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The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission

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The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission

T. Merritt Bumpass, Jr.*

The 1972 amendments to title VII permitted the Equal Employment Opportunity Commission to institute actions in federal district courts based upon charges of discrimination filed pursuant to section 706 of the Civil Rights Act. These suits brought by the Commission have resembled class actions, and in response employers have demanded the procedural protections and judicial controls afforded by rule 23 of the Federal Rules of Civil Procedure. The author examines the legislative history of the 1972 amendments and finds persuasive support for a conclusion that Congress did not intend to exempt section 706 actions by the Commission from the application of the Federal Rules of Civil Procedure, including rule 23. He explores the relevant policy considerations and notes their applicability to section 707 actions as well. The author concludes that the procedural prerequisites of rule 23 are necessary to protect the substantive rights of employers and should be applied to both section 706 and section 707 actions.

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The Application of Rule 23 of the Federal Rules of Civil Procedure to Actions Brought by the Equal Employment Opportunity Commission

INTRODUCTION

IN RECENT YEARS federal courts have rendered a number of decisions concerning the question of whether the provisions of rule 23 of the Federal Rules of Civil Procedure, the class action rule, apply to suits brought by the Equal Employment Opportunity Commission (EEOC) under title VII of the Civil Rights Act of 1964, as amended in 1972.¹ The issue has not been decided uniformly; its ultimate resolution holds important ramifications, not only for how the EEOC will prosecute its lawsuits, but also for how such actions may affect substantive rights. This article examines the legislative background of this issue and analyzes the considerations and arguments which have been, or at least should be, raised in resolving it.

I. LEGISLATIVE AND JUDICIAL BACKGROUND

As originally enacted, title VII created a cause of action on behalf of individuals who had suffered discrimination proscribed by the statute.² The original statutory language did not authorize

1. 42 U.S.C. § 2000e to 2000e-17 (1970), *as amended by* Equal Employment Opportunity Act of 1972 (EEOA), Pub. L. No. 92-261, §§ 2-13, 86 Stat. 103.

2. Section 706 of title VII originally stated in part:

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) . . . the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

Civil Rights Act of 1964, § 706(e), 78 Stat. 260 (current version at 42 U.S.C. § 2000e-5(e) (1976)).

the EEOC to initiate actions concerning violations of the Act. Instead, the Commission was limited to investigating charges filed with it, making findings with respect to such charges, and seeking voluntary elimination of any unlawful employment practices uncovered.³ The Commission was authorized only to institute actions to compel compliance with court orders already issued against an employer, employment agency, or labor organization.⁴ The original language of title VII did authorize the United States Attorney General to bring "pattern or practice" suits⁵ and to intervene, with the court's permission, in civil actions brought by individuals if the Attorney General certified that such actions were of general public importance.⁶

These statutory provisions permitted only minimal governmental assistance for aggrieved individuals, and Congress responded in 1972 by amending title VII. Section 706 was amended to permit the EEOC to institute actions in federal district court based upon charges which had been filed with the Commission.⁷ The EEOC was also given the authority to intervene, with the court's permission, in civil actions brought by individuals against defendants other than governments, governmental agencies, or political subdivisions upon certification by the EEOC that the actions were of general public importance.⁸ Individuals were accorded the right to intervene in actions brought by the EEOC or

3. See *id.* § 706(a), 78 Stat. 259 (current version at 42 U.S.C. § 2000e-5(a) (1976)).

4. *Id.* § 706(i), 78 Stat. 261 (current version at 42 U.S.C. 2000e-5(i) (1976)).

5. Section 707 of title VII originally provided in part:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States. . . .

Id. § 707(a), 78 Stat. 261 (current version at 42 U.S.C. § 2000e-6(a) (1976)).

6. *Id.* 706(e), 78 Stat. 260 (current version at 42 U.S.C. § 2000e-5(e) (1976)).

7. Section 706 has been amended to read as follows:

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court.

EEOA § 4(a), 42 U.S.C. § 2000e-5(f)(1) (1976) (amending U.S.C. § 2000e-5(f) (1970)).

8. *Id.*

the Attorney General.⁹ Moreover, individuals who had filed charges could still bring civil actions if the EEOC had not filed its own action based on such charges or had not entered into conciliation agreements concerning them.¹⁰ Finally, the 1972 amendments transferred the Attorney General's pattern or practice authority to the EEOC.¹¹

Since 1972, the EEOC has actively pursued section 706 actions against private employers. These actions have usually been based upon broadly framed complaints which attack a variety of employment practices and which seek injunctive and monetary relief on behalf of considerable numbers of employees.

At least as early as 1974, employers began to urge federal district courts to apply the provisions of rule 23¹² to these section 706

9. *Id.*

10. *Id.*

11. Section 707(e), the language of which follows, is one of three subsections added to § 707 of title VII:

Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

Id. § 5, 42 U.S.C. § 2000e-6(e)(1976) (amending 42 U.S.C. § 2000e-6 (1970)). Until two years after enactment of the 1972 amendments, the Attorney General retained concurrent authority to institute § 707 actions. 42 U.S.C. § 2000e-6(c) (1976) (originally enacted as EEOA, Pub. L. No. 92-261, § 5(c), 86 Stat. 107).

12. FED. R. CIV. P. 23(a) and 23(b) provide:

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

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

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

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

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

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient

actions in an attempt to secure the procedural protections and judicial controls afforded by the rule.¹³ The majority of the district courts which have considered this issue have held that section 706 actions brought by the EEOC are not subject to the burden of complying with the requirements of rule 23.¹⁴ Unfortunately, many of the opinions which have dealt with this issue have contained little analysis concerning their results.

Only one appellate court has considered the applicability of rule 23 to EEOC actions. In *EEOC v. D.H. Holmes Co.*,¹⁵ the Fifth Circuit Court of Appeals held that when the EEOC brings a section 706 action it must comply with rule 23. The court indicated, however, that the EEOC could bring a section 707 pattern or practice action without having to comply with rule 23.¹⁶

In *EEOC v. Datapoint Corp.*,¹⁷ the Fifth Circuit confirmed the

adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

13. See *EEOC v. Lutheran Hosp.*, 10 Fair Empl. Prac. Cas. 117 (E.D. Mo. 1974).

14. *EEOC v. Singer Controls Co. of America*, 18 Fair Empl. Prac. Cas. 309 (N.D. Ohio 1978); *EEOC v. Raymond Metal Prods. Co.*, 17 Fair Empl. Prac. Cas. 206 (D. Md. 1978); *EEOC v. Schlueter Mfg. Co.*, 17 Fair Empl. Prac. Cas. 53 (E.D. Mo. 1978); *EEOC v. Whirlpool Corp.*, 16 Fair Empl. Prac. Cas. 932 (N.D. Ind. 1978); *EEOC v. General Tel. Co.*, 16 Fair Empl. Prac. Cas. 476 (W.D. Wash. 1977); *EEOC v. Pinkerton's Inc.*, 14 Fair Empl. Prac. Cas. 1431 (W.D. Pa. 1977); *EEOC v. CTS*, 13 Fair Empl. Prac. Cas. 852 (W.D.N.C. 1976); *EEOC v. Vinnel-Dravo-Lockheed-Mannix*, 417 F. Supp. 575, 12 Fair Empl. Prac. Cas. 1815 (E.D. Wash. 1976); *Stuart v. Hewlett-Packard Co.*, 66 F.R.D. 73, 9 Empl. Prac. Dec. ¶ 9993 (E.D. Mich. 1975); *EEOC v. Lutheran Hosp.*, 10 Fair Empl. Prac. Cas. 1177 (E.D. Mo. 1974). See also *EEOC v. Avco New Idea Div.*, 18 Fair Empl. Prac. Cas. 311 (N.D. Ohio 1978); *EEOC v. Rexene Polymers Co.*, 10 Fair Empl. Prac. Cas. 61 (W.D. Tex. 1975); *EEOC v. Mobil Oil Corp.*, 362 F. Supp. 786, 6 Fair Empl. Prac. Cas. 727 (W.D. Mo. 1973).

District court decisions in which rule 23 has been held to apply to § 706 actions include: *EEOC v. Delaware Trust Co.*, 18 Fair Empl. Prac. Cas. 1521 (D. Del. 1979); *EEOC v. Page Eng'r Co.*, 17 Fair Empl. Prac. Cas. 1638 (N.D. Ill. 1978); *EEOC v. Akron Nat'l Bank & Trust Co.*, 78 F.R.D. 684, 17 Fair Empl. Prac. Cas. 636 (N.D. Ohio 1978); *Niedhardt v. D.H. Holmes Co.*, 13 Fair Empl. Prac. Cas. 449 (E.D. La. 1976), *aff'd*, *EEOC v. D.H. Holmes Co.*, 556 F.2d 787, 15 Fair Empl. Prac. Cas. 378 (5th Cir. 1977), *cert. denied*, 436 U.S. 962, 17 Fair Empl. Prac. Cas. 1000 (1978); and *EEOC v. Continental Oil Co.*, 393 F. Supp. 167 (D. Colo. 1975), *aff'd on other grounds*, 548 F.2d 884 (10th Cir. 1977). See also *EEOC v. Datapoint Corp.*, 12 Fair Empl. Prac. Cas. 1133 (W.D. Tex. 1975), *aff'd in part*, 570 F.2d 1264 (5th Cir. 1978).

15. 556 F.2d 787, 15 Fair Empl. Prac. Cas. 378 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978).

16. 556 F.2d at 792 n.8, 15 Fair Empl. Prac. Cas. at 382 n.8.

17. 570 F.2d 1264, 17 Fair Empl. Prac. Cas. 281 (5th Cir. 1978).

Holmes decision. It held that the district court had not erred in certifying the EEOC under rule 23 as the representative of a class of past and present employees, and in thereby binding all members of the class to the court's determination that the defendant's employment practices had not discriminated against minorities or females.

II. CONGRESSIONAL INTENT CONCERNING SECTION 706 ACTIONS BROUGHT BY THE EEOC

It is undeniable that many of the section 706 actions which have been prosecuted by the EEOC resemble class actions. In such suits, the EEOC has sought to obtain monetary and injunctive relief on behalf of sizable classes of past, present, and future employees. It has drafted both the substantive allegations and the requests for relief in its complaints with great generality.¹⁸

Recognition of the resemblance between EEOC actions and

18. For example, in *Holmes*, the court of appeals concluded that the EEOC suit was a "class action" for the following reasons:

First, there are the pleadings themselves. The complaint is very broadly and vaguely drawn. It names no employee adversely affected by unlawful discharge, promotion, or other employment policy. Nor does it name any employee opposing such alleged practices who has been harrassed as a result. It does not specify at which of the nine stores or in which of the 494 departments alleged violations of the Civil Rights Act took place. It does not name particular dates on which these alleged violations occurred. Instead, the complaint is drawn in the broadest terms so as to include all female employees, all nine stores, all 494 departments, and every day from July 2, 1965 (the effective date of the Civil Rights Act) to the present.

Furthermore, the request for relief is likewise drawn with great generality. We pass over the prayer for injunctive relief as, class action or not, the practical effect of an injunction is likely to be the same. But we do pause at the prayer for back pay. Such relief is sought on behalf of all "those persons adversely affected." We can only assume this to mean that relief, if granted, is to run in favor of a class of beneficiaries defined somehow by their relationship to the wrongs alleged. If this complaint and prayer do not amount to a "class action," we are at a loss to know what does.

556 F.2d at 793, 15 Fair Empl. Prac. Cas. at 382-83 (citations omitted). The court also relied upon the EEOC's course of discovery and its opposition to *Holmes*' motion to dismiss the class action aspects of the suit in concluding that the suit was a "class action."

In *EEOC v. Akron Nat'l Bank & Trust Co.*, 78 F.R.D. 684, 17 Fair Empl. Prac. Cas. 636 (N.D. Ohio 1978), the Commission sued on behalf of females employed at 23 of the defendant's facilities on the basis of a variety of alleged title VII violations. In that case and in *EEOC v. Page Eng'r Co.*, 17 Fair Empl. Prac. Cas. 1638 (N.D. Ill. 1978), the EEOC admitted that it was seeking class relief. *Id.* at 1639. *EEOC v. Akron Nat'l Bank & Trust Co.*, 78 F.R.D. at 685, 17 Fair Empl. Prac. Cas. at 637. In *EEOC v. Whirlpool Corp.*, 16 Fair Empl. Prac. Cas. 932 (N.D. Ind. 1978), the court noted that title VII actions brought by the EEOC are "by definition, in the nature of a class action." *Id.* at 939. *But see EEOC v. Raymond Metal Prods. Co.*, 17 Fair Empl. Prac. Cas. 206 (D. Md. 1978); *EEOC v. Mobil Oil Corp.*, 6 Fair Empl. Prac. Cas. 727 (W.D. Mo. 1973).

traditional class actions merely begins any inquiry concerning the propriety of applying rule 23 to such actions. The next step is an examination of the legislative history of the 1972 amendments in order to determine whether Congress indicated any special intention regarding this issue. Surprisingly, most courts which have been called upon to decide whether rule 23 should be applied to EEOC suits have made no such examination. Moreover, those courts which have considered Congress' intent have done so in a cursory fashion.¹⁹

The EEOC contended in its unsuccessful petition for certiorari in *Holmes* that the 1972 legislative history is silent on the question of Congress' intent concerning the application of rule 23 to Commission 706 actions.²⁰ In fact, the legislative history of the 1972 amendments is far from silent on this issue. A thorough inquiry reveals that Congress intended that the provisions of rule 23 would apply to section 706 actions brought by the EEOC. Several congressmen expressly stated during the debates that such actions would be subject to the Federal Rules of Civil Procedure in general and to rule 23 in particular; no congressman expressed a contrary view.

A. *Context of Congressional Debate*

During the congressional debate on the 1972 amendments, both the House and the Senate considered at great length whether the EEOC should be given enforcement powers by granting it the authority either to issue administrative cease-and-desist orders or to sue in federal district court.²¹ In the context of this debate, supporters of both approaches made many statements of varying levels of clarity and pertinence to the rule 23 issue. In the aggregate these statements indicate clearly that Congress contemplated that the provisions of the Federal Rules of Civil Procedure, including rule 23, would be applicable to section 706 actions.

The proponents of the court-enforcement approach wanted to

19. See, e.g., *EEOC v. Schluter Mfg. Co.*, 17 Fair Empl. Prac. Cas. 53 (E.D. Mo. 1978).

20. Petition for Certiorari at 9, 15, *EEOC v. D.H. Holmes Co.*, 436 U.S. 962 (1978) (*cert. denied*) [hereinafter cited as *Petition for Certiorari*].

21. See, e.g., SUBCOMM. ON LABOR, SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92d Cong., 2d Sess., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 118, 248, 279, 589, 645, 690 (Comm. Print 1972) [hereinafter cited as *EEOA LEGISLATIVE HISTORY*]. The court-enforcement approach, of course, was ultimately adopted.

secure a forum that would ensure employers a fair hearing.²² These legislators argued that enforcement through court actions was essential in order to guarantee employers "due process"²³ and a "fair trial."²⁴ They perceived a Commission bias in favor of charging parties,²⁵ and were concerned that under the cease-and-desist approach investigatory, prosecutory, and decisionmaking authority would be consolidated in the Commission.²⁶ They argued that only federal court proceedings could provide the necessary procedural safeguards and a fair trial.²⁷

Supporters of the court-enforcement approach frequently referred to the Commission's enforcement of title VII within the framework of the existing "federal court machinery" or the "federal judicial system."²⁸ Also, two senators argued that Commission suits should be handled by federal courts in the same manner as courts have long handled other actions.²⁹ One proponent of the alternative cease-and-desist approach complained that the court-enforcement approach would not offer aggrieved parties anything which they did not already possess since their disputes were already channelled to federal courts for decision.³⁰ It stands to reason that the congressmen who expressed such sentiments contemplated that the existing judicial "machinery" or "system"

22. *See id.* at 690, 695, 779, 782, 794, 797, 806, 837, 992, 1110, 1272-81, 1467, 1533.

23. *Id.* at 682, 797, 808, 1270-71, 1347, 1418, 1443, 1546.

24. *Id.* at 1694 (remarks of Sen. Ervin).

25. *Id.* at 119, 696, 698, 807, 810, 838, 991, 1027, 1290, 1314, 1533; *see id.* at 688, 795, 1012-13, 1367.

26. *Id.* at 696-99, 796, 808-10, 838, 841, 905, 974-77, 986, 991-94, 1027-28, 1270, 1309, 1418, 1441, 1546, 1595.

27. *Id.* at 122, 201, 226, 229, 278, 976, 988-89. As will be discussed in detail later, the application of the provisions of rule 23 to actions brought by the Commission does trigger certain procedural safeguards that would not otherwise exist. *See* text accompanying note 157 *infra*. For example, two district courts have asserted, though without adequate justification, that the application of rule 23 to Commission actions would have such a significant impact that it would frustrate congressional policy. *EEOC v. Schlueter Mfg. Co.*, 17 Fair Empl. Prac. Cas. 53 (E.D. Mo. 1978); *EEOC v. General Tel. Co.*, 16 Fair Empl. Prac. Cas. 476 (W.D. Wash. 1977). *See* note 108 *infra*. To the extent that rule 23 does impose such procedural safeguards, its application provides employers with a fairer forum than they would otherwise enjoy and thus can be said to satisfy a purpose vigorously pursued by proponents of the court-enforcement approach. A clear indication that employers believe that the application of rule 23 accords them fairer proceedings is evidenced by the fact that most reported decisions concerning the application of rule 23 to EEOC suits have arisen in the context of motions filed by employers seeking to have district courts apply the provisions of rule 23 to EEOC actions.

28. EEOA LEGISLATIVE HISTORY, *supra* note 21, at 549, 688, 694, 697, 794-95, 838, 1012-13, 1319; *see id.* at 698-99, 1550-51.

29. *Id.* at 678 (remarks of Sen. Dominick); *see id.* at 806-08 (remarks of Sen. Allen).

30. *Id.* at 263-64 (remarks of Rep. O'Hara).

which was ultimately adopted by Congress as an enforcement mechanism would include the application of established and customarily applied rules of civil procedure.

Proponents of the cease-and-desist approach also indicated that they understood that the Rules of Civil Procedure would apply to Commission suits if the court-enforcement approach were adopted. They argued that one advantage of cease-and-desist enforcement of civil rights would be that proceedings in administrative agencies are less subject to "technical rules" than are those heard by courts.³¹ It is reasonable to assume that the Federal Rules of Civil Procedure were among the "technical rules" that these supporters of the cease-and-desist approach proposed to avoid.

B. *Specific References During Debate to Rules of Civil Procedure*

On several occasions congressmen on both sides of the issue expressly stated that they thought that the Federal Rules of Civil Procedure in general, and rule 23 in particular, would be applied to actions brought by the Commission under section 706. In the House of Representatives, the Committee on Education and Labor reported favorably upon H.R. 1746,³² the House version of the 1972 amendments which initially incorporated the cease-and-desist approach.³³ In the Committee's report the minority members argued for a court-enforcement mechanism, noting that "[t]he district court approach has a great advantage over the administrative hearing procedure" and that the use of the discovery provisions of the Federal Rules of Civil Procedure "would greatly facilitate the collection of evidence for trial."³⁴ Ultimately, of course, the minority view with respect to the method of enforcement prevailed in the House as well as in the Senate.

At one point in the Senate proceedings, Senator Allen offered, on Senator Ervin's and his behalf, a substitute bill that was identical to the court-enforcement bill passed by the House.³⁵ Senator Javits, the ranking minority member of the Senate committee which had reported on a cease-and-desist bill and a leading proponent of the cease-and-desist approach, described the Allen-Er-

31. *Id.* at 71, 196, 238, 861-62; *see id.* at 1367.

32. H.R. REP. NO. 92-238, 92d Cong., 2d Sess. (1972).

33. EEOA LEGISLATIVE HISTORY, *supra* note 21, at 61, 68.

34. *Id.* at 122.

35. *Id.* at 989-90, 1005-06.

vin substitute as nothing more than a “‘re-do’ of the Dominick amendment” which had already been voted on five times by the Senate and had not been passed.³⁶ Senator Ervin said of the amendment offered by Senator Allen:

I hope that this substitute amendment will be agreed to. It provides that we will have enforcement in the courts. It affords an adequate procedure by which the EEOC, suing at the expense of the American taxpayers, can have a right of vindication in the court according to the established rules of procedure and the established rules of evidence.³⁷

Approximately two weeks later during the course of the Senate debate, Senator Dominick argued on behalf of his amendment which was ultimately adopted³⁸ by the Senate:

[W]e must retain a belief in this country that the Federal district courts provide a method of impartial review of highly emotional cases which involve not only basic human rights but also basic human emotions. Additionally, you can do far better in a court proceeding which is impartial, organized, and ruled by precedent and established rules of procedure than you can from an administrative proceeding composed of a group of people who are responsible to no one except the person who appointed them—largely in the executive department—or who may have been appointed as part of the staff of the agency itself.³⁹

In an attempt to break a filibuster, Senator Javits and Senator Williams, the manager of S. 2515, the cease-and-desist bill, offered what was described as a compromise amendment. The proposal would have permitted the Commission to make findings and recommendations in a disputed case but also would have allowed an aggrieved party to have such findings and recommendations reviewed by a federal district court.⁴⁰ The Javits-Williams amendment provided that proceedings before the Commission would be conducted in accordance with rules of procedure which “conform insofar as possible with the Federal Rules of Court Procedure for the district courts of the United States.”⁴¹ Senator Dominick criticized the Javits-Williams proposal for permitting too much judi-

36. *Id.* at 1003–05. Ultimately the Senate adopted another court-enforcement amendment authored by Senator Dominick. *Id.* at 1557.

37. *Id.* at 1002–03.

38. *See* note 36 *supra*.

39. *Id.* at 1485.

40. *Id.* at 1383–92, 1394–95, 1407.

41. *Id.* at 1386. Senator Javits explained the intended effect of his amendment:

The last item, which I think bears repetition in terms of this comparison, is that the rules of evidence applicable in district courts apply to the EEOC hearings. That is provided by the bill [S. 2515] now. Under our amendment not only

cial discretion in the application of the federal rules of procedure. He argued that pretrial discovery, which the proposal failed to secure, was necessary for employers to defend themselves adequately.⁴²

A clear indication of congressional intent is found in the comments of Senator Ervin which were made subsequent to the adoption by the Senate of the Dominick amendment:

As a result of about five separate rollcall votes and many days of debate, some Senators, who on the first votes apparently had no concept of what a rank prostitution of the judicial process this bill was, joined those of us who were opposed to making the agency a judge in its own case, and we adopted the Dominick amendment, which frees Americans involved in controversies with the EEOC from having the EEOC be the prosecutor, the judge, and I might add the executioner. Now they are assured of being able to get a hearing according to the rules of procedure and evidence by which the rights of all other persons are judged in the courts of our land, and before impartial judges rather than biased crusaders.⁴³

C. *Remarks of Senator Javits*

Those courts that have made an effort to examine the legislative history of the 1972 amendments have attached special significance to certain remarks that Senator Javits made after the Senate's adoption of the Dominick amendment. These remarks were made in the course of the debate concerning the issue of whether the authority to bring section 707 pattern or practice suits should be transferred from the Attorney General to the Commission. Senator Javits noted that the Attorney General's pattern and practice suits were essentially class actions.⁴⁴ He also noted that under the court-enforcement approach the Commission would be

the rules of evidence, but the rules of civil procedure, which are applicable in the district courts, will be applicable to the EEOC procedures.

Id. at 1429.

42. Senator Dominick feared that the Federal Rules of Civil Procedure would not be applied under the Javits-Williams proposal:

Whereas S. 2515 provides that the federal rules of evidence shall apply "so far as practicable," amendment 787 [*sic*] states that the proceedings be conducted in conformity with rules of evidence and that the rules of procedure apply "insofar as possible"—a judge factor which practically speaking will probably make inapplicable the most important federal rules of procedure—those of pretrial discovery. Adequate pretrial discovery safeguards respondents from the probability of entering hearings inadequately prepared to defend themselves against Commission charges.

Id. at 1444.

43. *Id.* at 1661.

44. *Id.* at 1588-90.

afforded the opportunity to bring class actions pursuant to the provisions of rule 23 of the Federal Rules of Civil Procedure. Since there was no reason why two agencies should be empowered to perform the same functions, he asserted that the authority to bring section 706 and 707 actions should be consolidated in the EEOC.⁴⁵ Thus, in the course of making this argument, Senator Javits' reference to rule 23 clearly demonstrated that he understood that the rule would apply to actions brought by the EEOC under section 706.⁴⁶

The court of appeals concluded in *Holmes* that Senator Javits' comments meant that Congress did not intend to exempt the Commission's section 706 actions from the provisions of rule 23.⁴⁷

45. *Id.*

46. Senator Javits remarked:

One other point which it seems to me is absolutely decisive is that the EEOC, under the Dominick amendment, has the authority to institute exactly the same actions that the Department of Justice does under pattern and practice. These are essentially class actions, and if they can sue for an individual claimant, then they can sue for a group of claimants.

It seems to me that this is provided for by the rules of civil procedure in the Federal courts, and also it is inherent in the amendment which we adopted. Under those circumstances it seems to me that this amendment is conclusively dealt with, and whatever may have been the argument which might have obtained in respect of cease-and-desist orders and the desire to retain this jurisdiction in the Department of Justice when the Commission was going to proceed by cease-and-desist order rather than by suit, has now given way to the fact that the Commission can only proceed by suit. And if it proceeds by suit, then it can proceed by class suit. If it proceeds by class suit, it is in the position of doing exactly what the Department of Justice does in pattern and practice suits.

I have referred to the rules of civil procedure. I now refer specifically to Rule 23 of those rules, which is entitled "Class Actions" and which give the opportunity to engage in the Federal court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party.

Id. at 1589-90.

47. 556 F.2d at 794 n.11, 15 Fair Empl. Prac. Cas. at 384 n.11. See notes 15-16 *supra* and accompanying text. The court of appeals also relied on a portion of the section-by-section analysis prepared by Senator Williams concerning the bill adopted by the Senate. Of the section which would permit the EEOC to bring lawsuits in district courts, Senator Williams stated *inter alia*:

In establishing the enforcement provisions under this subsection and subsection 706(f) generally, it is not intended that any of the provisions contained therein are designed to affect the *present* use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the *individual claimant*. As a consequence, the leading cases in this area to date have recognized that Title VII claims are necessarily class action complaints and that, accordingly, it is not necessary that each individual entitled to relief under the claim be named in the original charge or in the claim for relief.

EEOA LEGISLATIVE HISTORY, *supra* note 21, at 1773 (emphasis added). See also *id.* at 1847. This commentary can be given only limited significance in interpreting congressional

The district courts which decided *EEOC v. Whirlpool Corp.*⁴⁸ and *EEOC v. General Telephone Co.*,⁴⁹ as well as the EEOC itself,⁵⁰ have drawn a different conclusion from the Senator's remarks.

In its petition for certiorari in *Holmes*, the EEOC argued that it was clear from the context of Senator Javits' remarks that he was "referring to Rule 23 class actions merely as an analogy to the Commission's Section 706 jurisdiction. . . ." ⁵¹ The Commission cited *Whirlpool* and *General Telephone* as support for its argument. In *Whirlpool*, the court said that Senator Javits' remarks were made to demonstrate that the type of suit which may be brought under section 707 is virtually the same as that which may be brought under section 706.⁵² The court also said that his remarks were made to illustrate the breadth of the Commission's enforcement power by comparing it to a class action.⁵³

While Senator Javits' comments were made in the context of comparing section 706 and section 707 actions,⁵⁴ this context does not alter the meaning of the Senator's words. In the course of comparing actions brought under the two sections, Senator Javits stated that, with the adoption of the Dominick amendment, the EEOC had been made a "properly suing party" within the meaning of rule 23 and could now bring class actions as "provided for by the rules of civil procedures in the Federal courts."⁵⁵

A different argument was set forth in *General Telephone*. In that case, the court adopted the magistrate's report in which the magistrate had stated, in effect, that the 1972 amendments had made sections 706 and 707 essentially the same, that the Attorney General had never been required to comply with rule 23 in bringing section 707 actions, and that therefore Congress must not have intended that rule 23 would apply to section 706 actions brought

intent concerning the application of rule 23 to Commission suits. In directing his remarks to the "present" use of class actions by "individual claimants," Senator Williams appears to have referred only to private class actions since only that type was permitted under § 706 at the time his remarks were made. Only his statement that "Title VII claims are necessarily class action complaints" can be said, because of its literal breadth, to contain any implications concerning Commission suits, and any such implications are limited by the context in which the phrase is found.

48. 16 Fair Empl. Prac. Cas. 932, 937 (N.D. Ind. 1978). See note 18 *supra*.

49. 16 Fair Empl. Prac. Cas. 476, 478 (W.D. Wash. 1977).

50. Petition for Certiorari, *supra* note 20, at 15 n.7.

51. *Id.*

52. 16 Fair Empl. Prac. Cas. at 937.

53. *Id.*

54. See notes 45-46 *supra* and accompanying text.

55. EEOA LEGISLATIVE HISTORY, *supra* note 21, at 1589-90.

by the EEOC.⁵⁶ In his recommendation the magistrate placed particular reliance upon one paragraph of Senator Javits' remarks.⁵⁷ However, the magistrate did not explain how this excerpt supported his own argument. The absence of such explanation is understandable since in that paragraph Senator Javits made reference to the EEOC having been made a "properly suing party" within the meaning of rule 23.

The short, but sufficient, response to the magistrate's reliance upon the comments of Senator Javits is that a fair reading of the Senator's remarks reveals a contemplation that EEOC section 706 suits would be subject to rule 23. Such was obviously Senator Javits' understanding, regardless of the status of the law which then existed with respect to rule 23 and section 707 actions. And, as has been demonstrated earlier⁵⁸ and will be discussed further,⁵⁹ such was also the contemplation of many other congressmen. Furthermore, neither Senator Javits nor any other congressman made any reference during the legislative proceedings to the past application, or lack thereof, of rule 23 to section 707 suits. References were made to pattern or practice decisions, but such references were directed to the question of whether, in view of the Attorney General's record in the prosecution of section 707 actions, such authority should be transferred to the EEOC.⁶⁰

The section-by-section analysis of the Conference Committee bill which was prepared by Senators Williams and Javits did say that "[i]n any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."⁶¹ Of course, in 1972 when title VII was amended, there was no "present case law" concerning the application of rule 23 to

56. 16 Fair Empl. Prac. Cas. at 478. See also EEOC v. Singer Controls Co. of America, 18 Fair Empl. Prac. Cas. 309, 310 (N.D. Ohio 1978).

57. 16 Fair Empl. Prac. Cas. at 478. The magistrate accorded special significance to the following comment of Senator Javits:

I have referred to the rules of civil procedure. I now refer specifically to rule 23 of those rules, which is entitled "Class Actions" and which give the opportunity to engage in the Federal court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party.

EEOA LEGISLATIVE HISTORY, *supra* note 21, at 1590. See note 46 *supra* and accompanying text.

58. See notes 21-43 *supra* and accompanying text.

59. See notes 79-106 *infra* and accompanying text.

60. See, e.g., EEOA LEGISLATIVE HISTORY, *supra* note 21, at 73-74, 125, 588, 1574-88, 1592-93.

61. *Id.* at 1844.

EEOC section 706 actions. Nor was there any case law concerning the application of rule 23 to section 707 actions. As of 1972, neither the decisions cited by the magistrate in his report nor any other reported decision had expressly addressed the question of whether section 707 actions are subject to rule 23.⁶² With the exception of *United States v. Ironworkers Local 86*,⁶³ none of the section 707 decisions cited by the magistrate in *General Telephone* could possibly have been within the contemplation of the congressmen who amended title VII in 1972 since all these decisions were decided subsequent to 1972.⁶⁴

In *Ironworkers Local 86*, the Attorney General brought a pattern or practice lawsuit against five building construction unions and three joint apprenticeship and training committees associated with the unions. The Court of Appeals for the Ninth Circuit made no mention of rule 23. It did, however, deny the appellants' contention that the provisions of rule 52(a) of the Federal Rules of Civil Procedure should not govern the court's review of the district court's findings of fact.⁶⁵ The implication of this holding is obvious and does not comport with the theory of the magistrate; if one of the Federal Rules of Civil Procedure applies to an action, then presumably so should any others which by their terms are pertinent.

62. It might be argued that, in effect, the federal courts had decided as of 1972 the question of the applicability of rule 23 to § 707 actions. Rule 23(c)(1) required the court to determine as soon as practicable after the commencement of the action whether it is to be maintained as a class action. FED. R. CIV. P. 23(c)(1). This provision has been interpreted as imposing upon the court the duty to make such determination regardless of whether a party has requested it. *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 310, 10 Fair Empl. Prac. Cas. 239, 247 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951, 14 Fair Empl. Prac. Cas. 1686 (1977); *Garrett v. Hamtramck*, 503 F.2d 1236, 1243 (6th Cir. 1974). Thus, the failure of a court to act could be regarded as a determination of the issue. However, the duty imposed by rule 23(c)(1) is limited by its terms to actions which have been "brought as a class action." Therefore, it is questionable whether § 707 actions brought by the Attorney General would fall within the purview of this paragraph of the rule since it is doubtful that the Attorney General ever denominated any of its actions a "class action." In any event, the far more important consideration concerning the question of congressional intent is the fact that no court had made any express determination concerning the applicability of rule 23 to § 707 actions as of the time of the 1972 title VII amendments.

63. 443 F.2d 544, 3 Fair Empl. Prac. Cas. 496 (9th Cir. 1971).

64. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 14 Fair Empl. Prac. Cas. 1514 (1977); *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 11 Fair Empl. Prac. Cas. 167 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 12 Fair Empl. Prac. Cas. 1090 (1976); *United States v. Georgia Power Co.*, 474 F.2d 906, 5 Fair Empl. Prac. Cas. 587 (5th Cir. 1973).

65. 443 F.2d at 548-49, 3 Fair Empl. Prac. Cas. at 499-500. The appellants argued that rule 52(a) should not apply because the district court had relied heavily on documentary evidence and depositions and very little on demeanor evidence.

The Fifth Circuit Court of Appeals decided two of the other section 707 cases cited by the magistrate in *General Telephone*. In *United States v. Georgia Power Co.*,⁶⁶ a pattern or practice suit had been consolidated for trial with two private class actions. Neither the application of rule 23 nor of any other rule of procedure was in issue or was even mentioned by the court in this case. In *United States v. Allegheny-Ludlum Industries, Inc.*,⁶⁷ certain appellants attacked the provisions of consent decrees which had been filed simultaneously with the filing of a complaint by the Attorney General against nine steel companies and the United Steelworkers. The court analyzed the right of the appellants to intervene in this action not only in terms of the provisions of title VII but also in terms of the provisions of rule 24 of the Federal Rules.⁶⁸ The court also relied upon the provisions of rule 19 in concluding that the appellants were not indispensable parties to the action.⁶⁹ In *Allegheny-Ludlum*, the court did, as indicated by the magistrate in his report, make specific reference to rule 23.⁷⁰ That reference, however, provides no real support for the magistrate's theory. In concluding its discussion of the appellants' joinder arguments, the court stated that the appellants' real objective was to convert a government pattern or practice action into a rule 23 class action.⁷¹ The court's comment may have constituted a recognition of a distinction between the two types of action; however, it certainly cannot be deemed to have constituted a holding that rule 23 should not have been applied to the government suit

66. 474 F.2d 906, 5 Fair Empl. Prac. Cas. 587 (5th Cir. 1973).

67. 517 F.2d 826, 11 Fair Empl. Prac. Cas. 167 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 12 Fair Empl. Prac. Cas. 1090 (1976).

68. In the words of the court, "Logical analysis of any question concerning intervention in federal court begins with Rule 24 of the Federal Rules of Civil Procedure." 517 F.2d at 840, 11 Fair Empl. Prac. Cas. at 177.

69. *Id.* at 876-77, 11 Fair Empl. Prac. Cas. at 206-07. In a footnote the court quoted in full the text of rule 19. *Id.* at 876 n.79, 11 Fair Empl. Prac. Cas. at 206-07 n.79. The last paragraph of rule 19 states, "This rule is subject to the provisions of Rule 23." FED. R. CIV. P. 19(d). This cross-reference indicates the inappropriateness of selectively applying the Federal Rules of Civil Procedure.

70. 517 F.2d at 877, 11 Fair Empl. Prac. Cas. at 207.

71. The court stated:

Actually, any further consideration of appellants' theory in terms of joinder of parties becomes hopelessly distorted and unproductive. It appears to us—though again the argument is utterly vague and conclusory—that their real objective is to convert what began as a government "pattern or practice" suit into an eventual Fed. R. Civ. P. 23 class action. Under Rule 23(a) one or more members of a class may initiate a class action when, *inter alia* "(1) the class is *so numerous that joinder of all members is impracticable*. . . ." This criterion is consistent with the scope in which appellants purport to prosecute these appeals. . . .

Id. (emphasis in original).

in the first place.⁷² In fact, the court specifically declined to rule upon the question of whether the action should have been certified as a class action.⁷³ And, in any event, the court of appeals had not decided *Allegheny-Ludlum* when Congress was debating the 1972 amendments.

The final case cited by the magistrate was the 1977 decision of the Supreme Court in *International Brotherhood of Teamsters v. United States*.⁷⁴ It did not address the applicability of rule 23 to section 707 actions. It did, however, refer to the "affected class" and its three "subclasses" for whom relief was sought,⁷⁵ and relied upon rule 19 in determining that the union could remain a party to the lawsuit.⁷⁶ This case, like the others cited by the magistrate, provides no support for the theory that congressional intent regarding the application of rule 23 to section 706 actions can be drawn from the fact that prior to 1972 rule 23 had not been applied to section 707 actions.

D. *References in the Amended Statute to Rules of Civil Procedure*

Senator Javits' remarks do not constitute the final factor which should be examined in determining Congress' intent concerning the rule 23 issue. Perhaps the clearest indication of congressional intent that the Rules of Civil Procedure would apply to suits brought by the Commission under section 706 is the action Congress took with respect to the application of rule 53 to Commission actions. In 1972, Congress added the following subsection to amended section 706:

It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules

72. Of course, the Fifth Circuit Court of Appeals did indicate in *Holmes* that it believes that § 707 actions are not subject to the provisions of rule 23. See text accompanying note 16 *supra*.

73. The court made clear that it "need not delve into a labyrinthian search for the answer to whether the district court somehow erred in failing to certify the proceedings below as a class action before finally entering the decrees, for no one has briefed or argued the point in exactly those terms." 517 F.2d at 878, 11 Fair Empl. Prac. Cas. at 208.

74. 431 U.S. 324, 14 Fair Empl. Prac. Cas. 1514 (1977).

75. *Id.* at 332, 14 Fair Empl. Prac. Cas. at 1517-18.

76. *Id.* at 356 n.43, 14 Fair Empl. Prac. Cas. at 1527 n.43.

of Civil Procedure.⁷⁷

This provision was inserted by Congress in order to relax the rule 53 restrictions on the appointment of special masters.⁷⁸

Consideration of the rule 53 matter began with a colloquy between Senator Dominick and Senator Javits. The exchange was inspired by Senator Javits' comment that, under the amendment to S. 2515 which Senator Williams and he had proposed, the EEOC would act in the manner of a special master or referee.⁷⁹ Senator Dominick then asked Senator Javits what his reaction would be if language were added to the Dominick amendment that would sanction the appointment by district courts of hearing examiners or special masters to determine facts.⁸⁰ Senator Javits responded that he believed that the Federal Rules of Civil Procedure already permitted such appointments but that the courts did not in fact make them.⁸¹ Later in the debates, Senator Dominick argued on behalf of his court-enforcement amendment that if a federal court faced delay in hearing an EEOC case because of its caseload, it could expedite matters by appointing, pursuant to the Federal Rules of Civil Procedure, a hearing examiner to hear the case.⁸²

After the adoption of the Dominick amendment, Senator Javits offered another amendment to S. 2515 which provided that if a title VII action had been pending for more than 120 days after the joining of issues without the case having been scheduled for trial, the court would be required to appoint a special master to hear the case pursuant to rule 53 of the Federal Rules of Civil Procedure.⁸³ The amendment was modified to make the appointment of a master discretionary with the trial court. It was then adopted by the Senate and ultimately by the Conference Committee.⁸⁴ Senator Javits explained that this amendment was designed to relax the provisions of rule 53 which preclude the appointment

77. EEOA § 4(f)(5), 42 U.S.C. § 2000e-5(f)(5)(1976) (amending 42 U.S.C. § 2000e-5(f)(5) (1970)).

78. FED. R. CIV. P. 53(b) provides:

A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

79. EEOA LEGISLATIVE HISTORY, *supra* note 21, at 1428.

80. *Id.*

81. *Id.*

82. *Id.* at 1540.

83. *Id.* at 1675-76, 1683, 1730-31.

84. *Id.* at 1731, 1817.

of masters except in most unusual cases.⁸⁵

This congressional action is of great significance to the rule 23 issue because it demonstrates that Congress contemplated that the Federal Rules would apply to EEOC actions, as well as to other civil rights actions. Moreover, Congress deemed it necessary to qualify the application of the provisions of one of the rules to title VII actions. It can only be concluded that had Congress intended that rule 23 not apply to Commission suits, it would have taken similar action with respect to rule 23.

In one other instance, Congress did take similar action. Senator Williams offered an amendment which would permit aggrieved persons to intervene in civil actions brought by the EEOC or the Attorney General.⁸⁶ Senator Williams explained that while it was likely that an individual would have such right of intervention under the Federal Rules of Civil Procedure, he felt that it was necessary to make clear the existence of this right.⁸⁷ The Senate adopted Senator Williams' amendment⁸⁸ and ultimately it was incorporated into the 1972 amendments.⁸⁹ Thus, here too Congress took affirmative action to ensure that the provisions of a Federal Rule of Civil Procedure did not conflict with the purposes of the amendments.

The magistrate noted in *General Telephone* that the 1972 amendments specifically require the EEOC to comply with rule 65⁹⁰ when seeking a temporary restraining order or a preliminary injunction.⁹¹ Yet Congress made no reference to EEOC compliance with rule 23. Therefore, he reasoned, Congress did not intend that the EEOC should comply with rule 23.⁹²

85. *Id.* at 1731, 1848.

86. *Id.* at 1669.

87. *Id.* at 1670.

88. *Id.*

89. *Id.* at 1847, 1900.

90. FED. R. CIV. P. 65.

91. Section 706(f)(2) of the 1972 amendments provides in pertinent part:

Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission . . . may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure.

EEOA § 4(f)(2), 42 U.S.C. § 2000e-5(f)(2)(1976) (amending 42 U.S.C. § 2000e-5(f)(2) (1970)).

92. The magistrate stated:

Had Congress intended the Commission to be bound by Rule 23, the requirement should have been expressed in the statute. Congress saw fit to specifically require

There was no recorded debate in either house concerning the reference to rule 65, and the section-by-section analysis of the amendments sheds no light on the rationale for the reference. Thus, it simply is not clear why Congress referred to rule 65 in the 1972 amendments. An examination of the compromises made during the legislative process may provide, however, an explanation for the reference to rule 65. The Joint Explanatory Statement of Managers at the Conference on H.R. 1746 summarized the proposals made during the course of the legislative proceedings concerning the pertinent subsection in the following manner:

The Senate amendment authorized the Commission or the Attorney General to seek preliminary injunctive relief. The House bill authorized the Commission to seek preliminary relief and required a showing that substantial and irreparable injury to the aggrieved party would be unavoidable. The Senate receded with an amendment that authorizes the Commission or the Attorney General to seek preliminary injunctive relief and a provision that Rule 65 of the Federal Rules of Civil Procedure should govern all actions brought under this subsection.⁹³

The House bill contained limitations upon the right to obtain temporary injunctive relief which appear to have exceeded the limitations recognized under traditional principles of equity.⁹⁴ On the other hand, the Senate bill simply provided that whenever necessary to carry out the purposes of title VII, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision could "bring an action for appropriate temporary or preliminary relief pending final disposition of such charge."⁹⁵ In view of the differences between the

the EEOC to comply with the provisions of Rule 65 of the Federal Rules of Civil Procedure in connection with obtaining temporary or preliminary injunction relief under § 706(f)(2), but made no reference to compliance with Rule 23. The most reasonable conclusion to be drawn is that Congress did not intend to require the EEOC to comply with Rule 23.

EEOC v. General Tel. Co., 16 Fair Empl. Prac. Cas. 476, 479 (W.D. Wash. 1977).

93. EEOA LEGISLATIVE HISTORY, *supra* note 21, at 1816. *See id.* at 331.

94. Neither the proposed requirement that the aggrieved party's injury be "substantial" nor the requirement that it be "unavoidable" is among the traditional prerequisites for granting injunctive relief. *See, e.g.*, *Boys Mkts. Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970), in which the Supreme Court indicated that the "ordinary principles of equity" which must be scrutinized are "whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." *Id.* at 254. Arguably at least, "irreparable" injury is not necessarily the same as "substantial" and "unavoidable" injury since the House bill contained all three words. EEOA LEGISLATIVE HISTORY, *supra* note 21, at 331.

95. *Id.* at 1782.

House and Senate versions, the conferees may have found the traditional, familiar limitations contained in rule 65 to be an acceptable compromise. Moreover, the conferees may have felt that specific reference to rule 65 was a convenient and efficient method of setting forth the terms of the compromise which they had reached.⁹⁶ In any event, the scant attention paid this provision by Congressmen provides a compelling reason for declining to attach any significance to its inclusion. This is especially true in view of the fact that there exist so many other clear indications of congressional intent concerning rule 23 contrary to that discerned by the magistrate in *General Telephone*.

E. *Absence of Reference in the Amended Statute to Rule 23*

The discussion in the preceding section suggests that the significance, if any, which should be accorded Congress' failure to mention specifically rule 23 in the text of the 1972 amendments should be considered in a broader context. In other words, should congressional silence be regarded as a conscious failure to exempt the EEOC from compliance, as the courts in *Holmes* and *EEOC v. Akron National Bank & Trust Co.*⁹⁷ concluded, or as absence of any intention to require compliance, as the magistrate concluded in *General Telephone*.⁹⁸ The courts' conclusion is more reasonable. To conclude otherwise is to conclude also that Congress intended that only those Federal Rules specifically mentioned in title VII should be deemed applicable to Commission actions. Certainly Congress did not attempt to list in the statute each of the eighty-six Federal Rules which it intended would apply to any particular Commission action.

It is reasonable to presume that Congress was aware, at the time the 1972 amendments were drafted, of the general applicability of the Federal Rules of Civil Procedure to all civil actions.⁹⁹

96. Finally, in view of the specific limitation contained in rule 65(e), Congress may have wished to dispel any doubt about the applicability of rule 65. Rule 65(e) states that "[t]hese rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee. . . ." FED. R. CIV. P. 65(e).

97. 78 F.R.D. 684, 17 Fair Empl. Prac. Cas. 636 (N.D. Ohio 1978).

98. See notes 56 & 57 *supra*. Rule 23 is not limited by its terms to the application to any particular type of plaintiff or defendant who is a party to a class action. See note 12 *supra*.

99. The rules, as amended from time to time, have been prescribed by the Supreme Court and submitted to Congress for its review and possible action. See 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 10001-10007 (1969). 28 U.S.C. § 2072 (1976) provides in pertinent part:

Rule 1 states that the "rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81."¹⁰⁰ The language of this rule has remained essentially the same since the promulgation of the Federal Rules in 1938.¹⁰¹ The rule 81 exceptions do not include any category that could be deemed to exempt civil rights actions brought by the United States or any of its agencies from coverage by the Federal Rules.¹⁰² Nor has rule 81 ever contained such an exception.¹⁰³ Moreover, the applicability of the Federal Rules to actions in

The Supreme Court shall have the power to prescribe by general rules . . . the practice and procedure of the district courts and courts of appeals of the United States in civil actions. . . .

. . .

Such rules shall not take effect until they have been reported to Congress. . . .

. . . Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

100. FED. R. CIV. P. 1.

101. See 4 C. WRIGHT & A. MILLER, *supra* note 99, § 1011, at 68-69.

102. FED. R. CIV. P. 81(a)(1)-(6) provides in pertinent part:

(a) To What Proceedings Applicable.

(1) These rules do not apply to prize proceedings in admiralty [or] to proceedings in bankruptcy or proceedings in copyright. . . . They do not apply to mental health proceedings in the United States District Court for the District of Columbia.

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. . . .

(3) In proceedings under Title 9, U.S.C. relating to arbitration, or under . . . Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

(4) These rules do not alter the methods prescribed by [designated statutes] . . . for instituting proceedings in the United States district courts to review orders of the Secretary of Agriculture [or] of the Secretary of the Interior [or] of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules as far as applicable.

(5) These rules do not alter the practice in the United States district courts prescribed . . . for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, . . . except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship . . . remain in effect.

103. See 7 MOORE'S FEDERAL PRACTICE ¶ 81.01[1], at 81-89 (2d ed. 1978).

which the United States is a party is clearly indicated by a number of specific references to the United States in the Rules themselves. For example, rule 4(d)(4) provides for personal service of summons upon the United States, rule 12(a) specifies that an answer must be served by the United States within sixty days after service of summons and complaint, and rule 55(e) forbids the granting of a default judgment against the United States except upon proof of the claim.¹⁰⁴

Finally, as was pointed out earlier with respect to the application of rule 53 to Commission actions¹⁰⁵ and as was noted by the court in *Holmes*,¹⁰⁶ Congress certainly knows how to establish exemptions from the Federal Rules. It did not do so with respect to the application of rule 23 to section 706 actions brought by the Commission. It is, therefore, reasonable to conclude, for this reason as well as the others discussed previously, that Congress intended that rule 23 would apply to such actions.

F. *Frustration of Congressional Intent*

Before concluding the discussion of congressional intent, an argument made by two district courts should be noted. In *General Telephone* and in *EEOC v. Schlueter Manufacturing Co.*,¹⁰⁷ the courts based their decisions, at least in part, on the premise that application of rule 23 to Commission actions would frustrate Congress' intent to strengthen the enforcement provisions of title VII.¹⁰⁸ The courts confused a matter of degree with one of kind.

104. See also FED. R. CIV. P. 13(d), 15(c), 25(d), 37(f), 39(c), 45(c), 54(d), 62(e), 65(c), 69(b).

Federal courts had held prior to 1971 that the United States and its agencies are subject to the Federal Rules just as are any other litigants who are properly before federal courts. See, e.g., *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681 (1958); *Mitchell v. Bass*, 252 F.2d 513, 517 (8th Cir. 1958). The courts had also held prior to 1971 that § 706 actions brought by private persons on behalf of themselves and other individuals were subject to the provisions of rule 23. See, e.g., *Oatis v. Crown Zellerbach Co.*, 398 F.2d 496, 499, 1 Fair Empl. Prac. Cas. 328, 330 (5th Cir. 1968). Rule 23 is not limited by its terms to the application to any particular type of plaintiff or defendant who is a party to a class action. See note 12 *supra*.

105. See text accompanying notes 77-86 *supra*.

106. In *Holmes*, the court of appeals noted that since 1973, proceedings under the Bankruptcy Act have been conducted under special rules of procedure promulgated pursuant to 28 U.S.C. § 2075 (1976). 556 F.2d at 795 n.12, 15 Fair Empl. Prac. Cas. at 384 n.12. See note 102 *supra* and accompanying text.

107. 17 Fair Empl. Prac. Cas. 53 (E.D. Mo. 1978).

108. In *General Telephone* the court reasoned:

It seems unlikely that Congress would expand the enforcement power of the EEOC by giving it the right to sue, and then restrict it to the procedures available prior to the amendments. If the EEOC were bound by Rule 23, then its enforce-

As mentioned earlier,¹⁰⁹ the dominant issue of the 1971-72 debates was whether the EEOC should be granted enforcement powers by according it the authority to issue cease-and-desist orders or by enabling it to sue in federal district court. The use of either mechanism would have increased the EEOC's enforcement power since previously it was authorized only to institute actions to compel compliance with court orders. Thus, even though the application of rule 23 to Commission actions would place some limitations upon the prosecution of such actions, it would not frustrate Congress' purpose of increasing the Commission's enforcement powers. The Commission would still be empowered to bring class actions in all instances that it deems appropriate and that are otherwise appropriate in light of the provisions of rule 23, as liberally interpreted in title VII actions.¹¹⁰ Prior to 1972, the Commission could not have brought any enforcement actions, and it could not have sought to remedy any violations of title VII left uncorrected by private individuals and the Attorney General. Moreover, the EEOC can now bring to bear in an initial action the agency's considerable expertise and resources, factors which often are absent in actions brought by private individuals.

Supporters of the cease-and-desist approach realized that granting the EEOC court-enforcement powers would strengthen title VII. They also recognized that the enforcement process would be subject to limitations which they had sought to avoid. Senator Williams remarked, in a statement preceding the section-by-section analysis of the 1972 amendments, that the court-enforcement "process may be somewhat slower and more cumbersome than the cease-and-desist procedure which we originally sought. But, in the final analysis, I most firmly believe that we will get the desired enforcement."¹¹¹ In the House, Congressman O'Hara asserted that the Erlenborn court-enforcement bill offered

ment power would be no greater than that of any individual, and the 1972 changes would be meaningless.

16 Fair Empl. Prac. Cas. at 479. In *Schlueter Manufacturing*, the court similarly concluded: "Chief among the stated reasons for the various amendments was Congress' belief that the then existing enforcement provisions of Title VII were inadequate. Requiring the Commission to seek class certification prior to being able to seek relief in the public interest would clearly frustrate this purpose." 17 Fair Empl. Prac. Cas. at 54 (citation omitted).

109. See text accompanying note 21 *supra*.

110. See, e.g., *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1127, 2 Fair Empl. Prac. Cas. 231, 235 (5th Cir. 1969) (Godbold, J., concurring); *Lamphere v. Brown Univ.*, 71 F.R.D. 641, 650 (D.R.I. 1975), *appeal dismissed*, 553 F.2d 714 (1st Cir. 1977).

111. EEOA LEGISLATIVE HISTORY, *supra* note 21, at 1843.

aggrieved parties no rights they did not already possess.¹¹² The House, however, was not persuaded and adopted the Erlenborn bill.

In effect, *General Telephone* and *Schleuter Manufacturing* repeated the argument made by Congressman O'Hara.¹¹³ Making this argument is tantamount to asserting that since Congress intended to give the EEOC enforcement powers by giving it the right to sue in federal court, Congress must necessarily have also intended that such actions would not be subject to any of the limitations or guidelines which are normally applied to civil suits. The shortcomings of this argument are apparent.

III. POLICY CONSIDERATIONS CONCERNING THE APPLICATION OF RULE 23 TO SECTION 706 ACTIONS BROUGHT BY THE EEOC

The inquiry concerning the application of rule 23 to section 706 actions brought by the EEOC might reasonably be concluded by deciding that Congress intended that rule 23 would apply to such actions. While congressional will is usually determinative of such an issue, an examination of relevant policy arguments is also important. Contrary to assertions made by the EEOC and several courts, there are no substantial reasons why rule 23 should not be applied to Commission actions. Indeed, there are good reasons why the provisions of the rule should be applied.

A. *Class Membership*

In *Holmes*, the EEOC argued that it could never satisfy the requirement of rule 23 that the representative of the class be a member of the class.¹¹⁴ Such an inability would, so the theory goes, prevent the Commission from bringing any section 706 enforcement actions. This argument is apparently buttressed by a literal application of language found in the Supreme Court's deci-

112. *Id.* at 263-64.

113. See note 108 *supra* and accompanying text.

114. 556 F.2d at 792, 796, 15 Fair Empl. Prac. Cas. at 382, 386; Petition for Rehearing and Suggestion for Rehearing En Banc by the Appellant Equal Employment Opportunity Commission at 4-6, EEOC v. D.H. Holmes Co., (5th Cir. 1977) [hereinafter cited as EEOC Petition for Rehearing]. Several district courts have agreed with the Commission's argument. EEOC v. Akron Nat'l Bank & Trust Co., 78 F.R.D. 684, 688 (N.D. Ohio 1978); EEOC v. Whirlpool Corp., 16 Fair Empl. Prac. Cas. 932 (N.D. Ind. 1978); EEOC v. General Tel. Co., 16 Fair Empl. Prac. Cas. 476 (W.D. Wash. 1977); EEOC v. Pinkerton's, Inc., 14 Fair Empl. Prac. Cas. 1431 (W.D. Pa. 1977).

sion in *East Texas Motor Freight System, Inc. v. Rodriguez*.¹¹⁵ In that case the Court held, in part, that the Fifth Circuit Court of Appeals had erred in certifying a private class action because the named plaintiffs had not suffered the alleged discrimination. Since they were not members of the class they purported to represent, the named plaintiffs were not proper class representatives under rule 23.¹¹⁶

In *Holmes*, the court of appeals responded to the Commission's argument concerning class membership by reasoning that since Congress had given the Commission standing to sue, the Commission was a real party in interest, and thus for purposes of rule 23, was a member of the class.¹¹⁷ The court also reasoned that it would be anomalous to hold that an enforcement agency such as the EEOC could never satisfy the membership requirement of rule 23 when earlier cases had held that certain private organizations, although technically not members of a class, had satisfied this requirement.¹¹⁸

In *EEOC v. Whirlpool Corp.*,¹¹⁹ the district court agreed with the conclusion of *Holmes* that the amended language of section 706 had given the Commission standing to sue and had made the Commission a real party in interest. However, the court did not agree that the Commission could satisfy the requirement of class

115. 431 U.S. 395, 14 Fair Empl. Prac. Cas. 1505 (1977).

116. The Court in *East Texas* noted that the plaintiffs "were not members of the class of discriminatees they purported to represent. As this Court has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Id.* at 403, 14 Fair Empl. Prac. Cas. at 1508.

117. 556 F.2d at 795-96, 15 Fair Empl. Prac. Cas. at 386. The *Holmes* court emphasized that Congress itself had "conferred standing on EEOC. Congress has thus determined that EEOC does sufficiently 'possess the same interest and suffer the same injury' as the class members for whom it would sue." *Id.* at 796 n.16, 15 Fair Empl. Prac. Cas. at 386 n.16. The district court in *Page Engineering Co.* also relied on this rationale in concluding that the EEOC should be deemed a class member for the purposes of rule 23. 17 Fair Empl. Prac. Cas. 1638, 1640 (N.D. Ill. 1978).

118. 556 F.2d at 796-97, 15 Fair Empl. Prac. Cas. at 386. *Holmes* cited *Smith v. Board of Educ.*, 365 F.2d 770, 777 (8th Cir. 1966) and *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2d Cir. 1968).

Other decisions not cited in *Holmes* in which courts have rejected the argument that the class representative is not a technical member of the class include *Thompson v. Board of Educ.*, 71 F.R.D. 398, 404 (W.D. Mich. 1976); *U.S. v. Truckee-Carson Irrigation Dist.*, 71 F.R.D. 10, 16 (D. Nev. 1975); *Undergraduate Student Ass'n v. Peltason*, 359 F. Supp. 320, 321 (N.D. Ill. 1973). See *Harris v. Pan Am. Airways, Inc.*, 74 F.R.D. 24 (N.D. Cal. 1977); *National Hairdressers & Cosmetologists' Ass'n v. Philadelphia Co.*, 7 Fed. R. Serv. 17a.151, Case 1 (D. Del. 1943).

119. 16 Fair Empl. Prac. Cas. 932 (N.D. Ind. 1978).

membership.¹²⁰ In reaching this determination, the court in *Whirlpool* distinguished two cases relied upon in *Holmes: Smith v. Board of Education*¹²¹ and *Norwalk CORE v. Norwalk Redevelopment Agency*.¹²² According to the *Whirlpool* court, these cases involved only the issue of standing and not whether organizations that technically are not members of a class can nonetheless act as class representatives.¹²³ The assessment of these decisions by the *Whirlpool* court is in error.

Smith v. Board of Education was a civil rights action brought by the Arkansas Teachers Association (ATA) and an individual teacher.¹²⁴ Justice (then Judge) Blackmun wrote for the court:

[T]o argue that ATA here is not a member of the class for which relief is sought, is, we think, but another way of arguing the question whether ATA is a real party in interest. Having held that ATA is a proper party in this latter respect, we think it follows that it is not to be dismissed from the case because of Rule 23(a).¹²⁵

Norwalk CORE v. Norwalk Redevelopment Agency was a class action suit brought under rule 23 by the Norwalk, Connecticut chapter of the Congress of Racial Equality, two tenant associations, and eight individuals.¹²⁶ The Second Circuit Court of Appeals felt that "the reasons for requiring an individual plaintiff in a class action to be a member of the class do not necessarily preclude an association from representing a class where its *raison d'être* is to represent the interests of that class."¹²⁷ The court declined to decide the question of the association's standing since it appeared to the court that the individual plaintiffs could adequately represent the interests of all members of the class.¹²⁸

In concluding that the EEOC cannot be a member of a class within the meaning of rule 23, the *Whirlpool* court relied upon *Local 194, Retail, Wholesale and Department Store Union v. Standard Brands, Inc.*¹²⁹ In that case the Court of Appeals for the Seventh Circuit held that a union bringing a civil rights action on behalf of its members has standing only to seek injunctive or de-

120. *Id.* at 935, 940.

121. 365 F.2d 770, 9 Fair Empl. Prac. Cas. 1081 (8th Cir. 1966).

122. 395 F.2d 920 (2d Cir. 1968).

123. 16 Fair Empl. Prac. Cas. at 938.

124. 365 F.2d at 773, 9 Fair Empl. Prac. Cas. at 1082.

125. *Id.* at 777, 9 Fair Empl. Prac. Cas. at 1085 (citation omitted).

126. 395 F.2d at 923.

127. *Id.* at 937. Professors Wright and Miller agree with this view. See note 137 *infra*.

128. *Id.* at 937-38.

129. 540 F.2d 864, 13 Fair Empl. Prac. Cas. 499 (7th Cir. 1976).

claratory relief and that such an action is not governed by the provisions of rule 23.¹³⁰ After reaching the latter conclusion, the court observed that "an organization suing solely as a representative of one or more of its members would be unable to meet all the requirements of Rule 23, if those requirements were read literally. It is not a member of the class of persons whose rights are to be vindicated. . . ." ¹³¹

No real significance concerning the application of rule 23 to EEOC lawsuits can be drawn from the court's conclusion. The court emphasized that the union had standing to seek only prospective, noncompensatory relief on behalf of its members. A declaratory or injunctive suit brought by a union differs markedly from a damage suit brought by the EEOC or by a private class.¹³² Thus, the analogy drawn by the *Whirlpool* court is not apt, and the court's reliance on *Local 194* is inappropriate.

The view adopted by the court in *Holmes* concerning the EEOC's ability to be a member of a class is more reasonable and less technical than that espoused in *Whirlpool*. There is no room for doubt that Congress provided the Commission with standing to sue under section 706.¹³³ Nor is there any doubt that the EEOC is a real party in interest within the meaning of rule 17(a)¹³⁴ when it initiates section 706 actions.¹³⁵ Furthermore, since Congress in-

130. The court based this holding upon the pronouncements of the Supreme Court in *Warth v. Seldin*, 422 U.S. 490 (1975) (An organization which has not suffered monetary injury has no standing to recover damages for its individual members but does have standing to seek injunctive or declaratory relief.).

131. 540 F.2d at 867, 13 Fair Empl. Prac. Cas. at 502.

132. The former action is much like an action brought by a single individual on his own behalf since the practical effect of injunctive or declaratory relief is likely to be the same whether sought on behalf of one or many individuals. See *EEOC v. D.H. Holmes Co.*, 556 F.2d 787, 793, 15 Fair Empl. Prac. Cas. 378, 383 (5th Cir. 1977), *cert. denied*, 436 U.S. 962, 17 Fair Empl. Prac. Cas. 1000 (1978) and cases cited therein; *EEOC v. Datapoint Corp.*, 12 Fair Empl. Prac. Cas. 1133, 1134 (W.D. Tex. 1975), *aff'd in part*, 570 F.2d 1264, 17 Fair Empl. Prac. Cas. 281 (5th Cir. 1978); *Davy v. Sullivan*, 354 F. Supp. 1320 (M.D. Ala. 1973). Thus, the application of rule 23 is not required to ensure the economical use of judicial and private resources.

133. See text accompanying note 119 *supra*. Even the court in *Whirlpool* agreed that such was the case. 16 Fair Empl. Prac. Cas. at 935. Congress may confer standing to sue "even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. 490, 514 (1975).

134. FED. R. CIV. P. 17(a) provides in part:

Every action shall be prosecuted in the name of the real party in interest. . . . [A] party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

135. As previously noted, even the *Whirlpool* court recognized that the EEOC is a real

tended that the EEOC would be a "properly suing" party within the meaning of rule 23 when it brings section 706 actions,¹³⁶ it would serve the purposes of both rule 23 and title VII to hold that the EEOC is a member of a class within the meaning of rule 23(a).¹³⁷

B. *Adequacy of Representation*

In addition to asserting the class membership argument, the EEOC has also argued that since its purpose in bringing suit is to represent the public interest, it must be excused from compliance with the requirements of rule 23.¹³⁸ A number of district courts have concluded that because the EEOC does represent the public interest, it cannot qualify as an adequate class representative within the meaning of rule 23(a)(4).¹³⁹ These courts have reasoned that the public interest which the EEOC represents as a

party in interest. 16 Fair Empl. Prac. Cas. at 935. See note 119 *supra* and accompanying text.

136. See text accompanying note 46 *supra*.

137. See *EEOC v. Delaware Trust Co.*, 18 Fair Empl. Prac. Cas. 1521, 1526 (D. Del. 1979).

Professors Wright and Miller have concluded that the approach used by the Eighth Circuit in *Smith v. Board of Education*—focusing upon the existence of standing and status as a real party in interest in resolving the issue of class membership—is the proper one:

This approach seems sound inasmuch as the primary consideration should be whether the party can adequately represent the interests of the class. Once adequacy of representation and standing are established, the action should not be defeated because of the technical point that an organization, which is the real party in interest, is not a member itself.

7 C. WRIGHT & A. MILLER, *supra* note 99, § 1761, at 591-92.

138. FED. R. CIV. P. 23(a)(4) provides: "(A) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class." The EEOC argues that it cannot meet this prerequisite: For example, "a private party typically seeks an award of backpay for purposes of restitution; the EEOC, by contrast, may well seek backpay in section 706 proceeding principally to serve the public purpose by giving employers the 'incentive to shun practices of dubious legality.'" *Petition for Certiorari*, *supra* note 20, at 10-11 (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)). See *EEOC v. Delaware Trust Co.*, 18 Fair Empl. Prac. Cas. 1521 (D. Del. 1979); *EEOC v. Akron Nat'l Bank & Trust Co.*, 78 F.R.D. 684, 686, 17 Fair Empl. Prac. Cas. 636, 638 (N.D. Ohio 1978); *EEOC Petition for Rehearing*, *supra* note 114, at 2-4.

139. *EEOC v. Akron Nat'l Bank & Trust Co.*, 8 F.R.D. 684, 688, 17 Fair Empl. Prac. Cas. 636, 639-40 (N.D. Ohio 1978); *EEOC v. Whirlpool Corp.*, 16 Fair Empl. Prac. Cas. 932, 935 (N.D. Ind. 1978); *EEOC v. General Tel. Co.*, 16 Fair Empl. Prac. Cas. 476, 479 (W.D. Wash. 1977).

Other decisions in which courts have relied at least in part upon some form of this "public purpose" argument in holding that the EEOC need not comply with rule 23 include *EEOC v. Raymond Metal Prods. Co.*, 17 Fair Empl. Prac. Cas. 206 (D. Md. 1978); *EEOC v. Pinkerton's Inc.*, 14 Fair Empl. Prac. Cas. 1431 (W.D. Pa. 1977); *EEOC v. CTS*, 13 Fair Empl. Prac. Cas. 852 (W.D. N.C. 1976); *EEOC v. Vinnell-Dravo-Lockheed-Man-*

complainant may conflict with the private interests of the aggrieved individuals involved in the suit; that is, the EEOC may be more concerned with broad injunctive and affirmative relief affecting future compliance with title VII than with the redress of injuries already suffered by individual employees.¹⁴⁰

Courts have noted several factors that may demonstrate a divergence of public and private interests in title VII actions. First, Congress granted the EEOC and private plaintiffs the right to intervene in one another's section 706 actions. This legislative action may reflect congressional opinion that the interests of the EEOC and private plaintiffs are not coextensive.¹⁴¹ Second, some courts have held that private individuals are not bound by judgments obtained in suits brought by the EEOC.¹⁴² Finally, where a private party has filed an action, the EEOC has been permitted to file a separate action when the scope of its complaint is broader than that of the private party.¹⁴³

While indeed there may be both public and private interests involved in section 706 actions, any conflict between the two seems more theoretical than real and is unlikely ever to render the EEOC a less than adequate representative under rule 23(a)(4). In the context of an actual prosecution by the EEOC of a section 706 action, there is no reason why the EEOC's interest in obtaining broad, affirmative relief would be inconsistent with efforts to obtain backpay, whether for deterrence or restitution, for aggrieved

nix, 417 F. Supp. 575 (E.D. Wash. 1975); and *EEOC v. Lutheran Hosp.*, 10 Fair Empl. Prac. Cas. 1177 (E.D. Mo. 1974).

140. *EEOC v. Whirlpool Corp.*, 16 Fair Empl. Prac. Cas. 932, 935 (N.D. Ind. 1978); *EEOC v. General Tel. Co.*, 16 Fair Empl. Prac. Cas. 476, 479 (W.D. Wash. 1977). In *Rodriguez v. East Tex. Motor Freight*, 505 F.2d 40, 8 Fair Empl. Prac. Cas. 1246 (5th Cir. 1974), *rev'd on other grounds*, 431 U.S. 395, 14 Fair Empl. Prac. Cas. 1505 (1977), the court noted that although "the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution." 505 F.2d at 66, 8 Fair Empl. Prac. Cas. at 1266.

141. *EEOC v. Akron Nat'l Bank & Trust Co.*, 78 F.R.D. 684, 688, 17 Fair Empl. Prac. Cas. 636, 640 (N.D. Ohio 1978); *EEOC v. Whirlpool Corp.*, 16 Fair Empl. Prac. Cas. 932, 936 (N.D. Ind. 1978).

142. *See EEOC v. Whirlpool Corp.*, 16 Fair Empl. Prac. Cas. 932, 936 (N.D. Ind. 1978); *EEOC v. General Tel. Co.*, 16 Fair Empl. Prac. Cas. 476, 479 (W.D. Wash. 1977). In addition, § 706(f)(1) provides that without a party's consent, the EEOC's consent to a conciliation agreement cannot bind that party. *EEOA* § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1976); *see* *Petition for Certiorari*, *supra* note 20, at 13-14.

143. *EEOC v. Whirlpool Corp.*, 16 Fair Empl. Prac. Cas. 932, 936 (N.D. Ind. 1978). *See also EEOC v. Occidental Life Ins. Co.*, 535 F.2d 533 (9th Cir. 1976), *aff'd*, 432 U.S. 355 (1977); *EEOC v. Kimberly Clark*, 511 F.2d 1352 (6th Cir. 1975); *EEOC v. General Elec.*, 532 F.2d 359 (4th Cir. 1976).

individuals.¹⁴⁴ In the context of an attempt by the EEOC to settle a section 706 action, the provisions of rule 23(e) require the district court to insure that neither public nor private interests are unfairly compromised by a settlement.¹⁴⁵

As a practical matter, the public and private interests involved in a section 706 action invariably coincide. The EEOC decides whether to initiate its actions by examining activities which it believes have resulted in injuries to specific groups of employees.¹⁴⁶ Moreover, for years private plaintiffs have maintained class actions under section 706 that have vindicated not only individual interests but also, according to the courts, important public interests as well.¹⁴⁷ Thus, the courts have concluded that such private plaintiffs are capable of adequately representing both private and public interests.

The antagonism that will defeat a claim of representative status is antagonism that goes to the very subject matter of the litigation.¹⁴⁸ That level of antagonism does not exist between the

144. If, after 1972, there does remain any meaningful distinction between §§ 706 and 707, see text accompanying note 227-32 *infra*, then it is that § 706 is still designed primarily to redress *individual* rights. See *EEOC v. Continental Oil Co.*, 548 F.2d 884, 887 (10th Cir. 1977); *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 843, 11 Fair Empl. Prac. Cas. 167, 179 (5th Cir. 1975), *cert. denied*, 425 U.S. 826, 12 Fair Empl. Prac. Cas. 1090 (1976). Insofar as monetary relief is sought for individuals, even a § 707 "pattern or practice" suit is a "private" and not a "public" lawsuit. *United States v. Georgia Power Co.*, 474 F.2d 906, 923, 5 Fair Empl. Prac. Cas. 587, 599 (5th Cir. 1973).

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

Section 1.46 of the *Manual for Complex Litigation* advises courts of the inquiries which should be made in determining whether a proposed settlement is fair and reasonable and states that "Rule 23(e) makes the court the protector of the rights of absent class members." FEDERAL JUDICIAL CENTER, *MANUAL FOR COMPLEX LITIGATION*, § 1.46, at 61 (1978). If the requirements of rule 23(e) would compel the EEOC to consider interests of aggrieved persons which it would otherwise ignore, making some settlements more difficult to achieve, the difficulties would be justified by the broad, remedial purposes of the statute itself.

146. Even in targeting employers for § 707 "pattern or practice" actions, the EEOC looks to the effect of employment practices upon groups of employees. See 28 DAILY LAB. REP. (BNA) A-5 (Feb. 8, 1979); 56 DAILY LAB. REP. (BNA) A-6 (Mar. 22, 1978).

147. See, e.g., *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45, 7 Fair Empl. Prac. Cas. 81, 84 (1975); *Local 194, Retail, Wholesale and Dep't Store Union v. Standard Brands, Inc.*, 540 F.2d 864, 866, 13 Fair Empl. Prac. Cas. 499, 500 (7th Cir. 1976); *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 848, 11 Fair Empl. Prac. Cas. 167, 183 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Karan v. Nabisco, Inc.*, 17 Fair Empl. Prac. Cas. 507, 511 (W.D. Pa. 1978); *Wilhite v. South Cent. Bell Tel. & Tel. Co.*, 426 F. Supp. 61, 63 (E.D. La. 1976).

148. See, e.g., *Berman v. Narragansett Racing Ass'n*, 414 F.2d 311, 317 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970); *Redmond v. Commerce Trust Co.*, 144 F.2d 140, 151

interest in obtaining broad injunctive relief and the interest in recovering backpay as restitution for victims of discrimination. The interests of the representative and the members of the class need not be identical; they need only share common objectives and legal or factual positions.¹⁴⁹ Moreover, the interests of the representative may go beyond those of the class without being in conflict with those of the class.¹⁵⁰

The main consideration in determining the adequacy of representation under rule 23(a)(4) is the forthrightness and vigor with which the representative of the class can be expected to defend the interests of the members of the class.¹⁵¹ While the EEOC may be concerned with protecting a public interest when it brings a section 706 action seeking backpay for aggrieved individuals, that motive does not prevent it from representing aggrieved individuals with the requisite forthrightness and vigor.¹⁵²

In *Holmes*, the court stated that the question of the adequacy of the EEOC's representation is a question of fact that should be "resolved in the trial court in the usual manner."¹⁵³ Other courts reaching the same conclusion have held that the EEOC should not be deemed a less than adequate representative as a matter of law merely because it represents public as well as private interests. Rather, the question of the EEOC's adequacy as the representative of a class should be decided on a case-by-case basis.¹⁵⁴

Such an approach is reasonable and proper. There simply is

(8th Cir. 1944), *cert. denied*, 323 U.S. 776 (1944); *Lamphere v. Brown Univ.*, 71 F.R.D. 641, 650 (D.R.I. 1976), *appeal dismissed*, 553 F.2d 714 (1st Cir. 1977); 7 C. WRIGHT & A. MILLER, *supra* note 99, § 1768, at 639.

149. *See, e.g.*, *Russell v. American Tobacco Co.*, 528 F.2d 357, 365 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *Fujita v. Sumitomo Bank*, 70 F.R.D. 406, 410-11 (N.D. Cal. 1975); *Fertig v. Blue Cross*, 68 F.R.D. 53, 57 (N.D. Iowa 1974); *Zarate v. State Dep't of Health & Rehabilitative Serv.*, 347 F. Supp. 1004 (S.D. Fla. 1971); *Feder v. Harrington*, 52 F.R.D. 178 (S.D.N.Y. 1970); 7 C. WRIGHT & A. MILLER, *supra* note 99, § 1769, at 655.

150. *Bucha v. Illinois High School Ass'n*, 351 F. Supp. 69, 72 (N.D. Ill. 1972); *First Am. Corp. v. Foster*, 51 F.R.D. 248, 250 (N.D. Ga. 1970).

151. *E.g.*, *Mearsay v. First Republic Corp.*, 43 F.R.D. 465, 470 (S.D.N.Y. 1968); 7 C. WRIGHT & A. MILLER, *supra* note 99, § 1768, at 646-47.

152. *See generally* 7 C. WRIGHT & A. MILLER, *supra* note 99, § 1768, at 647.

153. *EEOC v. D.H. Holmes Co.*, 556 F.2d 787, 797, 15 Fair Empl. Prac. Cas. 378, 386 (5th Cir. 1977).

154. A district court took this position in *EEOC v. Page Eng'r Co.*, 17 Fair Empl. Prac. Cas. 1638, 1640 (N.D. Ill. 1978). In *Harris v. Anaconda Aluminum Co.*, 17 Fair Empl. Prac. Cas. 181 (N.D. Ga. 1978), the EEOC successfully complied with rule 23 in a decision rendered subsequent to *Holmes* by a district court sitting within the Fifth Circuit. The defendant employer contended that neither the EEOC nor the individual plaintiffs would be adequate representatives of the class. The district court noted a portion of the comments of the appeals court in *Holmes* and then concluded that "thus far" the EEOC had aggres-

no justification for concluding as a matter of law that the EEOC can never adequately represent the interests of a class. If in a particular instance, a district court does perceive potential antagonism between the EEOC and a class of aggrieved employees, it can conduct a hearing to determine the extent and significance of any such antagonism and can weigh it against the vigor and expertise with which the EEOC can be expected to pursue the interests of the class. Even if a court discerns actual antagonism, it may be able to employ the provisions of rule 23(c)(4) and (d)¹⁵⁵ to tailor the action and minimize the effects of the antagonism.¹⁵⁶

C. *Impediments to Enforcement Efforts*

The EEOC has argued that its enforcement efforts will be hindered if the requirements of rule 23 are applied to section 706 actions. Specifically, the EEOC has pointed to the numerosity requirement of rule 23(a)(1),¹⁵⁷ the typicality requirement of 23(a)(3),¹⁵⁸ and the manageability requirement¹⁵⁹ as potential impediments. A district court has also concluded that the application of rule 23 would occasionally make settlement of EEOC suits more difficult.¹⁶⁰ Whatever merit these concerns may have, they are more than offset by the interests served by the application of rule 23.

sively pursued the litigation, had protected the interests of the class, and therefore would be permitted to act as class representative in the suit. *Id.* at 185.

155. FED. R. CIV. P. 23(c)(4) provides: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." Rule 23(d) provides in pertinent part: "In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (3) imposing conditions on the representative parties or on intervenors; . . . (5) dealing with similar procedural matters."

156. *See generally* Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968); Karan v. Nabisco, Inc., 17 Fair Empl. Prac. Cas. 507, 519 (W.D. Pa. 1978); 7 C. WRIGHT & A. MILLER, *supra* note 99, § 1768; 7A *id.* §§ 1794, 1796.

157. Petition for Certiorari, *supra* note 20, at 15. For the pertinent text of the rule, see note 158 *infra*.

158. Petition for Certiorari, *supra* note 20, at 14. FED. R. CIV. P. 23(a) provides that among the prerequisites to a class action are "(1) the class is so numerous that joinder of all members is impracticable . . . [and] (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class. . . ."

159. *See* notes 189-95 *infra* and accompanying text; 156 DAILY LAB. REP. (BNA) A-11 (Aug. 11, 1976).

160. EEOC v. Whirlpool Corp., 16 Fair Empl. Prac. Cas. 932, 939 (N.D. Ind. 1978). *See* notes 140-145 *supra* and accompanying text.

1. *The Numerosity Requirement*

The Commission has argued that the numerosity requirement would impede its enforcement efforts because it would be precluded from seeking relief in a section 706 action on behalf of any group of individuals, with the exception of the charging party or parties, unless it could demonstrate that joinder of all of the potential plaintiffs would be impractical.¹⁶¹ The district court in *EEOC v. Whirlpool Corp.*¹⁶² supported this view and detailed what it perceived to be the practical difficulties of imposing the numerosity requirement:

[I]n cases where the class of aggrieved employees is too small for that requirement to be met, those discriminatees would as a practical matter often be left without legal recourse. Because the Commission would be precluded from representing them, these discriminatees could join the Commission's suit only if they retained private counsel. While the Act provides for the appointment of attorneys at the court's discretion, it is unclear whether this provision extends beyond private parties who bring their own separate Title VII suits. If the provision does indeed extend to cases where discriminatees seek joinder in a suit already brought by the Commission, the cost of court-appointed private counsel for each individual discriminatee seeking joinder will be great. If an employee seeking joinder in a Commission suit is unable to convince a court that he satisfies the criteria for court-appointed counsel, relief for that employee may be effectively foreclosed. In many cases the back pay award due that aggrieved employee will be too small to warrant retaining private counsel.¹⁶³

In order to make its point, the *Whirlpool* court hypothesized a very special set of facts. Not only does its example contemplate a class too small to satisfy the numerosity requirement, but it also assumes a class of employees who cannot satisfy the statute's criteria for court-appointed attorneys¹⁶⁴ and whose claims are insuffi-

161. Petition for Certiorari, *supra* note 20, at 15; see *EEOC v. Delaware Trust Co.*, 18 Fair Empl. Prac. Cas. 1521, 1523 (D. Del. 1979).

162. 16 Fair Empl. Prac. Cas. 932 (N.D. Ind. 1978).

163. *Id.* at 939 (citation omitted). The court also took the position that the EEOC could seek class relief under § 707 without having to comply with the requirements of rule 23.

164. Section 706(f)(1) provides for the appointment by the court of an attorney for a complainant "in such circumstances as the court may deem just." EEOA § 7(f)(1), 42 U.S.C. § 2000e-5(f)(1) (1976). The language of the statute provides no basis for the fear expressed by the court in *Whirlpool* that, with respect to the appointment of counsel, courts will distinguish situations involving the joinder of plaintiffs from those in which plaintiffs initiate separate actions.

There is, however, no automatic right to appointment of counsel in a title VII case.

cient to warrant retention of private counsel. Rarely would these circumstances converge in a suit brought by the Commission, and even if they did, the bringing of such a suit would not be an efficient use of the Commission's enforcement resources. Employees who cannot satisfy the criteria for court-appointed attorneys and whose claims do not warrant the retention of counsel have not, at least in relative terms, suffered serious injury. Furthermore, if the EEOC chose to prosecute such a case despite these considerations, it still could obtain the injunctive relief necessary to end any discriminatory practices shown to have existed.¹⁶⁵

It should also be noted that existing case law provides a basis for a flexible treatment of the numerosity requirement. First, there is no set standard for class size that is applied by the courts in determining whether the class is so numerous as to make join-

Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972). The court's discretionary decision whether to appoint counsel depends on a number of factors, including the merits of the asserted claim. Although the district court may not refuse to appoint counsel for an employment discrimination claimant solely because the Commission has found no reasonable basis for the claim, *Caston v. Sears, Roebuck & Co.*, 556 F.2d 1305 (5th Cir. 1977), it may be considered as an important factor. *Id.* at 1309. Another factor is the amount of effort shown by the plaintiff to obtain counsel. *Spanos v. Penn Cent. Transp. Co.*, 478 F.2d 806 (3d Cir. 1972); *Johnson v. Hertz Corp.*, 316 F. Supp. 961 (S.D. Tex. 1970). Finally, the district court may properly consider a plaintiff's financial status in assessing the "justness" of the plaintiff's application for counsel. *Edmunds v. E.I. duPont deNemours & Co.*, 315 F. Supp. 523 (D. Kan. 1970).

165. If the EEOC's action does not satisfy the numerosity requirement of rule 23, then the EEOC may be required to join other persons as parties pursuant to the provisions of rule 19(a). That rule requires that a person must be joined

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).

Rule 19(b) lists the factors that must be considered by a court in deciding whether to proceed without an indispensable person:

[F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

FED. R. CIV. P. 19(b).

If the Commission's action does not meet the numerosity requirement, a court should permit the EEOC to represent the individuals upon whose charges its action is based without their joinder, pursuant to rule 17(a). That rule allows "a party authorized by statute [to] sue in his own name without joining with him the party for whose benefit the action is brought . . ." FED. R. CIV. P. 17(a).

der impracticable. Classes consisting of as few as fourteen¹⁶⁶ and eighteen¹⁶⁷ members have been held to be sufficient to satisfy rule 23(a)(1). More important, the courts have made it clear that factors other than mere numbers should be considered in determining whether joinder is impracticable. All the circumstances of the case, including the nature of the cause of action¹⁶⁸ and the ability of individual litigants to institute actions on their own behalf,¹⁶⁹ should be considered in determining whether the rule 23(a)(1) requirement is satisfied.

In *Harris v. Anaconda Aluminum Co.*,¹⁷⁰ a post-*Holmes* decision by a Fifth Circuit district court, the Commission and the individual plaintiffs sought to represent a class of all present, former, and future black employees of the defendant company. The Commission claimed that the class consisted of more than 200 persons; the individual plaintiffs stated that it was comprised of 110 persons.¹⁷¹ The defendant employer contended that the Commission and two individual plaintiffs had failed to identify a sufficient number of class members to satisfy the numerosity requirement of rule 23(a)(1). The defendant relied upon the Commission's apparent inability to name more than twenty class members.¹⁷² The court noted that the decision as to impracticability of joinder depends upon "the particular circumstances of the case rather than any arbitrary numerical limitation."¹⁷³ It concluded that the

166. *Manning v. Princeton Consumer Discount Co.*, 390 F. Supp. 320, 324 (E.D. Pa. 1975), *aff'd on other grounds*, 533 F.2d 102 (3d Cir.), *cert. denied*, 429 U.S. 865 (1976).

167. *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 9 Fair Empl. Prac. Cas. 1065 (4th Cir. 1967). In *Local 246, Utility Workers Union v. Southern Cal. Edison Co.*, 2 Fair Empl. Prac. Cas. 328 (C.D. Cal. 1969), the court, relying upon its perceptions of the purposes of civil rights actions and the probability of similar discrimination against future applicants, held that classes comprised of only eight and two identifiable persons satisfied the numerosity requirements. In *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 463 (E.D. Pa. 1968), a class of 25 members satisfied the numerosity requirement.

168. *DeMarco v. Edens*, 390 F.2d 836, 845 (2d Cir. 1968); *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 9 Fair Empl. Prac. Cas. 1065 (4th Cir. 1967); *Harriss v. Pan Am. World Airways, Inc.*, 74 F.R.D. 24 (N.D. Cal. 1977); *Barnes v. Board of Trustees*, 369 F. Supp. 1327, 1333 (W.D. Mich. 1973); *Davy v. Sullivan*, 354 F. Supp. 1320, 1325 (M.D. Ala. 1973); *Thomas v. Clarke*, 54 F.R.D. 245, 250 (D. Minn. 1971).

169. *Barnes v. Board of Trustees*, 369 F. Supp. 1327, 1333 (W.D. Mich. 1973); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968); 7 C. WRIGHT & A. MILLER, *supra* note 99, § 1762, at 602; *Donelan, Prerequisites to a Class Action Under Rule 23*, 10 B.C. INDUS. & COM. L. REV. 527, 531 (1969).

170. 17 Fair Empl. Prac. Cas. 181 (N.D. Ga. 1978).

171. *Id.* at 182 n.3.

172. *Id.* at 183.

173. *Id.* at 184.

plaintiffs had shown through the allegations of the complaint, statistical admissions of the defendant, and the statements of fourteen individuals interviewed by the Commission that the complaints of the twenty persons identified were common to other individuals similarly situated.¹⁷⁴ The court's treatment of the numerosity issue in this case is consistent with the established inclination of federal courts to take a relaxed view of the burden of demonstrating numerosity.¹⁷⁵

Applying rule 23(a)(1) to EEOC section 706 actions may occasionally create difficulties in the prosecution of such actions that would not otherwise exist. In such instances, however, the joinder of all potential title VII plaintiffs who are members of a class not satisfying the numerosity requirement should be no more difficult than joinder of comparably sized classes of individuals who seek to maintain other kinds of civil actions.¹⁷⁶ Indeed, joinder should prove less difficult in title VII cases than in other kinds of actions since courts have traditionally taken a "liberal" or "remedial" view of title VII suits. Those instances in which the EEOC's actions do not satisfy rule 23's numerosity requirement are likely to be rare and certainly will not involve any of the EEOC's major enforcement efforts. Consequently, no special exemption from the numerosity requirement is justified.

2. *The Typicality Requirement*

The EEOC has expressed concern that the typicality requirement of rule 23(a)(3)¹⁷⁷ might restrict it to asserting claims similar to those of the party upon whose charge the action is based.¹⁷⁸

174. *Id.*

175. *See, e.g., Afro Am. Patrolmens League v. Duck*, 503 F.2d 294, 298 (6th Cir. 1974); *Jack v. American Linen Supply Co.*, 498 F.2d 122, 124 (5th Cir. 1974).

176. The members of a class which does not satisfy the numerosity requirement are not precluded from joining an action brought by the EEOC simply because they have not filed charges with the EEOC. *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 1 Fair Empl. Prac. Cas. 328 (5th Cir. 1968). Moreover, it is likely that the courts will deem the title VII provision concerning appointment of attorneys to be applicable in these situations. *See* note 164 *supra*.

177. The prerequisite is that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class. . . ." FED. R. CIV. P. 23(a)(3). *See* note 158 *supra*.

178. *Petition for Certiorari*, *supra* note 20, at 14. Interestingly, the Commission took the opposite approach in *EEOC v. Delaware Trust Co.*, 18 Fair Empl. Prac. Cas. 1521, 1525 (D. Del. 1979), arguing that its claims were atypical of any class members because it represents the public interest.

The typicality requirement of rule 23(a)(3) may result in additional limitations on the scope of a private class action. Although certain claims may be within the jurisdictional

The EEOC has argued that it does not merely "stand in the shoes" of a charging party when it prosecutes a claim.¹⁷⁹ Its argument should be heeded. The EEOC should, even within the bounds of rule 23, be permitted to represent interests broader than those that charging parties can properly represent. Here, the often recited but usually poorly defined concept of the public interest which the EEOC serves should be accorded a clear and purposeful meaning.

Whether a section 706 action is brought by an individual or by the Commission, it must be supported by a charge which has been filed with the Commission.¹⁸⁰ The jurisdictional scope of the action is limited by the reasonably anticipated scope of the EEOC's investigation, not by the terms of the charge itself.¹⁸¹ The EEOC's claims should be deemed to be typical of any claims that are within the jurisdictional scope of the complaint. If the EEOC is not permitted to represent otherwise appropriate classes whose claims are within the jurisdictional scope of a title VII action, the Commission will be doing no more than "standing in the shoes" of charging parties. In that event its public purpose would be substantially diminished and serious violations of title VII could go unremedied.

The EEOC's public purpose can be served without impinging upon the purpose of the typicality requirement. The typicality provision requires that the claims of the representative party be similar enough to the claims of the class members to ensure that the representative party will adequately represent the class members.¹⁸² The application of this provision necessitates a comparison of the claims of the representative party with those of the other members of the class.¹⁸³ Identification of the EEOC's claims

scope of the action, a private plaintiff will be precluded by rule 23(a)(3) from representing a class whose claims are not typical of his own. *See Kinsey v. Legg, Mason & Co.*, 60 F.R.D. 91, 6 Fair Empl. Prac. Cas. 194 (D.D.C. 1973).

179. The *Holmes* court stated that: "When EEOC seeks to recover back pay for individuals, it would seem to be Congress' clear intent that EEOC stand in the shoes of those individuals and represent them in a suit the individuals would otherwise be entitled to bring." *EEOC v. D.H. Holmes*, 556 F.2d 787, 796, 15 Fair Empl. Prac. Cas. 378, 386 (5th Cir. 1977).

180. EEOA § 4(a), 42 U.S.C. § 2000e-5(f)(1) (1976).

181. *See, e.g., Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466, 2 Fair Empl. Prac. Cas. 788, 796 (5th Cir. 1970); *EEOC v. Mobil Oil Corp.*, 6 Fair Empl. Prac. Cas. 722, 726 (W.D. Mo. 1973).

182. *Santiago v. City of Philadelphia*, 72 F.R.D. 619, 625 (E.D. Pa. 1976); *Sommers v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 66 F.R.D. 581, 587 (E.D. Pa. 1975); *Fertig v. Blue Cross*, 68 F.R.D. 53, 57 (N.D. Iowa 1974); *Rosado v. Wyman*, 322 F. Supp. 1173, 1193 (E.D.N.Y. 1970), *aff'd on other grounds*, 402 U.S. 991 (1971).

183. *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir. 1975).

is not as simple as the identification of the claims of an individual since the EEOC's claims do not arise from actual injury as do those of an individual. Thus, other factors must be examined in order to determine what should be deemed to be the EEOC's claims.

First, the EEOC clearly "possesses" the claims of the charging party or parties upon whose charge or charges the EEOC's actions is based. The EEOC has been given standing by statute to pursue such claims¹⁸⁴ and should be regarded as the real party in interest with respect to them. Second, the EEOC has a definite nexus with and a legitimate interest in all claims that it uncovers during the course of a proper investigation of a charge of discrimination, regardless of whether such claims are typical of those of the charging party. Congress has assigned to the EEOC the task of conducting such investigations,¹⁸⁵ and thus it seems appropriate, at least for the purpose of assessing typicality, to define the claims of the EEOC as all claims that it uncovers during the course of a proper investigation.¹⁸⁶ Under such an approach, the EEOC's claims would be deemed to be typical of all the claims that are within the jurisdictional scope of the action.¹⁸⁷

3. *Manageability*

While the EEOC did not express in *Holmes* its position con-

184. See notes 7 & 11 *supra*.

185. Congress has given the Commission a duty to investigate under § 706. "Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission . . . the Commission . . . shall make an investigation thereof." EEOA § 4(a), 42 U.S.C. § 2000e-5(b) (1976). Section 707 also gives the Commission authority to investigate. "[T]he Commission shall have authority to investigate an act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of persons claiming to be aggrieved or by a member of the Commission. *Id.* § 5, 42 U.S.C. § 2000e-6(e) (1976). See also §§ 709, 710, 42 U.S.C. § 2000e-8,-9 (1976).

186. The EEOC has been permitted to seek relief in § 706 actions with respect to discriminatory conduct other than that alleged by charging parties. See, e.g., *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1359, 1363 (6th Cir. 1975), *cert. denied*, 423 U.S. 994 (1975).

187. In *EEOC v. Federated Mut. Ins. Co.*, No. 75-1925 (N.D. Ga. Sept. 19, 1978), the court reached the result urged in the text. A different result was reached in *EEOC v. Brookhaven Bank & Trust Co.*, No. 76-275 (S.D. Miss., Nov. 10, 1978). Although in *Harris v. Anaconda Co.*, 17 Fair Empl. Prac. Cas. 181 (N.D. Ga. 1978), the court was not presented with the issue, it found that the claims of the Commission were "most typical" of those of the class and certified the Commission rather than two individual plaintiffs as the representative of the class.

The identification of the EEOC's claims in the manner urged in the text is not inconsistent with the EEOC's wish to represent not only the interests of all persons with claims within the jurisdictional scope of the action but also the broader public interest.

cerning the manageability requirement of rule 23,¹⁸⁸ presumably it shares a view similar to that expressed by the district court in *Stuart v. Hewlett-Packard Co.*¹⁸⁹ In *Stuart*, the court permitted the EEOC to intervene in an action for damages and declaratory and injunctive relief brought by three women on behalf of themselves and all past, present, and future female employees of the defendant. The court conditionally declined to certify the class action brought by the individual plaintiffs. The court determined, however, that the action should proceed with respect to declaratory and injunctive relief on the basis of the EEOC's complaint which contained allegations similar to those asserted by the individual plaintiffs. The court also determined that the EEOC should not have to comply with the provisions of rule 23, reasoning (1) that the primary responsibility for the eradication of discrimination had been assigned by Congress to the "agency mechanism" rather than to the "class action mechanism" and (2) that class actions are appropriately utilized only in extraordinary circumstances.¹⁹⁰ The court expressed particular concern about the problems of manageability that a class action could present and concluded that pursuit by the EEOC of injunctive and declaratory relief was a desirable alternative.¹⁹¹

188. The difficulty of managing a class action is referred to in rule 23 with respect to the court's determination of whether a (b)(3) action is maintainable. To maintain a (b)(3) action the court must find that common questions of law or fact predominate and that the class action "is superior to other available methods [of adjudication] The matters pertinent to the findings include . . . the difficulties likely to be encountered in the management of a class action." FED. R. CIV. P. 23(b)(3). Civil rights actions have traditionally been brought pursuant to rule 23(b)(2) which provides that a class action is maintainable if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ." Nevertheless, the manageability concept is relevant to a (b)(2) action as well. *Karan v. Nabisco, Inc.*, 17 Fair Empl. Prac. Cas. 507, 518 (W.D. Pa. 1978).

189. 66 F.R.D. 73, 9 Empl. Prac. Dec. ¶ 9993 (E.D. Mich. 1975). See also *EEOC v. Avco New Idea Div.*, 18 Fair Empl. Prac. Cas. 311, 313 (N.D. Ohio 1978). For reference to the Commission's expression concerning manageability, see 156 DAILY LAB. REP. (BNA) A-11 (August 11, 1976).

190. 66 F.R.D. at 77-78, 9 Empl. Prac. Dec. at 7138-39.

191. When a party representing the public interest, such as the EEOC in this case, has been allowed to intervene on the basis of its statutory authority the court should look to that party, with its expertise and resources, as a viable alternative to coping with the "manageability" problems inherent in the class action vehicle. This can be accomplished by letting the EEOC assume the duties of the purported class representatives and pursue any declaratory or injunctive remedy.

Id. at 77-79. The court gave no indication why it limited the EEOC to actions for declaratory or injunctive relief. If the court was responding to concern about the manageability of an action to recover backpay, its reaction was unnecessarily drastic. Tailoring the action pursuant to the provisions of rule 23(c)(4), which would permit the EEOC to seek backpay

Potential sources of problems in the management of class actions are the size of the class, the feasibility of notice, and the adjudication of damage claims of the numerous members of the class.¹⁹² Representative treatment is often most needed in the litigation of those cases which, if brought as individual suits, would impose a great burden on the party opposing the class as well as on the judicial system.¹⁹³ Thus, the question of manageability must be resolved by weighing the efficiency which the class action would produce against the administrative complexities which may arise from its use.¹⁹⁴

Notwithstanding the court's sentiments in *Stuart*, the designation of the EEOC as plaintiff in an action does not guarantee in and of itself that intolerable administrative difficulties will not arise. Surely actions which are truly unmanageable will remain so regardless of who represents the class. It seems most unlikely that the EEOC will contend with any real vigor, or that many courts would be persuaded, that the EEOC should be permitted to pursue otherwise unmanageable class actions.¹⁹⁵

4. *Settlement Difficulties*

The court in *EEOC v. Whirlpool Corp.* suggested that the application of rule 23 would make settlement more difficult because the EEOC might have to consider the monetary interests of aggrieved individuals which it might otherwise ignore.¹⁹⁶ The court overlooked, however, a consideration which portends at least as much, and probably more, difficulty for the settlement of EEOC suits—absent the application of rule 23, settlement of an EEOC

on behalf of a manageable class of individuals, would have been more appropriate. See note 155 *supra* and accompanying text.

192. 3B MOORE'S FEDERAL PRACTICE § 23.45, at 23-370 to 371 (2d ed. 1978).

193. See generally *Id.* § 23.45.

194. *Id.* at 23-374.

195. Important considerations dictate that such actions should not be maintained without at least some modification or restriction by the court:

Only if counsel and the Court can adequately entertain and analyze all of the issues concerning the whole class can the class interests be protected and the remedial objectives of Title VII be served. Unmanageable cases may not only be a disservice to Title VII policies and adequate protection of individual class members claims, but they may cause excessive delay in final resolution of the case, to the prejudice of all involved, and disrupt the judicial economy objectives of the class action device.

Karan v. Nabisco, Inc., 17 Fair Empl. Prac. Cas. 507, 518-19 (W.D. Pa. 1978).

196. 16 Fair Empl. Prac. Cas. 932, 939 (N.D. Ind. 1978). See notes 140 & 145 *supra* and accompanying text.

action is not binding upon individual employees.¹⁹⁷ Any individual employee who is not entitled to relief under the EEOC's settlement or who declines offered relief is free to bring his own action, including a class action, against the defendant employer. The risk of facing such actions must in many instances cause prudent employers to doubt whether they can afford to agree to otherwise acceptable proposals of settlement. These risks and their resultant chilling effect upon settlement efforts can be avoided when the provisions of rule 23 are applied and a settlement agreement is entered that is binding upon all members of the class.¹⁹⁸

D. *Salutary Purposes of Rule 23*

The preceding discussion has highlighted the difficulties that supposedly may arise because of the application of rule 23 to section 706 actions brought by the EEOC. This section briefly notes some salutary purposes that would be served by the application of rule 23 to EEOC class actions. Essentially, these are the same purposes that are served by the application of the rule to private class actions.

In *Holmes*, the appellate court stated that rule 23 prevents piecemeal lawsuits, permits widespread relief, affords a defendant protection against inconsistent adjudications, and provides a basis for the judicial control necessary to prevent abuse of the class action mechanism.¹⁹⁹ The court predicted that if the EEOC were exempted from rule 23, "chaos" could result in the management of EEOC actions since such matters as notice, exclusion, intervention, dismissal, compromise, and statute of limitations would be left in question.²⁰⁰ The court noted in the *Holmes* litigation itself two sources of potential difficulty. First, more than a year after the initial complaint had been filed, the defendant still did not know precisely against whom and upon what grounds it had to defend. Second, without rule 23, if the EEOC should prevail, it would be unclear who could recover on a monetary judgment; if the defendant should prevail, individuals arguably within the af-

197. *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 65, 8 Fair Empl. Prac. Cas. 1246, 1265 (5th Cir. 1974), *rev'd on other grounds*, 431 U.S. 345, 14 Fair Empl. Prac. Cas. 1505 (1977); *see Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201, 5 Fair Empl. Prac. Cas. 204 (2d Cir. 1972), *cert. denied*, 411 U.S. 931, 5 Fair Empl. Prac. Cas. 862 (1973).

198. *See B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW* 1107, 1130 (1976).

199. 556 F.2d at 795, 15 Fair Empl. Prac. Cas. at 385.

200. *Id.* at 796, 15 Fair Empl. Prac. Cas. at 384. *See also EEOC v. Delaware Trust Co.*, 18 Fair Empl. Prac. Cas. 1521, 1523 (D. Del. 1979).

fectured class would not be precluded from instituting their own suits against the defendant.²⁰¹

The Fifth Circuit Court of Appeals expressed similar concerns in its subsequent decision in *EEOC v. Datapoint Corp.*²⁰² In this case the lower court had certified the EEOC as the representative of a class of persons under rule 23. The Commission had sought injunctive relief and back pay on behalf of the class, but the district court had found that none of the defendant's practices had discriminated against the members of the class. On appeal the Commission contended that the members of the class should not be bound by the judgment. The court of appeals disagreed. It stated that to decide the case in the manner urged by the Commission would be inequitable, could result in the litigation of the same facts and issues in different forums and with different results, and would waste the resources of both the litigants and the courts.²⁰³

Doubtless district courts would not permit the chaos forecast by the *Holmes* court to occur, even in the absence of the application of rule 23. Nevertheless, two concerns expressed by the *Holmes* court, notably the binding effect of judgments and the provision of fair and adequate notice to defendants, are of particular importance and require the application of rule 23.

The EEOC has attempted to minimize the significance of the lack of binding effect of judgments when rule 23 is not applied. The Commission argued in *Holmes* that in "most circumstances" aggrieved employees would not be able to bring separate actions after the Commission's suit had been concluded.²⁰⁴ However, other than with respect to the charging parties upon whose charges the Commission's suit is based,²⁰⁵ the Commission offered no basis for its assurances that employers need not be concerned about exposure to multiple lawsuits. Moreover, in a footnote in its Petition for a Writ of Certiorari,²⁰⁶ the Commission cited several

201. *Id.*

202. 570 F.2d 1264, 17 Fair Empl. Prac. Cas. 281 (5th Cir. 1978).

203. *Id.* at 1268, 17 Fair Empl. Prac. Cas. at 284.

204. The EEOC made this argument in both its Petition for Rehearing before the court of appeals and its Petition for a Writ of Certiorari. EEOC Petition for Rehearing, *supra* note 114, at 10-11; Petition for Certiorari, *supra* note 20, at 18-19.

205. The Commission noted in its petitions that in *McClain v. Wagner Elec. Co.*, 550 F.2d 1115 (8th Cir. 1977), the court held that when the Commission brings a § 706 suit based on a charge filed by an individual, that individual has the right to intervene in the Commission's suit but has no right to bring a separate action.

206. Petition for Certiorari, *supra* note 20, at 19 n.10.

cases²⁰⁷ for the proposition that EEOC suits are *not* binding on private parties, and in *EEOC v. Datapoint Corp.*,²⁰⁸ the Commission argued that an adverse judgment was not binding even upon the members of the class which it had been certified to represent.

In *EEOC v. Whirlpool Corp.*,²⁰⁹ the district court offered three reasons why defendants in uncertified Commission actions need not be concerned about multiple liability even in the absence of the application of rule 23. First, the court pointed out that no individual may bring a title VII action unless he has filed a charge with the Commission within 180 days of the alleged act of discrimination.²¹⁰ This requirement does as a practical matter offer some protection for defendants, but it is far from the guarantee against multiple jeopardy provided by the application of rule 23. The charge requirement prevents the maintenance of an action only if an individual seeks to bring an action concerning an isolated act of discrimination, such as a discharge, which has occurred at a time beyond the period of limitations. The charge requirement would not, however, preclude an individual from bringing a subsequent action if that action seeks to redress a continuing violation of title VII. In such instances the requirement would serve only to limit the amount of backpay recoverable.²¹¹

Second, the *Whirlpool* court suggested that a private party will rarely be able to file a separate suit and will be limited to intervention except in the unlikely event that the scope of the Commission's suit is narrower than that of the private party.²¹² The court offered no basis for this conclusion. If its reference to private par-

207. *United States v. Trucking Employers, Inc.*, 561 F.2d 313 (D.C. Cir. 1977); *United States v. Allegheny-Ludlum Indus., Inc.*, 515 F.2d 826, 11 Fair Empl. Prac. Cas. 167 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); *Williamson v. Bethlehem Steel Corp.*, 486 F.2d 1201, 5 Fair Empl. Prac. Cas. 204 (2d Cir. 1972), *cert. denied*, 411 U.S. 931, 5 Fair Empl. Prac. Cas. 862 (1973).

208. 570 F.2d 1264, 17 Fair Empl. Prac. Cas. 281 (5th Cir. 1978).

209. 16 Fair Empl. Prac. Cas. 932 (N.D. Ind. 1978).

210. *Id.* at 940. In cases in which an individual has initially instituted proceedings with a state or local fair employment agency, his charge may be filed with the EEOC within 300 days after the occurrence of the unlawful act or within 30 days of receipt of notice that the state or local agency has terminated its proceedings, whichever is earlier. EEOA § 4(a), 42 U.S.C. § 2000e-5(e) (1976).

211. Section 706(g) provides: "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." EEOA § 4(a), 42 U.S.C. § 2000e-5(g) (1976). Since the Commission's suit presumably would have been based upon a charge filed earlier than that which would support for the individual's suit, the defendant would be exposed to the risk of greater back pay liability in the Commission's suit than in the individual's action.

212. 16 Fair Empl. Prac. Cas. at 940.

ties means persons other than charging parties,²¹³ then the court's conclusion is erroneous. The results of section 707 actions do not bind private nonparties.²¹⁴ There is no reason to believe that the courts will view the effect of the results of section 706 EEOC suits any differently—absent, of course, the application of rule 23.²¹⁵

Finally, the court in *Whirlpool* suggested that, as a practical matter, private individuals would rarely file suit when the Commission has already done so.²¹⁶ The court's speculation may be correct; it is, however, no substitute for according judgments in Commission actions binding effect upon all members of the classes in whose behalf they are brought. Certainty and predictability can be achieved only by the application of rule 23.²¹⁷

Certification of classes under rule 23 would, as the *Holmes* court also noted, enable defendants to know better against whom and upon what grounds they must defend. The EEOC²¹⁸ and at least two courts²¹⁹ have argued that the notice of the filing of a charge which is provided a defendant,²²⁰ the reasonable cause determination issued by the EEOC, and the conciliation efforts en-

213. See note 205 *supra*.

214. *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 841, 11 Fair Empl. Prac. Cas. 167, 178 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 12 Fair Empl. Prac. Cas. 1090 (1976); *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201, 1203, 5 Fair Empl. Prac. Cas. 204, 205 (2d Cir. 1972), *cert. denied*, 411 U.S. 931, 5 Fair Empl. Prac. Cas. 862 (1973).

215. See *EEOC v. Avco New Idea Div.*, 18 Fair Empl. Prac. Cas. 311, 313 (N.D. Ohio 1978); *B. SCHLEI & P. GROSSMAN*, *supra* note 198, at 1107.

216. 16 Fair Empl. Prac. Cas. at 940.

217. See *EEOC v. Delaware Trust Co.*, 18 Fair Empl. Prac. Cas. 1521, 1523-24 (D. Del. 1979). Rule 23(c)(3) provides that judgments in class actions, whether favorable or adverse to members of the class, shall "include and describe" the members of the class. FED. R. CIV. P. 23(c)(3). If an action satisfies the requirements of rule 23, the parties comply with applicable notice provisions, and the court fairly exercises its powers under rule 23, then it is quite likely that the court's judgment will be given binding effect. 7A C. WRIGHT & A. MILLER, *supra* note 99, § 1789. See also Advisory Committee's Note, FED. R. CIV. P. 23, 39 F.R.D. 69, 105-06 (1966). Although title VII actions have traditionally been certified under rule 23(b)(2) and rule 23 does not by its terms require notice in (b)(2) class actions, see *B. SCHLEI & P. GROSSMAN*, *supra* note 198, at 1107-09, notice may be provided under the provisions of 23(d)(2). Some courts have concluded that due process requires such notice. *Id.* See also *Harris v. Pan Am. World Airways Inc.*, 74 F.R.D. 24, 44 (N.D. Cal. 1977).

218. Petition for Certiorari, *supra* note 20, at 18; EEOC Petition for Rehearing, *supra* note 114, at 8-9.

219. *EEOC v. Singer Controls Co.*, 18 Fair Empl. Prac. Cas. 309, 310 (N.D. Ohio 1978); *EEOC v. Whirlpool Corp.*, 16 Fair Empl. Prac. Cas. 932, 939-40 (N.D. Ind. 1978).

220. See EEOC Form 131, "Notice of Charge of Employment Discrimination (Feb. 1976)." The one-page form gives the following notice of a charge of employment discrimination:

You are hereby notified that a charge of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et. seq.*,

gaged in by the EEOC furnish a defendant with sufficient notice of the scope of the Commission's suit. Such information, however, often provides a defendant with very limited knowledge of the precise facts and issues subsumed in the Commission's typically broad and general allegations. The notice of the filing of a charge provides a potential defendant with only the identity of the charging party, the time the alleged violation occurred, and the generic classification of the charge. Whether a matter was actually covered by the EEOC's determination of probable cause or by its conciliation efforts can be very uncertain. Disputes are not unlikely concerning the meaning and scope of language used by the Commission in its determination letters as well as the content of any contacts between the Commission and a defendant's representatives during conciliation proceedings. Defendants can use discovery to clarify this information, but discovery efforts have often been ineffective because defendants and the Commission have engaged in protracted discovery struggles with respect to the timing and specificity of the information that the Commission can be required to reveal.²²¹

Certification of classes under rule 23(c)(1)²²² would give "clear definition to the action."²²³ As soon as possible after the commencement of a class action, classes and subclasses would be specifically identified and described to the court.²²⁴ Application of the rule to EEOC section 706 actions would adequately notify defendants of the adverse interests²²⁵ and would make discovery more effective and pretrial identification of the issues more feasible.

has been filed against you. Information relating to the date, place, and circumstances of the alleged unlawful employment practice or practices is proved herein.

The information referenced is provided in summary fashion.

221. See, e.g., *EEOC v. Carter Carburetor*, 76 F.R.D. 143, 14 Fair Empl. Prac. Cas. 665 (E.D. Mo. 1977), *mandamus issued*, 577 F.2d 43, 17 Fair Empl. Prac. Cas. 706 (8th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3459 (U.S. Jan. 8, 1979); *EEOC v. Anchor Continental, Inc.*, 74 F.R.D. 523 (D.S.C. 1977); *EEOC v. Brookhaven Bank & Trust Co.*, No. 76-275 (S.D. Miss., Nov. 10, 1978); *EEOC v. J. M. Smucker Co.*, No. 76-273 (W.D. Tenn., June 9, 1978) (memorandum and order of magistrate); *Petition for Rehearing*, *supra* note 114, at 9.

222. FED. R. CIV. P. 23(c)(1) requires in part: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

223. Advisory Committee's Note, FED. R. CIV. P. 23, 39 F.R.D. 69, 104 (1966); see *EEOC v. Delaware Trust Co.* 18 Fair Empl. Prac. Cas. 1521, 1522, 1524 (D. Del. 1979).

224. See FEDERAL JUDICIAL CENTER, *MANUAL FOR COMPLEX LITIGATION* § 1.42, at 31 (1978). See also *id.* § 1.40.

225. See generally *Harriss v. Pan Am. World Airways, Inc.*, 74 F.R.D. 24, 36 (N.D. Cal. 1978).

E. *Selective Application of Rules of Procedure*

A final policy consideration which weighs in favor of the application of rule 23 to Commission 706 actions is that there is no basis for the selective application of the Federal Rules of Civil Procedure to Commission suits. As was demonstrated earlier, the Rules themselves contain no basis for an exemption of Commission actions from rule 23 and indeed contain clear indications that the Rules are to be applied to actions brought by the United States.²²⁶ While the Commission may find objectionable the application of rule 23 to its actions, it surely would not agree that other Rules of Procedure, such as those dealing with discovery, subpoenas, or joinder, should not apply to its lawsuits. There is no more basis for failing to apply these or any other Federal Rules which by their terms may apply to Commission actions than there is for declining to apply rule 23.

IV. THE APPLICATION OF RULE 23 TO SECTION 707 ACTIONS BROUGHT BY THE EEOC

The considerations discussed with respect to whether rule 23 should apply to Commission 706 actions are also pertinent to whether rule 23 should apply to Commission 707 actions. Their repetition is not necessary. Rather, the issue in examining the application of rule 23 in the section 707 context is whether, after the 1972 amendments to title VII, there remains a difference between the purposes of sections 706 and 707 sufficient to warrant different results with respect to the application of rule 23 to Commission suits.

When title VII was enacted in 1964, sections 706 and 707 each had a distinct purpose. Section 706 authorized private persons to bring suits on their own behalf, or, in effect, on behalf of a class of persons.²²⁷ Title VII litigation by an agency of the United States could be initiated only under section 707 and only by the Attorney General.²²⁸ Section 707 authorized the Attorney General to bring pattern or practice suits, which would seek to eradicate significant, generalized occurrences of discriminatory action.²²⁹ Thus, while

226. See notes 99-104 *supra* and accompanying text.

227. See, e.g., *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 1 Fair Empl. Prac. Cas. 328 (5th Cir. 1968).

228. See text accompanying notes 2-6 *supra*.

229. "[A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature." 110 CONG. REC. 14270 (1964) (remarks of Sen. Humphrey).

both section 706 class actions and section 707 actions may have served both public and private purposes, prior to 1972 the government could initiate judicial action and bring its resources and expertise to bear upon discriminatory conduct pursuant only to section 707.

For all practical purposes this distinction disappeared with the 1972 amendments to title VII. Since that time the EEOC has had the statutory authority to bring broadly based suits under section 706 as well as pattern or practice suits under section 707.²³⁰ After passage of the Dominick amendment granting the EEOC authority to bring section 706 actions, Senator Williams made the following remarks in support of the amendment that would transfer section 707 authority to the EEOC:

The EEOC now will have—under the bill as it is at this moment—jurisdiction to bring discrimination cases before a Federal district court. There will be no difference between the cases that the Attorney General can bring under section 707 as a “pattern and practice” charge and those which the Commission will be able to bring as a result of yesterday’s decision to give EEOC court enforcement powers. Frankly, the pattern and practice section becomes a redundancy in the law.²³¹

In essence, Senator Williams stated that there no longer would be any difference between actions brought by the EEOC under section 706 and those brought by the Attorney General under section 707. Senator Javits repeatedly expressed similar sentiments.²³²

230. See text accompanying notes 7–11 *supra*.

231. EEOA LEGISLATIVE HISTORY, *supra* note 21, at 1587. But see *id.* at 1586 (remarks of Sen. Hruska).

232. Senator Javits remarked:

A pattern or practice suit is, after all, nothing but a broader version involving more parties in greater depth in terms of length of time and the prevalence of a given practice than an individual suit. . . .

The question is whether we should perpetuate, when the entire basis for it has been removed, what would be after this bill becomes law, a bureaucratic anachronism by giving the power to institute suit to two entities, where they both concern private parties.

. . . .
One . . . point which it seems to me is absolutely decisive is that the EEOC, under the Dominick amendment, has the authority to institute exactly the same actions that the Department of Justice does under pattern and practice. These are essentially class actions, and if they can sue for an individual claimant, then they can sue for a group of claimants.

. . . .
. . . If [the EEOC] proceeds by class suit, it is in the position of doing exactly what the Department of Justice does in pattern and practice suits.

. . . .
Therefore . . . we have first the Commission with the authority to act in exactly the same type of case in which the Department of Justice acts. Second, we

The EEOC has argued, in effect, that the similarity between sections 706 and 707²³³ compels the conclusion that rule 23 should not be applied to Commission 706 actions since it has not been applied to section 707 actions brought by the Commission.²³⁴

have taken away the cease-and-desist authority and substituted the power to sue which fully qualifies the Commission to take precisely the action now taken by the Department of Justice.

. . . .
 Mr. President, in the area in which the Department of Justice will deal with a Government entity, we leave the right to sue with them. So, to inhibit the transfer of pattern and practice suits is simply to create two agencies to do the work of one.

If we inhibit that, we risk complete confusion as both the Commission and the Attorney General can proceed in exactly the same kind of case.

. . . .
 . . . I have said on a number of occasions in this debate that [the Civil Rights Act of 1964] was a compromise and that much was given up, especially in respect of the right of seeking a remedy against discrimination in employment. And one of the things that was given up was any enforcement authority or the right to sue by the EEOC that we are trying to repeal now. That is why we felt we had to give the Attorney General the power to sue in big cases, in class action cases, and in cases where there was a constant pattern of discrimination directed at individuals with limited resources whom we were relegating to the courts and who could hardly be expected to carry such a broad and deep case. We are now changing that and giving it back to the Commission.

It seems to me that the logical conclusion which follows from that is that the authority previously given to the Justice Department is no longer necessary.

EEOA LEGISLATIVE HISTORY, *supra* note 21, at 1588-90. With respect to Senator Javits' statement that in 1964 the Justice Department was granted § 707 authority as a result of the elimination of, or as a substitution for, the right of the EEOC to bring suit under what was to be § 706, see *United States v. Georgia Power Co.*, 474 F.2d 906, 920, 5 Fair Empl. Prac. Cas. 587, 597 (5th Cir. 1973); 110 CONG. REC. 12595-96, 14220 (1964), *reprinted in* LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 3067, 3062.

233. The Commission made this argument in its Petition for Rehearing in the *Holmes* litigation:

While Section 706 and 707 are not identical, they have many similarities, particularly since the 1972 amendment to Title VII transferred section 707 litigation authority from the Attorney General to the Commission at the same time it subjected Section 707 suits to the same procedural requirements as Section 706 suits. Thus, the Commission's litigation authority under either Section 706 or Section 707 may now be initiated by the filing of a charge by a private party, and both section 706 and section 707 suits must now be preceded by investigation, a reasonable cause determination and conciliation. Both types of suits, therefore, vindicate the public interests in essentially the same manner.

EEOC Petition for Rehearing, *supra* note 114, at 7-8 (citation and footnote omitted).

In its Petition for a Writ of Certiorari in *Holmes*, the EEOC indicated that it perceived a difference between the two sections but that it could accomplish the same purposes with either section:

Section 707 is reserved for more serious cases involving systemic discrimination and initiated by a Commissioner's charge. Yet the decision of the court of appeals would force the Commission to resort to Section 707 much more often, even in cases that the Commission considers more suitable for treatment under Section 706.

Petition for Certiorari, *supra* note 20, at 19 (citation omitted).

234. The *Holmes* court concluded that when the EEOC initiated a § 706 action, it had

Several courts which have held rule 23 inapplicable to Commission section 706 actions have taken positions similar to that of the EEOC.²³⁵ In *EEOC v. Whirlpool Corp.*, the court adopted the Commission's argument and concluded that it was erroneous to distinguish, on the issue of rule 23, between Commission suits brought under section 706 and section 707.²³⁶

Conversely, several courts which found rule 23 applicable to Commission 706 actions discerned important differences between sections 706 and 707. In *Holmes*, the court indicated that if the EEOC were unable to comply with rule 23 in its section 706 action, it could nonetheless file a new action and protect the same substantive rights under section 707.²³⁷ In *EEOC v. Akron National Bank & Trust Co.*,²³⁸ the court concluded that while the EEOC could never satisfy the requirements of rule 23, which did apply to its section 706 actions, it could seek the same relief in a section 707 "statutory class action" without having to satisfy rule 23. Finally, in *EEOC v. Page Engineering Co.*,²³⁹ the court held that the EEOC should comply with rule 23 when it brings a section 706 action. Since the court perceived an "inherent difference" between sections 706 and 707, it expressly noted that its

to comply with rule 23. The court indicated, however, that if the EEOC initiated a § 707 pattern or practice suit, it need not comply with rule 23. See text accompanying note 15 *supra*.

235. *EEOC v. Singer Controls Co.*, 18 Fair Empl. Prac. Cas. 309 (N.D. Ohio 1978). The court in *General Telephone Co.* declined to apply rule 23 to a § 706 action, reasoning in part:

The result of the 1972 amendments was to make the two sections effectively the same in relation to the enforcement power of the EEOC. Today, the EEOC may bring suit under either § 706 or § 707, and may seek both injunctive relief in the form of back pay and retroactive seniority.

Both parties in the case at bar agree that there is no longer any essential difference between § 706 and § 707 suits brought by the EEOC and that the applicability of Rule 23 should be the same under either section. If the EEOC is required to comply with Rule 23 under § 706, it should also be required to comply with § 707.

EEOC v. General Tel. Co., 16 Fair Empl. Prac. Cas. 476, 478 (W.D. Wash. 1977).

At least one court has stated that when the EEOC brings a § 707 action, it must follow the same procedures observed prior to instituting a § 706 action. *EEOC v. United Airlines, Inc.*, 12 Fair Empl. Prac. Cas. 1592, 1594 (N.D. Ill. 1975). The court also concluded that the two-year limitation on back pay claims contained in § 706 applied to § 707 actions.

236. 16 Fair Empl. Prac. Cas. at 937 (N.D. Ind. 1978).

237. 556 F.2d at 792 n.8, 15 Fair Empl. Prac. Cas. at 382 n.8. In *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 843, 11 Fair Empl. Prac. Cas. 167, 179 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 12 Fair Empl. Prac. Cas. 1090 (1976), the court discussed its perception of the differences between § 706, and its orientation toward protection of private rights, and § 707, and its orientation toward protection of public rights. See also *EEOC v. Continental Oil Co.*, 548 F.2d 884, 887 (10th Cir. 1977).

238. 78 F.R.D. 684, 17 Fair Empl. Prac. Cas. 636 (N.D. Ohio 1978).

239. 17 Fair Empl. Prac. Cas. 1638 (N.D. Ill. 1978).

decision did not reach the issue of whether rule 23 should apply to a section 707 suit.²⁴⁰

The conclusions of the courts in *Holmes* and *Akron National Bank & Trust Co.* are incongruous. The courts concluded in both cases that the EEOC could obtain the same relief for class members under section 707 that it had sought under section 706. Thus, the courts effectively demonstrated that the EEOC can accomplish the same purposes under either section. Yet, without any expressed basis for doing so, both courts concluded that rule 23 should apply to Commission 706 actions but not to Commission 707 actions.

Whether one looks to the legislative history of section 707, the opinions of courts which have held rule 23 inapplicable to section 706 actions brought by the EEOC, or the opinions of courts which have held rule 23 applicable to such 706 actions, there is substantial support for the proposition that the rule 23 issue should be resolved identically for both section 706 and section 707 actions. For many of the reasons discussed earlier, rule 23 should be applied to section 707 actions as well as to those brought under section 706. There is no basis in the legislative history of title VII,²⁴¹ in the language of the statute, or in the Federal Rules of Civil Procedure for holding otherwise. The application of rule 23 to section 707 actions will serve the same purposes as were outlined earlier with respect to section 706 actions and will impose only those restrictions upon the Commission's enforcement efforts that are necessary to insure fairness for all parties.

V. CONCLUSION

The provisions of rule 23 should be applied to Commission actions that are brought pursuant to either section 706 or section 707. The Federal Rules by their terms govern the procedure in federal district courts in all civil actions, other than in certain expressly described exceptions. Commission actions are not among such exceptions.

240. *Id.* at 1640.

241. On the contrary, in 1964, as well as in 1972, Congress demonstrated an awareness of the general applicability of the Rules of Civil Procedure to title VII actions. The Senate modified language in the House bill in what was to become § 706 of the Act; it removed House language concerning the appointment of masters, recognizing that the provisions of rule 53 could cover the subject. See 110 CONG. REC. 8194, 12724, 12814, 12819 (1964), reprinted in LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 3268-69, 3007, 3054, 3019.

There are convincing indications contained in the legislative history of the 1972 amendments of title VII that Congress intended that rule 23 would govern the class action aspects of section 706 actions brought by the Commission. The same 1972 amendments obviated any distinction between the purposes of sections 706 and 707 which may have existed previously. Consequently, the two sections should be treated alike insofar as the application of rule 23 is concerned.

The policy objections to the application of rule 23 that have been raised by the Commission and some district courts are not persuasive. The provisions of rule 23, if properly applied, would not seriously hinder the enforcement efforts of the Commission; rather, they would serve the same beneficial purposes in Commission class actions as they do in other kinds of class actions.