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Sending Notice to Potential Plaintiffs in Class Actions Under the Age Discrimination in Employment Act: The Trial Court's Role

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SENDING NOTICE TO POTENTIAL PLAINTIFFS IN CLASS ACTIONS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT: THE TRIAL COURT'S ROLE

INTRODUCTION

Congress enacted the Age Discrimination in Employment Act (ADEA or Act)[1] to protect the employment rights of older workers by promoting employment based on ability and prohibiting discrimination based on age.[2] The ADEA incorporates section 216(b) of the Fair Labor Standards Act (FLSA),[3] which grants an employee the right to sue on behalf of himself or on behalf of other, similarly situated employees.[4] ADEA

1. Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1982)).

2. *See id.* § 621. The ADEA prohibits employers from discriminating against employees aged 40 to 70, *see id.* § 631(a), in hiring, discharge, employment terms and other factors that might deprive one of employment opportunities, *see id.* § 623(a). Employment agencies and labor organizations are also prohibited from discriminating activities. *Id.* § 623(b), (c).

Congress also sought to "help employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.* § 621(b). Thus, the Act provides for education and research programs, *see id.* § 622, and requires conciliatory attempts by the Equal Employment Opportunity Commission (EEOC) before plaintiffs institute litigation, *see id.* § 626(b).

3. *See id.* § 626(b). Section 216(c) provides for public suits by the Secretary of Labor. *Id.* § 216(c). For ADEA purposes, this function was transferred in 1978 to the EEOC. *See* Reorg. Plan No. 1 of 1978, § 2, 43 F.R. 19,807 (1978), *reprinted in* 5 U.S.C. app. at 1155 (1982), *and in* 92 Stat. 3781 (codified as amended at 29 U.S.C. § 626(a)-(c) (1982)).

The Fair Labor Standards Act of 1938 (FLSA), ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1982)), a cornerstone of the New Deal, *see* Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 Law & Contemp. Probs. 464, 464-66 (1939), was designed to "promote economic justice and security for the lowest paid . . . wage earners, to create conditions of employment stability, and to eliminate unfair competitive labor practices in industry." S. Rep. No. 640, 81st Cong., 1st Sess. 1, *reprinted in* 1949 U.S. Code Cong. Serv. 2241, 2241. The Act provides for minimum wages and overtime pay. 29 U.S.C. §§ 201-219 (1982). For background on the FLSA, see Dodd, *The Supreme Court and Fair Labor Standards, 1941-1945*, 59 Harv. L. Rev. 321 (1946); Forsythe, *supra*.

4. Section 216(b) reads, in pertinent part:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and *in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plain-*

class actions have helped the ADEA become an important means for protecting older workers' rights.[5] Aggregating claims under section 216(b) is imperative for the viability of private actions under the Act because of the large costs and small awards in ADEA suits.[6] Yet restrictive interpretations of section 216(b) threaten its continued effectiveness.[7]

In many class actions brought under the ADEA, the plaintiffs' attorney tries to contact potential class members.[8] The attorney often asks the court to compel discovery of the names and addresses of employees "similarly situated" to the plaintiffs. Then, fearing that communication with potential plaintiffs might be deemed unlawful client solicitation under state laws,[9] the lawyer asks the court to send or authorize the

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tiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

29 U.S.C. § 216(b) (1982) (emphasis added).

This language is often used to describe the class action. *See* Fed. R. Civ. P. 23 advisory committee note ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated . . . ."); 1 J. Pomeroy, Equity Jurisprudence 448 (4th ed. 1918) (using phrase "on behalf . . . of others similarly situated" to describe a pre-Rule 23 version of the class action); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 712 (1941) (quoting Linden Land Co. v. Milwaukee Elec. Ry. & Light Co., 107 Wis. 493, 496, 83 N.W. 851, 852 (1900) (referring to class actions brought by similarly situated plaintiffs)); Moore & Cohen, *Federal Class Actions*, 32 Ill. L. Rev. 307, 318 (1937) (in the spurious suit of Rule 23, plaintiffs sue on behalf of themselves and others similarly situated). Although the term "class action" appears nowhere in § 216(b), the group suit under that section is always referred to as a class action. *See, e.g.*, McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1214 (8th Cir. 1984); Woods v. New York Life Ins. Co., 686 F.2d 578, 580 (7th Cir. 1982); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 861 (9th Cir. 1977). Moreover, when a single plaintiff brings an action on behalf of other employees similarly situated and files notice of intent to sue with the EEOC, as required by 29 U.S.C. § 626(d), the time period for the similarly situated plaintiffs to sue is tolled. *See* Mistretta v. Sandia Corp., 639 F.2d 588, 593-94 (10th Cir. 1980); Bean v. Crocker Nat'l Bank, 600 F.2d 754, 759 (9th Cir. 1979).

5. *See* Spahn, *Resurrecting the Spurious Class: Opting-In to the Age Discrimination in Employment Act and the Equal Pay Act through the Fair Labor Standards Act*, 71 Geo. L.J. 119, 121 (1982); *see also* Schuster & Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 Indus. & Lab. Rel. Rev. 64, 70 (1984) (private suits comprised 73% of all suits brought under ADEA up until 1981).

6. This is because ADEA suits are expensive to bring, *see* Schuster & Miller, *supra* note 5, at 70, and the recoveries are limited, *see* Vazquez v. Eastern Air Lines, 579 F.2d 107, 111 (1st Cir. 1978). See *infra* note 119.

7. *See* Lusardi v. Xerox Corp., 99 F.R.D. 89, 93 (D.N.J. 1983), *appeal dismissed*, 747 F.2d 174 (3d Cir. 1984); Spahn, *supra* note 5, at 156-57.

8. *See, e.g.*, McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1211 (8th Cir. 1984); Woods v. New York Life Ins. Co., 686 F.2d 578, 579 (7th Cir. 1982); Vivone v. Acme Mkts., Inc., 105 F.R.D. 65, 66 (E.D. Pa. 1985); Owens v. Bethlehem Mines Corp., 108 F.R.D. 207, 214 (S.D. W. Va. 1985).

9. Some states have held that letters sent from attorneys to potential clients violate state laws against solicitation, even if those letters are not misleading or fraudulent. *See* State v. Moses, 231 Kan. 243, 243-46, 642 P.2d 1004, 1004-07 (1982) (mass mailing with general information concerning attorney's real estate expertise punishable as solicitation);

notice.[10]

Dayton Bar Ass'n v. Herzog, 70 Ohio St. 2d 261, 263 & note, 436 N.E.2d 1037, 1038 & note (mass mailing with information about federal statute similar to in-person solicitation and thus held punishable), *cert. denied*, 459 U.S. 1016 (1982). *But see In re* Von Wiegen, 63 N.Y.2d 163, 166, 170, 470 N.E.2d 838, 839, 841, 481 N.Y.S.2d 40, 41, 43 (1984) (letters sent to victims of Hyatt Regency skywalk disaster did not pose problems of in-person solicitation and were thus not punishable), *cert. denied*, 105 S. Ct. 2701 (1985). Although the Supreme Court has held that the states may not ban outright non-misleading lawyer mailings of a general nature, *see In re* R.M.J., 455 U.S. 191, 206-07 (1982), attorney-sent notice could be distinguished on the ground that it is sent to a particular person concerning a particular case and is thus punishable. *See* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1216 n.7 (8th Cir. 1984). This Note argues that a blanket ban on attorney-sent notice violates the first amendment. See *infra* notes 122-57 and accompanying text.

10. *See* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1211-12 (8th Cir. 1984) (plaintiffs' motion for court-issued notice is denied and plaintiffs are forbidden from communicating on their own); Woods v. New York Life Ins. Co., 686 F.2d 578, 579-80 (7th Cir. 1982) (plaintiffs request court-issued notice; court supervises but does not send notice on its letterhead); Vivone v. Acme Mkts., Inc., 105 F.R.D. 65, 66, 68 (E.D. Pa. 1985) (plaintiffs' motion for discovery of names and addresses is granted); Owens v. Bethlehem Mines Corp., 108 F.R.D. 207, 216-17 (S.D. W. Va. 1985) (plaintiffs' request for court authorization of notice is denied); Behr v. Drake Hotel, 586 F. Supp. 427, 430, 432 (N.D. Ill. 1984) (plaintiffs' request for court approval of notice and discovery of list of present and former employees is granted); Allen v. Marshall Field & Co., 93 F.R.D. 438, 440, 442 (N.D. Ill. 1982) (court supervises notice form pursuant to plaintiffs' request for court authorization); Johnson v. American Airlines, 531 F. Supp. 957, 958 (N.D. Tex. 1982) (court grants motion for authorization and discovery of names and addresses of potential plaintiffs); Frank v. Capital Cities Communications, Inc., 88 F.R.D. 674, 675-76 (S.D.N.Y. 1981) (request for court authorization of notice and compelled discovery of potential plaintiffs' names and addresses is granted); Monroe v. United Air Lines, 90 F.R.D. 638, 640 (N.D. Ill. 1981) (court grants leave to send notice and grants motion requesting compelled discovery of names, addresses and dates of birth of potential plaintiffs); Geller v. Markham, 19 Fair Empl. Prac. Cas. (BNA) 1622, 1624 (D. Conn. 1979) (court grants motion for court authorization of notice and compels discovery of names and addresses), *aff'd in part and rev'd in part on other grounds*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); Montalto v. Morgan Guar. Trust Co., 83 F.R.D. 150, 153 (S.D.N.Y. 1979) (motion for discovery of names of potential plaintiffs is denied); Wagner v. Loew's Theatres, Inc., 76 F.R.D. 23, 24, 25 (M.D.N.C. 1977) (plaintiffs' request for court supervision of notice is denied); Roshto v. Chrysler Corp., 67 F.R.D. 28, 28, 30 (E.D. La. 1975) (plaintiffs' request for "right to notify" potential plaintiffs denied).

Similar procedures are followed in other § 216(b) class actions. *See, e.g.*, Dolan v. Project Constr. Corp., 725 F.2d 1263, 1265, 1269 (10th Cir. 1984) (affirming grant of protective order regarding discovery of names, addresses and particulars of employment of employees and denying plaintiffs' motion for court-authorized notice in FLSA action); Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335, 336 (2d Cir. 1978) (per curiam) (affirming grant of motion for court authorization of notice in FLSA action), *cert. denied*, 441 U.S. 944 (1979); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 860, 864 (9th Cir. 1977) (reversing district court, which permitted notice sent by plaintiffs themselves, and vacating grant of plaintiffs' motion to compel discovery of names and addresses of potential plaintiffs in FLSA action); Pirrone v. North Hotel Assocs., 108 F.R.D. 78, 81-82, 85 (E.D. Pa. 1985) (motion for discovery of employees' names and addresses solely to aid notice in FLSA action granted); Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1156-57, 1161 (N.D. Ga. 1984) (denying plaintiffs' motion for discovery of names and addresses and court-approved notice to potential plaintiffs in FLSA action). The difference between court authorization and court issuance is inconsequential when considered from the viewpoint of plaintiffs' lawyers. The lawyer's interest is in lessening the likelihood of punishment for client solicitation. *See*

In deciding whether to send or authorize notice, trial courts determine if they have the power to do so[11] by deciding whether sending or authorizing notice comports with the proper role of the judiciary[12] and by examining the extent of Congress' implicit or explicit mandate for such conduct.[13]

Some courts have asserted that a court role in sending notice to potential plaintiffs is nonjudicial and therefore can be justified only by express legislative mandate or if due process requires it.[14] Although Rule 23 of the Federal Rules of Civil Procedure has been held not to govern ADEA class actions under section 216(b),[15] these courts insist on viewing section

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Woods v. New York Life Ins. Co., 686 F.2d 578, 581 (7th Cir. 1982). A court, however, may find it less taxing for plaintiffs' attorneys to send notice, if the court decides that notice is appropriate. *Cf.* 7A C. Wright & A. Miller, Federal Practice and Procedure § 1788, at 166-67 (1972) (in Rule 23 actions, court usually supervises notice but has plaintiffs' counsel send it). Usually, the court has plaintiffs and defendant submit suggested notice forms, or asks defendant to object to plaintiffs' proposed form. The court modifies the form if it deems it necessary. *See, e.g.*, Johnson v. American Airlines, 531 F. Supp. 957, 966-67 (N.D. Tex. 1982); Allen v. Marshall Field & Co., 93 F.R.D. 438, 446, 449-50 (N.D. Ill. 1982).

11. In determining the power issue, the courts have generally not distinguished between court-supervised, court-authorized or court-issued notice. The disputed issue is judicial involvement, not its precise nature. *See* Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1160 n.5 (N.D. Ga. 1984). Apparently, courts tacitly assume that if they have the power to aid notice, they have the discretion to decide how to exercise it. *Cf.* Woods v. New York Life Ins. Co., 686 F.2d 578, 582 (7th Cir. 1982) (Eschbach, J., concurring in part and dissenting in part) (district court should be allowed the discretion to determine format of notice). Such an assumption conforms with the court's discretion in determining how best to send notice in Rule 23 actions. *See* 7A C. Wright & A. Miller, *supra* note 10, § 1788, at 170.

In Woods v. New York Life Ins. Co., 686 F.2d 578 (7th Cir. 1982), however, Judge Posner opined that although the trial court has the power to supervise notice, the judge does not have the power to "issue a judicial invitation to join a lawsuit" by affixing his signature to notice on court letterhead. *See id.* at 581-82. This distinction relies on the assumption that the recipient of notice will interpret a judge's signature or court letterhead as endorsement of the merits of the action. *See id.* at 581. However, the notice presumably contemplated by the *Woods* court as within judicial power, like notice authorized by other courts, should contain the name of the judge and the court's address so that the recipient can opt in. *See, e.g.*, Johnson v. American Airlines, 531 F. Supp. 957, 966-67 (N.D. Tex. 1982) (notice contained name of judge and told recipient to opt in by filing with the clerk of the court). This might just as easily be misinterpreted as court endorsement. Moreover, by facilitating notice, the court is indeed issuing a judicial invitation to the lawsuit. See *infra* notes 110-14 and accompanying text. Disputes over stationery merely elevate form over substance. *See* Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1160 n.5 (N.D. Ga. 1984). See *infra* notes 22-24.

12. *See, e.g.*, Woods v. New York Life Ins. Co., 686 F.2d 578, 581-82 (7th Cir. 1982); Roshto v. Chrysler Corp., 67 F.R.D. 28, 30 (E.D. La. 1975).

13. *See* Monroe v. United Air Lines, 90 F.R.D. 638, 639 (N.D. Ill. 1981); *see, e.g.*, Baker v. Michie Co., 93 F.R.D. 494, 495 (W.D. Va. 1982).

14. *See, e.g.*, McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1213-14 (8th Cir. 1984); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 863 (9th Cir. 1977); Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1159 (N.D. Ga. 1984); Baker v. Michie Co., 93 F.R.D. 494, 495 (W.D. Va. 1982).

15. Courts of appeals have held Rule 23 inapplicable to § 216(b) suits, whether under the ADEA, Equal Pay Act or FLSA. *See* McKenna v. Champion Int'l Corp., 747 F.2d

216(b) class actions in light of the class action under Rule 23(b)(3). They point out that under Rule 23(b)(3) class members are bound by a court's judgment unless they opt out.[16] These courts view the compulsory notice provision found in Rule 23(c)(2), which applies to Rule 23(b)(3) suits, as required because a denial of due process results if class members are bound by a judgment of which they had no knowledge.[17] Comparing Rule 23(b)(3) with section 216(b), it is noted that such a denial of due process does not occur in the section 216(b) class action, since section

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1211, 1213 (8th Cir. 1984) (ADEA); Dolan v. Project Constr. Corp., 725 F.2d 1263, 1266 (10th Cir. 1984) (FLSA); Haynes v. Singer Co., 696 F.2d 884, 886 (11th Cir. 1983) (FLSA); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (9th Cir. 1977) (FLSA); LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 289 (5th Cir. 1975) (ADEA); *see also* Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335, 335-36 (2d Cir. 1978) (per curiam) (granting a motion to send notice to potential plaintiffs in an FLSA suit by considering only § 216(b) and not mentioning Rule 23), *cert. denied*, 441 U.S. 944 (1979). Although the Third, Fourth and District of Columbia Circuits have not decided the issue, *see* Lusardi v. Xerox Corp., 747 F.2d 174, 176 (3d Cir. 1984); Thompson v. Sawyer, 678 F.2d 257, 270 & n.8 (D.C. Cir. 1982), district courts within those circuits have held that Rule 23 does not apply. *See, e.g.*, Vivone v. Acme Mkts., Inc., 105 F.R.D. 65, 66 (E.D. Pa. 1985); Held v. National R. Passenger Corp., 101 F.R.D. 420, 421 (D.D.C. 1984); Baker v. Michie Co., 93 F.R.D. 494, 496-97 (W.D. Va. 1982); Wagner v. Loew's Theatres, Inc., 76 F.R.D. 23, 24 (M.D.N.C. 1977). *But see* Geller v. Markham, 19 Fair Empl. Prac. Cas. (BNA) 1622, 1623 (D. Conn. 1979) (viewing section 216(b) class action through the framework of Rule 23), *aff'd in part and rev'd in part on other grounds*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

Prior to LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975), several district courts applied Rule 23 standards to § 216(b) class actions. *See* Blankenship v. Ralston Purina Co., 62 F.R.D. 35, 37-43 (N.D. Ga. 1973); Townsend v. Treadway, 22 Wage & Hour Cas. (BNA) 12, 15 (M.D. Tenn. 1973); Bradford v. Peoples Natural Gas Co., 60 F.R.D. 432, 440-41 (W.D. Pa. 1973); Gebhard v. GAF Corp., 59 F.R.D. 504, 507-08 (D.D.C. 1973); Bishop v. Jelleff Assocs., Inc., 4 Fair Empl. Prac. Cas. (BNA) 1262, 1262-63 (D.D.C. 1972); Laffey v. Northwest Airlines, 321 F. Supp. 1041, 1042-43 (D.D.C. 1971).

Section 216(b) also applies to actions under the Equal Pay Act of 1963 (EPA), Pub. L. No. 88-38, § 3, 77 Stat. 56-57 (codified as amended at 29 U.S.C. § 206(d) (1982)); *see* Jackson v. University of Pittsburgh, 405 F. Supp. 607, 611-12 (W.D. Pa. 1975) (EPA class action should be brought under § 216(b) of FLSA).

In deciding the trial court's role in sending notice to potential ADEA plaintiffs, courts base their discussion, in part, on FLSA and EPA cases brought under § 216(b). Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1158-59 n.4 (N.D. Ga. 1984); *see* Woods v. New York Life Ins. Co., 686 F.2d 578, 580 (7th Cir. 1982) (citing Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335, 336 (2d Cir. 1978) (per curiam), *cert. denied*, 441 U.S. 944 (1979), as applicable to the ADEA case before the court). Such cases are therefore relevant to the issues raised in this Note. However, the particular policies and procedures of the FLSA and EPA distinct from those related to § 216(b) are beyond the scope of this Note.

16. *See* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1213 (8th Cir. 1984) (discussing Rule 23(c)(2), which applies only in Rule 23(b)(3) actions); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862 (9th Cir. 1977); Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1159 (N.D. Ga. 1984); Baker v. Michie Co., 93 F.R.D. 494, 496 (W.D. Va. 1982).

17. *See* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1213 (8th Cir. 1984); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 864 (9th Cir. 1977); Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1159 (N.D. Ga. 1984).

216(b) plaintiffs must opt in to be bound by a judgment.[18] Concluding that due process does not require notice in section 216(b) actions and reading Congress' silence concerning notice as an absence of the purportedly requisite legislative sanction, these courts hold the trial court without power to send or authorize notice to potential plaintiffs.[19]

Other courts view notice as one of the many procedures a trial court may use without any legislative directive. Finding that notice helps to effectuate the broad remedial purposes of the ADEA and to conserve judicial resources, these courts uphold the trial court's power to act.[20]

Apart from the question of power, some courts state that undesirable consequences of notice—stirring up litigation and solicitation of claims—require the court both to abstain from exercising its power and to forbid the plaintiffs' attorney from contacting potential plaintiffs.[21] Other courts agree that the trial court should refrain from an affirmative role but hold that the court may not unduly restrict the plaintiffs' attorney from communicating with potential plaintiffs.[22] Finally, a third view holds that these purportedly undesirable factors are insufficient to justify a court's abstention from an affirmative role where it will effectuate congressional purposes.[23]

Part I of this Note discusses the trial court's power to authorize and supervise notice and concludes that a trial court does not transcend its role when it sends or authorizes notice to potential plaintiffs. Part I further contends that Congress, through the ADEA and the statutes it incorporates, has not restricted that role. Instead, by providing the ADEA with section 216(b)'s class action procedure, Congress sanctioned the ju-

18. *See* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1213 (8th Cir. 1984); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 862-64 (9th Cir. 1977); Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1159 (N.D. Ga. 1984); Baker v. Michie Co., 93 F.R.D. 494, 496 (W.D. Va. 1982).

19. *See* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1214 (8th Cir. 1984); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 863-64 (9th Cir. 1977); Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1161 (N.D. Ga. 1984).

20. *See* Lusardi v. Xerox Corp., 99 F.R.D. 89, 93 (D.N.J. 1983), *appeal dismissed*, 747 F.2d 174 (3d Cir. 1984); Johnson v. American Airlines, 531 F. Supp. 957, 960-61 (N.D. Tex. 1982); Allen v. Marshall Field & Co., 93 F.R.D. 438, 442 (N.D. Ill. 1982); Frank v. Capital Cities Communications, Inc., 88 F.R.D. 674, 675-76 (S.D.N.Y. 1981).

21. McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1214-17 (8th Cir. 1984); *see also* Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 864 (9th Cir. 1977) (reversing lower court's grant of permission to contact potential plaintiffs).

22. Dolan v. Project Constr. Corp., 725 F.2d 1263, 1268 (10th Cir. 1984); Owens v. Bethlehem Mines Corp., 108 F.R.D. 207, 216-17 (S.D. W. Va. 1985); Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1161 (N.D. Ga. 1984).

23. Pirrone v. North Hotel Assocs., 108 F.R.D. 78, 82 (E.D. Pa. 1985); Johnson v. American Airlines, 531 F. Supp. 957, 959-60 (N.D. Tex. 1982); Frank v. Capital Cities Communications, Inc., 88 F.R.D. 674, 676 (S.D.N.Y. 1981). Similar analysis is found in FLSA cases under § 216(b). *See* Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335, 336 (2d Cir. 1978) (per curiam), *cert. denied*, 441 U.S. 944 (1979); Soler v. G & U, Inc., 86 F.R.D. 524, 530 (S.D.N.Y. 1980); Riojas v. Seal Produce, Inc., 82 F.R.D. 613, 617-18 (S.D. Tex. 1979).

diciary's invocation of policies justifying its involvement in sending notice.

Part II of this Note determines that what some courts assert to be undesirable consequences of notice are not sufficiently serious to justify either prohibiting communications by attorneys with potential plaintiffs or a court's abstaining from sending or authorizing notice. It concludes that court involvement in sending notice will help advance the purposes of the ADEA and minimize the chance for undesirable attorney conduct in the notice procedure.

I. THE POWER OF THE TRIAL COURT TO SEND OR AUTHORIZE NOTICE

The power of the trial court to send or authorize notice to potential plaintiffs depends on whether such conduct comports with the appropriate role of a trial court, and the degree to which Congress has sanctioned court involvement.[24] Congress has not explicitly granted or denied such power in section 216(b) actions.[25] The court's power to send or authorize notice therefore depends on whether congressional authorization is necessary,[26] and on whether one should read the ADEA, FLSA and Portal-to-Portal Act (PPA)[27] as approval or disapproval of a court role.

A. *Does Court Involvement in Sending Notice Comport with the Proper Role of the Trial Court?*

The propriety of the court's role in giving notice must be viewed in light of judicial customs and practices, which define the scope of a court's role.[28] Courts therefore examine the act of sending or authorizing notice

24. *See* Woods v. New York Life Ins. Co., 686 F.2d 578, 581-82 (7th Cir. 1982); *see also* Pan Am. World Airways v. United States Dist. Court, 523 F.2d 1073, 1077-79 & n.3 (9th Cir. 1975) (because notice is contrary to the judiciary's power, it requires express congressional sanction).

25. *See* Lusardi v. Xerox Corp., 99 F.R.D. 89, 93 (D.N.J. 1983) (Congress silent on issue of notice in § 216(b) class actions), *appeal dismissed*, 747 F.2d 174 (3d Cir. 1984); Monroe v. United Air Lines, 90 F.R.D. 638, 639 & n.3 (N.D. Ill. 1981) (no explicit provision referring to notice).

Congress can explicitly provide for court involvement in sending notice, as it has under Rule 23, *see* Fed. R. Civ. P. 23(c)(2). It could also explicitly prohibit court involvement. *See* Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1021 n.19 (1982) (Congress may withdraw the power to make federal rules).

26. Another way to determine whether congressional mandate is necessary is through the concept of the inherent powers of a court. When a court has inherent power to engage in particular conduct, it needs no congressional mandate. See *infra* note 49.

27. Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (1947) (codified at 29 U.S.C. §§ 251-262 (1982)). The PPA amended § 216(b) of the FLSA. See *infra* notes 92-93 and accompanying text.

28. *See* State *ex rel.* Ellis v. Thorne, 112 Wis. 81, 87, 87 N.W. 797, 799 (1901) (judicial power is that power historically exercised); Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1017 (1924) (judicial power defined as the sum of historical exercises of power and ongoing court activities that must adapt to justice's

and the justifications for that act.[29]

1. Court-Sent or Authorized Notice: A Nonjudicial Act?

Some courts argue that court involvement in sending notice alters the proper character of the judge and the court.[30] According to this view, by informing persons of their rights and inviting them to a suit, a court transcends its traditionally passive role, engaging in conduct appropriate only for the parties.[31]

The modern trial judge, however, commonly plays an active role in a lawsuit.[32] For example, in class actions, the judge functions as a manager of the case, guarding the rights of class members who are not before the court.[33] Conserving judicial resources may demand conduct imping-

changing demands); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv. L. Rev. 1281, 1302-03 (1952) (procedural law depends on judicial custom; the trial judge's role may be mere "patterns of behavior").

29. Considering the difficulty of defining the scope of judicial power, *see* Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1307 (1976) (judges exercise "messy admixture of powers"); Kaufman, *The Essence of Judicial Independence*, 80 Colum. L. Rev. 671, 689 (1980) (no cases explicitly define the scope of judicial power), it is remarkable that some courts have characterized notice to potential plaintiffs as beyond the judiciary's scope in such terse and conclusory terms. *See, e.g.*, Baker v. Michie Co., 93 F.R.D. 494, 495 (W.D. Va. 1982) (if no due process problem or express statutory mandate, court lacks power); Roshto v. Chrysler Corp., 67 F.R.D. 28, 30 (E.D. La. 1975) (refusing to permit notice conforms to the court's proper role and our legal heritage).

30. *See* Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1160 (N.D. Ga. 1984) (court supervision or authorization of notice transforms character of judge) (quoting Woods v. New York Life Ins. Co., 686 F.2d 578, 581-82 (7th Cir. 1982)). The *Woods* court rejected only notice on court letterhead or with the judge's signature. *See Woods*, 686 F.2d at 581-82. The *Goerke* court applied the *Woods* rationale to reject any court involvement. *See Goerke*, 600 F. Supp. at 1160; *see also* Cherner v. Transitron Elec. Corp., 201 F. Supp. 934, 937 (D. Mass. 1962) (sending notice would transform court into a social agency).

31. *See* Dolan v. Project Constr. Corp., 725 F.2d 1263, 1268-69 (10th Cir. 1984) (role of court should be passive; helping to contact potential plaintiffs transcends that role); Woods v. New York Life Ins. Co., 686 F.2d 578, 581-82 (7th Cir. 1982) (informing nonparties of rights raises serious questions of judicial power); Pan Am. World Airways v. United States Dist. Court, 523 F.2d 1073, 1077 n.3 (9th Cir. 1975) (sending notice is contrary to power of judiciary; courts are powerless to act regarding persons not before them); Baker v. Michie Co., 93 F.R.D. 494, 496 (W.D. Va. 1982) (notice constitutes affirmative invitation to lawsuit, a nonjudicial function).

The above-cited courts appear to rely upon an anachronistic view of the trial court's role, in which the lawsuit is party-initiated and party-controlled and the judge passively arbitrates the interaction of the parties, waiting for all issues to be raised by the parties before considering them. *See* Chayes, *supra* note 29, at 1283; *cf.* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 819 (1824) (judiciary has power to act only when party submits proper subject to court), *cited in* Pan Am. World Airways v. United States Dist. Court, 523 F.2d 1073, 1077 n.2 (9th Cir. 1975).

32. "A trial judge is not a mere moderator. He serves as a governor, obligated to see that the law is properly administered." United States v. Baer, 575 F.2d 1295, 1301-02 (10th Cir. 1978); *see* Chayes, *supra* note 29, at 1302.

33. *In re* Air Crash Disaster at Fla. Everglades on Dec. 29, 1972, 549 F.2d 1006, 1012 n.8 (5th Cir. 1977); *see also* Manual for Complex Litigation § 1.10 (5th ed. 1982) (trial judge has power and duty to control process of case; in complex cases, judge assumes active role).

ing on the customary choices of a party, as when a judge forces a plaintiff to quit his suit and join another.[34] Additionally, a court often continues to supervise a party's conduct long after it issues a decree.[35]

Moreover, the recent revision of Rule 16 of the Federal Rules of Civil Procedure[36] demonstrates the current view that the court's role at the pretrial stage should be broadened, not attenuated.[37] In the interests of fairness and efficiency, the trial judge is now expected to intervene personally at the pretrial stage, engaging in conduct formerly thought to be appropriate only for the parties.[38] Court authorization or sending of notice to potential plaintiffs seems not inconsistent with these current notions of judicial involvement that seek to promote efficiency and fundamental fairness.

Because inviting potential plaintiffs to a suit may benefit plaintiffs or at

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34. *See* Davis v. Board of School Comm'rs, 517 F.2d 1044, 1049 (5th Cir. 1975) (plaintiff required to drop suit and intervene in another), *cert. denied*, 425 U.S. 944 (1976).

35. *See* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 44 (1971) (discussing district court's supervisory role in achieving integration of school system); Chayes, *supra* note 29, at 1298-1302 (through the ongoing affirmative conduct of some judicial decrees, a trial judge functions like a policy planner and manager).

36. (a) . . . In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as
(1) expediting the disposition of the action;
(2) establishing early and continuing control so that the case will not be protracted because of lack of management;
(3) discouraging wasteful pretrial activities;
(4) improving the quality of the trial through more thorough preparation, and;
(5) . . . facilitating the settlement of the case. . . .
. . . .
(c) . . . The participants at any conference under this rule may consider and take action with respect to
(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;
(2) the necessity or desirability of amendments to the pleadings; . . . .
. . .
(4) . . . the avoidance of unnecessary proof and of cumulative evidence;
. . . .
(6) . . . the advisability of referring matters to a magistrate or master;
(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute; . . .
. . . .
(10) . . . the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and
(11) such other matters as may aid in the disposition of the action.
Fed. R. Civ. P. 16.

37. *See* Fed. R. Civ. P. 16(c) advisory committee note; 3 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 16.02, at 16-21 (1985); Pollack, *Cutting the Fat From Pretrial Proceedings*, 97 F.R.D. 319, 326 (1983). See *infra* note 38 and accompanying text.

38. *See* Fed. R. Civ. P. 16 advisory committee note (introduction); Pollack, *supra* note 37, at 319-20, 326 (1983); Comment, *Recent Changes in the Federal Rules of Civil Procedure: Prescriptions to Ease the Pain?*, 15 Tex. Tech. L. Rev. 887, 890 (1984).

least increase a defendant's liability, involvement in sending notice arguably threatens the judge's impartiality or the appearance of that impartiality.[39] However, a judge's impartiality and the appearance of his impartiality are not easily jeopardized.[40] When a court sends or authorizes notice, the judge supervises the format of the notice to assure that the opt-in requirements are presented fairly.[41] The judge does not determine the merits of the case;[42] she decides only that certain persons should know about the suit.[43] Court-issued or supervised notice would not foster a judge's bias or prejudice toward either party.[44] Nor would the appearance of a judge's propriety—to juries or recipients of notice—be threatened.[45] Juries remain unaware of notice proceedings and the court can inform recipients that the notice does not constitute endorsement of the merits of the action.[46]

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39. *See* Dolan v. Project Constr. Corp., 725 F.2d 1263, 1268 (10th Cir. 1984); Woods v. New York Life Ins. Co., 686 F.2d 578, 581 (7th Cir. 1982); Baker v. Michie Co., 93 F.R.D. 494, 496 (W.D. Va. 1982); *see also* Kaufman, *supra* note 29, at 692 (1980) (impartial adjudication is the hallmark of a court). *But see* Shapiro, *Judicial Independence: The English Experience*, 55 N.C.L. Rev. 577, 652 (1977) (viewing judicial independence as a determinant of "courtness" oversimplifies the complex and ambiguous role of courts).

40. See *infra* note 44.

41. *See* Allen v. Marshall Field & Co., 93 F.R.D. 438, 445 (N.D. Ill. 1982) (plaintiffs and defendants submit possible notice forms; judge modifies plaintiffs' form and authorizes it; notice contains information regarding opt-in procedure and case); Riojas v. Seal Produce, Inc., 82 F.R.D. 613, 620-22 (S.D. Tex. 1979) (plaintiff suggests notice format and defendant is given time to object; notice enumerates opt-in requirements with basic information about the case).

42. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974).

43. *See* Johnson v. American Airlines, 531 F. Supp. 957, 961, 966-67 (N.D. Tex. 1982). Indeed, the judge's involvement may favor neutral discussion of the issues. *See* Allen v. Marshall Field & Co., 93 F.R.D. 438, 442 (N.D. Ill. 1982) (quoting Monroe v. United Air Lines, 90 F.R.D. 638, 640 (N.D. Ill. 1981)).

44. Potentially compromising situations of a much more serious nature have been held not to affect a judge's impartiality. For instance, a judge's neutral stance is not necessarily threatened when one of those who supported him when he sought appointment litigates before the judge. *See* Warner v. Global Natural Resources PLC, 545 F. Supp. 1298, 1300 (S.D. Ohio 1982). Nor does a judge's personal disapproval of policies underlying the law he applies necessarily undermine his impartiality. *See* Southern Pac. Communications Co. v. American Tel. & Tel. Co., 740 F.2d 980, 991 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1359 (1985). Further, a judge does not lose his neutral stance, either in fact or appearance, when he has a close relationship with a politician who was investigated by a defendant in his legislative capacity, now appearing before the judge. *See In re* United States, 666 F.2d 690, 696 (1st Cir. 1981). For further discussion of unthreatened impartiality, see United States v. Gigax, 605 F.2d 507, 511 (10th Cir. 1979) (dictum) (judge's ruling adverse to defendant does not establish judge's bias). For background, see Code of Judicial Conduct Canons 2 & 3; 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3542 (1984); Frank, *Commentary on Disqualification of Judges—Canon 3C*, 1972 Utah L. Rev. 377.

45. See *supra* note 44.

46. *See* Allen v. Marshall Field & Co., 93 F.R.D. 438, 450 (N.D. Ill. 1982) (notice included disclaimer: "No Opinion Expressed As To The Merits Of The Case"). The use of such a disclaimer is common practice in Rule 23 class actions. 7A C. Wright & A. Miller, *supra* note 10, § 1788, at 166-67.

2. Sending Notice to Nonparties in the Absence of Congressional Sanction: When is a Trial Court Justified?

Trial courts have broad discretionary powers regarding procedural aspects of litigation.[47] Some courts assert, however, that court-issued or authorized notice to nonparties lies beyond the sphere of judicial power and is justified only when required by due process.[48] Examination of contexts in which the court has been held to have inherent power to issue

47. *See* 4 C. Wright & A. Miller, Federal Practice and Procedure § 1029, at 129 (1969).

The All Writs Act, 28 U.S.C. § 1651 (1982), and Fed. R. Civ. P. 83 enable courts to formulate rules and take certain steps that are not specified by Congress. The All Writs Act constitutes a " 'legislatively approved source of procedural instruments designed to achieve 'the "rational ends of law.' " ' " United States v. New York Tel. Co., 434 U.S. 159, 172 (1977) (quoting Harris v. Nelson, 394 U.S. 286, 299 (1969) (quoting Price v. Johnston, 334 U.S. 266, 282 (1948) (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 273 (1942)))). Typically, the All Writs Act is invoked when the court's purpose or effectiveness would otherwise be frustrated. United States v. New York Tel. Co., 434 U.S. 159, 173 (1977). Litigants in § 216(b) actions have invoked the All Writs Act as a source of the court's power to send notice. *See* Woods v. New York Life Ins. Co., 686 F.2d 578, 581-82 (7th Cir. 1982). Indeed, one court, invoking the power provided in the All Writs Act, has fashioned a procedure akin to Rule 23 where Rule 23 did not apply. *See* United States *ex rel.* Sero v. Preiser, 506 F.2d 1115, 1125-26 (2d Cir. 1974) (habeas corpus case in which court justified class action procedure because of inmates' illiteracy and probable lack of relief without class action), *cert. denied*, 421 U.S. 921 (1975); *see also* Harris v. Nelson, 394 U.S. 286, 299 (1969) (In some cases, "courts may fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage."). The problem with invoking the All Writs Act as support for court involvement in sending notice is that one still faces the question of whether sending or authorizing notice is "in conformity with judicial usage," *id.*

Rule 83 has also been invoked by litigants as a source of power. *See* Pan Am. World Airways v. United States Dist. Court, 523 F.2d 1073, 1077 (9th Cir. 1975). It provides that district courts may "make and amend rules governing [their] practice not inconsistent with [the Federal Rules of Civil Procedure]" and that "[i]n all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules." Fed. R. Civ. P. 83. The first part of Rule 83 grants rulemaking power and the second part grants decisionmaking power. Note, *Rule 83 and the Local Federal Rules*, 67 Colum. L. Rev. 1251, 1252 (1967). A local court rule regarding notice promulgated under the first part of Rule 83 might be inappropriate since the determination of whether to send notice requires discretionary decisionmaking power of the trial judge. Yet it is questionable whether the second sentence grants power that a court would not already be regarded as having under the inherent powers doctrine. *Cf.* Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 Loy. L.A.L. Rev. 213, 220 (1981) (Rule 83 could be understood as a means for trial courts to govern themselves under their inherent powers); Franquez v. United States, 604 F.2d 1239, 1244-45 (9th Cir. 1979). Further, invoking Rule 83 as a source of power still requires determining whether court-sent or authorized notice comports with the role of the judiciary, *see* Woods v. New York Life Ins. Co., 686 F.2d 578, 581-82 (7th Cir. 1982) (Rule 83 cannot constitute source of power for nonjudicial function); Pan Am. World Airways v. United States Dist. Court, 523 F.2d 1073, 1078 (9th Cir. 1975) (Rule 83 does not constitute support for sending notice because court involvement in notice is contrary to the judiciary's traditional role), and whether notice in ADEA class actions is inconsistent with the spirit of the Federal Rules, *see* Zarate v. Younglove, 86 F.R.D. 80, 92-93 (C.D. Cal. 1980) (issue of consistency with federal rules may require determining policies behind federal rules).

48. *See, e.g.*, Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 863 (9th Cir. 1977); Baker

notice to nonparties when due process was not at issue demonstrates the error of this conclusion.[49]

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v. Michie Co., 93 F.R.D. 494, 495 (W.D. Va. 1982); Roshto v. Chrysler Corp., 67 F.R.D. 28, 29 (E.D. La. 1975).

In *Roshto*, the court suggested that although notice to potential plaintiffs would invariably have the *effect* of informing persons of their rights, a court may not justify sending notice to achieve that *purpose*. 67 F.R.D. at 29. The court did not explain why such a purpose is beyond the scope of the judiciary. *Id.* The court's suggestion, nevertheless, has dubious merit. Sending notice is procedural conduct, albeit with substantive overtones, and is thus subject to legislative review. See *infra* note 49. A court therefore has the power to invoke bona fide justifications to send notice. *Cf.* Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 Yale L.J. 718, 736 (1975) (courts should use their remedial powers lying outside the Federal Rules to engage in procedural conduct as long as they articulate their substance-oriented justification for a power's use; if necessary, Congress can correct the court); Levin & Amsterdam, *Legislative Control Over Judicial Rule-making: A Problem in Constitutional Revision*, 107 U. Pa. L. Rev. 1, 14-18 (1958) (procedural issues with a radical impact on society should be left to the courts, subject to legislative review). Nor should the court wait for legislative approval before engaging in procedural conduct, for the legislature may never act. *Cf.* G. Calabresi, A Common Law for the Age of Statutes 8-15 (1982) (describing legislative inertia); Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 Colum. L. Rev. 787, 793-94 (1963) (describing Congress' failure to move promptly to resolve ambiguities in the law). Rather, in the absence of explicit congressional directives, the courts should not hesitate to adopt their own procedural provisions. *See* Chayes, *supra* note 29, at 1314 (Congress often articulates only general objectives and orientation, leaving details to judicial discretion); Levin & Amsterdam, *supra*, at 36-39, 42 (courts should have the initiative regarding procedure that is subject to legislative review); Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 36 (1985) (courts create collateral rules, in the absence of congressional ones, to help achieve Congress' intentions); *see also* Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 Fordham L. Rev. 167, 199 (1985) (until Congress acts explicitly, courts have power to create applicable rules) (discussing Illinois v. City of Milwaukee, 406 U.S. 91 (1972)).

49. The concept of "inherent powers" is not altogether clear or precise. *See* Frankfurter & Landis, *supra* note 28, at 1022-23 (1924); Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Colum. L. Rev. 480, 485 (1958) (referring to the "shadowy concept" of inherent power) (quoting Comm. on Admin. of Justice of the St. Bar of Cal., Rep., 31 Cal. St. B.J. 204, 206 (1956)). One court has articulated three types of inherent powers. The first type encompasses powers so essential to the function of courts as courts that to eliminate them and still "conceive of courts is a self-contradiction." *See* Eash v. Riggins Trucking, Inc., 757 F.2d 557, 562 (3rd Cir. 1985) (en banc) (quoting Frankfurter & Landis, *supra* note 28, at 1023). Congress is powerless to infringe on this class of inherent powers. *Eash*, 757 F.2d at 562. For example, Congress could not pass a statute forbidding the courts to engage in any textual interpretation, since that is the basic function of a court. *See* Merrill, *supra* note 48, at 28 n.118 (the judicial power includes the power "to say what the law is") (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). The second type comprises those powers arising from a court's nature, "necessary to the exercise of all others." *Eash*, 757 F.2d at 562 (quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1979) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812))). Congress may not abrogate this power or render it practically inoperative. *See* Michaelson v. United States, 266 U.S. 42, 65-66 (1924) (Congress may not abrogate court's inherent power to punish contempt). An example is the contempt sanction. *Eash*, 757 F.2d at 562-63. The third type consists of those powers necessary to courts in the sense of being practically useful. *Id.* at 563. These are powers that Congress may deny, but the courts may use them without congressional directive. *See Eash*, 757 F.2d at 563. They are sometimes referred to as equitable powers. *See* Hall v. Cole, 412 U.S. 1, 5 (1973); ITT Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir.

a. *The Inherent Power of the Court to Issue Notice in Class Actions Under the 1938 Version of Rule 23*

In contending that notice is proper only when due process is at issue, courts confuse the mandatory notice provision of Rule 23 with the discretionary notice powers of a trial court.[50] Some courts state that under Rule 23(b)(3), notice is required because of the binding effect of the judgment on all those defined within the class.[51] However, it is illogical to assume that because notice is required in the presence of one factor, it is necessarily prohibited in the absence of that factor.

Indeed, Rule 23(d)(2), providing for notice when the court deems it appropriate,[52] codifies the court's inherent power to administer fairly and efficiently the action before it through orders it considers appropriate.[53] This inherent power existed under the 1938 version of Rule 23, which encompassed the "spurious" class suit, the historical analogue of the section 216(b) class action.[54] The spurious suit, like the class action under modern Rule 23(b)(3), was brought by plaintiffs whose rights were affected by common questions of law and fact.[55] However, class members

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1978). Since sending notice is considered an equitable court power, *see* Spahn, *supra* note 5, at 142, and is not absolutely essential for a court's function as a court or necessary for exercising all other powers, it should be classified as among the third category of inherent powers.

The importance of the inherent powers concept in this analysis is its reflection of procedural custom and practice that courts engaged in without congressional sanction.

50. *See* Spahn, *supra* note 5, at 142. For a case that properly distinguishes discretionary and required notice power, see Monroe v. United Air Lines, 90 F.R.D. 638, 639 & n.3 (1981).

51. See *supra* note 17 and accompanying text.

52. *See* Fed. R. Civ. P. 23(d)(2).

53. *See* 7A C. Wright & A. Miller, *supra* note 10, § 1794, at 211; Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 299, 313 (1972).

54. See *infra* notes 57 and 104.

Professor J. William Moore, drafter of the 1938 version of Rule 23, noted that express provisions for notice were unnecessary since a court already possessed power to send notice to absent parties. *See* 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 23.01[6] (2d ed. 1985) (commenting on Proposed Amendment of 1955 to Rule 23, *reprinted in* 3B J. Moore & J. Kennedy, *supra*, ¶ 23.01[4]).

55. 7 C. Wright and A. Miller, *supra* note 10, § 1752.

The spurious suit was one of the three types of class actions under the 1938 version of Rule 23. Each type was defined by the nature of the right that was sought to be enforced for or against the class. *See* 3B J. Moore & J. Kennedy, *supra* note 54, ¶ 23.01[1.-1] (reprinting 1938 version of Rule 23). The three types came to be known as "true" (involving a "joint" right), "hybrid" (involving specific property) and "spurious" (involving common questions of law or fact). *See* 7 C. Wright & A. Miller, *supra* note 10, § 1752. Attempts to pigeonhole class actions into one or more of the three categories resulted in widespread confusion. *See* Fed. R. Civ. P. 23 advisory committee note; 7 C. Wright & A. Miller, *supra* note 10, § 1753, at 538-40; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 362 (1967); *cf.* Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Cornell L.Q. 327, 336 (1948) (distinction between hybrid and spurious class action is a "will o' the wisp"). Since "similarly situated" employees in § 216(b) suits do not have a joint interest and the action does not involve specific property, the common question requirement of the "spurious" class action remained the only suitable candidate for analogy. *See* 3B J.

in the spurious suit, unlike in modern Rule 23(b)(3), were bound only if they opted in.[56] Nevertheless, courts required that notice be sent to potential plaintiffs in spurious class suits,[57] and the advisory committee for modern Rule 23 affirmed the exercise of that power.[58]

The Seventh Circuit has distinguished the court's power to issue notice under section 216(b) from that under Rule 23 by noting that in Rule 23 suits the court issues notice to parties, while in section 216(b) suits the recipients are not parties until they have opted in.[59] This hypertechnical distinction is not dispositive of the court's role. First, a trial court has the inherent power to send notice to nonparties.[60] Further, in the spurious action, potential class members were not considered parties,[61] yet notice was nevertheless sent to them.[62]

b. *The Inherent Power of the Court to Issue Notice to Necessary Parties*

The "necessary party" is an absentee having some interest in a case whose presence in a lawsuit is desirable to protect the court's interest in avoiding multiple lawsuits, the parties' interest in receiving complete justice or the absentee's interest in not being adversely affected by the outcome of the suit, whether by stare decisis or other practical factors.[63]

Moore & J. Kennedy, *supra* note 54, ¶ 23.10[4] (2d ed. 1985). However, interpreting the § 216(b) class action as a spurious one was not so much an inevitable occurrence as it was the result of courts' caution and confusion regarding § 216(b). *See* Foster, *infra* note 72, at 324, 326; *see also* Poole, *Private Litigation Under the Wage and Hour Act*, 14 Miss. L.J. 157, 167 (1942) (§ 216(b) actions are broader than traditional class actions) (quoting Shain v. Armour & Co., 40 F. Supp. 488, 489 (W.D. Ky. 1954)).

56. *See* All Am. Airways v. Elderd, 209 F.2d 247, 248 (2d Cir. 1954); 7 C. Wright & A. Miller, *supra* note 10, § 1752, at 526 (spurious action had no binding affect on unnamed persons).

57. *See, e.g.*, Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 567, 588-89 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1962); Dickinson v. Burnham, 197 F.2d 973, 978-79 (2d Cir.) (dictum), *cert. denied*, 344 U.S. 875 (1952); Derdiarian v. Futterman Corp., 38 F.R.D. 178, 179 (S.D.N.Y. 1965). For cases that question the propriety of court involvement in the notice process, see Cherner v. Transitron Elec. Corp., 201 F. Supp. 934, 935-37 (D. Mass. 1962) (although court has power to send notice to potential plaintiffs, in securities case notice would be inconsistent with Congress' intent, would probably not result in the joinder of additional claims and would put court in role of social agency); Baim & Blank, Inc. v. Warren-Connelly Co., 19 F.R.D. 108, 111 (S.D.N.Y. 1956) (where potential plaintiffs have no common questions of law or fact affecting their rights, court should not notify them of pending action). In 1909, T.A. Street—the man who coined the much maligned term "spurious suit"—described the desirability of sending notice in spurious suits. *See* 1 T.A. Street, Federal Equity Practice § 552 (1909).

58. The advisory committee cited Oppenheimer v. F.J. Young & Co., 144 F.2d 387 (2d Cir. 1944), a case involving a spurious action, as an instance in which notice to potential plaintiffs would be appropriate to allow them to intervene. *See* Fed. R. Civ. P. 23(d)(2) advisory committee note.

59. *See* Woods v. New York Life Ins. Co., 686 F.2d 578, 582 (7th Cir. 1982).

60. See *infra* notes 65-67 and accompanying text.

61. See *supra* notes 57-58 and accompanying text.

62. See *supra* note 57 and accompanying text.

63. *See* Shields v. Barrow, 58 U.S. (17 How.) 129, 139 (1854); Fed. R. Civ. P. 19

The trial court has inherent power to bring necessary parties before it,[64] a power that is now codified and arguably legislatively sanctioned in Rule 19 of the Federal Rules of Civil Procedure.[65]

Bringing "necessary" parties before the court may involve sending notice to them.[66] Because the power to give notice to "necessary" parties is considered "inherent," its exercise would be appropriate without legislative sanction.[67] Two of the justifications for using this procedure—protecting the interests of absentees and avoiding circuitous and duplicative litigation—are invoked by courts that direct notice in section 216(b) class actions.[68] Because neither of these justifications necessarily involve due process concerns,[69] notice to nonparties need not be based solely on due process requirements. Rather, notice is justified, even in the absence of congressional sanction, when it may prevent multiple lawsuits or protect the interests of absentees.[70]

Because a party characterized as "necessary" will always have some interest in the lawsuit, it could be argued that the necessary party's inter-

advisory committee note; *see also* United States v. Dovolis, 105 F. Supp. 914, 916 (D. Minn. 1952) (absentee should be allowed to join suit to avoid circuitous litigation and in interests of fairness).

64. *See* Porter v. Warner Holding Co., 328 U.S. 395, 403 (1946); *see also* Mallow v. Hinde, 25 U.S. (12 Wheat.) 193, 197 (1827) (court has discretion to require plaintiff to bring before it any party with an interest in the action, no matter how remote).

65. Rule 19 reads in pertinent part:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Fed. R. Civ. P. 19(a). The 1966 revision of Rule 19 emphasizes pragmatic considerations rather than formalistic categorization of the parties. *See* 7 C. Wright & A. Miller, *supra* note 10, § 1601.

The Federal Rules receive indirect legislative sanction because, although promulgated by the Advisory Committee under the Supreme Court's authority, they are presented to Congress, which has 90 days to reject them before they become law. *See* Rules Enabling Act, 28 U.S.C. § 2072 (1982). The extent to which Congress' sanction can be inferred from this procedure is disputed. See *infra* note 81.

66. *See* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 232-33 (1938); Fed. R. Civ. P. 19(c) advisory committee note.

67. See *supra* note 49.

68. *See* Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335, 336 (2d Cir. 1978) (per curiam) (notice should be sent to avoid a multiplicity of suits), *cert. denied*, 441 U.S. 944 (1979); Johnson v. American Airlines, 531 F. Supp. 957, 960-61 (N.D. Tex. 1982) (notice informs absentees of rights and avoids multiple lawsuits); Riojas v. Seal Produce, Inc., 82 F.R.D. 613, 619 (S.D. Tex. 1979) (notice justified by fairness to absentees). *But see* Baker v. Michie Co., 93 F.R.D. 494, 496 (W.D. Va. 1982) (not sending notice might promote judicial economy: fewer claims would be brought).

69. In some cases, the court's failure to protect absentees may result in a violation of due process. *See* 7 C. Wright & A. Miller, *supra* note 10, § 1602, at 20.

70. See *supra* note 68.

est is more substantial than that of a similarly situated potential plaintiff in a section 216(b) class action. According to this view, the more tenuous interest removes the absentee from the sphere of the court's influence in the section 216(b) suit and renders the court's notice powers in the necessary party context inapplicable.[71]

The interests of absentees in section 216(b) suits are nevertheless substantial. First, if the plaintiffs lose, absentees are unlikely to bring a second suit.[72] Such a result has long been recognized as a proper subject for court consideration when it renders a ruling.[73] Given the expansion of the availability of the lawsuit, as exemplified by the relaxed requirements for standing,[74] the flexibility of the Federal Rules[75] and the modern view that it is desirable to allow most persons into a lawsuit whose interests will be significantly affected by it,[76] this justification appears well within the purview of the courts. Second, even if the first plaintiffs prevail and a second group has not intervened before judgment,[77] the claims of the second group may be too small to warrant a fresh suit.[78] Thus absentees are often effectively precluded from raising their claims. Providing small claimants with the practical ability to vindicate their rights is more difficult to characterize as belonging either to the judiciary or legislature. This justification is one of the principal rationales behind the modern class action.[79] Nevertheless, it is unclear whether the judiciary may in-

71. *Cf.* Woods v. New York Life Ins. Co., 686 F.2d 578, 582 (7th Cir. 1982) (court communication with nonparties exceeds scope of judicial power).

72. *See* Foster, *Jurisdiction, Rights, and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions*, 1975 Wis. L. Rev. 295, 330-31; Comment, *The Spurious Class Suit: Procedural and Practical Problems Confronting Court and Counsel*, 53 Nw. U.L. Rev. 627, 633 (1958).

73. *See* Bourdieu v. Pacific W. Oil Co., 299 U.S. 65, 70 (1936) ("The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result."); All Am. Airways v. Elderd, 209 F.2d 247, 248 (2d Cir. 1954); Chayes, *supra* note 29, at 1289 (the interest required for joinder was defined narrowly at first; liberalization of the requisite interest was due to awareness of judgment's effects beyond the parties). See *supra* notes 63-67 and accompanying text, *infra* notes 109-15 and accompanying text.

74. *See* Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1381-83 (1973); *see also* United States v. SCRAP, 412 U.S. 669, 689 n.14 (1973) ("an identifiable trifle is enough for standing") (quoting Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 613 (1968)).

75. *See* Fed. R. Civ. P. 1 ("[The Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."); 4 C. Wright & A. Miller, *supra* note 47, § 1029 (1969).

76. *See* Chayes, *supra* note 29, at 1310.

77. Notice may provide parties impetus to intervene before judgment. See *infra* notes 115-21.

78. If potential plaintiffs are unaware of a first suit, they could not have easily joined it, and thus might be permitted to use offensive collateral estoppel in a subsequent suit. *Cf.* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (despite trial court's broad discretion, it should not allow use of offensive collateral estoppel when plaintiff could easily have joined earlier action). Even with this increased chance of a favorable ruling, however, the second group's claims may still be too small to warrant suit.

79. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338 & n.9 (1980) (central

voke it in the absence of Congress' express approval,[80] which is arguably present in Rule 23.[81] Therefore, examining whether section 216(b) and the ADEA are congressional affirmances of this class action policy is necessary to determine whether court notification of absentees is also justified on this ground.

B. *Legislative Mandate: The Guidance Provided to the Trial Court by the Three Acts Implicated in the ADEA Class Action*

Having determined that court involvement in sending notice generally conforms to the proper role of the trial court, an analysis of court power next requires an assessment of congressional guidance regarding notice. If the ADEA and the history of section 216(b) are interpreted as permitting notice to potential class members, then the court may send or au-

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concept of Rule 23 is to allow small-claim holders redress by permitting them to spread the cost of litigation among other class members); Eisen v. Carlisle & Jaquelin, 417 U.S. 156, 185-86 (1974) (Douglas, J., dissenting in part) (class action provides recourse for people with small claims); Welmaker v. W.T. Grant Co., 365 F. Supp. 531, 553 (N.D. Ga. 1972) (class actions provide incentive to bring small claims that would otherwise be impracticable to sue on); Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 Colum. L. Rev. 299, 299 (1980); Kalven & Rosenfield, *supra* note 4, at 685 & n.5 (1941); Yeazell, *From Group Litigation to Class Action Part I: The Industrialization of Group Litigation*, 27 UCLA L. Rev. 514, 519-20 (1980); Note, *The Cost-Internalization Case for Class Actions*, 21 Stan. L. Rev. 383, 419 (1969).

80. This is because this justification does not appear to have been widely invoked before the 1938 version of Rule 23. Instead, the pre-1938 commentators described the purposes of the class action as convenience and preventing a multiplicity of lawsuits. *See* Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich. L. Rev. 878, 889 (1932); Lesar, *Class Suits and the Federal Rules*, 22 Minn. L. Rev. 34, 35, 51 (1937); Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Corn. L.Q. 399, 401-02 (1934). Thus it cannot be definitively stated whether absent the modern rules a court would have inherent power to send notice for the purpose of providing small claimants with a means to sue. Indeed, one commentator has stated that this justification is invalid even under Rule 23(b)(3) because it serves an essentially legislative purpose and is not for the judiciary to invoke. *See* Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. Cal. L. Rev. 842, 859-60 (1974).

81. Congressional sanction of Rule 23(b)(3) as a procedure providing redress for small claimants is questionable. First, it is doubtful whether Congress' failure to reject Rule 23 when the Supreme Court presented it with the Rule, *see* Rules Enabling Act, 28 U.S.C. § 2072 (1982), should be interpreted as approval. *See* Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1102 (1982). Moreover, the Advisory Committee did not clearly articulate providing redress for small claimants as a purpose of the 1966 version of Rule 23. *See* Fed. R. Civ. P. 23(b)(3) advisory committee note; Landers, *supra* note 80, at 846-47. Although since the promulgation of Rule 23(b)(3) the Supreme Court and many commentators have viewed one of its purposes as providing small claimants with redress, it would be a strange method of interpretation that would view such post facto articulations of policy by the judiciary and others as representative of the legislative will. *Cf.* Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting) ("Plainly the Rules are not acts of Congress and can not be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality.")

thorize notice to further the substantive aims of the ADEA.[82] If, however, they are read as reflecting congressional disparagement of an affirmative court role in the notice procedure, as some courts contend,[83] then the court lacks the power to send or authorize notice.

1. The ADEA and Its Incorporation of Section 216(b)

The drafters of the ADEA were concerned with offering aggrieved parties effective procedures to enforce the Act.[84] Because 216(b) was suitable for aggregating small claims of aggrieved employees,[85] and because the FLSA contained both public and private enforcement mechanisms,[86] the use of the FLSA's provisions suited the ADEA's remedial purposes.

Nevertheless, some courts insist that not using Rule 23 and its explicit notice provisions reflects the ADEA's drafters' implicit disapproval of a court role in sending notice to potential plaintiffs.[87] When the ADEA was drafted, however, that role was not extensively questioned.[88]

Few cases had discussed the issue, and of these, most approved of a court role or at least upheld the court's power to give notice.[89] Further, Rule 23(c) concerned *mandatory* notice; it did not address the court's *discretionary* power to give notice. The section 216(b) class action did not require mandatory notice because of section 216(b)'s opt-in requirement.[90] Thus, the drafters of the ADEA had no reason to include an explicit notice provision. Congress' silence, therefore, should not be interpreted as disapproval of notice.[91]

82. *See* Lusardi v. Xerox Corp., 99 F.R.D. 89, 93 (D.N.J. 1983), *appeal dismissed*, 747 F.2d 174 (3d Cir. 1984).

83. *See* Dolan v. Project Constr. Corp., 725 F.2d 1263, 1267 (10th Cir. 1984) (Congress limited role of court in section 216(b) actions through the Portal-to-Portal Act); Baker v. Michie Co., 93 F.R.D. 494, 495-97 (W.D. Va. 1982) (if Congress intended provisions of Rule 23 to be used by courts, it would have provided that Rule 23 be used in section 216(b) actions); McGinley v. Burroughs Corp., 407 F. Supp. 903, 911 (E.D. Pa. 1975) (same).

84. *See* 113 Cong. Rec. 34,749 (1967) (statement of Rep. Halpern) ("[M]ost importantly, [the ADEA] gives the aggrieved persons . . . just and adequate channels to enforce the provisions of the bill.").

85. See *infra* notes 109-14 and accompanying text.

86. See *supra* notes 3-4. *See also* 113 Cong. Rec. 34,748 (1967) (statement of Rep. Dent) (the enforcement provisions of the FLSA were chosen instead of the NLRB approach).

87. See *supra* note 83 and accompanying text. Rule 23 was promulgated in 1966 and the ADEA was drafted in 1967. *See* Fed. R. Civ. P. 23; 29 U.S.C. §§ 621-64 (1982).

88. *Cf.* Spahn, *supra* note 5, at 140 (notice much more important in ADEA cases than in other § 216(b) cases).

89. See *supra* note 57 and accompanying text.

90. *See* 29 U.S.C. § 216(b) (1982). See *supra* note 18 and accompanying text.

91. *See* Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335, 336 (2d Cir. 1978) (per curiam), *cert. denied*, 441 U.S. 944 (1979); *cf.* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979) (Congress' silence regarding private remedy should not necessarily be interpreted as disparagement of private remedy); Porter v.

2. The Portal-to-Portal Act's Amendment of Section 216(b) of the Fair Labor Standards Act

The Portal-to-Portal Act of 1947[92] amended section 216(b) of the FLSA by eliminating the "representative" action—brought by a plaintiff with no stake in the action—and requiring the plaintiff in the "collective" action—brought by interested parties similarly situated to each other—to opt in to the lawsuit.[93] Some courts have interpreted these changes and comments of the drafters as demonstrating congressional disparagement of the section 216(b) class action and an intent to curtail the court's role in such actions.[94]

Some courts, apparently believing "representative action" to be synonymous with "class action," interpret a heading entitled "Representative Actions Banned" appearing in the PPA as a pejorative reference to all class actions under section 216(b).[95] These courts forget that the PPA left intact what the drafters called the "collective" suit.[96] In fact, the PPA's drafters explicitly noted that the amendment was not intended to affect the more important "collective" class action.[97] Because very few "representative" actions were actually brought,[98] Congress' elimination of the "representative" action had little practical effect on the impact of section 216(b).

Courts also mistakenly construe the PPA's drafters' concern with burdensome discovery as applicable to plaintiffs' requests for names and addresses of similarly situated employees in the modern section 216(b) class action.[99] In various comments, the drafters of the PPA referred to the

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Warner Holding Co., 328 U.S. 395, 398 (1946) (it is assumed that a court has the full panoply of its equitable powers unless expressly restricted by Congress).

92. Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84 (codified at 29 U.S.C. §§ 251-262 (1982)).

93. *See* 93 Cong. Rec. 2182 (1947) (statement of Sen. Donnell). The "representative" action was eliminated because the drafters of the PPA thought it facilitated coercive actions not brought in "good faith." *Id.*

94. *See* Dolan v. Project Constr. Corp., 725 F.2d 1263, 1267 (10th Cir. 1984); Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1157-60 (N.D. Ga. 1984); *see also* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1214 (8th Cir. 1984) (purpose of the PPA to limit § 216(b) actions).

95. Dolan v. Project Constr. Corp., 725 F.2d 1263, 1267 (10th Cir. 1984); Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1157 (N.D. Ga. 1984).

96. *See* 93 Cong. Rec. 2182 (1947) (statement of Sen. Donnell); *see also* Woods v. New York Life Ins. Co., 686 F.2d 578, 581 (7th Cir. 1982) (bona fide class action procedure still intact after PPA amendment of § 216(b)).

97. *See* 93 Cong. Rec. 2182 (1947) (statement of Sen. Donnell).

98. *Cf.* Herman, *The Administration and Enforcement of the Fair Labor Standards Act*, 6 Law & Contemp. Probs. 368, 385-86 (1939) (labor unions, the most suitable representative plaintiffs, were wary of bringing § 216(b) suits). Additionally, private suits played a comparatively unimportant role. *See* Foster, *supra* note 72, at 310 (public enforcement of the FLSA was more important than private enforcement under § 216(b)).

99. *See* Dolan v. Project Constr. Corp., 725 F.2d 1263, 1265, 1267 (10th Cir. 1984); Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1157 & n.2 (N.D. Ga. 1984).

The disputed comment is as follows:

excessively detailed and costly records employers would be responsible for if the PPA was not passed.[100] But the drafters did not oppose the discovery of normally maintained records.[101] Since employers normally keep records of employees' names and addresses, these comments do not apply to plaintiffs' requests in the modern ADEA class action.

Finally, and most importantly, some courts contend that the opt-in requirement added to section 216(b) by the PPA was intended both to restrict the scope of and curtail the court's role in section 216(b) class actions.[102]

As noted, plaintiffs in the spurious class suit under the 1938 version of Rule 23 were not bound by a judgment unless they individually consented to be joined.[103] The section 216(b) collective action had been analogized to and was referred to by courts as a spurious class action.[104] Thus, in section 216(b) class actions, plaintiffs already had to opt in to be

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> The procedure in these suits follows a general pattern. A petition is filed under section 16(b) by one or two employees in behalf of many others. To this is [sic] attached interrogatories calling upon the employer to furnish specific information regarding each employee during the entire period of employment. The furnishing of this data alone is a tremendous financial burden to the employer.

H.R. Rep. No. 71, 80th Cong., 1st Sess. 4, *reprinted in* 1947 U.S. Code Cong. Serv. 1029, 1032.

100. *See* Woods v. New York Life Ins. Co., 686 F.2d 578, 581 (7th Cir. 1982); H.R. Rep. No. 71, 80th Cong., 1st Sess. 2-4, *reprinted in* 1947 U.S. Code Cong. Serv. 1029, 1032.

The chief purpose of the Portal-to-Portal Act was to eliminate recovery allowed under a series of Supreme Court decisions, *see* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 691-92 (1946); Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 161, 166 (1945); Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944), for back wages under the FLSA for time spent traveling within the workplace. *See* Portal-to-Portal Act of 1947, ch. 52, 61 Stat. 84, 84 (codified at 29 U.S.C. §§ 251-262 (1982)). The drafters of the PPA made clear that their concern regarding burdensome discovery extended to the kind of situation involved in Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946). *See* H.R. Rep. No. 71, 80th Cong., 1st Sess. 2-4, *reprinted in* 1947 U.S. Code Cong. Serv. 1029, 1030-31. An example of such burdensome discovery consisted of requests for 4,123,050 items regarding starting and quitting times, total hours and overtime hours worked, and hours shown on employees' time cards. H.R. Rep. No. 71, 80th Cong., 1st Sess. 3-4, *reprinted in* 1947 U.S. Code Cong. Serv. 1029, 1032; *see also* 93 Cong. Rec. 2180 (1947) (statement of Sen. Donnell) (referring to unfairness of having employers keep records of such things as how long it took employees to walk to work stations, to tape their arms or to don their overalls).

101. Senator Donnell, Chairman of the Senate committee responsible for the PPA, explicitly stated that the drafters had no objection to the discovery of records kept by an employer. *See* 93 Cong. Rec. 2180 (1947).

102. *See* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1214 (8th Cir. 1984) (PPA and its opt-in requirement had effect of limiting FLSA); Dolan v. Project Constr. Corp., 725 F.2d 1263, 1267 (10th Cir. 1984) (opt-in requirement demonstrates congressional intent to remove court from active role in § 216(b) actions); Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1159, 1160 (N.D. Ga. 1984) (same).

103. See *supra* note 54 and accompanying text.

104. *See* Pentland v. Dravo Corp., 152 F.2d 851, 853 (3d Cir. 1945) (classifying § 216(b) proceeding as spurious suit); Schempf v. Armour & Co., 5 F.R.D. 294, 296 (D. Minn. 1946) (same).

bound by the court's judgment before the PPA added an explicit opt-in requirement.[105] Therefore, the PPA only codified what was already practice, making suits under section 216(b) expressly analogous to spurious suits under the 1938 version of Rule 23.[106]

Some courts viewed the spurious action as merely the equivalent of permissive joinder,[107] already provided for in Rule 20.[108] However, this interpretation relegates the Rule 23 spurious action to the status of mere redundancy.[109] According to a view more congruent with the purposes of the FLSA, the spurious class action and its section 216(b) analogue were procedures by which the court could take an active role in aiding the public's interest in avoiding multiple lawsuits and the interests of plaintiffs with small claims.[110] Under the FLSA, individual claims were relatively small[111] and often did not warrant bringing suit unless aggregated with those of other persons.[112] To foster the aggregation of claims, section 216(b) functioned as an invitation to the lawsuit.[113] The court would therefore send notice to similarly situated potential plaintiffs.[114] Thus, duplicative suits were avoided, and enforcement of the FLSA was aided. By choosing to incorporate section 216(b) in the ADEA, the ADEA's drafters affirmed this procedure. The trial court therefore is justified in sending notice when it will aid small claimants to vindicate their rights under the ADEA or otherwise further the aims of the ADEA.

Indeed, notice to potential plaintiffs is often essential to further these aims.[115] Because of the unaggressive stance of the Equal Employment Opportunity Commission,[116] charged with public enforcement of the ADEA, the private suite under section 216(b) now plays the dominant

105. *See* Foster, *supra* note 72, at 327.

106. *See* Spahn, *supra* note 5, at 129.

107. *See* California Apparel Creators v. Wieder, Inc., 162 F.2d 893, 897 (2d Cir.), *cert. denied*, 332 U.S. 816 (1947); Saxton v. W.S. Askew Co., 35 F. Supp. 519, 521 (N.D. Ga. 1940); 7 C. Wright & A. Miller, *supra* note 10, § 1752, at 525.

108. *See* Fed. R. Civ. P. 20(a).

109. *See* Kalven & Rosenfield, *supra* note 4, at 699.

110. *See* Pentland v. Dravo Corp., 152 F.2d 851, 853 (3d Cir. 1945) (§ 216(b) action empowers a collective lawsuit with the strength of collective bargaining); Schempf v. Armour & Co., 5 F.R.D. 294, 297-98 (D. Minn. 1946) (the FLSA mandates that every opportunity be given to allow employees to join a § 216(b) action); Z. Chafee, Some Problems of Equity 274-75 (1950); Kalven & Rosenfield, *supra* note 4, at 685 n.5.

111. *See, e.g.*, Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 710 (1945) (upholding recoveries of $423.16 and $1002.10); Foster, *supra* note 72, at 332 (amounts of recoveries are insufficient to make § 216(b) truly effective). See *infra* note 119.

112. See *supra* note 6.

113. *See* All Am. Airways v. Elderd, 209 F.2d 247, 248 (2d Cir. 1954); Z. Chafee, *supra* note 110, at 275.

114. *See* Schempf v. Armour & Co., 5 F.R.D. 294, 297-98 (D. Minn. 1946); Timberlake v. Day & Zimmerman, Inc., 3 Wage & Hour Cas. (BNA) 311, 313 (S.D. Iowa 1943).

115. *See* Lusardi v. Xerox Corp., 99 F.R.D. 89, 93 (D.N.J. 1983), *appeal dismissed*, 747 F.2d 174 (3d Cir. 1984); Allen v. Marshall Field & Co., 93 F.R.D. 438, 442 (N.D. Ill. 1982).

116. *See* Spahn, *supra* note 5, at 121.

role in the ADEA's enforcement.[117] Congress intended section 216(b) to provide a strong deterrent to violations of the FLSA and the ADEA.[118] Yet, perhaps because damage awards are limited under the ADEA,[119] section 216(b) does not appear effectively to deter discriminatory practices.[120] By apprising claimants of their rights when they are financially able to act on them, notice can strengthen section 216(b)'s deterrent effect. Further, if notice is not sent to individual claimants, the factual and legal issues particular to them may never be presented in court. Finally, notice can help fulfill Congress' aim that employers not escape liability because of employees' ignorance of their rights.[121]

II. CONCERNS REGARDING SOLICITATION OF CLAIMS AND "STIRRING UP" LITIGATION

Some courts have refused to send or authorize notice to potential

117. *See* Schuster & Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 Indus. & Lab. Rel. Rev. 64, 70 (1984) (in survey of ADEA cases through 1981, public actions accounted for only 26.8% of all ADEA suits).

118. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 710 (1945) (Congress clearly intended § 216(b) to have a deterrent effect); S. Rep. No. 640, 81st Cong., 1st Sess. 7 (greater power should be given to Department of Labor to discourage employers from violating the FLSA), *reprinted in* 1949 U.S. Code Cong. Serv. 2241, 2247-48.

119. Recovery under § 216(b) payment is for lost wages, which may be doubled ("liquidated damages"). 29 U.S.C. § 216(b) (1982). For ADEA purposes, these double damages are only available to plaintiffs who prove a willful violation. *Id.* § 626(b). Compensatory damages for pain and suffering and punitive damages are held unavailable. *See, e.g.*, Pfeiffer v. Essex Wire Corp., 682 F.2d 684, 687-88 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982); Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 809-10 (8th Cir. 1982); Naton v. Bank of Cal., 649 F.2d 691, 698-99 (9th Cir. 1981); Slatin v. Stanford Research Inst., 590 F.2d 1292, 1296 (4th Cir. 1979); Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038-39 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); Rogers v. Exxon Research & Eng'g Co., 550 F.2d 834, 841-42 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *see* Note, *Damages in Age Discrimination Cases—The Need for a Closer Look*, 17 U. Rich. L. Rev. 573, 587 (1983). Reinstatement may be an available remedy under the Act, and when that is unavailable or inappropriate, awards of prospective wages ("front pay") may be made. *See* Whittlesey v. Union Carbide Corp., 742 F.2d 724, 728 (2d Cir. 1984); EEOC v. Prudential Fed. Sav. & Loan Ass'n, 741 F.2d 1225, 1232-33 (10th Cir. 1984), *vacated on other grounds*, 105 S. Ct. 896 (1985); Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1100 (8th Cir. 1982). *Contra* Kolb v. Goldring, Inc., 694 F.2d 869, 874-75 & n.4 (1st Cir. 1982) (front pay should not be awarded). For background and further discussion, see Note, *Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act*, 53 Fordham L. Rev. 579 (1984).

120. *See* Note, *Damages in Age Discrimination Cases—The Need for a Closer Look*, *supra* note 119, at 588 (ADEA cases have increased considerably in recent years, demonstrating that age discrimination has not abated). Admittedly, the increase in ADEA litigation may also be attributed to other factors. But, at the least, the increase in litigation demonstrates that the purpose of the ADEA—the elimination of age discrimination—has not been achieved.

121. *See* S. Rep. No. 640, 81st Cong., 1st Sess. 7 (Secretary of Labor notes that it is against congressional purposes for employers to be relieved of liability on account of employees' ignorance), *reprinted in* 1949 U.S. Code Cong. Serv. 2241, 2247-48.

Ignorance of rights under the ADEA may be the result of employers' failure to post information regarding those rights in the workplace. *See* Allen v. Marshall Field & Co., 93 F.R.D. 438, 445 (N.D. Ill. 1982).

plaintiffs in ADEA class actions, regardless of their determination of the power issue, because they believe that notice fosters the undesirable solicitation of claims and "stirs up" litigation.[122] Curiously, some of these courts view the act of contacting potential plaintiffs by mail, even if performed or supervised by the court, as fraught with the problems of in-person solicitation.[123] Because the Supreme Court has upheld blanket bans on in-person solicitation by lawyers[124] and because some courts find a substantial governmental interest in preventing stirring up litigation, these courts also ban communication between plaintiffs' attorney and potential plaintiffs.[125]

A blanket prohibition on sending notice, which proposes a commercial transaction, is analyzed according to first amendment standards for the protection of commercial speech.[126] Under the first amendment, commercial speech receives less comprehensive protection than noncommercial speech.[127] Because sending notice to potential plaintiffs is not inherently misleading, a blanket ban on attorney communication is justified only if it furthers a substantial governmental interest by the least restrictive means.[128] Analyzing whether soliciting clients or stirring up litigation constitute substantial governmental interests that justify a ban

122. *See* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1215 (8th Cir. 1984); Baker v. Michie Co., 93 F.R.D. 494, 496-97 (W.D. Va. 1982); Montalto v. Morgan Guar. Trust Co., 83 F.R.D. 150, 152 (S.D.N.Y. 1979); Roshto v. Chrysler Corp., 67 F.R.D. 28, 30 (E.D. La. 1975); *accord* Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 863 (9th Cir. 1977).

123. *See* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1216 (8th Cir. 1984) (attorney-sent notice like in-person solicitation); Baker v. Michie Co., 93 F.R.D. 494, 496 (W.D. Va. 1982) (notice, unlike advertising, focuses on a particular plaintiff in particular litigation).

Courts often do not explain the difference between "stirring up litigation" and "solicitation of claims." *See, e.g.*, Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 863 (9th Cir. 1977); Wagner v. Loew's Theatres, Inc., 76 F.R.D. 23, 25 (M.D.N.C. 1977); Roshto v. Chrysler Corp., 67 F.R.D. 28, 30 (E.D. La. 1975). The phrase "stirring up litigation" focuses on the effect of such litigation on courts and defendants, while "solicitation of claims" focuses on the attorney-client relationship. See *infra* notes 130-57 and accompanying text.

124. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 468 (1978).

125. *See* McKenna v. Champion Int'l Co., 747 F.2d 1211, 1217 (8th Cir. 1984); Roshto v. Chrysler Corp., 67 F.R.D. 28, 30 (E.D. La. 1975).

126. McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1214 (8th Cir. 1984); *see* Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2275 (1985); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978); *In re* Primus, 436 U.S. 412, 437-39 (1978).

If plaintiffs were represented by a nonprofit organization, devoted to advancing "beliefs and ideas" through litigation, *In re* Primus, 436 U.S. 412, 423-24, 434 (1977) (quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958)), then notice would be analyzed according to a stricter standard than that for commercial speech, *id.* at 437-38 & n.32; *see also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978); NAACP v. Button, 371 U.S. 415, 429-30 (1963).

127. Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2274-75 (1985); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983); *In re* R.M.J., 455 U.S. 191, 203 (1982); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 562-63 (1980).

128. Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2277-78 (1985).

on lawyer communication with potential ADEA plaintiffs also provides a framework for determining whether they justify the trial court's refusal of a role in sending notice.[129]

A. *Stirring Up Litigation*

An initial question is whether inviting potential class members to an ongoing lawsuit constitutes "stirring up litigation." If the litigation is already under way, adding claims by sending notice does not stir up new litigation; rather it broadens the scope of already existing litigation.[130] Indeed, when claims are added to a section 216(b) action, the net effect may often be to decrease litigation, since many claims will be resolved at one trial.[131]

Courts that invoke the "stirring up litigation" rationale imply that stirring up litigation per se is an evil—presumably even for warranted claims[132]—and also liken the effects of notice to barratry, champerty or maintenance[133]—age-old proscriptions aimed at preventing frivolous or maliciously coercive suits.[134]

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129. For cases that consider the Supreme Court's lawyer advertising cases relevant to the non-first amendment determination of whether the court may take part in the notice process, see Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335, 336 (2d Cir. 1978) (per curiam) (citing Bates v. State Bar, 433 U.S. 350 (1977), which forbade blanket bans on lawyer advertising, as undercutting the rationale for a court's refusal to send notice because notice would constitute "stirring up litigation"), *cert. denied*, 441 U.S. 944 (1979); Baker v. Michie Co., 93 F.R.D. 494, 496 (W.D. Va. 1982) (determined issue of court involvement in part by comparing notice unfavorably to lawyer advertising that had been upheld by the Supreme Court); Monroe v. United Air Lines, 90 F.R.D. 638, 640 (N.D. Ill. 1981) (Supreme Court ruling on lawyer advertising suggests that stirring up litigation and soliciting clients do not pose serious problem in the notice context).

130. *See* Lusardi v. Xerox Corp., 99 F.R.D. 89, 93 (D.N.J. 1983), *appeal dismissed*, 747 F.2d 174 (3d Cir. 1984).

131. *Cf.* Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335, 336 (2d Cir. 1978) (per curiam) (notice is justified by court's interest in avoiding multiple lawsuits), *cert. denied*, 441 U.S. 944 (1979); Allen v. Marshall Field & Co., 93 F.R.D. 438, 444 (N.D. Ill. 1982) (notice will aid judicial economy by minimizing the number of separate actions); Johnson v. American Airlines, 531 F. Supp. 957, 959-60 (N.D. Tex. 1982) (same); Monroe v. United Air Lines, 90 F.R.D. 638, 640 (N.D. Ill. 1981) (same). *But see* Baker v. Michie Co., 93 F.R.D. 494, 497 (W.D. Va. 1982) (if potential plaintiffs await outcome of suit, and original plaintiffs prevail, new suits will be brought by the potential plaintiffs).

132. *Cf.* Wagner v. Loew's Theatres, Inc., 76 F.R.D. 23, 25 (M.D.N.C. 1977) ("The awakening of sleeping plaintiffs by either the plaintiff or the Court would fly in the teeth of the centuries-old doctrine against the solicitation of claims.") (quoting Roshto v. Chrysler Corp., 67 F.R.D. 28, 30 (E.D. La. 1975)).

133. *See* Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 863 (9th Cir. 1977) (citing California statute proscribing barratry); Baker v. Michie Co., 93 F.R.D. 494, 495 (W.D. Va. 1982).

134. "[M]aintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty." *In re* Primus, 436 U.S. 412, 424 n.15 (1978); 4 W. Blackstone, Commentaries *134-36. If viewed broadly, these traditional proscriptions would include activities that are now recognized as legitimate, such as the contingency fee. *See* Radin, *Maintenance By Champerty*, 24 Calif. L. Rev. 48, 69-72 (1935). Thus courts inter-

The idea that instituting legitimate litigation constitutes an evil has been rejected by the Supreme Court.[135] In *Zauderer v. Office of Disciplinary Counsel*,[136] the Court expressed doubts that any governmental interest is served when citizens' access to accurate information that may lead them to vindicate their rights through legal action is impeded.[137] The Court stated that promoting access to the courts is not "an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride."[138]

Regarding meritless or maliciously coercive suits, the section 216(b) class action is not immune from being exploited for such unscrupulous purposes. Such abuse, however, is not endemic only to lawyers in ADEA class actions. In *Zauderer*, the Court acknowledged the potential use of advertisements for bringing meritless or harassing suits.[139] Nevertheless, the Court stated that a blanket ban against such communications was not necessary to achieve the state's interest in preventing such suits.[140] Instead, the Court suggested that a less restrictive means to achieve the state's goal would be to punish attorneys who bring meritless or harassing suits.[141]

Sending notice to potential plaintiffs poses even fewer possibilities for such problems than the type of advertisement addressed in *Zauderer*. The *Zauderer* decision permits attorneys to solicit clients for particular lawsuits through print advertising.[142] Although an advertisement might be registered with the state bar association,[143] the court or state bar might remain ignorant of the identities of individual clients garnered by a

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pret these proscriptions as applying only to frivolous suits or suits brought only to harass. *See In re* Primus, 436 U.S. at 436-37 (comparison to barratry, champerty or maintenance inapposite where conduct was not maliciously inspired or served no public interest); NAACP v. Button, 371 U.S. 415, 439 (1963) ("Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation.") (footnote omitted); Radin, *supra*, at 75, 77-78 (essence of champertous act is whether claim is meritless or purpose is to extort money), *cited in* NAACP v. Button, 371 U.S. at 438 n.17.

135. *See* Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2277-78 (1985) (dictum).

136. 105 S. Ct. 2265 (1985).

137. *See id.* at 2277-78 (dictum); *see also* Bates v. State Bar, 433 U.S. 350, 375-77, 376 n.32 (1977) (Court expressed concern that aggrieved individuals receive information about their legal rights).

138. Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2278 (1985).

139. *See Zauderer*, 105 S. Ct. at 2279 & n.12; Bates v. State Bar, 433 U.S. 350, 375 n.31 (1977). The *Zauderer* decision involved, inter alia, an advertisement directed at women who had used the Dalkon Shield. *See Zauderer* at 2271-72. The plaintiffs' attorney succeeded in procuring clients for a suit against the manufacturer. *Id.*

140. *See id.* at 2278-80.

141. *See id.* at 2279 n.12; *see also In re* Von Wiegen, 63 N.Y.2d 163, 174, 470 N.E.2d 838, 845, 481 N.Y.S.2d 40, 46 (1984) (communications that actually foment meritless suits should be proscribed, unlike those communications that further legitimate informational function), *cert. denied*, 105 S. Ct. 2701 (1985).

142. *Zauderer*, 105 S. Ct. at 2280.

143. *Cf. In re* Von Wiegen, 63 N.Y.2d 163, 175, 470 N.E.2d 838, 844, 481 N.Y.S.2d 40, 47 (1984) (discussing filing requirements for writings), *cert. denied*, 105 S. Ct. 2701 (1985).

particular ad. In contrast, the court in an ADEA suit will be aware of potential plaintiffs who choose the attorney's services. The potential for malicious suits would thus be no greater than in any other sort of litigation.[144] Moreover, when a court decides a motion to give notice to potential plaintiffs in an ADEA class action it determines whether the recipients are "similarly situated," in effect deciding whether their joinder is warranted.[145] Thus it is unlikely that the claims added will be meritless. Because the evils associated with stirring up litigation are no more serious when notice is sent than those raised in *Zauderer*, and because the court may use the same less restrictive means of dealing with them proposed in *Zauderer*,[146] a blanket ban of notice based on preventing the stirring up of litigation should not stand.[147]

B. *Client Solicitation*

Courts next justify a ban on attorney-sent notice and court abstention from involvement in sending notice by citing the undesirable effects of client solicitation.[148] According to some courts, the recipient of a mailed notice form, even a form scrutinized by a trial court, is subjected to the same dangers that arise from in-person solicitation.[149]

The Supreme Court has upheld bans against in-person solicitation by lawyers because of the inherent potential for overreaching, invasion of privacy and undue influence and because of the special regulatory problems that in-person solicitation presents.[150] Like lawyer advertising aimed at specific lawsuits and lawyer mailings of generalized informa-

144. *Cf.* Bates v. State Bar, 433 U.S. 350, 375 n.31 (1977) (Court questions inevitable relationship between advertising and dishonesty, noting that unethical lawyers will meet with unethical clients regardless of restrictions. Thus a sanction should address fraud per se, rather than unduly restricting legitimate activities.).

145. *See* Graffy v. Jewel Food Stores, No. 83C-9313, slip op. at __ (N.D. Ill. Oct. 29, 1985) (before granting notice in section 216(b) suit, court must first decide whether added claims would be frivolous or insubstantial).

146. The court can impose sanctions, *see* Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2279 n.12 (1985), such as those under Rule 11 of the Federal Rules of Civil Procedure. *Cf.* Tedesco v. Mishkin, No. 82-8753, slip op. at 29-31 (S.D.N.Y. Feb. 25, 1986) (in class action, judge fined defendant attorney more than $76,000 for making false and misleading communications with plaintiff class members).

147. *Cf.* Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. at 2279 n.12 (mere possibility that communication will result in stirring up meritless litigation does not sustain blanket ban on that communication where state can assess validity of attorney advertising without great difficulty).

148. *See* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1215-17 (8th Cir. 1984); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 863 (9th Cir. 1977); Roshto v. Chrysler Corp., 67 F.R.D. 28, 30 (E.D. La. 1975).

149. *See* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1216-17 (8th Cir. 1984); *see also* Baker v. Michie Co., 93 F.R.D. 494, 496 (W.D. Va. 1982) (notice focuses on particular plaintiff in particular lawsuit).

150. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464-66 (1978); *see also* Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2277 (1985) (discussing *Ohralik* Court's reasoning).

tion, which the Supreme Court has held may not be banned outright,[151] notice of ADEA actions does not present these problems. The typical notice to a potential plaintiff is unlikely to invade the recipient's privacy.[152] It is an announcement of rights and services, without explicit or extensive reference to the recipient's particular situation.[153] Also, like print advertising, the notice in letter form lacks the coercive aspect of a personal encounter.[154] The recipient is free to act or refrain from acting and can consult friends, family or another attorney before responding to the letter.[155] The trial judge can require that notice contain the names of other lawyers, with an explanation that the recipient is free to consult any of the listed attorneys or one of the recipient's choosing.[156] Thus, like print advertising, the letter is "more conducive to reflection and the exercise of choice . . . than is personal solicitation by an attorney."[157] Because letters designed to pressure the recipient can be dealt with on an individual basis, a blanket ban on attorney-issued notice is not the least restrictive means of preventing such attorney abuse, and thus should not pass muster under the first amendment.

When a court issues notice, acting as a neutral arbiter, it is doubtful the recipient will be misled or coerced.[158] But even if notice is sent by plaintiffs' attorneys, court supervision of the notice form can render instances of such dangers highly improbable. Any potentially problematic information can be expunged or altered by the court.[159] By supervising the notice form, the court functions much like state entities in charge of overseeing lawyer advertising.[160] A court's involvement in sending notice would therefore have a salutary influence on the notice procedure.[161]

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151. *See* Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2280 (1985) (lawyer advertising aimed at specific lawsuit); *In re* R.M.J., 455 U.S. 191, 206 (1982) (generalized mailings).

152. *See In re* Von Wiegen, 63 N.Y.2d 163, 174, 470 N.E.2d 838, 844, 481 N.Y.S.2d 40, 46 (1984) (direct mail solicitation does not substantially invade privacy), *cert. denied*, 105 S. Ct. 2701 (1985).

153. There may be instances in which mail solicitation contains personal information that might upset the recipient, unlike court-supervised notice. For instance, in Leoni v. State Bar of California, 39 Cal. 3d 609, 704 P.2d 183, 185-86, 217 Cal. Rptr. 423, 425-26 (1985), *appeal dismissed*, 106 S. Ct. 1170 (1986), the attorneys' letters referred to recipients' financial status and the status of litigation in which they were engaged.

154. *See* Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2277 (1985); *In re* Von Wiegen, 63 N.Y.2d 163, 174, 470 N.E.2d 838, 844, 481 N.Y.S.2d 40, 46 (1984), *cert. denied*, 105 S. Ct. 2701 (1985).

155. See *supra* note 154.

156. *See* Johnson v. American Airlines, 531 F. Supp. 957, 966 (N.D. Tex. 1982).

157. Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265, 2277 (1985).

158. *Cf.* Lusardi v. Xerox Corp., 99 F.R.D. 89, 93 (D.N.J. 1983) (comparing court-authorized notice to barratry is "silly"), *appeal dismissed*, 747 F.2d 174 (3d Cir. 1984).

159. *See* Allen v. Marshall Field & Co., 93 F.R.D. 438, 444-45 (N.D. Ill. 1982) (court modifies form of notice).

160. *Cf. In re* Von Wiegen, 63 N.Y.2d 163, 175, 470 N.E.2d 838, 845, 481 N.Y.S.2d 40, 47 (1984) (little chance of deception because of state's filing requirement), *cert. denied*, 105 S. Ct. 2701 (1985).

161. *See* Foster, *supra* note 72, at 330 & n.121; Gordon, *The Common Question Class*

Thus the government has no substantial interest in generally proscribing notice to potential plaintiffs. The putative evils of client solicitation and stirring up litigation do not justify court rejection of an affirmative role in the notice procedure.[162] The state and federal courts can punish attorneys who actually send misleading or coercive communications, but such occurrences are extremely unlikely when the court takes an affirmative role. Because sending notice to potential plaintiffs does not present the kinds of problems posed by in-person solicitation, the court is free to send or supervise notice when it would advance the purposes of the ADEA.

CONCLUSION

Court supervision or authorization of notice to potential plaintiffs comports with a trial court's role. A court, therefore, does not need an explicit directive from Congress to send or authorize notice. Congress' silence regarding notice does not vitiate that power. On the contrary, by choosing section 216(b), the ADEA's drafters endorsed the use of class actions to aggregate small claims and thus implicitly sanctioned one of the purposes of sending notice.

Analysis of the nature and purposes of notice reveals that comparisons with in-person solicitation are inapposite. Further, because sending notice to potential members of ADEA class actions serves to inform bona

Suit Under the Federal Rules and in Illinois, 42 Ill. L. Rev. 518, 532 (1947); Kaplan, *supra* note 55, at 398-99.

162. Court restriction of communications between attorneys and potential plaintiffs can be challenged on grounds other than the first amendment. In Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981), the Court ruled that possible abuses arising from lawyer contact with class members in Rule 23 actions did not justify routine bans on such contact. *See id.* at 104. The Court held that the purposes of the Federal Rules and especially of Rule 23 would be frustrated if limitations on communications between parties and potential class members were not based on specific findings by the court that the limitations are required. *See id.* at 101-02.

Gulf Oil has been held inapplicable by lower courts to § 216(b) class actions on the grounds that potential plaintiffs in § 216(b) suits do not possess the same due process rights as Rule 23 class members, *see* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1215-16 n.5 (8th Cir. 1984), and that the Court in *Gulf Oil* was not faced with solicitation problems because plaintiffs were represented by the NAACP, *see* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1216 n.5 (8th Cir. 1984). However, the *Gulf Oil* Court was concerned with interference with the policies behind Rule 23. To a large extent those same policies are embodied in § 216(b) class actions. See *supra* notes 109-11 and accompanying text. Moreover, the solicitation problems in § 216(b) class actions are not particularly important when the court supervises notice. See *supra* notes 148-61 and accompanying text. Restrictions on lawyer communications in Rule 23 actions are aimed at particular abuses, such as attempts by defendants to obtain repudiations of named plaintiffs' counsel and communications regarding fees, *see* Manual for Complex Litigation § 1.41 & n.43 (5th ed. 1982). The court-supervised notice form could not be used for such purposes. Thus a court should only base restriction of attorney communication with potential plaintiffs in § 216(b) actions on specific findings of potential for abuses. *See* Dolan v. Project Constr. Corp., 725 F.2d 1263, 1268 (10th Cir. 1984) (quoting Gulf Oil v. Bernard, 452 U.S. 89, 101 (1981)); Goerke v. Commercial Contractors & Supply Co., 600 F. Supp. 1155, 1161 (N.D. Ga. 1984) (same).

fide claimants of rights created by Congress, sending notice does not resemble the traditional evil of stirring up litigation. The trial court thus may not prohibit communications of counsel with potential class members. Instead, the court can minimize potential abuses of the notice procedure and further the aims of the ADEA by supervising notice to "similarly situated" potential class members.

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