offers to dismiss the class allegations in exchange for relief for the named plaintiff follow many "across-the-board" class complaints. Some of these offers are made in a manner suggesting that the class allegations were included in the complaint solely to provide the plaintiff with bargaining leverage. Others appear to reflect a good faith belief that the plaintiff, although willing to represent any victims of discrimination he can find, is under no obligation to do so until the court certifies a class.

It is doubtful, however, that a plaintiff who has filed a class action is entirely free to abandon the members of the alleged class at will. The Supreme Court, in United Airlines Inc. v. McDonald, has held that absent class members have a right to rely on the class representative to protect their interests notwithstanding a denial of certification by the trial court. Although the McDonald Court was only

claim at trial. Compare Eastland v. TVA, 553 F.2d 364, 365 (5th Cir.) (plaintiff claiming to represent "all past, present, and future black employees and applicants for employment in TVA's Muscle Shoals, Alabama area operations and facilities, and all black persons who would apply or would have applied for employment in said operations but for the defendant's racially discriminatory recruitment and employment practice or reputation therefor"), cert. denied, 434 U.S. 985 (1977) with Williams v. TVA, 552 F.2d 691, 698 (6th Cir. 1977) (Engels, J., concurring in part, dissenting in part) (conditionally certified class of "all blacks presently employed by TVA, or formerly employed and presently laid off, who have allegedly been discriminated against on the basis of race").

145. "[T]his Court's recent experience has been that the clear majority of proposed Title VII settlements in actions containing Rule 23 class allegations occur prior to actual class certification and make provision only for the named plaintiff." Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61, 62-63 (S.D. Tex. 1977).

146. "Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail . . . . The distinctions between innocent and guilty defendants and between those whose violations have worked great injury and those who have done little if any harm become blurred, if not invisible. The only significant issue becomes the size of the ransom to be paid for total peace." Handler, The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 9 (1971).


148. In McDonald, the trial court had refused to certify an alleged class. Three years later, a judgment was entered in favor of the named plaintiff and several intervenors. Before the time for taking an appeal had run, one of the members of the alleged class learned that no appeal would be taken from the decision denying certification and sought to intervene for the purpose of taking an appeal herself. Id. at 396 n.1. The Supreme Court allowed the intervention because she had acted "as soon as it became clear to [her] that the interests of the unnamed class members would no longer be protected by the named class representatives." Id. at 394.
concerned with the right of alleged class members to rely on the named plaintiffs, it is reasonable to assume that the plaintiffs have a corollary obligation to protect the class members who exercise that right. That obligation is created by a formal pleading, usually signed by a member of the bar, announcing that the class members' interests will be protected. Members of the alleged class would, therefore, seem entitled to notice if the offer to represent them is withdrawn.\textsuperscript{149}

Several courts have required representatives of uncertified classes who want to settle their individual claim to give notice of settlement to class members who may be relying on them to protect their interests.\textsuperscript{150} Surprisingly, however, that logic has not been extended to situations in which certification of a class alleged in a complaint has been denied in whole or in part.\textsuperscript{151} If a plaintiff's voluntary dismissal of the class action for purposes of settlement will prejudice a member of an uncertified class, that class member will be equally prejudiced by an order denying certification, or by one limiting the scope of the class to a group that does not include him. Whenever a plaintiff de-

\begin{footnotesize}
\textsuperscript{149} "The very bringing of a class action, especially where counsel are known to be skilled in the field, may deter the institution of suits by members of the ostensible class. The passage of time may impair or defeat the rights of others thus deflected from acting for themselves. . . . Having nominated themselves as class representatives, both plaintiff and his counsel have undertaken responsibilities, and triggered possible consequences, that may not now be erased by routine acceptance of the resignation they now tender. It is necessary at least that some decent notice be given to those plaintiff[s] purported to [be] represent[ed] so that such members of what was once said to be a 'class' may appear, if they wish, to oppose the present application, seek to be substituted as representatives or take other steps appropriate for protection of their interests." Rothman v. Gould, 52 F.R.D. 494, 496 (S.D.N.Y. 1971) (footnote omitted). See also ABA Code of Professional Responsibility DR 2-110(A)(2) ("lawyer shall not withdraw from employment until [he] has taken reasonable steps to avoid foreseeable prejudice to the rights of [his] client").


\end{footnotesize}
cides to abandon his efforts to have the entire class described in his complaint certified, those who will be excluded from the litigation may be prejudiced. This is no less true when the abandonment takes the form of a failure to press for certification than when abandonment is the result of a decision to settle the suit before certification.152

Although notice would seem to be a minimal requirement whenever a plaintiff chooses to abandon an alleged class, a plaintiff may not be able to pay for individual notice to every member of a broad class that has been wholly or partially abandoned.153 Moreover, if funds are available, locating class members in time to protect their rights may not always be possible.154 Because the ultimate cause of any prejudice is the abandonment rather than the lack of notice, the best protection for class members would be an end to the practice of casually pleading class actions on behalf of persons whom the plaintiff is not sure he can represent. Fairness to class members, therefore, requires that class action complaints define the class to be represented in terms clear enough to allow laymen to determine whether their interests will, or will not, be protected. The plaintiff and his attorney should be prepared to press the claim that the plaintiff can represent all alleged class members, both before the trial court and, if necessary, on appeal. Pleadings that contain averments that the plaintiff will represent the interests of the class described in the complaint should simply comply with the requirements of rule 11.155

III. DRAWING THE NET: CERTIFICATION OF A CLASS ACTION

Courts are required by rule 23(c)(1) to determine "as soon as practicable" whether an action filed as a class action may be maintained as one. This emphasis on speedy resolution of the certification issue seems particularly well suited to Title VII actions because the courts are statutorily required to expedite these actions.156 Although neither the court's power to do justice to the named plaintiff nor its power to enforce Title VII is at stake in a certification hearing,157 protracted

152. See, e.g., Garrett v. R.J. Reynolds Indus., Inc., 81 F.R.D. 25, 28 (M.D.N.C. 1978) (class described in the plaintiffs' motion for certification was smaller than the one they had originally sought to represent, and there is no suggestion in the decision that notice was sent to class members).


156. 42 U.S.C. § 2000e-5(f)(5); see note 133 supra.

157. See notes 41-51 supra and accompanying text.
litigation over the collateral issues involved in certification can interfere with its ability to do either.

One might, therefore, expect that when the initial pleadings fail to define a class or set out facts establishing that certification would be appropriate, the court would be inclined to dispose of the class action issues summarily. The general rule, however, is that certification cannot be denied on the basis of the pleadings, even if the class action allegations are completely boiler-plate in nature and tell the defendant nothing he could not have learned by reading the text of rule 23. When a plaintiff has indicated an intention to represent a class and has recited the requirements of rule 23, most courts will treat him as a class representative until it has been established that he cannot represent any class.

In these circumstances, a responsible plaintiff’s lawyer may conclude that his client’s interests require him to plead the broadest possible class allegations, even if he has no reason to believe that a class exists. It is not only clear that “there’s no harm in the asking,” but that tactical advantages for his client may be gained if he does ask. The putative class representative may be able to induce the court to abandon its neutral role and join him in the search for wrongdoing by the defendant.

158. E.g., Shelton v. Pargo, Inc., 582 F.2d 1298, 1312-13 (4th Cir. 1978); Walker v. World Tire Corp., 563 F.2d 918, 921 (8th Cir. 1977); Weathers v. Peters Realty Corp., 499 F.2d 1197, 1200 (6th Cir. 1974); see Lamphere v. Brown Univ., 553 F.2d 714, 718 (1st Cir. 1977) (courts may certify class on basis of pleadings but may not deny certification on basis of pleadings).

159. Belcher v. Bassett Furniture Indus., Inc., 588 F.2d 904, 905-06 (4th Cir. 1978); Jones v. Diamond, 519 F.2d 1090, 1097-1100 (5th Cir. 1975).

160. Perhaps the most remarkable reaction to a conclusory “across-the-board” class allegation is found in Goodman v. Schlesinger, 584 F.2d 1325 (4th Cir. 1978). The district court had denied certification and then, after trial, found for the defendant. The court of appeals affirmed the judgment against the plaintiffs, but held that the district court had acted prematurely in dismissing the class allegations before the plaintiffs had been able to conduct discovery. Id. at 1331-32. Because the named plaintiffs had been held not to have been the victims of race discrimination, however, they were ineligible to act as class representatives under prevailing Supreme Court doctrine. Id. at 1332; see East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977). The court overcame this hurdle by remanding “the class action to the district court with instructions that it be retained on the docket for a reasonable time to permit a proper plaintiff or plaintiffs, with grievances similar to those of [the named plaintiffs] to present himself to prosecute the action as a class representative.” 584 F.2d at 1332. Thus, there was, and still may be, pending in the United States District Court for the Eastern District of Virginia a Title VII case replete with docket number, lawyers, and defendant, but lacking a plaintiff or issues to be litigated.

161. “In class actions, particularly in the civil rights field, the general rules on burden of proof must not be applied rigidly or blindly. The court too bears a great responsibility to insure the just resolution of the claims presented; it should be loathe to deny the justiciability of class actions without the benefit of the fullest possible factual background.” Jones v. Diamond, 519 F.2d 1090, 1099 (5th Cir. 1975).
tions to dismiss and for summary judgment. The ability to demand burdensome discovery while he hunts for a class provides him with obvious leverage in settlement discussions. A conscientious attorney might well be expected to hesitate before sacrificing these substantial tactical advantages to an abstract rule of pleading. Therefore, the rule of pleading should be given realistic dimensions so that an attorney does not gain tactical advantages at the expense of the rights of others.

A. The Rule 23 Criteria for Certification

Before a class can be certified, the court must find that the requirements of rule 23(a) have been satisfied. The language of this rule, however, provides minimal guidance for distinguishing between classes that should be certified and those that should not. The meaning of those requirements must, therefore, be inferred from the purpose of rule 23—the resolution of multiple claims in a single proceeding. An interpretation of a rule 23 requirement permitting certification of a class that will not achieve this purpose should be rejected.

162. "A court should grant a motion under Rule 12 or Rule 56 in a class action prior to deciding the certification question only when the challenged claim or defense is wholly lacking in merit and there appears to be no litigable issue. . . . Such a motion may deflect the court from discharging its obligations under Rule 23." Manual for Complex Litigation § 2.11, at 125 (1978).

163. "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." Fed. R. Civ. P. 23(a).

164. In commenting on the 1966 Amendments to Rule 23, Justice Black protested that they "place too much power in the hands of the trial judges and . . . might almost as well simply provide that 'class suits can be maintained . . . whenever in the discretion of a judge he thinks it is wise.' Proposed Amendments, supra note 22, at 274. Since the rule was adopted, the developing case law has further confused the situation by suggesting that classes should be certified in Title VII cases whenever possible. A decade after the effective date of Title VII, and nine years after the adoption of rule 23, a district court was able to say, in Piva v. Xerox Corp., 70 F.R.D. 378 (N.D. Cal. 1975): "So uniformly have the circuit courts liberally applied the requirements of Rule 23(a)(2) and (3) in favor of class certification, that we are able to find only six Title VII cases wherein a circuit court has either affirmed a district court's denial of a class certification or narrowed a district court's definition of a class." Id. at 386.

165. "If an action satisfies all the requirements in Rule 23(a), the parties comply with the notice provisions in the rule, and the court properly exercises its powers under subdivision (c) and (d) so that the case is handled in a fair and efficient manner, it is highly likely that all the prerequisites for giving the decree binding effect are present." 7A C. Wright & A. Miller, supra note 17, § 1789, at 177.
1. Numerosity

Subdivision (a)(1) requires that the members of a class be so numerous that joinder is "impracticable." The numerosity requirement reflects the desire to conserve judicial resources by avoiding multiple trials of the same issue. Accordingly, an individual who has no claim to litigate should not be counted for numerosity purposes. If he cannot sue in his own name, his presence in the class adds to the court's burdens in the class suit without minimizing the likelihood that other actions will be filed. Nevertheless, Title

166. "The cases under Title VII appear to offer no guidance as to the point at which joinder becomes 'impracticable'. . . . In class actions generally, the trend has been to regard classes of approximately thirty or less as not being sufficiently numerous, although there are exceptions in both directions." Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 45 (N.D. Cal. 1977).

167. "[The] use [of rule 23] in claims for damages is justified where the public policy considerations of efficient court administration outweigh the potential prejudice to persons in interest who are not parties to the proceedings, but who may nevertheless become legally bound by an adjudication as if they were in fact parties litigant." Greenfield v. Villager Indus., Inc., 483 F.2d 824, 831 (3d Cir. 1973).


169. But see Inda v. United Air Lines Inc., 565 F.2d 554 (9th Cir. 1977), cert. denied, 435 U.S. 1007 (1978); Swain v. Hoffman, 547 F.2d 921 (5th Cir. 1977). In both cases, plaintiffs who had failed to exhaust their administrative remedies were held not able to sue in their own names even though each was thought potentially eligible for membership in a class represented by other persons.

Inda involved a suit against a private-sector employer under § 706 of Title VII. 565 F.2d at 560. If a plaintiff who has brought such an action has exhausted his own administrative remedies, he may represent persons who have not done so under rule 23. Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975). The explanation for this result, however, is not that invocation of rule 23 automatically suspends the need for class members to exhaust their remedies, but rather that courts may excuse persons from doing so if no purpose would be served by requiring them to resort to the administrative process. See Weinberger v. Salfi, 422 U.S. 749, 765-67 (1975); McKart v. United States, 395 U.S. 185, 199 (1969); NLRB v. Industrial Union of Marine & Shipbldg. Workers, 391 U.S. 418 (1968). Thus, it may be that the plaintiffs in Inda could qualify for class membership because their claims had already been submitted to the administrative process by somebody else. But in that case, there would be no impediment to individual suits. If, on the other hand, the policies underlying the exhaustion of administrative remedies doctrine were not satisfied, and therefore, they could not sue on their own behalf, it is difficult to see how their membership in the class could be justified.

The defendant federal agency in Swain was sued under § 717(c) of Title VII. 547 F.2d at 923. That statute is an "explicit waiver of sovereign immunity." United States v. Testan, 424 U.S. 392, 406-07 n.8 (1976). The statute's requirement that plaintiffs file an administrative claim prior to filing suit is, therefore, a condition precedent to the waiver of sovereign immunity and beyond a court's power to excuse. Id. at 399; see Zahn v. International Paper Co., 414 U.S. 291, 301 (1973). The Swain court was, therefore, correct in dismissing the plaintiffs who had not filed administrative claims,
VII courts rarely concern themselves with the number of alleged class members who actually could maintain a separate suit. They look, instead, to the number of employees or applicants for employment whom the plaintiff alleges he can represent. Therefore, the plaintiff willing to claim that he can represent large numbers of persons is likely to satisfy the numerosity requirement, even though only a few of those persons could file an independent action.

Despite the many decisions emphasizing the need to construe the requirements of rule 23 liberally, only a few courts have noted that a plaintiff’s inability to satisfy the numerosity requirement for certification does not necessarily mean that the alleged class members cannot participate in the action. If joinder is not impracticable, it must be practicable. When certification would have been appropriate but for the numerosity requirement, members of the alleged class will almost certainly meet the requirements of rule 24(b)(2) for permissive intervention.

2. Commonality and Typicality

Subdivisions (a)(2) and (a)(3) require that there be “questions of law or fact common to the class,” and that “the claims . . . of the repre-
sentative parties [be] typical of claims . . . of the class."173 Taken together, they seem intended to ensure that the claim of the named plaintiff and the claims of the class members are so related that the resolution of the plaintiff's claim will serve as a basis for resolving the claims of all. Thus, when a former airline stewardess challenges her discharge on the ground that her employer's no-marriage rule violates Title VII,176 her claim would obviously be both common to, and typical of, the claim of any stewardess seeking to challenge that rule. If the employer can prevail against one, he can prevail against all; conversely, if he has discriminated against one, he has discriminated against all. No such relationship would exist between the claim of that stewardess and the claim of other female employees of that airline that the height requirements for pilots discriminate on the basis of sex.177 Proof of one claim is not proof of the other, and it is difficult to see how one woman's claim could be considered representative of the other's. Yet, courts willing to certify "across-the-board" class actions in Title VII cases necessarily determine that such different claims do meet the commonality and typicality requirements.178

The Third and Fourth Circuits have recently modified the "across-the-board" approach by holding that plaintiffs who are employees may not represent applicants for employment.179 The language of the decisions suggests that the courts reached their conclusions at least partially because of commonality and typicality considerations. Yet,

vene. The plaintiff's lawyer, who has already signified his willingness to represent them under rule 23, can do so under rule 24 if the intervenors request his services.


177. See Boyd v. Ozark Airlines, Inc., 568 F.2d 50, 52 (8th Cir. 1977).

178. "The prevailing view in this judicial district is that a Title VII plaintiff may represent a class including all persons affected by an employer's allegedly discriminatory practices, even though that plaintiff has been adversely affected by only one such practice and in only one department of the company. . . . Appropriately named the 'across-the-board' approach, this view finds the commonality and typicality requirements of Rule 23(a) satisfied in recognition that race discrimination is by its very nature a classwide question." Gramby v. Westinghouse Elec. Corp., 84 F.R.D. 655, 659 (E. D. Pa. 1979) (citations omitted).

litigants do not have common claims merely because they were subjected to similar kinds of personnel actions. When a black employee sets out to prove that he was denied a promotion because of his supervisor's prejudice against blacks, he has no choice but to try to establish an important element of the case of a black applicant who alleges that the same supervisor denied him employment because of racial prejudice.\(^\text{180}\) He need prove nothing, however, relevant to the claim of another black denied a promotion because he failed a discriminatory examination, or because a different supervisor was allegedly biased.\(^\text{181}\)

3. Adequacy of Representation

Because a principal purpose of a pre-trial certification order is "to assure that members of the class [will] be . . . bound by all subsequent orders and judgments,"\(^\text{182}\) the adequacy of representation requirement of rule 23(a)(4) lies at the heart of rule 23. If a class member's interests are protected during the litigation, the result should arguably bind him even though he can show that certification was improper.\(^\text{183}\) If his interests were not adequately represented, however, he has a constitutional right to be released from the judgment.\(^\text{184}\)

In assessing the adequacy of the representation likely to be afforded class members, courts generally require no more than that the plaintiff's attorney be competent and that there be no obvious conflicts of interest within the class.\(^\text{185}\) Certification seldom has been

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180. See note 164 supra.
181. Cf. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 622 (1974) ("[w]here there have been prior patterns of discrimination by the occupant of a state executive office but an intervening change in administration, the issuance of prospective coercive relief against the successor to the office must rest, at a minimum, on supplemental findings of fact indicating that the new officer will continue the practices of his predecessor").
183. See Garcia v. Board of Educ., 573 F.2d 676 (10th Cir. 1978). Several plaintiffs who were members of an ethnic minority sought to enjoin operation of a desegregation plan that would involve busing of their children. Id. at 677-78. The defendants pleaded res judicata because the plan was ordered in the course of an earlier class action in which the Garcia plaintiffs were represented by the named plaintiffs. Id. at 678. The court sustained the plea, in part because the Garcia plaintiffs had been adequately represented in the earlier action by an intervening class of defendants, as well as by other intervenors who had opposed the Garcia plaintiffs' certified representative. Id. at 679-80.
denied due to inadequate representation because judges are perhaps unwilling to evaluate the performances of lawyers who appear before them.\textsuperscript{166} The danger of conflicting interests among class members is generally discounted because such conflicts are assumed to be unlikely among persons seeking to end discrimination against themselves.\textsuperscript{167} Thus, subdivision (a)(4) is often found to be satisfied for no better reason than that a plaintiff has hired a competent attorney and shares a common racial, sexual, or ethnic identity with class members.\textsuperscript{168}

Nevertheless, adequacy of representation problems are likely to arise whenever a named plaintiff is allowed to represent persons whose rights to recover are independent and different from his own. When a black who has failed a written examination challenges that test, he must, to establish his own right to relief, establish the claim of every other black who failed that examination for the position. He need not, however, establish the claims of blacks who failed other examinations, and may find it to his advantage to concentrate his time and resources on the claim in which he has a personal stake.\textsuperscript{169}

\textsuperscript{186} Note, Class Actions: Defining the Typical and Representative Plaintiff under Subsections (a)(3) and (4) of Federal Rule 23, 53 B.U.L. Rev. 406, 410 n.34 (1973). Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975), is an apparent example of a court’s reluctance to pass on a lawyer’s competence. The Jones plaintiff filed a complaint on behalf of a class, but failed to allege anything but conclusions of law. \textit{Id.} at 1097. He moved for certification on the basis of answers to interrogatories, but neglected to introduce those answers into evidence. \textit{Id.} When the trial court denied certification, he took an interlocutory appeal but failed to perfect it, thus requiring the appellate court to find an alternate basis for exercising jurisdiction. \textit{Id.} at 1094-97. The appellate court then concluded that the plaintiff’s failure to show in his initial pleadings that certification was appropriate was not a sufficient basis for concluding, as a matter of law, that certification was inappropriate and remanded the case for further proceedings. \textit{Id.} at 1098-99.


\textsuperscript{188} It is not likely that a Title VII defendant would be successful in a plea of res judicata if he rested on the argument that the plaintiff must have been adequately represented in an earlier class action because both she and the class representative were both women, and the class attorney was competent. Such a “once-you’ve-heard-one-you’ve-heard-em all” defense would almost certainly be rejected out of hand, even by the court that certified the original class on essentially that theory.

\textsuperscript{189} See Johnson v. Uncle Ben’s, Inc., 626 F.2d 419, 423 (5th Cir. 1980). It has been held, in a non-Title VII context, that when “it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative. . . . Much of the [plaintiff’s] effort would . . . necessarily [be] devoted to [his] own problems . . . ; this may well result in less attention to the issue which would be controlling for the rest of the class. A representative plaintiff should not be permitted to impose such a disadvantage on the class.” Koos v. First Nat’l Bank, 496 F.2d 1162, 1164-65 (7th Cir. 1974) (citations omitted).
the typical Title VII "across-the-board" class action, the plaintiff volunteers to litigate dozens, or even scores, of claims. It is simply unrealistic to assume that he will press every claim that the class definition has raised. Every experienced attorney knows that the representatives of such classes spend the time between certification and trial determining what claims to press in addition to their own. Class members with claims identical to the plaintiff's are the only ones assured of representation; the others are dependent on tactical considerations over which they have no control.

Other conflicts between employees are likely to exist in other employment situations. The Supreme Court has recently warned that a single plaintiff should not represent both applicants for employment and employees because applicants, "if granted relief, [will] compete with employees for fringe benefits or seniority." Similar conflicts would be even more pronounced in a class of employees who are competing directly or indirectly for a limited number of opportunities to advance. If the class representative is confined to representing persons with claims he must prove to prevail himself, such conflicts are not likely to affect the representation he will provide. The black employee who must establish his supervisor's racial bias to prevail has no choice but to represent the interests of black rivals with claims against that supervisor. He need not, however, try to establish that another supervisor acted illegally in denying a potential rival a promotion, and it may be in his interest to refrain from doing so.

When a plaintiff seeks to represent only persons whose claims he must prove while establishing his own, the court may reasonably restrict its adequacy of representation inquiry to the competency of the plaintiff's attorney. If that attorney is competent to prove the plaintiff's claim, the plaintiff's self-interest will ensure that class members are adequately represented. In contrast, when the typicality and commonality requirements are construed so that named plaintiffs may represent persons whose claims may be slighted or abandoned without prejudice to their own claims, however, those class members are completely dependent on the plaintiff's willingness to act as a volunteer champion of their interests. In this circumstance, it is difficult to see how any court can determine in advance that the class members will be adequately represented throughout the litigation.

190. General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 331 (1980).
191. This will be true as long as certification is limited to the issue of the animus of the supervisor. Once the employer's animus against blacks is established, the plaintiff would have to abandon his representative role while litigating the question of which of the blacks rejected by the supervisor would have gotten the position in question. See note 95 supra.
192. In the Fifth Circuit, "throughout the litigation" includes appeals, as a class member who has not prevailed is not adequately represented if no appeal is taken. Gonzales v. Cassidy, 474 F.2d 67, 75-76 (5th Cir. 1973). To determine whether a
Judges who make such determinations may not have stopped to ask themselves whether they are convinced that no member of the class should be allowed to file his own suit once the class suit has been adjudicated. 193

B. The Judicial Criteria for Certification

The Supreme Court, in East Texas Motor Freight System, Inc. v. Rodriguez, 194 admonished courts not to certify classes merely on the basis of allegations in the complaint. 195 Nevertheless, many courts continue to do precisely that. 196 "As parties who have allegedly been aggrieved by some . . . discriminatory practices," the Fifth Circuit has said, "plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies." 197 Employment decisions may
not be made, however, in accordance with a single policy. The mere assertion that a company-wide policy of discrimination exists is no guarantee that evidence dispositive of the plaintiff’s claim will also resolve the claim of another class member.\footnote{198}

The Fourth Circuit, in \textit{Stastny v. Southern Bell Telephone and Telegraph Co.},\footnote{199} held that \textit{Rodriguez} does not apply to pre-trial certification orders.\footnote{200} The \textit{Stastny} court’s belief that an “[i]ntertwining of class action inquiry with merits inquiry” was unavoidable,\footnote{201} led it to conclude that the certification issues in Title VII cases cannot be fully determined until the plaintiff’s claim has been adjudicated.\footnote{202} It therefore thought a trial court may be “completely justified” in basing its pre-trial certification order on the plaintiff’s allegations.\footnote{203} Such an order would be tentative and subject to revocation if the plaintiff failed to prove his class claim at trial.\footnote{204} Although the court recognized that a “withdrawal of certification may be thought unfair to the party opposing the class after a full trial has revealed an underlying failure of proof on the merits of the class claim as alleged,” it attributed that unfairness to “recognized imperfections in [rule 23’s] design in this area.”\footnote{205} Rule 23, however, was “designed, in part, . . . to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.”\footnote{206} It was the trial court’s willingness to allow plaintiffs
to act as class representatives on the basis of unfounded allegations that brought about the unfairness to the defendant, not any imperfection in the rule.\footnote{207}

Other courts have sought to minimize the risk that tentatively certified classes will have to be subsequently decertified by requiring the plaintiff to establish what amounts to "probable cause"—usually by evidence of a statistical imbalance.\footnote{208} This approach, on its face, is questionable. Statistical proof of a racial imbalance, however, does not imply that a single animus or practice created that imbalance.\footnote{209} The fundamental error is, however, the assumption that certification is appropriate only if the plaintiff's allegations of a policy of discrimination are true. When a class is certified on such an assumption, the defendant cannot obtain a binding judgment against class members because the class must be decertified if he prevails.\footnote{210} Whereas the Stastny court simply bypassed the requirement that the status of the action be determined early in the litigation, the "probable cause" courts turn the certification hearing into a mini-trial, thereby allowing the plaintiff to "obtain a determination on the merits of the claimsadvanced on behalf of the class without any assurance that a class

\footnote{207. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974).}

\footnote{208. In Garrett v. R.J. Reynolds Indus., Inc., 81 F.R.D. 25 (M.D.N.C. 1978), the court proceeded to "review the statistical data in the present case to determine whether an inference of discrimination exists. If no reasonable inference of discrimination is revealed by the statistics, the Court would not certify a class for an across-the-board attack. The individual plaintiffs would have failed to show that there exist questions of law or fact common to the proposed class." Id. at 32; see Vuyanich v. Republic Nat'l Bank, 82 F.R.D. 420, 431 (N.D. Tex. 1979); Garcia v. Rush-Presbyterian-St. Luke's Medical Center, 80 F.R.D. 254, 270 (N.D. Ill. 1978); I.M.A.G.E. v. Bailar, 78 F.R.D. 549, 554 n.10 (N.D. Cal. 1978); Karan v. Nabisco, Inc., 78 F.R.D. 388, 404 (W.D. Pa. 1978). After determining that no such reasonable inference could be drawn, the court denied certification. 81 F.R.D. at 50.}

\footnote{209. If promotion decisions at a plant are made by 100 supervisors, 60 of whom are unbiased, 30 of whom discriminate against blacks, and 10 of whom discriminate against whites, a statistical analysis may reveal an imbalance due to discrimination against blacks. It does not follow, however, that all blacks denied a promotion by any of the supervisors were subject to a common policy of discrimination. Indeed, on these facts, the odds are that most of them were not subjected to any illegal discrimination. That evidence, therefore, will not support an "inference that any particular employment decision . . . was made in pursuit of [an illegal] policy." International Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977).}

\footnote{210. "The judgment in an action maintained as a class action . . . whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class." Fed. R. Civ. P. 23(c)(3) (emphasis added).}
action may be maintained," in violation of Eisen v. Carlisle & Jacquelin. It has been held that allowing the plaintiff to present some proof of discrimination is consistent with Eisen so long as either the plaintiff is forbidden to prove a prima facie case or the defendant is forbidden to rebut the plaintiff's proof. Courts employing this logic miss the point. Eisen does not impose an arbitrary limit on the persuasiveness with which a plaintiff may prove his case or on a defendant's right to rebut that proof. Rather, the decision acts as a reminder that the defendant is not required to answer to the plaintiff's claim that the defendant has discriminated against class members until the plaintiff has established that he can represent those class members.

C. A Suggested Procedure for Determining Whether Certification is Appropriate in a Title VII Action

A certification order is, in effect, a declaration that the court is satisfied that the outcome of the lawsuit will bind each member of the class. The order must, therefore, be based on a finding that the plaintiff will litigate the claims of each class member. Allegations that the defendant violates Title VII will not support such a finding, even if they are supported by statistics showing an imbalance in the number of minorities or women employed by the defendant. What is needed is evidence that will allow the court to determine what the plaintiff must prove to prevail and how many other persons have claims that turn on the same proof.

A plaintiff who seeks to establish a Title VII claim must ultimately establish that someone made an employment decision on the basis of

211. 417 U.S. 156, 177-78 (1974); see notes 17-25 supra and accompanying text.
212. "Plaintiffs are not to be permitted or required to prove their case at this time, and to determine whether they have established a prima facie case of discrimination would pose the precise dangers mentioned by the Supreme Court in [Eisen]. That high a threshold is plainly impermissible. . . . Accordingly, the Court concludes that Rules 23(a)(2) and (b)(2) require plaintiffs to make a factual showing of class-based discrimination sufficient to provide substantial questions for resolution at trial."
214. In a thoughtful analysis of the difficulties caused by what he refers to as the "presumption in favor of certification" in Title VII cases, Professor Rutherglen has suggested that the courts continue to certify classes on the basis of the merits of the plaintiff's claims, but require the plaintiff to establish the validity of those claims early in the litigation, with sufficient proof to meet the summary judgment requirements of rule 56. Rutherglen, supra note 14, at 720-30. As Rutherglen notes, however, use of the merits in certification proceedings has "no explicit basis in rule 23."
Id. at 736.
racial, sexual, ethnic, or religious prejudice, or on the basis of a facially neutral employment practice that itself violates Title VII. The plaintiff seeking to establish his right to represent a rule 23 class must, therefore, first identify the motive or practice that he must prove illegal if he is to prevail. If enough other persons were subjected to that motive or practice to satisfy the requirements of rule 23(a)(1), and if the plaintiff's counsel appears capable of pressing the plaintiff's claim, the plaintiff may appropriately try to prove that the motive or practice is illegal on behalf of all of them. The putative representative of a Title VII class, therefore, needs sufficient discovery, to learn who made the offending decision and, if that person relied on a facially neutral practice or job requirement, what that practice or requirement was. He would also need discovery to ascertain how many other employees of his race, sex, religion, or ethnic background had been aggrieved by that person, practice, or requirement. Discovery on the merits of his claim, however, would not be needed until after resolution of the certification issue.

The probable objection to this approach to certification would be the preclusion of certification when the plaintiff suspects that the employer has an unwritten policy of discrimination that can only be proved at trial. At the outset of such an action, the plaintiff would possess evidence that he had been subjected to a personnel decision made by a particular supervisor, but he would normally be unable to show that the supervisor was in turn acting in accordance with a plant-wide policy. It might be said that to deny certification in such circumstances would be to deny certification in precisely those cases in which it is most needed.

The answer is that rule 23 requires named plaintiffs to establish their ability to represent class members adequately before assuming the duties of a representative. Although named plaintiffs often prevail, they also often lose. To certify a class on the possibility that they may win is to risk forcing innocent defendants into litigation against represented class members who can prevail against them, but against whom they cannot win. Moreover, if certification orders are entered when adequate representation of class members is uncertain, class members may be induced to rely for representation on those who will

215. "'Disparate treatment'... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred... Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involves employment practices that are facially neutral... but that in fact fall more harshly on one group than another and cannot be justified by business necessity.... Proof of discriminatory motive... is not required under a disparate-impact theory." International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (citations omitted); see notes 95-102 supra and accompanying text.
not represent them. Certification orders impose a fiduciary obligation on the court to ensure that class members are, in fact, represented. It is difficult to see how that obligation can be satisfactorily discharged by a post-trial determination that the certification order was a mistake.

Moreover, denial of certification does not mean that a plaintiff is unable to enforce Title VII. He may still be able to prove the existence of an overall policy of discrimination during the trial of his own claim. If he does, he can seek the same injunctive relief as an individual as he could have sought as a class representative.

IV. The Dickerson Debacle: A Concluding View of Rule 23

An analysis of a recent series of decisions rendered in the case of Dickerson v. United States Steel Corp. serves to illustrate the effect of the certification of overly broad classes on Title VII litigation. Dickerson was a class action brought in June of 1973 by four black

216. The Supreme Court has noted that the purpose of rule 23 is best served if class members are encouraged to rely on the class representative rather than file their own actions. See United Airlines, Inc. v. McDonald, 432 U.S. 385, 394 n.15 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 757 n.9 (1976); American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974). Courts that encourage laymen to rely on class representatives would appear to have an obligation to differentiate between those self-proclaimed class representatives who are likely to represent the class members and those who are not.

217. See cases cited note 13 supra.

218. The Fourth Circuit opined that when a class is decertified after trial, notice to class members will be sufficient to protect their rights. See Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 282 & n.25 (4th Cir. 1980). But what are the class members to do with that notice? If they are permitted to file their own actions, the defendant will have been stripped of his right to timely notice of the claims against him for no better reason than that someone charged him with a pattern of wrongdoing that could not be proved. If their actions are held to be time-barred, the trial court has induced people to rely on the plaintiffs to their detriment. Although the appellate court made much of the fact that the trial court's certification orders were merely tentative, id. at 276-77, it seems unduly harsh to tell a lay class member suddenly ejected from the litigation that he should have read the "fine print" in the court's certification order before relying on the plaintiffs' counsel to represent him.

219. See notes 41-50 supra and accompanying text.

220. See, e.g., Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1979).

221. 42 U.S.C. § 2000e-5(g) (1976); see notes 44-52 supra and accompanying text.

employees at United States Steel's Fairless Hills plant. The class was defined as virtually every black who had, has, or might later have, a Title VII claim against the Fairless Hills plant or against any of the unions representing employees at that plant. The complaint did not, on its face, appear to meet the requirements for a class action. The definition of the class was overly broad, suggesting a design to preserve the plaintiffs' room to maneuver rather than to isolate a group whom the plaintiffs and their attorneys were determined to represent. Moreover, there was no indication in any of the Dickerson opinions that the complaint alleged a factual basis for their belief that the named plaintiffs could represent the entire alleged class, and subsequent events suggest that they were probably unable to do so. It is, therefore, reasonable to assume that the plaintiffs followed the common practice of simply reciting or paraphrasing the language of rule 23. If this assumption is correct, the class allegations amounted to little more than an assertion that the plaintiffs believed that the defendants had violated the law in unspecified ways, thereby injuring persons whose identities were as yet unknown. If the trial court had any concerns about either the ability of the Dickerson complaint to qualify as a class action complaint or the need for prompt action to prevent alleged class members from relying on unrealistic promises, however, its opinions do not reflect them.

Six months after the complaint was filed, the court was called on to resolve a dispute involving the scope of discovery. The defendant-employer had objected to the plaintiffs' interrogatories because they went to the merits of the case rather than "to the question of whether [the] action should be maintained as a class action," and asked that its obligation to answer be deferred until after the certification issue was resolved. Anticipating the Supreme Court's decision in Eisen, the

223. 7 FEP Cases (BNA) at 1318. The class the plaintiffs sought to represent was "a. all blacks now employed or who might be employed in the future by United States Steel Corporation at its Fairless Hills, Pennsylvania plant; all blacks who were employed by the company from July 2, 1965 to the present date, but who are no longer employed there; and all blacks who unsuccessfully sought employment at the Fairless Hills plant at any time between July 2, 1965 and the present date; b. all blacks who are represented . . . by defendant labor organizations at the Fairless Hills plant . . . from July 2, 1965 to the present date." 64 F.R.D. at 353 (footnote omitted).

224. See notes 108-16 supra and accompanying text.

225. See notes 145-55 supra and accompanying text.

226. See notes 145-55 supra and accompanying text.

227. 7 FEP Cases (BNA) at 1318.

228. Id. The logic of the employer's position is easily seen with the benefit of hindsight. Black clerical workers, among others, would eventually be excluded from the class. 14 FEP Cases (BNA) at 1450-51 & n.1. If the claims of those clericals were not part of the subject matter of the lawsuit, matters pertaining only to those claims should not be discoverable under rule 26(b)(1). The employer, therefore, had good reason to object to discovery that went to the merits of the claims of putative class
Dickerson court held that the employer need answer only "those interro
togatories addressed to the class action question which are relevant
and which are not unduly burdensome." 229

Nine months later, the Dickerson court certified the entire class set
out in the complaint. 230 Nothing in its opinion lists the elements of
the individual plaintiffs' claims or indicates why they are common to,
or typical of, the claims of class members. The court's only finding of
fact is that the "plaintiffs have shown a recent enough and a broad
enough experience with defendant's operations to sustain the conclu-
sion that they will be fair and adequate representatives of the
class." 231 The opinion, however, presents several factual assertions
by the plaintiffs that the court possibly found persuasive: that the
defendant employed 839 blacks; that the plaintiffs were "represented
by counsel experienced in civil rights class actions;" and that the
plaintiffs "[had] no interests which conflict with those of the
class." 232 Clearly, however, the court did not "[contemplate] that all
members of the class [would] be bound by the ultimate ruling on the
merits." 233 In a later opinion denying a motion to decertify the class,
the court would explicitly acknowledge that "[t]his is not to say that
the presently certified class may not have to be narrowed somewhat
before trial." 234 Even though the court still did not know whose
claims would be resolved by the lawsuit, it certified the class,
thereby lifting the pre-certification restrictions on discovery. Despite
the ritual assertion in the court's opinion that "[t]he burden is upon
the plaintiffs to show that each of [the rule 23] requirements has been
met," 235 its failure to base certification on any factual findings, its
approving reference to the "proposition that 'racial discrimination is
by definition class discrimination,'" 236 and its preoccupation with the
defendant's arguments against certification all demonstrate that the
court was not asking "why," but "why not." 237

members until the court had determined who was, and who was not, in the litiga-
tion. See notes 131-44 supra and accompanying text. Indeed, some months later the
Supreme Court would warn against allowing putative representatives to "secure the
benefits of a class action without first satisfying the requirements for it." Eisen v.
Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974); see notes 22-29 supra and accom-
ppanying text.

229. 7 FEP Cases (BNA) at 1320.
230. 64 F.R.D. at 353.
231. Id. at 356.
232. Id. at 354.
234. 12 FEP Cases (BNA) at 1468.
235. 64 F.R.D. at 354 (citation omitted).
236. Id. at 357 (quoting Hall v. Werthan Bag Co., 251 F. Supp. 184, 186 (M.D.
Tenn. 1966)).
237. See Rutherglen, supra note 15, at 723.
In October 1976, the court narrowed the class to exclude blacks in management, clerical, and technical positions because the named plaintiffs—production and maintenance workers—lacked the personal knowledge of management, clerical, and technical work necessary to represent those employees adequately. The court also excluded unsuccessful black applicants because those applicants might have claims to retroactive seniority that would make them senior to the named plaintiffs and, therefore, have interests antagonistic to those of the plaintiffs. The order provided that the partial decertification would not be effective until persons to be excluded from the class were notified that, once excluded, the statute of limitations would start to run.

Thus, after two years of litigation, the abandoned class members were given essentially a nonsuit without prejudice. The defendants had been forced to defend themselves on the basis of representations that the named plaintiffs and their attorneys could speak for people for whom they in fact could not speak. The defendants had been required to submit to discovery on the basis of those court approved representations, only to be told that the plaintiffs had made a mistake. Any costs they had incurred in developing defenses against claims that had been dismissed were admitted to have been unnecessary.

Moreover, it is not clear that the court could protect the abandoned class members from the statute of limitations. By concluding that the statutory period would not start to run until its order excluding them from the class became final, the court appeared to assume that the filing of any class action complaint always tolls the limitations period for all members of an alleged class. Its authority for this proposition, Wetzel v. Liberty Mutual Insurance Co., is based on the rule of American Pipe, which teaches that the limitations period for class members is tolled when the defendant is given notice of

238. 14 FEP Cases (BNA) at 1450-51.
239. Id. at 1451.
240. Id.
241. See EEOC v. Datapoint Corp., 457 F. Supp. 72 (W.D. Tex.), aff'd in part, rev'd in part and remanded, 570 F.2d 1264 (5th Cir. 1978). The court awarded attorneys' fees in a class action suit to a prevailing defendant "because the vast majority of the [class claims] were abandoned, and because the vast majority of Defendant's time and expense was spent before trial in the preparation of a defense to claims that were ultimately abandoned." The court also found that "those abandoned claims [were] frivolous, groundless, brought vexatiously, or brought unreasonably." Id. at 69. In Dickerson, there is no suggestion that the abandoned claims were unreasonable. Instead, it was the averment that the plaintiffs could represent the entire class that was unreasonable.
242. 439 F. Supp. at 68; 14 FEP Cases (BNA) at 1451.
their claims. Yet, some of the class members being excluded were ineligible for class membership because the named plaintiffs lacked a personal knowledge of their circumstances. Thus, the Dickerson plaintiffs not only failed to provide the defendant with the information mandated by American Pipe, but also could not have provided that information if they had wanted to do so. Therefore, the statute of limitations had probably extinguished any cause of action that the abandoned class members might have once had. The notice that the court ordered sent to the abandoned class members might appropriately have included information concerning their right to seek redress from their representatives if they had relied on the class action allegations to their prejudice.

After the partial decertification, the Dickerson plaintiffs, in response to a pre-trial order, stated that they would prove nine claims of class-wide discrimination. Given the inclusive nature of the plaintiff's class definition, however, no one could confidently state that the plaintiffs' listing covered every Title VII claim that every class member might have against the Fairless Hills plant. If black employees were relying on the named plaintiffs to establish specific claims that were ultimately omitted from the listing of issues, those claimants were now effectively excluded from the class. Nothing in any of the published opinions would suggest that the listing was mailed to class members with an appropriate warning.

After fifty-eight days of trial over a period of seven months, the plaintiffs rested their case, and the defendants moved to dismiss each of the claims because no prima facie case had been established. For purposes of requiring the defendant to go forward, the court held that the plaintiffs had established the first four claims entirely or partially, but granted a motion to dismiss the last five. Additionally, the court found that about fifty of the class members who testified "had established [prima facie] individual claims of racial discrimination,

244. 414 U.S. 538 (1974).
245. Id. at 561; see notes 123-31 supra and accompanying text.
246. 439 F. Supp. at 83-94.
247. In Green v. United States Steel Corp., 481 F. Supp. 295 (E.D. Pa. 1979), the Dickerson judge was faced with a suit brought by one of the applicants excluded from the Dickerson class. The defendants pleaded the statute of limitations on the ground that the Dickerson complaint did not fairly apprise them of her claim. Id. at 300. The trial court rejected the claim, essentially holding that class action defendants in Title VII cases have no right to timely notice of the claims of individual class members. Id. at 301; see note 149 supra and accompanying text.
248. The nine claims were "(1) initial assignments of blacks to undesirable jobs; (2) exclusion from crafts by discriminatory tests; (3) exclusion from first crews and newly opened facilities; (4) exclusion from promotions; (5) restrictive transfer opportunities; (6) excessive discipline; (7) failure by the union to process grievances; (8) maintenance of a hostile atmosphere to blacks; and (9) violation of . . . [a] consent decree [entered in another case]." 582 F.2d at 829.
even though the applicable class-wide claims of racial discrimination were dismissed.”

A class claim, according to the court, required the plaintiffs to “show something more than a small number of discriminatory incidents affecting a few members of the class,” while an individual claim could be an isolated act of discrimination. Thus, the court seemed to impose a kind of numerosity requirement on proof of a class claim, a requirement to be met at trial rather than prior to certification.

In opposition to the establishment of the fifty individual claims, the defendants argued that the “court’s dismissal of a class-wide claim bars individual lawsuits under that claim by class-member witnesses.” Because the court believed its certification order “must have certainly inhibited many class members from instituting separate actions,” it held “that it must recognize and decide the individual class members’ cases of discrimination, even if the class claim was not proved.” The issue was then certified for an interlocutory appeal.

The Third Circuit rejected the defendants’ argument that the dismissal of the class claims barred the individual claims, reasoning that the finding of an absence of a practice or pattern of discrimination was based on statistical evidence and was “not necessarily inconsistent with a claim that discrete, isolated instances of discriminations occurred.” It further held, however, that the lower court could not adjudicate those individual claims because the claimants had not moved to intervene in the action, that their claims lacked “the cohesiveness and commonality essential to a class action,” and that intervention would be unfair to the defendants because “the class-member witnesses’ testimony was relevant only to the class-wide

249. Id.
250. 439 F. Supp. at 65.
251. This imposition of a “numerosity requirement” on plaintiffs in a class action was based on an interpretation of International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). 439 F. Supp. at 65. The Teamsters Court, however, did not refer to “plaintiffs in a class action.” That case was brought by the United States under the old § 707(a) of Title VII of the Civil Rights Act of 1964. 431 U.S. at 328 n.1. That statute authorized the Attorney General to bring a civil action when he “has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of” discrimination. Id. Thus, the Teamsters Court was not considering the burden of a class action plaintiff, but what the Government had to prove under § 707 of the Act. The Supreme Court has further emphasized the difference between a private plaintiff and the government seeking Title VII relief under rule 23. See General Tel. Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 329-31 (1980) (EEOC may seek class-wide relief without being certified as the class representative).
252. 582 F.2d at 830.
253. 15 FEP Cases (BNA) at 1802.
254. 15 FEP Cases (BNA) at 1802.
255. Id.
256. 582 F.2d at 830.
What, then, had been accomplished by five years of litigation, two interlocutory appeals to the Third Circuit, one denial of a petition for a writ of certiorari, and fifty-eight days of a partially completed trial? Not much, it would appear. The burden of going forward had been placed on the defendant as to the first four claims. The defendants had prevailed on the other five, but only against the class, as opposed to the class members. If the litigation achieved one of the purposes of class certification—prevention of a "multiplicity of suits"—it was by lulling potential litigants into waiting too long to sue.

The result in *Dickerson* cannot be ascribed to the work of a reckless counsel or an inept judge. In declining to limit their class by persons or issue, the class lawyers were doing no more than what the appellate courts have been permitting class representatives to do for over a decade. In fact, the class attorneys went further in their efforts to represent the class than is necessary to meet the standards of most courts. Although classes are often narrowed without the class counsel doing anything other than arguing that the narrowing is inappropriate, the *Dickerson* attorneys drew the court's attention to the desirability of notice to class members excluded by its October 1976 order.259 Proof of over fifty individual claims of discrimination contrasts sharply with the willingness of many class attorneys to rest the class members' claims on a statistical showing.260 Similarly, the court seems to have applied the case law in a craftsman-like manner, accurately reflecting the law of its circuit. It is fair to say that it was the court's painstaking evaluation of the results of the trial that exposed the difficulties of certifying a class with Title VII claims.261 What makes *Dickerson* unique is not the problems found when the court looked beneath the surface of the "class-wide" evidence, but the court's willingness to expose those problems and try, albeit unsuccessfully, to rectify them.

The underlying cause of the *Dickerson* debacle is the failure to recognize that an applicant for rule 23 status is asking the court to deny others the right to be heard that he is demanding for himself. The courts of appeal are so oblivious to the implications of certifying a Title VII class that they sometimes treat the right to serve as a class representative as the personal right of the named plaintiff.262 Yet, the

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257. *Id.* at 831-32.
258. *15* FEP Cases (BNA) at 1802.
259. *14* FEP Cases (BNA) at 1451.
260. *E.g.*, Taylor v. Safeway Stores, Inc., *524* F.2d 263 (10th Cir. 1975); *see notes 70-84 supra and accompanying text.
262. For instance, the Fifth Circuit held that a plaintiff who had exhausted his administrative remedies could represent those under rule 23 who had not done so
The named plaintiff has nothing at stake at a certification hearing; he can seek full relief for his injury despite the outcome of the certification proceeding.263

The persons most vitally interested in the certification proceedings are those whom the named plaintiff proposes to bring before the court. They are entitled to have the court skeptically consider any claim that their interests will be fully protected if the court will only appoint the plaintiff and his counsel as their representative.264 Both the case law and Title VII literature have emphasized the need to use rule 23 to make the courthouse available to laymen who, through a lack of sophistication or fear of their employer, would otherwise be unable to redress Title VII injuries. Yet, that same lack of sophistication may leave them incapable of protesting the failure of a class attorney to carry out his promises. No one can estimate the number of people who failed to pursue their remedies against their employer because they relied on a class action allegation that came to nothing, or the number who found that the unsatisfactory resolution of a poorly litigated class action barred their own claims.

The defendant’s interests at certification also outweigh any the plaintiff may have. Under current procedures, plaintiffs are free to walk away from any problems caused by their class action complaints, either by seeking decertification or by not pressing the class action. On the other hand, the defendant in an improperly certified class action faces a “spurious” class action of the kind rule 23 was designed because “the right to bring a class action is concomitant to the right to de novo proceedings in the district court.” Eastland v. TVA, 553 F.2d 364, 372 (5th Cir.), cert. denied, 434 U.S. 985 (1977). It did not explain the connection between the right to a plenary hearing and the right to deny someone else such a hearing. In a non-Title VII case, another court stopped a defendant from inquiring into the ability of a plaintiff to finance a class action with the remark that “[f]ederal judges take an oath to ‘administer justice without respect to persons, and do equal right to the poor and to the rich.’” Sanderson v. Winner, 507 F.2d 477, 479 n.3 (10th Cir. 1974). One somehow doubts that the Tenth Circuit will turn aside a collateral attack on a class action judgment with a similar statement if it appears that the inadequacy of representation was the result of the named plaintiff’s financial condition.

263. See notes 41-50 supra and accompanying text.
264. See notes 56-61 supra and accompanying text. In Johnson v. General Motors Corp., 598 F.2d 432 (5th Cir. 1979), the court noted, without apparent concern, that in Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972), it had accepted the plaintiff’s characterization of his action as a class action even though the district court had never certified a class. 598 F.2d at 436. After the Rowe court had reversed a district court’s finding for a Title VII defendant, the Rowe plaintiff returned to the district court and obtained broad injunctive relief and compensatory relief for himself—all of which he could have obtained without class certification. The Johnson plaintiff was a member of the Rowe class who thus received nothing from his class representative save the need to go to the Fifth Circuit before he could overcome a plea of res judicata to his own suit. Id. at 436-38.
to eliminate, and at worst, a “strike suit” designed to bludgeon him into settlement.

If rule 23 is to fulfill its purpose, several working assumptions of the courts must be changed: that Title VII discrimination is “class” discrimination within the meaning of rule 23; that there is a meaningful difference between a complaint that does not purport to be a class action complaint and one that defines a meaningless class and recites the language of the rule; that precertification proceedings are designed to allow the plaintiff to search for a class he may represent rather than to allow him to establish that he may represent the class alleged in the complaint; that the court’s decision on certification may be delayed for months or even years while the plaintiff poses as the champion of people whom he may not be able to represent; that there is a connection between the right to serve as a “private attorney general” and the ability to satisfy rule 23; and that a certification order constitutes something less than the court’s personal assurance to all concerned that he has reason to believe that the interests of every individual whose Title VII claim falls within the language of the certification order will be fully protected during the coming litigation.

Abandonment of these assumptions will have a drastic effect on the use of rule 23 in Title VII cases. Many class actions will not survive the pleadings stage. Fewer still will be certified. But this is to say no more than that litigants will not find it easy to persuade judges that they can present other people’s claims for them without their consent.

265. See notes 17-22 supra and accompanying text.
266. See notes 145-46 supra and accompanying text.