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I. INTRODUCTION

From its beginning, controversy and difficulty have surrounded the broad class action authorization of the 1966 revision to rule 23. Until recently, however, most of that concern focused on the massive damage of class actions typically maintained under rule 23(b)(3). Under the influence of the Burger Court's landmark decision in *Eisen v. Carlisle & Jacquelin*[1] and lower court decisions recognizing that the early tendency to "sever" individual issues to permit class certification had subverted the rule's primary goal of judicial economy,[2] the federal common question damage class action—although still an important aspect of the complex litigation landscape—has been significantly curtailed from some of its earlier broadly sweeping and potentially abusive applications.[3]

On the other hand, until recently, rule 23(b)(2) civil rights class actions, primarily seeking declaratory or injunctive relief on behalf of a class alleged to have suffered illegal discrimination, were assumed to present a paradigm of cases suitable for class treatment. This was the view of the advisory committee on the rule—a view supported by substantial prior judicial author-

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1. 417 U.S. 156 (1974).

2. *E.g.*, Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).

3. *See, e.g.*, Simer v. Rios, 661 F.2d 655 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982); Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); Polin v. Conductron Corp., 552 F.2d 797 (8th Cir.), *cert. denied*, 434 U.S. 857 (1977); Shumate & Co. v. National Ass'n of Sec. Dealers, Inc., 509 F.2d 147 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975); Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974). *See generally* cases cited in 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1778 n.35, 1781 n.99 (1972 & Supp. 1982).

ity.[4] It was manifested primarily in the "across-the-board" rule that developed in cases like *Johnson v. Georgia Highway Express, Inc.*[5] in the Fifth Circuit. This rule permitted employees or job applicants injured in one way by a discriminatory policy or practice to represent those injured in another way if they alleged that all had been subjected to discrimination on the same impermissible basis.[6] For example, employees discriminated against in promotions would routinely be permitted to represent applicants allegedly discriminated against in hiring and vice versa.[7]

However, in its 1977 decision in *East Texas Motor Freight System v. Rodriguez*,[8] the Supreme Court foreshadowed significant developments that cast considerable doubt on the continued viability of the broad rule 23(b)(2) civil rights class action. While paying lip service to the common view that "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs,"[9] the Court held it essential to class representation that "a class representative . . . be part of the class and 'possess the same interest and suffer the same injury' as the class members."[10] Five years later this somewhat ambiguous concept reached full fruition in *General Telephone Co. v. Falcon.*[11] In *Falcon* [12] the Supreme Court appeared to repudiate the "across-the-board" rule of *Johnson v. Georgia Highway Express.*[13]

The Supreme Court's decisions have not been of a single cloth, however. During the same period, decisions such as *Sosna v. Iowa*[14] and *United States Parole Commission v. Geraghty*[15] established the concept of the certified class as a "separate legal entity" to appraise justiciability and mootness. Those decisions

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4. *See* FED. R. CIV. P. 23(b)(2) advisory committee note, 1966 amendment.

5. 417 F.2d 1122 (5th Cir. 1969).

6. *Id.*; *see also* Falcon v. General Tel. Co., 626 F.2d 369, 375 (5th Cir. 1980), *vacated*, 450 U.S. 1036 (1981), *rev'd*, 457 U.S. 147 (1982); Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 900 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978).

7. *Johnson*, 417 F.2d at 1124.

8. 431 U.S. 395 (1977).

9. *Id.* at 405.

10. *Id.* at 403, (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974)).

11. 457 U.S. 147 (1982).

12. *Id.* at 157-58.

13. 417 F.2d 1122 (5th Cir. 1969).

14. 419 U.S. 393 (1975).

15. 445 U.S. 388 (1980).

not only enhanced the practical viability of civil rights class actions, but also rested upon premises that appear somewhat at odds with *Rodriguez* and *Falcon*.

This change in the focus of critical examination of class action maintainability from subdivision (b)(3) to subdivision (b)(2)—the portion of the rule most firmly grounded in historic class action doctrine[16]—is a significant development that warrants careful examination. The Supreme Court's simultaneously restrictive and expansive approach to rule 23(b)(2) class actions could be viewed as a paradox. But there may be a unifying theme. The Court's renewed emphasis on the representational character of the class action and on the need to respect the positions and desires of individual class members may reflect a shift from a broad theoretical acceptance of the need to eradicate discrimination in every form and vestige to a more pragmatic recognition of the need to restrict the judicial process to real grievances that will be effectively presented by the parties before the court. Similarly, the expansion of traditional concepts of justiciability and mootness in the class action setting can be explained on practical rather than doctrinal grounds. When the existence of a class with a real, live, and common grievance has been amply demonstrated, the lapse or failure of the named representative's claim should not preclude its vindication if adequate representation can be ensured.

The underlying focus on the pragmatic aspects of class action maintainability in the Court's recent decisions has raised a host of new problems for federal courts. If the objective situations and subjective inclinations of alleged class members are the focus of inquiry, how and at what stage are they to be determined? If, as the Court appears to suggest, the probability of class dissidence is relevant to the certification decision, how is it to be ascertained in an action which requires no notice to the absentees, and what significance should be attached to the "votes" of the absent class members? If the lapse, loss or settlement of a named representative's claim following the certification decision does not inevitably lead to a conclusion of mootness, but merely raises a question of adequate representation, what standard should control the determination of adequacy? And when a representative is determined to be inadequate, what

16. *See* FED. R. CIV. P. 23(b)(2), (3) advisory committee note, 1966 amendment.

are the rights of interested persons and the obligations of the court in seeking to cure such inadequacy?

These and other questions of adequate representation and practical class action administration provide the focus of the present discussion.

II. Adequacy of Representation in "Across-the-Board" Rule 23(b)(2) Class Actions under *Falcon*

A. The Falcon *Decision*

In *General Telephone Co. v. Falcon*,[17] the Court faced a typical civil rights class action. The named plaintiff claimed that he had been discriminated against in promotion because he was a Mexican-American. He sought to represent a class including not only present and former employees but also unsuccessful applicants for employment. Applying the Fifth Circuit's "across-the-board" rule,[18] the district court certified the class without conducting an evidentiary hearing. After full trial, the court found that the plaintiff had individually suffered disparate treatment in promotion but not in hiring; whereas, evidence established a disparate impact on the class in hiring but not in promotion.[19] The court of appeals upheld class certification, but vacated the merits determinations with respect to both the named plaintiff and the class.[20]

The Supreme Court took as its starting point its holding in *East Texas Motor Freight System v. Rodriguez*[21] that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members."[22] On this basis, the Court concluded that the named representative could not maintain a class action "on behalf of both employees who were denied promotion and applicants who were denied employment."[23] The named representative's promotion claims did

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17. 457 U.S. 147 (1982).

18. Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969).

19. Falcon v. General Tel. Co., 463 F. Supp. 315, 316, 317 (N.D. Tex. 1978), *aff'd in part, remanded in part*, 626 F.2d 369 (5th Cir. 1980), *vacated*, 450 U.S. 1036 (1981), *rev'd*, 457 U.S. 147 (1982).

20. 626 F.2d at 376.

21. 431 U.S. 395 (1977).

22. 457 U.S. at 156 (1982) (quoting East Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403 (1977) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974))).

23. 457 U.S. at 155, 158-59.

not "fairly encompass" the hiring claims of the class.[24] The Court appeared to rest its decision primarily on the lack of "commonality" and "typicality" required by rule 23(a),[25] although it recognized that those requirements tend to "merge" with the adequacy of representation requirement.[26]

In support of its conclusion, the Supreme Court reasoned that the evidence of intentional discrimination used to establish the plaintiff's individual claim of discrimination in promotion had nothing in common with the statistical evidence of disparate impact used to establish the class hiring claim.[27] Therefore, in the Court's view, it was clear "that the maintenance of respondent's action as a class action did not advance 'the efficiency and economy of litigation which is the principal purpose of the procedure.' "[28]

With due respect, this conclusion is far from obvious. Although separate evidence on individual and class claims was presented, judicial economy would have been advanced by establishing the hiring claims of the class with classwide statistical evidence in a single proceeding. The real question was whether such classwide evidence should be presented by a named plaintiff whose individual claim differed from those of the class. Accordingly, the real problem in *Falcon* was not a failure of judicial economy, but a potential lack of adequate representation. The most fundamental reason rule 23(a) requires the claims of the named representative to present common questions and be typical of those of the class is to ensure that in presenting his or her own claims, the class representative necessarily and inevitably will present the claims of the class in their best light.[29] From the record in *Falcon*, it was not at all clear at the time of the class certification that this would be true, although it later appeared that the representative had done a credible job of presenting the claims of the class.[30]

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24. *Id.* at 156.

25. *Id.* at 157.

26. *Id.* at 157 & n.13.

27. *Id.* at 159.

28. *Id.* (quoting American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974)).

29. *See* 7 C. WRIGHT & A. MILLER, *supra* note 3, §§ 1763-1764.

30. Falcon's success on the merits in the trial court tended to support his claim to adequately represent the class. Falcon v. General Tel. Co., 463 F. Supp. 315 (N.D. Tex. 1978), *aff'd in part, rev'd in part*, 626 F.2d 369 (5th Cir. 1980), *vacated*, 450 U.S. 1036 (1981), *rev'd*, 457 U.S. 147 (1982).

B. Scope and Proper Application of Falcon

This focus on adequacy of representation sheds considerable light on the scope and proper application of *Falcon*. Although some courts appear to have interpreted the decision as sounding the death knell for across-the-board proceedings and as precluding the representation of unsuccessful job applicants by current employees and vice versa,[31] the Supreme Court made it clear that there is no such absolute preclusion. The Court emphasized that class certification was improper because it had been made solely on the pleadings without an evidentiary hearing[32] to demonstrate a significant overlap between the promotion claims of the named class representative and the hiring claims of the class of applicants.[33] The Court held:

> Without any *specific presentation* identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent, it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner by Mexican-American employees and applicants. If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action. We find nothing in the statue to indi-

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31. Jordan v. County of Los Angeles, 713 F.2d 503 (9th Cir. 1983); Moore v. Hughes Helicopters, Inc., 708 F.2d 475 (9th Cir. 1983); Everitt v. City of Marshall, 703 F.2d 207 (5th Cir.), *cert. denied*, 104 S. Ct. 241 (1983); Wilkins v. University of Houston, 695 F.2d 134 (5th Cir. 1983).

32. 457 U.S. at 152, 160.

33. The Court pointed out that

> [c]onceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims. For respondent to bridge that gap, he must prove much more than the validity of his own claim. Even though evidence that he was passed over for promotion when several less deserving whites were advanced may support the conclusion that respondent was denied the promotion because of his national origin, such evidence would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of petitioner's promotion practices, (2) that petitioner's promotion practices are motivated by a policy of ethnic discrimination that pervades petitioner's Irving Division, or (3) that this policy of ethnic discrimination is reflected in petitioner's other employment practices, such as hiring, in the same way it is manifested in the promotion practices.

Id. at 157-58 (footnote omitted).

> cate that Congress intended to authorize such a wholesale expansion of class action litigation.[34]

In its highly significant footnote fifteen, the Court further suggested that proof of a "biased testing procedure" to evaluate both applicants and employees would "clearly" satisfy the commonality and typicality requirements of rule 23(a).[35] Moreover, the Court did not limit the possibility of across-the-board proceedings to instances of uniform practices having a disparate impact on a broad class. It stated: "Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision making processes."[36]

Thus, the primary lesson of *Falcon* is not that across-the-board proceedings have been eliminated from the fabric of civil rights litigation, but that both the trial court and the parties frequently will devote considerably more time and effort to the class question.[37] *Falcon* establishes only that there is no presumption in favor of across-the-board proceedings; that normal class action requirements must be rigorously applied in Title VII and other civil rights litigation; and that "sometimes it may he necessary for the court to probe behind the pleadings before coming to rest on the certification question."[38] Except in cases involving the most obvious disparate impact theories, this latter observation seems to be a considerable understatement.

C. *Timing and Nature of the Merits Inquiry Required by* Falcon

The primary uncertainties after *Falcon* lie in determining the precise nature of the "specific presentation" identifying common questions of law and fact or the "significant proof" that the employer operates under a "general policy" of discrimination[39] sufficient to permit the certification of a broad civil rights

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34. *Id.* at 158-59 (footnote omitted) (emphasis added).

35. *Id.* at 159 n.15.

36. *Id.*

37. Significantly, in *Falcon* itself, the majority remanded for further proceedings, *id.* at 161, rather than dismiss as urged by the Chief Justice in his separate opinion, *id.* at 161 (Burger, C.J., concurring in part and dissenting in part).

38. *Id.* at 160.

39. *Id.* at 158, 159 n.15.

class action on behalf of a particular racial, sexual, or religious group, and in defining the proper procedure for making those determinations.

The apparent requirement for evidence and proof going to the merits initially seems inconsistent with several strains of established class action doctrine, most notably the Supreme Court's statement in *Eisen v. Carlisle & Jacquelin* that "nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[40] The Court made this statement while disapproving a preliminary assessment of the probability of success on the merits to allocate the cost of class notice in a rule 23(b)(3) case. But it is correctly read to suggest that a trial of the merits is an inappropriate way of resolving class action questions generally. *Eisen* recognizes the need for early definition of the scope of the litigation and is inconsistent with the concept of tying class certification to a preliminary merits determination, however tentative it may be.[41] Courts have frequently observed that the question of class certification should not turn on the court's view of the merits of the named plaintiff's claims.[42] Rule 23(c)(1) provides that class certification should be determined "as soon as practicable after the commencement of an action brought as a class action."[43]

Although *Falcon*'s holding could be read to be somewhat at odds with these principles, the lower court decisions interpreting *Falcon* have succeeded in lessening the tension to a considerable extent. Notwithstanding an occasional decision that *Falcon*'s focus on actual evidence of classwide discrimination suggests deferral of the certification decision until trial on the merits,[44]

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40. 417 U.S. at 156, 177 (1974).

41. *But see* Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 724-36 (1980), arguing that *Eisen* should be confined to its facts and that class action certification should depend on plaintiff's presentation of "evidence and affidavits sufficient to withstand the motion for summary judgment by the defendant." *Id.* at 728. As pointed out below, to the extent the suggestion is merely that the plaintiff present evidence from which a court should reasonably infer the existence of classwide discrimination on a common basis, it is unexceptionable. To the extent that it suggests the necessity for a full inquiry into all aspects of the merits, it seems contrary to rule 23 and to decisions both before and after *Falcon*.

42. *See* 7 C. WRIGHT & A. MILLER, *supra* note 3, § 1759, at 577-78; 7A C. WRIGHT & A. MILLER, *supra* note 3, § 1798, at 244-45.

43. FED. R. CIV. P. 23(c)(1).

44. *See* Richardson v. Byrd, 709 F.2d 1016 (5th Cir. 1983) (class certification hearing

most reported post-*Falcon* decisions have recognized that such a procedure is rarely, if ever, appropriate.[45] That approach would create a danger of unfairness closely akin to the practice of "one-way intervention" in spurious class actions under the old class action rule—a practice amended rule 23 was designed to eliminate.[46] Moreover, early ruling on the certification question is necessary in order to define the scope of pretrial discovery and other trial preparation. Early denial of class certification will significantly narrow the scope of inquiry, thus conserving the resources of the court and the parties. On the other hand, delayed grant of certification may render discovery already accomplished unusable.[47] Furthermore, under rule 23(c)(1) a class may be redefined, limited, or decertified entirely at any time prior to ultimate decision on the merits if evidence produced by full-merits discovery or at trial indicates that early appearances of common-

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combined with trial on liability with consent of parties), *cert. denied*, 104 S. Ct. 527 (1983); Nation v. Winn-Dixie Stores, Inc., 95 F.R.D. 82, 86 (N.D. Ga. 1982).

45. *E.g.*, Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th Cir. 1983); Anderson v. Albuquerque, 690 F.2d 796, 799 (10th Cir. 1982); Paxton v. Union Nat'l Bank, 688 F.2d 552, 558 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 1772 (1983); Meyer v. MacMillan Publishing Co., 95 F.R.D. 411, 413 (S.D.N.Y. 1982); Ladele v. Consolidated Rail Corp., 95 F.R.D. 198, 200 (E.D. Pa. 1982).

46. See the discussion of the difficulties with the original rule in FED. R. CIV. P. 23 advisory committee note, 1966 amendments. In arguing to the contrary, Professor Rutherglen has contended that a "delayed ruling on certification does not raise the danger of one-way intervention, so long as the pre-trial merits inquiry is binding only on the question of class certification." Rutherglen, *supra* note 41, at 735-36. He points out that courts have frequently undertaken such inquiries pursuant to their power to reexamine the class certification at any time during the proceedings, even after the trial on the merits. *Id.* at 732-34 ("In some respects, consideration whether class members will ultimately obtain relief has become so routine that it has escaped recognition."). Delayed certification permits discovery which bears on whether the named plaintiff's claim presents common questions of law or fact with those of a broader class. *Id.* at 733. Rutherglen further argues that examination of the merits will preclude plaintiff's from abusing the class action device to increase their "settlement leverage." *Id.* at 725-27. He rejects a preliminary injunction standard as vesting too much discretion in the trial judge and as too strongly implicating the merits. *Id.* at 729-30. Instead, he suggests a requirement that plaintiff establish his ability to withstand motion for summary judgment, with the decision "binding" only on the question of certification. *Id.* at 728-29.

This analysis minimizes perhaps the most significant reason for requiring early determination of class certification: the need to define the scope of the action for the purpose of discovery and other pretrial preparation. So far as the impact of settlement is concerned, failure of the court promptly to certify a class action that is proper may unduly weaken the plaintiff's bargaining power as much as an initial certification may enhance it.

47. MANUAL FOR COMPLEX LITIGATION § 1.40 (West 5th ed. 1982) (supplament to C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE (1982)).

ality, typicality and adequate representation were unfounded.[48] Thus an early appraisal can be made with confidence that it will have no irreparable consequences if it proves to have been mistaken with the benefit of hindsight.

Courts applying *Falcon* have recognized that, while early resolution of the merits is inappropriate, early inquiry into the merits is not only appropriate but normally mandated.[49] The real question is the appropriate scope of and limits on this inquiry if the class certification decision is not to overwhelm the trial and present an insuperable obstacle to the maintenance of civil rights class actions.

It seems likely that *Falcon* will have little or no effect in most disparate impact cases.[50] The existence of the disputed employment practice or standard and the scope of its application frequently will be undisputed. The question of the legality of the disproportionate impact goes to the merits and should provide no basis for denial of class certification. Although the statistical impact of the practice may vary somewhat among employee groups and locations, the fact that the same practice provides the basis for the claims of all should satisfy *Falcon*'s central concerns for judicial economy and, upon my suggested reading at least, adequacy of representation by insuring a significant overlap or "nexus" between the claims of the class and those of the representative. *Falcon* should not be read to require absolute identity between the claims of the class and those of the representative so long as a significant nexus exists, such as a challenge to a common employment practice.[51]

In contrast, *Falcon* may have a severe impact in disparate treatment cases. In such cases, courts have recognized the need to consider a full range of evidence going to the merits in making the class certification decision under *Falcon*. This has included statistical evidence showing a disproportionate percentage of class members occupying certain positions,[52] episodic

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48. *See* FED. R. CIV. P. 23(c)(1).

49. *See, e.g.*, Evans v. U.S. Pipe & Foundry Co., 696 F.2d 925 (11th Cir. 1983); Meyer v. MacMillan Publishing Co., 95 F.R.D. 411 (S.D.N.Y. 1982); Ladele v. Consolidated Rail Corp., 95 F.R.D. 198 (E.D. Pa. 1982); Nation v. Winn-Dixie Stores, 95 F.R.D. 82 (N.D. Ga. 1982).

50. *See, e.g.*, Nation v. Winn-Dixie Stores, 95 F.R.D. 82, 86 (N.D. Ga. 1982).

51. *See, e.g.*, Anderson v. Albuquerque, 690 F.2d 796, 800 (10th Cir. 1982).

52. *E.g.*, Evans v. U.S. Pipe & Foundry Co., 696 F.2d 925, 929 (11th Cir. 1983); Rowe v. Prudential Property and Casualty Ins. Co., 38 Fed. R. Serv. 2d 411 (Callaghan) (N.D. Ga. 1983).

evidence of other instances of discrimination,[53] and centralized control of personnel decisions at various locations.[54]

The need to consider merits evidence does not mean that the trial court must make a preliminary assessment of the merits at the class certification stage. The fact that the plaintiff's class certification evidence is contradicted or less than conclusive should not preclude certification if it could reasonably support an inference of discrimination on a common, classwide basis.[55] In this respect, the standard to be applied by the court is similar to the one applied in denying a motion for summary judgment or directed verdict. However, not all aspects of the merits are involved—only the single question of the existence and scope of an employment practice affecting the named plaintiff and the members of the class in a common way.[56] The standard for ruling on a preliminary injunction, which involves a preliminary appraisal of the merits,[57] seems highly inappropriate in this context. Such a standard would require that significant additional resources be devoted to the certification question and would pose an extremely high barrier to class certification. These burdens are unwarranted since only a preliminary procedural determination, not an injunction or some other form of relief, is at stake.

D. Unanswered Questions in the Application of Falcon

1. Defense efforts to preclude certification

The suggested approach still leaves many difficult questions. For example, what scope should the certification inquiry be accorded in defense efforts to preclude certification? If the plain-

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53. *E.g.*, Meyer v. MacMillan Publishing Co., 95 F.R.D. 411, 414 (S.D.N.Y. 1982); Ladele v. Consolidated Rail Corp., 95 F.R.D. 198, 203 (E.D. Pa. 1982); Nation v. Winn-Dixie Stores, 95 F.R.D. 82, 88 (N.D. Ga. 1982).

54. *E.g.*, Meyer v. MacMillan Publishing Co., 95 F.R.D. 411, 415-16 (S.D.N.Y. 1982); Ladele v. Consolidated Rail Corp., 95 F.R.D. 198, 203 (E.D. Pa. 1982).

55. *Id.*

56. This point is not explicitly acknowledged by Rutherglen, who argues that a summary judgment standard should be adopted, but appears to contend that plaintiff must establish that "he would prevail as a matter of law on both the individual and the class claims" under normal summary judgment standards. Rutherglen, *supra* note 41, at 728. In a later article focused on other questions, he refers generally to the necessity for "a limited examination of the merits before certification." Rutherglen, *Notice, Scope and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 13 (1983) [hereinafter cited as *Notice, Scope and Preclusion*].

57. *See* 11 C. WRIGHT & A. MILLER, *supra* note 3, §§ 2947-2948.

tiff relies on statistical evidence, should the defense be entitled to present its own statistical case at the class certification stage of the proceedings, or should it be limited to arguing about the reasonable inferences that can be drawn from the plaintiff's own showing? Similarly, when the plaintiff's case is based on episodic evidence,[58] should the defendant be permitted to present rebuttal evidence from the alleged participants?

The general view that a resolution of the merits or even a preliminary appraisal of the probability of success is not required or appropriate at the class certification stage[59] suggests that purely rebuttal evidence might be severely curtailed or entirely eliminated. Thus, the plaintiff would be required to present only a prima facie case of the general policy of discrimination.

A second possible position on the allowable scope of defense efforts to preclude certification would be more analogous to summary judgment by permitting each side to present its own evidence, with all conflicts resolved in favor of the plaintiff. But if the analogy to summary judgment were pursued to its logical conclusion, the class action determination would tend to be viewed as dependent on full-merits discovery and would inevitably be relegated to the later stages of pretrial preparation or even to the trial itself. As previously argued, this result not only would be contrary to the language of the rule, but also would disregard substantial practical reasons for favoring an early, albeit tentative, class determination. Moreover, under normal summary judgment standards—except in the rare case where the rebuttal evidence is so overwhelming that plaintiff's showing could not reasonably be credited—the defendant's contradictory evidence should be disregarded on the question of class certification.[60]

One might contend, however, that when the class issue is presented, the defense will frequently possess internally generated statistical and other evidence that might place plaintiff's class presentation in proper perspective and negate any reasonable inference of classwide discrimination on a common basis. But if such evidence were considered on the initial class decision, it would be unfair to deprive plaintiff of full discovery di-

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58. At least one decision has permitted certification based on plaintiff's own affidavits. Meyer v. MacMillan Publishing Co., 95 F.R.D. 411, 415 (S.D.N.Y. 1982).

59. *See supra* text accompanying notes 55-56.

60. *See* 10A C. WRIGHT & A. MILLER, *supra* note 3, § 2727.

rected to the accuracy and basis for defendant's statistical, episodic, and other class evidence. This unfairness would exert strong pressure to combine class action and merits discovery and to push off the class action decision until the later stages of pretrial preparation or the trial. For the reasons previously discussed,[61] such a result should be avoided.

No absolute rule prohibiting or mandating consideration of rebuttal evidence adequately resolves these competing concerns. As in other areas of class action management, much should be left to the informed discretion of the trial court. Perhaps the best approach would be to make the initial certification decision turn primarily on plaintiff's ability to make a simple prima facie showing after very limited discovery.[62] The trial court would then retain broad discretion to consider the defendant's internally generated contradictory evidence when it could be of significant assistance and would not require full-merits discovery for rebuttal. Otherwise, defense efforts to defeat certification with its own evidentiary showing could be postponed until plaintiff has had substantial opportunity for full-merits discovery going to the existence of classwide discrimination. At that point, the court could entertain defense motions to decertify the class (or plaintiff's motions to certify the class in cases where certification was initially denied) pursuant to its power to reconsider the issue of class certification at any time before decision on the merits.[63] The decisions, however, have not yet addressed this procedural question explicitly.

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61. *See supra* text accompanying notes 44-45.

62. *See supra* text accompanying notes 55-57.

63. *See* FED. R. CIV. P. 23(c)(1).

The defense bar might contend that the suggested procedure would be unfair because it would give the trial judge an early one-sided view of the merits. This argument should be rejected. A jury would not be involved in such proceedings, since the question of class certification is for the court alone. *See* 7A C. WRIGHT & A. MILLER, *supra* note 3, §§ 1785, 1801, at 128, 267-68. Federal trial courts are well aware of the limited purpose of the certification procedure and are unlikely to allow it to influence their ultimate determination of the merits.

The unfocused nature of opinions to date is illustrated by Nelson v. United States Steel Corp., 709 F.2d 675 (11th Cir. 1983), in which the court noted simply that plaintiff was "obligated to show, in at least a preliminary fashion, the required commonality between her claims and those of the putative class." *Id.* at 680. The court quoted from Gilchrist v. Bulger, 89 F.R.D. 402, 406 (S.D. Ga. 1981), that "plaintiff's burden of proof to demonstrate the existence of this common question entails more than the simple assertion of its existence, but less than a prima facie showing of liability." *Nelson*, 709 F.2d at 680.

2. Evidence and discovery relating to class certification

By analogy to summary judgment practices, one would expect the class determination normally to be based on affidavits and other documentary evidence, including the affidavits of plaintiff's statistical experts.[64] Oral testimony should be reserved for trial. One could argue that an oral hearing should be conducted when a conflict arises in the documentary evidence on the class question. But if, in any event, all questions of credibility are to be resolved in favor of the plaintiff, there seems little reason to require all of the trappings of a full adversary hearing including live witnesses.

As to discovery, if the named plaintiff is required to establish a prima facie case of classwide discrimination on a common basis as a condition of class certification, it would be unfair to resolve that question without allowing the plaintiff to conduct some limited discovery on the class issues. Indeed, as previously noted, there may be tendency to postpone class certification until full-merits discovery is complete. This approach is not required by *Falcon* and is inconsistent with the general need to reach the class certification decision early in the proceedings in order to define the limits of the trial and of discovery.[65] Just as the plaintiff should not be entirely foreclosed from class discovery necessary to meet his *Falcon* burden, the defendant should not be subjected to unlimited rummaging in his personnel files or an unending series of depositions covering all aspects of its policies before an initial determination that a broad class action is appropriate.

The best accommodation of these competing interests would be to permit plaintiff limited and carefully controlled discovery, subject to specific approval of the court, designed to uncover the use and scope of any challenged employment practice, basic statistical data, and similar complaints over a defined period. If such rudimentary discovery reveals no pattern of classwide discrimination on a common basis, class certification should be denied initially, subject to reconsideration as the case progresses.

If the plaintiff attempts to meet his *Falcon* burden with statistical evidence of underrepresentation, some standard of comparison must be used.[66] If a court would resolve the merits on

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64. *See* 10A C. WRIGHT & A. MILLER, *supra* note 3, § 2721.

65. *See supra* text accompanying note 47.

66. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 1161-93

the basis of general population or census data, the same approach should probably be used in class certification. On the other hand, if the court would require statistical evidence of the number of qualifying members in the relevant job pool in deciding on the merits, a similar requirement of at least prima facie evidence should probably extend to the class certification stage.[67] Thus, in a statistical case, the burden on the named plaintiff at the certification stage may be substantial.

E. Summary of the Impact of Falcon

A review of the cases applying *Falcon* to date makes clear that the scope of civil rights class litigation has been curtailed. Most courts applying *Falcon* have held that employees may not represent rejected applicants.[68] Courts have held that employees complaining of promotion procedures may not represent employees claiming discriminatory termination, and vice versa.[69] One court has held that full-time clerks could not represent part-time clerks and hookkeepers, or employees in other geographical areas.[70] Another has held that certification of an alleged nationwide class of casual employees depends on evidence that the alleged discriminatory practices existed throughout the organization.[71] The Supreme Court has remanded two appellate decisions for reconsideration in light of *Falcon*. The first had held that custodians allegedly suffering hiring discrimination because of their arrest and juvenile records might represent those applying for other jobs.[72] The second had held that an employee

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(1976).

67. *See, e.g.*, Grant v. Morgan Guar. Trust Co., 548 F. Supp. 1189, 1193 (S.D.N.Y. 1982).

68. *E.g.*, Freeman v. Motor Convoy, Inc., 700 F.2d 1339, 1345-47 (11th Cir. 1983); Minority Police Officers Ass'n v. South Bend, 555 F. Supp. 921, 925 (N.D. Ind. 1983); Ladele v. Consolidated Rail Corp., 95 F.R.D. 198, 202-03 (E.D. Pa. 1982); Meyers v. Ace Hardware, Inc., 95 F.R.D. 145, 151 (N.D. Ohio 1982). *But see* Shannon v. Hess Oil V.I. Corp., 96 F.R.D. 236, 242 (D.V.I. 1982).

69. Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 333-34 (4th Cir. 1983); Redditt v. Mississippi Extended Care Centers, Inc., 718 F.2d 1381, 1387 (5th Cir. 1983); Nation v. Winn-Dixie Stores, Inc., 95 F.R.D. 82 (N.D. Ga. 1982); *see also*, Rosario v. Cook County, 38 Fed. R. Serv. 2d 373 (Callaghan) (N.D. Ill. 1983) (applicants for promotion may not represent nonapplicants).

70. Nation v. Winn-Dixie Stores, 95 F.R.D. 82, 86 (N.D. Ga. 1982).

71. Ladele v. Consolidated Rail Corp., 95 F.R.D. 198, 203 (E.D. Pa. 1982).

72. Jordan v. County of Los Angeles, 669 F.2d 1311 (9th Cir.), *vacated and remanded*, 103 S. Ct. 35 (1982). On remand, the Ninth Circuit revised its earlier determination that class certification was proper. Jordan v. County of Los Angeles, 713 F.2d 503 (9th Cir. 1983).

allegedly suffering a discriminatory discharge could represent those disadvantaged in promotion and transfer.[73]

However, those early indications of the sweeping impact of *Falcon* should not be accorded undue significance. The Court's own language makes it clear that the decision was not intended to erect an absolute barrier to across-the-board certification. At most the decision counsels certain presumptions that a court may choose to follow absent sufficient evidence that the challenged employment practice extends beyond a particular group.[74]

Two recent Fifth Circuit decisions have applied a properly limited interpretation of *Falcon*. In *Richardson v. Byrd*,[75] a sex discrimination case, the district court, with the parties' consent,[76] combined trial on the merits with the class certification hearing (a practice that seems ill-advised for the reasons previously stated).[77] Evidence at trial demonstrated that the defendant sheriff's office initially assigned all female employees to the jail and that subjective decision making processes were used in all promotion and transfer decisions. The district court certified a class of past, present, and future employees and applicants and held that they had been discriminated against in hiring, transfer, promotion, and job assignment.[78] The court of appeals affirmed. Citing footnote fifteen of the Supreme Court's opinion in *Falcon*, the Fifth Circuit stated that *Falcon* was not "a holding that employees never can represent applicants or that an across-the-board class is never appropriate."[79] Because the jail's female section was smaller than its male section, the discrimina-

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73. Brown v. Eckerd Drugs, Inc., 663 F.2d 1268, 1275 (4th Cir. 1981), *vacated and remanded*, 457 U.S. 1128 (1982), *on remand*, 564 F. Supp. 1440 (W.D.N.C. 1983) (declining to recertify class).

74. *See Notice, Scope & Preclusion*, *supra* note 56, at 54, where the author states: "Employee status, organizational structure, and union representation must instead be taken for what they are: easily determined indications of the scope of challenged employment practices that may nevertheless be rebutted by examination of the employer's operations."

75. 709 F.2d 1016 (5th Cir.), *cert. denied*, 104 S. Ct. 527 (1983). *But cf.* Vuyanich v. Republic Nat'l Bank of Dallas, 723 F.2d 1195, 1198-1200 (5th Cir. 1984) (named plaintiffs complaining of race discrimination in hiring and sex discrimination in termination not entitled to represent others alleging race and sex discrimination in placement, compensation, and promotion); Fleming v. Travenol Laboratories, Inc., 707 F.2d 829 (5th Cir. 1983); Wheeler v. City of Columbus, 703 F.2d 853 (5th Cir. 1983).

76. *Richardson*, 709 F.2d at 1018.

77. *See supra* text accompanying notes 43-47.

78. 709 F.2d at 1018.

79. *Id.* at 1019-20.

tory assignment policy also limited the number of new female deputies that could be employed. Thus, "both applicants and employees were adversely affected by the same practice."[80] The named plaintiff, Richardson, whose complaint rested on the sheriff's refusal to transfer her from the civil division, was entitled to represent employees assigned to the jail with respect to both transfer and promotion because the evidence showed that all transfer and promotion decisions were based on subjective factors. "The concerns of *Falcon* were met when the proof surfaced an accused employment *practice* that adversely affected [Richardson] and the certified class of employees and applicants."[81]

Similarly, in *Carpenter v. Stephen F. Austin University*,[82] former black male and female hourly employees (the named plaintiffs were two terminated black females and a retired black male) contended that the University had engaged in race and sex discrimination by channeling blacks and women to lower paid positions in initial assignment and by maintaining discriminatory promotion, transfer, pay, termination, and retirement programs.[83] The district court initially certified a broad class of past, present, and future employees, but on pretrial motion for decertification, limited the class to hourly employees.[84] However, after hearing evidence at trial relating to sex discrimination against salaried clerical and secretarial employees, the trial court again redefined the class to include salaried and clerical employees.[85] The court of appeals held that the district court had not abused its discretion in redefining the class because the critical issue under *Falcon* was not whether the named plaintiffs and the class possessed identical job qualifications, but whether trial of the named plaintiffs' claims would involve issues of law or fact common to the entire class. In the instant case,

> [t]he statistical proof of channeling in both the service/maintenance and clerical job positions and the anecdotal testimony of female clerical employees presented at trial set forth common

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80. *Id.* at 1020.

81. *Id.*; *accord* Johnson v. Montgomery County Sheriff's Dep't, 99 F.R.D. 562 (M.D. Ala. 1983).

82. 706 F.2d 608 (5th Cir. 1983).

83. *Id.* at 613. The employer ultimately prevailed on the pay, termination, and retirement issues. *Id.* at 633.

84. *Id.* at 612.

85. *Id.* at 612-13.

> issues of law and fact with respect to the University's subjective job assignment procedures that resulted in placement of women, as well as blacks, according to stereotyped views of job qualifications.[86]

Although the court of appeals' holding in *Carpenter* could perhaps be faulted for failing to give adequate attention to whether terminated or retired employees could adequately represent current employees on the channeling and promotion issues, particularly since the employer ultimately prevailed on the termination issues,[87] the flexible certification approach followed by the district court was well attuned to proper implementation of *Falcon*.

As plaintiffs become more experienced in proceeding under the new guidelines established by *Falcon*, we may expect that similar showings of across-the-board discrimination on a common basis will be made with increasing frequency. When discrete employment practices are involved, multiple representatives of subclasses will no doubt be presented to challenge each. In short, as one court has concluded: "[W]e do not read *Falcon* as permanently removing the across-the-board class action from the Title VII landscape."[88] Instead, *Falcon* portends an increase in the complexity and burden of the pretrial stages of class civil rights litigation. This development will call for considerable attention and ingenuity on the part of the trial judge if the class aspects of such litigation are to be kept in reasonable perspective and control.[89]

III. Adequacy of Representation and Class Dissidence

Falcon's primary focus is on the lack of objective correspondence between the claims of the named class representative and

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86. *Id.* at 617.

87. *Id.* at 633. Defendants also argued that the named plaintiffs were not adequate class representatives because they had not been qualified for other positions and two of them had been terminated for nondiscriminatory reasons. *Id.* at 616. The court of appeals held that these claims did not undercut the propriety of the trial court's certification, but merely required an appraisal of adequacy of representation. *Id.* at 617. But as the class was not expanded to include salaried employees until trial on the merits, the court of appeals' ruling in this respect seems contrary to East Tex. Motor Freight Co. v. Rodriguez, 431 U.S. 395 (1977), assuming defendant's contention was supported by the evidence. *See supra* text accompanying notes 22-26; *see also infra* text accompanying notes 112-13.

88. Shannon v. Hess Oil V.I. Corp., 96 F.R.D. 236, 242 (D.V.I. 1982).

89. *See* Fed. R. Civ. P. 16 advisory committee note.

those of the members of the class. Yet its emphasis on the requirement that the class representative must "possess the same interest and suffer the same injury"[90] as class members has broader implications for another commonly recurring problem of adequate representation: conflict of interest or antagonism among class members resulting, not from any objective conflict between their claims, but from actually or potentially differing views among the class members regarding the assertion of their rights.

A. Hansberry v. Lee

The foundation case is the Supreme Court's 1940 decision in *Hansberry v. Lee*,[91] which involved a state court action by landowners to enforce a racially restrictive land use covenant against black purchasers of the land. The plaintiffs contended that the defendants were precluded by the decree in an earlier purported class action suit from contesting whether the covenant had become effective. The earlier action had determined, on the basis of a stipulation of the parties, that owners of the required ninety-five percent of the frontage had signed the agreement and that it was enforceable. In *Hansberry*, the Illinois Supreme Court held that the stipulation was false but not fraudulent or collusive, that the prior action had been a class action on behalf of all landowners, and that the defendants were therefore barred from contesting the performance of the condition precedent.[92]

The United States Supreme Court reversed on the ground that binding the members of the class would deny due process. Those resisting enforcement of the covenant were not united in interest with those interested in enforcing it and, therefore, were not members of the "same class." The court stated: "Because of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class."[93]

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90. *See supra* note 22 and accompanying text.

91. 311 U.S. 32 (1940).

92. *Id.* at 39-40.

93. *Id.* at 44. The Court continued:

> It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation is either to assert a common right or to challenge an asserted obliga-

As to the suggestion that the *defendants* (ostensibly opposed to enforcement) in the original action adequately represented the black purchasers in *Hansberry*, the Court contented itself with the observations that (1) they had not been treated as representatives of a class, and (2) "even though nominal defendants, it does not appear that their interest in defeating the contract outweighed their interest in establishing its validity."[94] The Court thereby inferentially overturned the Illinois Supreme Court's conclusion that the stipulation had not been fraudulent or collusive.

Hansberry presents a somewhat unique circumstance because the issue there was not class certification but preclusive effect in subsequent litigation. One might argue that supposed or potential class conflict should not preclude certification, even though members of the purported class who could demonstrate an actual conflict of interest on a particular issue would not be harred by the class judgment in subsequent litigation. However, this argument is not entirely satisfactory since the certification requirements of rule 23, particularly the requirement of adequate representation, are designed to ensure the binding effect of the class judgment.[95]

Hansberry is also somewhat different from the situation in which some members of the class simply may not wish to enforce their rights. While it could be argued that plaintiffs opposed to civil rights enforcement have no legally cognizable interest worthy of respect by the courts,[96] the black defendants in *Hansberry* were immediately adversely affected by a private contractual provision impairing their ability to obtain housing. We know with the benefit of hindsight that they had an affirmative civil right of their own not to be subjected to such discrimi-

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> tion. . . . It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.

Id. at 44-45 (references omitted).

94. *Id.* at 46.

95. *See* FED. R. CIV. P. 23 advisory committee note, 1966 amendment; *see also* 7 C. WRIGHT & A. MILLER, *supra* note 3, § 1765, at 617.

96. *E.g.*, Stotts v. Memphis Fire Dep't, 679 F.2d 579 (6th Cir.), *cert. denied*, 103 S. Ct. 297 (1982).

nation.[97] Moreover, *Hansberry* can be explained as a case in which the absence of preclusive effect resulted from lack of notice to class members,[98] or as resting on the United States Supreme Court's determination (contrary to the holding of the Illinois Supreme Court) that the defendants had colluded with plaintiffs in the prior litigation.[99]

B. Conflicting Applications of the Hansberry *Principle*

The ambiguities of the *Hansberry* opinion have been reflected in sharply divergent strains of authority in the courts of appeals. One line finds a well-known illustration in *Giordano v. Radio Corp. of America*.[100] In *Giordano* the court held that the plaintiff could not maintain an action protesting his expulsion from the union as a class action on behalf of union members.[101] Affidavits before the court made it clear that

> the membership of Local 103 is sharply divided on the very question involved in this case, the expulsion of the plaintiff and his associates. Indeed a majority of the members who voted on the question at a membership meeting held January 11, 1950, voted to sustain their expulsion. With the class thus sharply divided in opinion it would be absurd to say that the leader of one faction in the internecine struggle could adequately represent the whole membership.[102]

The court of appeals also properly rejected the suggestion that the class could be redefined to include only those union members who agreed with the plaintiff, because such a class would be "too ill-defined and ephemeral in make-up" to support a true class suit.[103] Since a class action judgment is binding on the class members, they must be "capable of definite identification as being either in or out of it."[104]

Giordano has had a considerable following in the federal courts, at least when there is concrete evidence of substantial

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97. *E.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

98. Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 338-39 (1948).

99. *See supra* note 93 and accompanying text.

100. 183 F.2d 558 (3d Cir. 1950).

101. *Id.* at 560. The class issue was thought to be relevant to the existence of jurisdictional amount. *Id.* at 561.

102. *Id.* at 560 (footnotes omitted).

103. *Id.* at 560-61.

104. *Id.* at 561.

disagreement within the class.[105] At the same time, before *Falcon*, commentators[106] and some courts[107] had urged that some class dissidence should not preclude class certification despite *Hansberry*. The judicial authority is illustrated by *Dierks v. Thompson*[108] in which some members of the alleged class of former employees favored one construction of a pension plan and some favored another. The court of appeals recognized that the named plaintiffs were typical of only one of the two conflicting groups, but refused to upset class certification on the ground that the *defendants* adequately represented the position of those who disagreed with the plaintiffs.[109] Similarly, in his well-known 1969 article on class actions, Professor Wright observed that "[i]n any conceivable case, some of the members of the class will wish to assert their rights while others will not wish to do so. . . . Yet no one has ever doubted the propriety of bringing such a suit as a class action."[110]

C. *Impact of* Rodriguez *and* Falcon *on the Treatment of Subjective Class Dissidence*

Do the Supreme Court's decisions in *Rodriguez* and *Falcon* shed any light on the proper resolution of this continuing, unresolved issue? In emphasizing a close correspondence between the interests of the absent class members and those of the named class representative,[111] the Supreme Court's decisions reflect the traditional view that legal rights are personal to their possessors, who may elect to enforce them or not, and are not subject to the unrestrained law enforcement discretion of a self-appointed, private attorney general. In *Rodriguez*, for example, the Court, after concluding that the named plaintiffs were not members of the class they sought to represent, went on to ob-

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105. *See, e.g.*, Peterson v. Oklahoma City Hous. Auth., 545 F.2d 1270, 1273 (10th Cir. 1976); Ihrke v. Northern States Power Co., 459 F.2d 566, 572 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972); Schy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970).

106. Wright, *Class Actions*, 47 F.R.D. 169, 174 (1970); 5 H. NEWBERG, NEWBERG ON CLASS ACTIONS, § 8152c, at 215-17 (1977).

107. *E.g.*, Peterson v. Oklahoma City Hous. Auth., 545 F.2d 1270, 1276 (10th Cir. 1976) (Doyle, J., dissenting); Dierks v. Thompson, 414 F.2d 453, 456-57 (1st Cir. 1969); Sturdevant v. Deer, 73 F.R.D. 375, 378 (E.D. Wis. 1976).

108. 414 F.2d 453 (1st Cir. 1969).

109. *Id.* at 457.

110. Wright, *supra* note 106, at 174 (footnote omitted).

111. General Tel. Co. v. Falcon, 457 U.S. 147, 156 (1982); East Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403 (1977).

serve that "[a]nother factor . . . suggesting that the named plaintiffs were not appropriate class representatives was the conflict between the vote by members of the class rejecting a merger of the city- and line-driver collective-bargaining units, and the demand in the plaintiffs' complaint for just such a merger."[112]

Thus, the clear election by members of the class to forego enforcement of their rights should not be disregarded by the federal courts in certification decisions. Indeed, it is difficult to see how one could contend that a representative is suing "on behalf of" a class at all—as required by rule 23(a)[113]—if many members of the class affirmatively oppose enforcing their rights.

This conclusion may appear superficially at odds with the structure of rule 23, which provides no right to "opt out" of rule 23(b)(2) actions in contrast to rule 23(b)(3) actions. However, the fact that class members may not "opt out" if they are adequately represented provides no basis for finding that they are adequately represented in the first instance. The primary reason for the absence of an "opt out" provision in rule 23(b)(2) was the assumption that greater homogeneity of interests would exist among the members of the class in actions properly maintained under that subdivision than in actions maintained under rule 23(b)(3).[114]

If, as suggested here, *Rodriguez* and *Falcon* support giving the views of the class substantial weight on the class certification decision, the federal trial courts face extremely difficult practical problems of judicial administration. Is an apparent likelihood of class dissidence sufficient to preclude certification? Or must a true conflict of interest be demonstrated by the opponent of certification? Assuming there is adequate evidence of conflict among the class, what proportion of the class must object to preclude certification? Are other procedural safeguards, such as notice, opportunity to intervene, or representation by the defendant, sufficient to ameliorate the question of adequate representation that would otherwise exist?

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112. 431 U.S. at 405 (footnote omitted).

113. "One or more members of a class may sue or be sued as representative parties on behalf of all . . . ." FED. R. CIV. P. 23(a).

114. *See* 7A C. WRIGHT & A. MILLER, *supra* note 3, § 1786, at 143-44.

D. Treatment of Class Dissidence after Falcon: Horton v. Goose Creek Independent School District

The most careful post-*Rodriguez* consideration of these questions appears in the Fifth Circuit's "sniffing dog" case, *Horton v. Goose Creek Independent School District*,[115] a lengthy per curiam opinion on rehearing, which in its class action aspects is identical to Judge Wisdom's original panel opinion.[116] The issue in *Horton* was whether the school district's canine drug detection program violated the Constitution.[117] The trial court had denied class certification, apparently on the ground that some students might support the program. The Fifth Circuit reversed. The court of appeals was not troubled by the absence of hard evidence of opposition to the action. It recognized "the chance that some class members support the canine search program as a very real possibility"[118] and thought "it improper to demand much evidence from the defendant that a significant number of class members oppose the plaintiff when it is obvious that a real possibility of antagonism exists."[119]

The court perceived "unresolved tension between the cases permitting certification in these circumstances and the leading case on adequacy of representation for purposes of binding class members, *Hansberry v. Lee* . . . ."[120] Nonetheless, the court of appeals held that the class should have been certified based on its conclusions that "[t]he very existence of the class procedure suggests a policy in favor of making it available to litigants when possible,"[121] that facilitating the assertion of claims and avoiding repetitive litigation "also militate in favor of devoting some ingenuity to making the class device available," and that trial judges "should err in favor of certification."[122] After noting the possibility that the trial court could have employed "a variety of techniques," including notice, opportunity to intervene, and conditional certification to protect any dissident class members, the

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115. 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3536 (1983).

116. Horton v. Goose Creek Indep. School Dist., 677 F.2d 471, *withdrawn*, 690 F.2d 470 (5th Cir. 1982).

117. 690 F.2d at 473. On the merits, the court of appeals concluded that dragnet "sniff searches" of the students themselves were unconstitutional, but not the sniffing of lockers and cars. *Id.* at 477-79.

118. *Id.* at 485.

119. *Id.* at 486.

120. *Id.*

121. *Id.* at 487.

122. *Id.*

court found such procedures to be unnecessary in *Horton* itself because the position of any dissident class members had been "asserted energetically and forcefully by the defendant"[123] with no indication of collusion.

While the result in *Horton* was probably correct because no hard opposition to the class was demonstrated, the general approach of the court seems at odds with recent Supreme Court decisions, most notably *Falcon*, in several respects. Just as the *Falcon* court required actual evidence of the existence of class-wide discrimination in order to permit class certification, so it seems to follow that actual evidence of substantial opposition to the class should be produced in order to preclude it.[124]

This raises the question whether the defense should be entitled to discovery on the dissidence issue. As such discovery will inevitably present complexity, delay, and the potential for harassment, it should not be permitted as a matter of course. Instead, when a court sees a likelihood of substantial opposition within the class, discretionary notice to the class, designed to solicit an expression of views, would seem more meaningful and appropriate. Because notice in rule 23(b)(2) class actions is discretionary under rule 23(d)(2),[125] individual notice to each class member is unnecessary. The expense of alternative forms of notice such as publication and posting should not be excessive. Moreover, since the burden of producing hard evidence of real disagreement within the class should rest with the defendant, the expense of notice—unlike the expense of mandatory notice in rule 23(b)(3) class actions[126]—should be borne by the defense.

E. Certification Standard Where Substantial Class Dissidence Is Demonstrated

If actual evidence of substantial class disagreement is presented, what standards should the court apply in making the certification decision? If virtually all members of the class are opposed to the action, it is difficult to conclude that there is any class at all. Certification should be denied for lack of adequate

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123. *Id.* at 487-88.

124. *See, e.g.*, Arthur v. Starrett City Assoc., 98 F.R.D. 500, 507 (E.D.N.Y. 1983) ("[I]n each of the cases cited by defendants, most of the putative class members had demonstrable views in opposition to the goals of the litigation and colorable legal interests in direct conflict with the named plaintiffs.").

125. FED. R. CIV. P. 23(c)(2), (d)(2).

126. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-79 (1974).

representation and for lack of numerosity.[127] When the class is more evenly divided, the question is much more difficult. The structure of rule 23 appears to preclude any opportunity to opt out so long as the action is certified under rule 23(b)(2).[128] Moreover, contrary to the conclusion in *Horton*,[129] neither the opportunity of intervention nor representation by the defendant adequately protects the interests of the class members. These procedures serve to ensure that both sides of the merits are heard,[130] but this does nothing to protect the interests of class members in declining to assert a right that they may substantively possess. The interest in declining to assert a right is at stake in cases like *Horton*, and neither intervention nor presentation of the defense's case on the merits can protect that interest.

One could argue that the question of certification is of no particular significance in cases like *Horton*, because even if the action is not certified, any relief that is granted will redound to the benefit of the class as a whole. This assumption is much too facile. When no class is certified, the better view is that relief must be limited to the plaintiffs before the court.[131] Moreover, in typical civil rights class actions, class certification may have a significant impact on the scope of discovery,[132] on the amount of attorney's fees awarded to the prevailing party,[133] and on the plaintiff's bargaining power in settlement negotiations.[134] These important practical consequences of class certification make it impossible to casually brush the question aside.

One potential solution to this conundrum—which admittedly has little judicial support[135]—is to question the propriety of continuing rule 23(b)(2) certification at all in such circumstances. Rule 23(b)(2) applies only when the defendant has ac-

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127. 7 C. WRIGHT & A. MILLER, *supra* note 3, § 1762, at 603 (lack of numerosity).

128. FED. R. CIV. P. 23; *see* 7A C. WRIGHT & A. MILLER, *supra* note 3, § 1789.

129. Horton v. Goose Creek Indep. School Dist., 690 F.2d 470 (5th Cir.), *cert. denied*, 103 S. Ct. 3536 (1983).

130. *Id.*

131. *See Notice, Scope and Preclusion*, *supra* note 56, at 19.

132. Garth, *Conflict and Dissent in Class Actions: A Suggested Perspective*, 77 NW. U.L. REV. 492, 501 (1982).

133. *Id.*; *see also* Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974); MANUAL FOR COMPLEX LITIGATION, *supra* note 47, § 1.47, at 70 (listing factors that determine size of attorney's fees. Since class actions are generally more complicated, fee awards should generally be greater.).

134. Garth, *supra* note 132, at 501.

135. *But see* Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983).

ted 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."[136] When a substantial portion of the class desires no remedy, injunctive or declaratory relief with respect to the entire class is inappropriate. Thus, if substantial disagreement is actually expressed, the court might consider recertifying the class under rule 23(b)(3) with its attendant right to opt out. This approach would be in accord with the general assumption that a proper rule 23(b)(2) action is more cohesive than one maintained under rule 23(b)(3).[137] Of course, recertification under rule 23(b)(3) would place the burden of mandatory class notice on the plaintiffs under the *Eisen* decision.[138] But even absent recertification with its attendant burden of mandatory notice, some decisions have recognized that federal district courts have power to provide notice and opportunity to opt out in rule 23(b)(2) actions under their discretionary rule 23(d)(2) power to enter orders in the conduct of class actions.[139]

The recent Eleventh Circuit decision in *Holmes v. Continental Can Co.*,[140] bears significantly on the question of recertifying a subdivision (b)(2) class action under subdivision (b)(3) when substantial class opposition is shown. In *Holmes*, an across-the-board attack on defendant's employment practices was settled on terms which disproportionately allocated one half of the lump sum settlement award of back pay to the named class representatives. Thirty-nine members of the class of 118 objected to the allocation. The court of appeals held that under these circumstances, the district court abused its discretion by approving the settlement without giving the dissident class members an opportunity to opt out.[141] The court recognized that there is no right to opt out in rule 23(b)(2) actions generally, but

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136. FED. R. CIV. P. 23(b)(2).

137. *See* 7A C. WRIGHT & A. MILLER, *supra* note 3, § 1775; Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983).

138. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

139. *See, e.g.*, Penson v. Terminal Transp. Co., 634 F.2d 989, 993 (5th Cir. 1981). However, the general rule is that there is no right to opt out of a rule 23(b)(2) class action unless provided for as part of a negotiated settlement. *See* Holmes v. Continental Can Co., 706 F.2d 1144, 1154 (11th Cir. 1983); Plumer v. Chemical Bank, 668 F.2d 654, 657-60 (2d Cir. 1982); Laskey v. United Auto Workers, 638 F.2d 954, 956-57 (6th Cir. 1981).

140. 706 F.2d 1144 (11th Cir. 1983).

141. *Id.* at 1155.

attributed that fact to the drafters' assumption that rule 23(b)(2) classes, which challenge employment practices "applying more or less equally to all members of the class,"[142] are inherently more cohesive and homogeneous than the common question damage actions typically maintained under subdivision (b)(3).[143] This assumption, however, cannot be automatically applied to the monetary relief stage of a Title VII action because "monetary awards may give rise to conflicts of interests within the class," as the award did in *Holmes*.[144] The court reasoned that in these cases, the relief stage is fundamentally more similar to a (b)(3) class than to a (b)(2) class, and the opt out protection of (b)(3) must be applied.[145] The court of appeals also observed:

> Former fifth and eleventh circuit cases acknowledge . . . that the rationale for not according procedural protections to absent class members is considerably weaker with respect to the monetary aspects of Title VII class actions, when interests of class members are most likely to diverge, than with respect to class wide injunctive relief.[146]

In contrast, the liability stage "stresses claims common to the class as a whole," suggesting that "the procedures associated with (b)(3) classes, procedures designed to protect absent class members, would serve little purpose."[147] A bifurcated procedure permitting opt out only at the relief stage "reflects a sensitivity toward the heterogeneous quality of the claims resolved at the monetary relief stage and evinces a recognition of the need to protect the interests of the absent class members at that stage."[148]

The *Holmes* decision is unexceptionable as far as it goes. But there is no persuasive basis for confining the court's rationale to the monetary stages of rule 23(b)(2) actions. In a case involving substantially demonstrated opposition to the very maintenance of the action, it is difficult to conceive of the class as "homogenous" or "cohesive" even though the entire class is similarly situated in an objective sense. A central message of both

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142. *Id.*
143. *Id.* at 1155-57.
144. *Id.* at 1154.
145. *Id.* at 1155.
146. *Id.* at 1157.
147. *Id.* at 1157-58.
148. *Id.* at 1158.

Rodriguez and *Falcon* is that the public policies favoring judicial efficiency and the eradication of discrimination provide no adequate justification for disregarding the essentially representative character of the class action device. Moreover, there is little reason to believe that according a right to opt out in civil rights class actions by classifying them under subdivision (b)(3) when substantial opposition to the maintenance of the action has been demonstrated would prove to be a serious obstacle to class action maintenance in most cases.

Absent recertification under rule 23(b)(3), or discretionary recognition of a right to opt out in an action maintained under subdivision (b)(2), the federal district courts inevitably will encounter a very difficult balancing process in reaching their certification decisions when confronted with substantial records of class opposition. Included in the balance will be such factors as the scope and depth of that opposition, the ability to shape relief to alleviate that opposition, and the practical availability of other methods of enforcement for the nondissident members of the class.[149] Underlying all these observations is the conclusion that recent Supreme Court class action decisions recognize the absent class members as an actual constituency whose views and interests must be represented and respected in charting the course of civil rights litigation.[150]

F. The Relevance of Decisions Considering Class Dissidence in Settlement

The situation we have been considering, significant class opposition to the maintenance of the action, should be compared with another instance of class dissidence commonly confronted in civil rights and other class actions—substantial opposition to the terms of a settlement agreement from members of the affected class. In the latter context, unlike the former, the "black letter law" is relatively well charted. Substantial class dissidence is one important factor among many the district court must con-

149. Garth, *supra* note 132, at 523-27.

150. *See* Lelsz v. Kavanagh, 710 F.2d 1040, 1043 (5th Cir. 1983):

> We caution that such public litigation requires the presence of affected persons by adequate representatives. Attempting to define as a single juristic unit all consumers of state habilitation service for the retarded places Rule 23(b)(2) under great strain. That a few persons aided by sophisticated counsel assert a common goal does not prove its existence.

Id. at 1048.

sider in determining whether settlement is "fair, adequate and reasonable."[151] In the leading case, *Pettway v. American Cast Iron Pipe Co.*,[152] the opposition of over seventy percent of the concerned subclass and all of the named class representatives to the overall back pay award (as opposed to its allocation) convinced the United States Court of Appeals for the Fifth Circuit that the "class" could not be said to have settled its claim. The court stated that

> [w]hile majority rule is not the test in every case, in the context of determining the total back pay award majority sentiment becomes highly relevant. We stress that this is not a dispute over the *allocation* of a settlement fund, with respect to which the court should not allow a majority, no matter how large, to impose its decision on the minority.[153]

Notwithstanding the result in *Pettway*, many decisions have approved settlements opposed by most or all of the named representatives as well as by a majority of the affected class.[154] The courts have recognized that the obligation of both the class counsel and the court is to the class as a whole. While a majority of the class may not be forced to bear a disproportionate burden in the allocation of the settlement, some sacrifice of the individual interests of class members may be required in order to maximize the overall recovery for the class.[155] Moreover, the prevailing view precludes dissidents from "opting out" of the settlement in a rule 23(b)(2) action to pursue their individual claims unless the settlement itself so provides.[156] On the other hand, as illustrated by *Holmes v. Continental Can Co.*,[157] even minority opposition to preferential allocation of the settlement to the named class representatives may require that the dissi-

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151. Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1219 (1983).

152. 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

153. *Id.* at 1217.

154. *See, e.g.*, Reed v. General Motors Corp., 703 F.2d 170, 174-75 (5th Cir. 1983); TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 462 (2d Cir. 1982); Parker v. Anderson, 667 F.2d 1204, 1210-11 (5th Cir.), *cert. denied*, 103 S. Ct. 63 (1982).

155. *See* Mendoza v. United States, 623 F.2d 1338, 1348 (9th Cir. 1980), *cert. denied sub nom.* Sanchez v. Tucson Unified School Dist. #1, 450 U.S. 912 (1981).

156. *See generally* Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981).

157. 706 F.2d 1144 (11th Cir. 1983).

dents be allowed to opt out as a condition of approval of the settlement.[158]

There are substantial arguments that class opposition to the initiation of an action should be accorded the same recognition that class opposition to the unfair allocation of a settlement fund receives. In a challenge to the overall fairness and adequacy of a settlement, all members of the class typically wish to vindicate their rights through the judicial process. Indeed, substantial resources have already been expended in a class proceeding. The only issue is whether, with the benefit of hindsight, the class might have fared better had the case been tried to a final decree—a highly problematic inquiry. On that question, little reason exists to prefer the biased perspective of a portion of the class to that of the remainder and to the informed judgment of class counsel and the district court that the class as a whole has been benefited. In contrast, a dispute over the right of initiation typically comes earlier in the proceeding, before significant resources have been expended, and involves the more fundamental question of whether a litigant may be forced to assert his legal rights against his will. On this question, the judgment of class counsel and a majority of the class seems of little relevance. Dissidence in this situation is thus much more analogous to a dispute over settlement allocation than to a dispute regarding the overall adequacy of a settlement.

This analysis supports the view previously expressed that the "opt out" procedure adopted by *Holmes* in the context of substantial minority opposition to the allocation of a settlement fund, should be extended to the liability stage of class actions ostensibly maintained under rule 23(b)(2) when substantial opposition to the maintenance of an action is demonstrated within the class.[159]

IV. Adequacy of Representation and the Expired, Settled, or Defective Claim of the Named Representative

In no area has the Supreme Court been more involved in the intricacies of class action procedure in recent years than in the cases involving the effect of the lapse of the named representative's claim, whether through mootness, settlement, or disposition after trial on the merits. In a series of decisions commenc-

158. *Id.* at 1153-55.
159. *Id.*

ing with *Sosna v. Iowa*[160] in 1975 and continuing through *United States Parole Commission v. Geraghty*[161] in 1980, the Court has prescribed an increasingly intricate body of procedural rules to deal with the problems of justiciability and adequacy of representation that such a lapse may present. This new body of doctrine is of immense practical importance in dealing with the problems of class action management routinely confronted in the federal trial courts.

On a theoretical level, the Supreme Court has been criticized for adhering too closely to a "bipolar" model of private rights litigation, with undue emphasis on the significance of the status of the named representative's claim and insufficient attention to the reality of the class as a party in interest and the class attorney as its representative.[162] Some commentators argue that this approach has led the Court to create an unnecessarily complex structure of rules and has distracted its attention from the true problem of representation of the class.[163]

This criticism is considerably overdrawn. A detailed examination of these developments demonstrates that the Court has significantly departed from traditional concepts of justiciability, standing, and mootness in the interest of permitting civil rights class actions to continue despite apparent inconsistency with normal article III and representation requirements. In doing so, the Court has accommodated the need to maintain incentives for "public law" litigation to a significant degree. At the same time, much can be said for preserving at least some role for the traditional representative, particularly in such fundamental respects as initiating the action and defining its basic contours. Absent this control of class counsel by a real party in interest, it is difficult to escape the conclusion that the class action device would be transformed from a needed means of obtaining redress for very real societal wrongs to individuals into a weapon for the vindication of the ideological and pecuniary interests of the lawyers themselves.

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160. 419 U.S. 393 (1975).

161. 445 U.S. 388 (1980).

162. *See, e.g.*, Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 37-39 (1982).

163. *Id.*

A. Sosna v. Iowa

The foundation for this entire line of development is Justice Rehnquist's opinion for the Court in *Sosna v. Iowa*,[164] holding that even though the named plaintiff had satisfied Iowa's challenged durational residency requirement for divorce while the case was pending on appeal and the controversy was not likely to be repeated as to her, the case was not moot. The Court affirmed the traditional view that

> [t]here must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case.[165]

Nevertheless, the Court also held that following certification of the class, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant."[166] The necessary article III controversy "may exist . . . between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot."[167] Provided there is a "live controversy" with the class following certification, the action may proceed, but the plaintiff whose claim is moot is not automatically an adequate representative.[168] Adequacy of representation is a separate inquiry.

In *Sosna* the Court treated the question of adequate representation very summarily, noting only that there was no clear lack of homogeneity in the class and that the interest of the class had been "competently urged at each level of the proceeding."[169] Justice White dissented on the grounds that an attorney could not initiate or maintain a class action without a client with a personal stake, that the only continuing interest in the action was that of the class attorney, and that the Court's reliance on class certification improperly rested on a legal "fiction" to satisfy a constitutional mandate.[170]

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164. 419 U.S. 393 (1975).
165. *Id.* at 402.
166. *Id.* at 399.
167. *Id.* at 402.
168. *Id.* at 403.
169. *Id.*
170. *Id.* at 413 (White, J., dissenting).
There was some indication in *Sosna* that the "capable of repetition yet evading re-

Sosna's emphasis on the class as a separate legal entity for article III purposes strongly suggested that certification was the

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view" doctrine might limit the scope of its holding. The Court specifically noted that the case presented an issue which "escapes full appellate review at the behest of any single challenger." *Id.* at 401. Yet in its subsequent decision in Franks v. Bowman Transp. Co., 424 U.S. 747, 754 (1976), the Court announced that "nothing in [*Sosna*] . . . holds or even intimates that the fact that the named plaintiff no longer has a personal stake in the outcome of a certified class action renders the class action moot unless there remains an issue 'capable of repetition, yet evading review.' " Nonetheless the "capable of repetition yet evading review" doctrine continues to be significant to resolution of class justiciability and representation problems in at least two respects. First, if the claim of the named representative falls within the class of those "capable of repetition yet evading review," then it is not moot and none of the problems of justiciability and adequate representation addressed in *Sosna* and subsequent decisions arises. Second, in *Sosna* itself, and subsequently in Gerstein v. Pugh, 420 U.S. 103 (1975), the Supreme Court recognized that even though no class had acquired a legal status of its own through certification prior to the expiration of the named plaintiff's claim, the action might still present a justiciable controversy if mootness occurred "before the district court can reasonably be expected to rule on a certification motion." 419 U.S. at 402 n.11. This "class action" branch of the "capable of repetition yet evading review" doctrine when there has been no class certification once again illustrates the consistently practical and realistic orientation of the Court in this area: an attorney will not be permitted to initiate class action without a client. But, if there is a client and the action is properly initiated, expiration of the named plaintiff's claim will not moot the class aspects if (1) formal class certification has occurred prior to that time, signifying that the trial court has determined that a class affected on a common basis with the named plaintiff actually exists; or (2) it was not reasonably practicable to rule on class certification prior to that time. This approach hardly seems hostile to the maintenance of effective public law litigation.

In applying this refinement to *Sosna*'s general rule requiring class certification to avoid mootness upon expiration of the named representative's claim, one might ask whether the federal district courts should take a strict or liberal approach in determining whether a court could reasonably be expected to rule on the class certification question prior to mootness. In Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030 (5th Cir. 1981), the Fifth Circuit considered a case in which defendants had tendered full judgment to the plaintiff while the district court had the question of certification under advisement. The trial court then dismissed the action as moot. The Fifth Circuit acknowledged the general principle that "if the named plaintiffs' individual claims become moot before a class has been certified, no justiciable claims are at that point before the court and the case must as a general rule be dismissed for mootness." *Id.* at 1046. It then went on to note that the *Sosna* Court's exception for claims not reasonably capable of certification prior to mootness could be interpreted as applying "only in those cases in which the controversy is so transitory that no single named plaintiff could maintain a justiciable claim long enough to reach the class certification stage of the litigation," or as allowing the district court a "reasonable time to rule on the certification question despite the intervening mootness of the named plaintiffs' claims" in any case without regard to whether the claim was inherently transitory. *Id.* at 1047-48. The *Zeidman* court found it unnecessary to resolve this question in the case before it, because even under the narrower view, permitting defendants to "pick off" the named plaintiff's claims one by one by tender of judgment prior to certification would render the claims "inherently transitory." The court of appeals saw no meaningful distinction between claims which by their very nature were transitory, and those which were made transitory by the deliberate act of the defendants. Otherwise, "the defendants would have the option to preclude a viable

critical event and that termination of the named plaintiff's claim when no class had been certified would moot the controversy. Several of the Court's subsequent decisions supported this suggestion. In two school cases, *Board of School Commissioners v. Jacobs*[171] and *Pasadena City Board of Education v. Spangler*,[172] the Court held that actions treated as class actions but never formally certified as such become moot upon the expiration of the named plaintiff's claims. In the *Jacobs* case, the Court emphasized the importance of a formal certification decision to define those bound by the judgment.[173] Similarly, in *East Texas Motor Freight System v. Rodriguez*,[174] plaintiffs had made no motion for class certification and the district court, sua sponte, denied certification simultaneously with its ruling on the merits. The Supreme Court held that no class action could be certified on appeal since, following trial, it was clear that the named plaintiffs were not qualified for the line-driver positions they sought and thus were not members of the class they sought to represent. The Court stated that the result would have been different if the named plaintiffs had been found not to be class members after the class initially had been certified.[175]

Other decisions during this same period contained contrary indications. In *United Airlines v. McDonald*,[176] following entry of a consent judgment satisfying the claims of the named plaintiffs, the Court held that class members were entitled to intervene for the purpose of appealing the earlier denial of class certification. The Court's holding was explicitly based on the conclusion that the trial court's refusal to certify the class was "subject to appellate review after final judgment at the behest of the named plaintiffs."[177] And in its 1978 decision in *Coopers & Lybrand v. Livesay*,[178] the Court, in holding that a denial of

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class action from ever reaching the certification stage." *Id.* at 1050.

The court's analysis in *Zeidman* seems out of focus. *Sosna*'s relation back doctrine quite clearly does depend upon the inherently transitory nature of the claim. But the Supreme Court's consistently pragmatic and realistic approach in this area suggests that in making that determination, a district court should not require an absolute or near impossibility of certification prior to mootness, but only reasonable impracticability.

171. 420 U.S. 128 (1975).
172. 427 U.S. 424 (1976).
173. 420 U.S. at 130.
174. 431 U.S. 395 (1977).
175. *Id.* at 406 n.12.
176. 432 U.S. 385 (1977).
177. *Id.* at 393.
178. 437 U.S. 463 (1978).

class certification was not subject to interlocutory appeal, stated that a prevailing plaintiff might appeal the denial following the entry of the final judgment.[179]

B. United States Parole Commission v. Geraghty[180]

These conflicting currents were resolved in the 1980 *Geraghty* decision. The trial court had denied class certification simultaneously with its ruling on cross motions for summary judgment upholding the validity of the United States Parole Commission's release guidelines. While the case was pending on appeal, Geraghty's individual claim was mooted by his release. The Supreme Court, by a narrow five to four majority,[181] held that the action was not moot.

The majority held that the article III mootness doctrine in the class action setting consists of two aspects: First, whether the issues presented are "live," and second, whether the named class representative has the necessary personal stake in the outcome.[182] In *Geraghty* there was a live controversy with at least some members of the class as demonstrated by motions to intervene.[183] As to the personal stake requirement, the Court derived a "relation back" doctrine from *Sosna* and related decisions.[184] It held that such decisions demonstrated the "flexible character of the Art. III mootness doctrine."[185] Mootness of the named plaintiff's claim did not moot the entire case because "[a] plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class."[186] Notwithstanding expiration of his substantive claim, the named plaintiff had a sufficient personal stake in the procedural claim for class certification to satisfy article III requirements.[187] Furthermore,

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179. *Id.* at 468, 469.

180. 445 U.S. 388 (1980).

181. The majority consisted of Justices Blackmun, Brennan, Marshall, White and Stevens, with Justice Powell, the Chief Justice, and Justices Stewart and Rehnquist dissenting.

182. 445 U.S. at 396 (citing Powell v. McCormack, 395 U.S. 484, 496 (1969)).

183. 445 U.S. at 396.

184. *Id.* at 397-98.

185. *Id.* at 399-400.

186. *Id.* at 402.

187. *Id.* at 403-04. The *Geraghty* Court recognized that its holding that a party retains a legally cognizable interest in a procedural issue divorced from the outcome of the case was at odds with traditional mootness doctrine. But it reasoned that "[t]his 'right' is more analogous to the private attorney general concept than to the type of interest tradi-

the Court made clear that its holding was limited to an appeal of the certification question. Only if denial of class certification were ultimately reversed could the merits be reached under *Sosna*.[188] As in *Sosna*, adequacy of representation by the named plaintiff was a separate issue.[189] Justice Powell's dissent predictably rested on the grounds that the core article III requirement of a personal stake was not "flexible,"[190] and there could be no article III personal stake in a procedural decision separate from the outcome of the case.[191]

Geraghty again illustrates the intensely practical approach of the current Supreme Court majority to the issue of public law litigation. A lawyer may not institute an action without an individual client. But when a real client has retained a lawyer and instituted an action, the Court will recognize the interests of a class that has been demonstrated to exist, notwithstanding theoretical article III questions.[192]

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tionally thought to satisfy the 'personal stake' requirement." *Id.* at 404.

188. *Id.* at 404.

189. *Id.* at 405-06.

190. *Id.* at 412.

191. *Id.* at 421-23.

192. Moreover, from a practical and functional standpoint it seems difficult to argue that an erroneous denial of class certification should lead to a totally different result. There is no reason to question the ability of a lawyer, even one lacking a client with a personal stake in the outcome, in adequately representing the interests of the class in the certification question on appeal. The named representative sought class certification at the outset of the action, and the ability of counsel to proceed on appeal is unlikely to have an impact more adverse to the class than it would have had if the claim of the named representative did not become moot.

On the other hand, deferring recognition of the interests of the class until the certification stage seems consistent not only with *Falcon*'s refusal to presume that civil rights actions are proper class actions at the outset, but also with the practical necessity for some clearly defined point at which the class as an entity assumes independent, juridical significance. It is also true that before the certification decision both the courts and the parties are less likely to have invested substantial resources that would be wasted if the action were dismissed.

The Supreme Court's opinion in *Geraghty* explicitly recognizes the important interests of the absent class members:

> The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar law suits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims [citations omitted]. . . . Although the named representative receives certain benefits from the class nature of the action, some of which are regarded as desirable and others as less so, these benefits generally are byproducts of the class-action device. In order to achieve the primary benefits of class suits, the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if

C. *Unanswered Question After* Sosna *and* Geraghty

Notwithstanding the intensity of Supreme Court activity in this area, several important questions about the scope and application of the *Sosna-Geraghty* doctrine remain.

1. *Effect of settlement of the named plaintiff's claim*

Geraghty involved the simple lapse of the named plaintiffs' claims. In footnote 10, the Court expressly reserved the question of the ability of a named plaintiff who had settled his individual claim to appeal from an adverse ruling on certification.[193] In its earlier decision of *United Airlines v. McDonald*,[194] the Court had stated in dictum that a stipulated award of back pay following judgment for the plaintiffs on liability would not preclude the named plaintiffs from appealing the denial of certification.[195]

In the settlement context, the answer to the mootness question should turn on the meaning of the settlement agreement

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the requirements of the Rule are met.

Id. at 403-04.

The Chief Justice's narrower opinion in the companion *Roper* case is even more explicit:

> The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; It may motivate them to bring cases that for economic reasons might not be brought otherwise. Plainly there has been a growth of litigation stimulated by contingent-fee arrangements and an enlargement of the role this type of fee arrangement has played in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost. The prospect for such fee arrangements offers advantages for litigation by named plaintiffs in class actions as well as for their attorneys. For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the "private attorney general" for the vindication of legal rights; obviously this development has been facilitated by Rule 23.
>
> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device. That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries. But the remedy for abuses does not lie in denying the relief sought here, but with re-examination of Rule 23 as to untoward consequences.

Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338-39 (1980).

193. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980).

194. 432 U.S. 385 (1977).

195. *Id.* at 393.

rather than on any limitation imposed by article III. Unless plaintiff's settlement precludes an appeal, a named plaintiff who has sought but not obtained classwide relief should have an article III "stake" in obtaining the broader relief sought in the complaint. This result follows from *Deposit Guaranty National Bank v. Roper*,[196] in which a strong majority of the Court held that an unaccepted tender of judgment, including interest and costs, on the plaintiff's individual claim did not preclude the plaintiff from appealing a previous denial of class certification because he retained an interest in spreading fees and costs among the class.[197] The article III result should be no different when the plaintiff has accepted the tender but has agreed to settle only his individual claim.

In the event that the parties do not make their intentions on this question explicit, defendants may argue unfair surprise if plaintiff is permitted to pursue the class appeal after settlement of the individual claim. On the other hand, it is well within defendants' power to insist on clarity in the settlement agreement, and the claims of absent class members may be barred by the statute of limitations unless the appeal is allowed. According to *American Pipe and Construction Co. v. Utah*,[198] the statute of limitations is tolled only from the commencement of an action as a class action until the denial of class certification. On balance, it would be better policy to permit the appeal unless the plaintiff has explicitly waived that right.

If there is an explicit waiver, should the court take action to protect the absent class members? At least in some instances, I suggest that it should. Although many members of the purported class may be unaware of the action, others may have relied on the action to their detriment. Although rule 23(e) of the federal rules requires notice only when certified class actions are settled, rule 23(d)(2)'s authorization of discretionary notice to the class should extend to cases in which the trial court's denial of class status is subject to challenge by an intervening class member on appeal.[199] As the Court of Appeals for the Fourth

196. 445 U.S. 326 (1980).

197. *Id.* at 336-40.

198. 414 U.S. 538 (1974). For recent decisions on the scope of the *American Pipe* tolling rule see Crown, Cork & Seal Co. v. Parker, 103 S. Ct. 2392 (1983) (*American Pipe* rule applies to plaintiffs in new actions as well as to intervenors), and Chardon v. Soto, 103 S. Ct. 2611 (1983) (applying state "running anew" rule instead of *American Pipe* "suspension" rule in § 1983 action).

199. United Airlines v. McDonald, 432 U.S. 385 (1977), holds that timely interven-

Circuit pointed out in a closely related context in its leading decision in *Shelton v. Pargo*,[200] named representatives who have commenced an action as a class action have "voluntarily accepted a fiduciary obligation towards the members of the putative class," and "[t]hey may not abandon the fiduciary role they assumed at will or by agreement . . . if prejudice to the members of the class they claimed to represent would result . . . ."[201]

2. Effect of the named plaintiff's loss on the merits

Another major uncertainty about the application of *Geraghty* arises when plaintiff has lost on the merits following a denial of class certification. Although his claim later expired, the named plaintiff in *Geraghty* was at least once a member of the aggrieved class. In contrast, a named plaintiff who has lost his or her individual claim on the merits may never have been a member of the purported class. In the latter situation, the rule of *Geraghty* potentially conflicts with that of the *Rodriguez* case.[202] *Rodriguez* held that a class could not be certified for the first time on appeal when trial on the merits revealed that the named plaintiffs were not objectively qualified for the positions they sought, and thus could not have been injured by the alleged discriminatory practices.[203]

In its post-*Geraghty* decision in *Alexander v. Gino's, Inc.*,[204] the Third Circuit stated that it "perceive[d] no reasoned distinction between the personal stake of a person whose claim is mooted and one whose claim is without substantive merit" for purpose of appraising mootness under *Geraghty*.[205] The Fourth Circuit reached the same result in *Harris v. Ballone*.[206] On the other hand, in *Satterwhite v. City of Greenville*,[207] the Fifth Circuit, sitting en banc, held that a plaintiff who had lost her case on the merits could not appeal the denial of class certification, at least when no certification hearing was held before denial of

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ors following a consent judgment have a right to appeal a denial of class certification even though their individual claims would be time barred under *American Pipe* assuming class certification had been properly denied.

200. 582 F.2d 1298 (4th Cir. 1978).

201. *Id.* at 1305.

202. East Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395 (1977).

203. *Id.* at 403-04.

204. 621 F.2d 71 (3d Cir.), *cert. denied*, 449 U.S. 953 (1980).

205. *Id.* at 73.

206. 681 F.2d 225 (4th Cir. 1982).

207. 578 F.2d 987 (5th Cir. 1978), *vacated and remanded*, 445 U.S. 940 (1980).

class status. As in *Rodriguez*, the court's rationale was that "it is now apparent that [plaintiff] is not a member of the class of discriminatees she seeks to represent" and "[plaintiff] has never suffered any legally cognizable injury either in common with the class or otherwise."[208]

Satterwhite denied class certification solely on the lack of adequate representation, and not for lack of an article III controversy.[209] Nonetheless, the Supreme Court vacated and remanded *Satterwhite* for reconsideration in light of *Geraghty*, even though *Geraghty* did not address the question of adequacy of representation, but only the question of article III justiciability. The Fifth Circuit then remanded to the trial court to determine both whether a live controversy with the class continued and whether the plaintiff was an adequate representative.[210]

This mysterious sequence of events leaves considerable uncertainty about the effect of a loss on the merits following denial of certification on appealability and adequate representation. One could attempt to reconcile *Rodriguez* and *Geraghty* by arguing that *Rodriguez* merely precludes a named plaintiff who has no claim on the merits from continuing to represent the class, and that the case is justiciable and may proceed as a class action provided an adequate representative of the class comes forward. On the other hand, *Geraghty* did say that a named representative could not continue to press the appeal on the merits until the class was properly certified, and "[i]f, on appeal, it is determined that class certification *properly was denied*, the claim on the merits must be dismissed as moot."[211] Under *Rodriguez*, class certification was properly denied if it turns out with the benefit of hindsight that the named plaintiff never had a claim on the merits. Under this highly technical construction, the loss of the named plaintiff's case on the merits would destroy maintainability and preclude another representative from continuing the action on behalf of the class.

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208. *Id.* at 992. Although the court in *Satterwhite* attempted to draw a distinction between denial of certification for lack of the substantive merit of the named plaintiff's claim and denial of certification for lack of "nexus" with the class, its effort was unpersuasive. The plaintiff had an insufficient nexus with the alleged class precisely because of the lack of substantive merit of her claim. *Id.* at 993 n.8.

209. *Id.* at 996.

210. *Satterwhite*, 634 F.2d at 232. The same procedure has been followed in a number of other post *Geraghty* decisions. *See, e.g.*, White v. I.T.T., 718 F.2d 994 (11th Cir. 1983), and cases cited.

211. 445 U.S. at 404 (emphasis added).

One panel of the the Fifth Circuit has now apparently adopted this somewhat mechanical view in *Everitt v. City of Marshall*,[212] relying on the original *Satterwhite* decision. But, as previously indicated, the Third and Fourth Circuits have reached a contrary result and would not distinguish loss on the merits from expiration of the named plaintiff's claim for article III purposes.[213] They would thus permit the action to continue if a proper representative is found.[214]

This view seems more in tune both with the pragmatic spirit of the Supreme Court's decision in *Geraghty* and with the practical realities of civil rights class action litigation. *Geraghty* holds that when a class has a live interest, the absence of a personal stake in the merits by the named representative should not preclude an appeal challenging an initial denial of class certification. This result recognizes both the reality of the interests of the class as an entity and the practical ability of class counsel to pursue the question on appeal on the basis of the trial court record. This reasoning applies equally whether the claim of the named representative has lapsed or whether it has ultimately been determined to be without merit. On the other hand, if the denial of class certification is to be reversed, and the action is to continue on behalf of the class, both *Rodriguez* and *Falcon* make clear that adequate representation requires the named representative to possess a claim on the merits that corresponds with those of the class.

3. *Other unresolved questions*

There are two other major areas of unresolved difficulty under *Geraghty*. First, both *Sosna* and *Geraghty* made clear that their holdings rested on the continued existence of a live controversy with members of the class throughout the pendency of the action. In *Geraghty*, the Court further noted that the "liveness" of the controversy with the class was demonstrated by pending motions of class members to intervene.[215] Subsequent decisions in the courts of appeals have relied on the presence of

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212. 703 F.2d 207 (5th Cir.), *cert. denied*, 104 S. Ct. 241 (1983). *Everitt* appears to conflict with the prevailing approach in the Fifth Circuit. *See* Satterwhite v. City of Greenville, 634 F.2d 23 (5th Cir. 1981).

213. Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982); Alexander v. Gino's, Inc., 621 F.2d 71, 73 (3d Cir.), *cert. denied*, 449 U.S. 953 (1980).

214. *See* Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982).

215. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980).

motions to intervene to establish the viability of the action[216] and on the absence of these motions as one factor demonstrating absence of the live controversy.[217]

How should the trial courts resolve this issue following a *Sosna-Geraghty* lapse in the named plaintiff's claim? I suggest that a motion to intervene should not be controlling, or in most cases, even important. In most class civil rights litigation, it is realistic to assume the continued interest of the class members in prohibiting invidious class based discrimination or other unconstitutional conduct directed at them. The absence of voluntary motions to intervene should be viewed as evidence of the absence of an actual controversy with the class only in cases in which there is some other hard evidence of class opposition or indifference to the maintenance of the action. (On the other hand, when the trial court has solicited intervention to remedy problems of representation, the absence of response assumes increased significance and should carry greater weight in determining whether live controversy with the class continues.)[218]

Sosna and *Geraghty* also state that adequacy of representation by a named plaintiff whose claim has expired or otherwise terminated presents a "separate inquiry" from justiciability.[219] Perhaps the most unsatisfactory aspect of the Court's performance in this area has been its abdication of guidance concerning how the federal courts are to approach this "separate inquiry." *Sosna* only observed that

> [in] the present suit, where it is unlikely that segments of the class appellant represents would have interests conflicting with those she has sought to advance, and where the interests of that class have been competently urged at each level of the proceeding, we believe that the test of Rule 23(a) is met.[220]

Geraghty concluded that the question was for the district court on remand.[221]

Absent a total lack of interest by class counsel or over-

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216. Jordan v. County of Los Angeles, 669 F.2d 1311, 1316 (9th Cir.), *cert. granted and judgment vacated*, 103 S. Ct. 35 (1982); Ford v. United States Steel Corp., 638 F.2d 753, 760-61 (5th Cir. 1981).

217. Armour v. City of Anniston, 654 F.2d 382, 383 (5th Cir. 1981).

218. *See, e.g.*, Jones v. Caddo Parish School Bd., 704 F.2d 206, 213-14 (5th Cir. 1983).

219. *Geraghty*, 445 U.S. at 402; Sosna v. Iowa, 419 U.S. 393 (1975).

220. 419 U.S. at 403.

221. 445 U.S. at 407.

whelming evidence of divergent interests among class members, this "separate inquiry" seems unlikely to assume significance in most cases. The issue is likely to become important only in those cases in which certification is denied and plaintiff is later determined never to have had a claim on the merits. Even though a live controversy with the class remains, *Rodriguez* strongly supports the view that a new representative must be found in such cases if further proceedings are necessary. One could attempt to support this result on the theory that a plaintiff who once had a claim in common with the class is more likely to possess the information and incentive adequate to protect the interests of other members of the class than one who has never suffered any injury as a result of the challenged practice. This explanation is not wholly satisfactory. However, as with other questions explored in this article, some working generalities must be employed to prevent class procedure from degenerating into a process of completely ad hoc decision making.

V. Intervention, Subclasses, and Notice as Responses to the Problems of Adequate Representation

The *Rodriguez-Falcon* doctrine creates a significant risk that either at trial or on appeal, the named representative may be found to be an inadequate representative of a significant portion of the alleged class in an across-the-board action.[222] Moreover, the *Sosna-Geraghty* doctrine, although stretching traditional concepts of justiciability in the interest of facilitating broad scale attacks on civil rights violations, makes clear that a named plaintiff whose claim has lapsed is not necessarily an inadequate representative of the class.[223] In addition, increased attention to divergent interests among the class, which the general tone of recent Supreme Court decisions seems to counsel, suggests that it may be necessary to create subclasses to ensure that the interests of all segments of the class are adequately protected.[224]

Thus, intervention of a new representative of the original class or of a subclass may frequently be highly desirable or even

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222. East Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395 (1977); Falcon v. General Tel. Co., 463 F. Supp. 315 (N.D. Tex. 1978), *aff'd in part, remanded in part*, 626 F.2d 369 (5th Cir. 1980), *vacated*, 450 U.S. 1036 (1981), *rev'd*, 457 U.S. 147 (1982).

223. *See supra* notes 166 & 182 and accompanying text.

224. 7A C. Wright & A. Miller, *supra* note 3, § 1790.

essential to continue a class action. At what stage of the proceedings do the interests of regularity, finality, and sound judicial administration outweigh the interest in ensuring careful protection of all of the potentially divergent interests among the class? What are the obligations of the court and the parties to produce such a representative? When does the impact of a class judgment on nonclass members who are not adequately represented in the action entitle them to participate? As might be expected, these topics have become the subject of an increasing number of opinions in the federal trial and appellate courts in recent years.

A. Timeliness of Intervention of a New Representative

The foundation case on the timeliness issue is the Supreme Court's 1977 decision of *United Airlines v. McDonald*.[225] Following the district court's denial of class certification in an action alleging sex discrimination based on United Airlines' "no marriage" rule for stewardesses, judgment was entered against United granting relief to the named plaintiffs, who then decided not to appeal the denial of class status. A member of the uncertified class then moved to intervene to pursue an appeal. The district court denied intervention because "this is five years now this has been in litigation, and this lady has not seen fit to come in here and seek any relief from this Court in any way during that period of time, and litigation must end."[226]

The United States Supreme Court agreed with the court of appeals that the motion to intervene was timely.[227] In assessing United's claim that such belated intervention was unfair, the Court focused on the sole purpose of the intervention—to appeal the denial of class status. United had conceded that the issue of class certification was reviewable at the request of the named plaintiffs following final judgment. The Court reasoned that United could not claim prejudice simply because one of the class members rather than the named plaintiff sought to maintain the appeal.[228] As to the belated nature of the motion, the Court stated:

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225. 432 U.S. 385 (1977).
226. *Id.* at 390.
227. *Id.* at 396.
228. *Id.* at 394-95.

> The critical fact here is that once the entry of final judgment made the adverse class determination appealable, the respondent quickly sought to enter the litigation. In short, as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests.[229]

United Airlines stands for the proposition, perhaps contrary to some previous suppositions,[230] that there should be no automatic presumption against postjudgment intervention even in complex class litigation. Prejudice to existing parties and interference with the orderly processes of the court must in each case be balanced against the purposes of the intervention and the impact of the denial may have on the proposed intervenors.[231]

As might be expected, a recurring problem in recent decisions has been whether postjudgment intervention to remedy an appellate reversal of class status under the *Rodriguez-Falcon* line of decisions is timely. Notwithstanding contrary decisions in the district courts,[232] at least one court of appeals has applied the *United Airlines* analysis to conclude that such intervention is timely because the proposed intervenors sought to come into the action as soon as the need for their intervention became known.[233] The interest of the defendant in avoiding classwide liability because of the belated, fortuitous failure of representation has not been thought sufficient to outweigh the interest of the class in obtaining relief.

As to the interest in the orderly administration of justice, the Fourth Circuit's leading decision in *Hill v. Western Electric Co.*[234] raises the intriguing possibility that, in cases in which the judgment was favorable to the class, it may be appropriate for the trial court simply to reinstate the original findings and con-

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229. *Id.* at 394.

230. *See* 7A C. WRIGHT & A. MILLER, *supra* note 3, §§ 1799, 1800.

231. For a recent decision affirming the denial of rule 24(a) motion to intervene by class members alleging interests ultimately divergent from those of the named representatives, see Lelsz v. Kavanagh, 710 F.2d 1040 (5th Cir. 1983). The court of appeals concluded that the proposed intervenors should have been aware of the alleged inadequate representation at an earlier time.

232. *See, e.g.*, Walker v. Jim Dandy Co., 97 F.R.D. 505 (N.D. Ala. 1983).

233. *E.g.*, Hill v. Western Elec. Co., 672 F.2d 381 (4th Cir.), *cert. denied*, 103 S. Ct. 1318 (1982); Brink v. DaLesio, 667 F.2d 420 (4th Cir. 1981); *see also* Brown v. Eckerd Drugs, Inc., 564 F. Supp. 1440, 1444 (W.D.N.C. 1983).

234. 672 F.2d 381 (4th Cir. 1982).

clusions if a proper representative does come forward. The court of appeals drew an analogy to cases recognizing the power of the district court to reinstate findings and conclusions following the curing of a jurisdictional defect on remand.[235] It concluded that those cases extended to other "fundamental defects" provided that "the error or defect must not have infected the merits of the very determination sought to be reinstated."[236] Although the court of appeals recognized that lack of adequate representation could affect the merits in some cases, it concluded that in others the defect might be purely formal.[237] Thus, reinstatement might be inappropriate when the intervening representative objects or when the finding of inadequacy of representation rests on "demonstrated" ineffectiveness.[238] But if the determination of inadequacy is "concerned only with a technical lack of identity of interest and injury between representative and class," any "presumed adverse effect on the merits stemming from this may in fact be utterly belied by the outcome."[239] This was the case in *Hill* because the trial court had rendered judgment in favor of the entire class.[240]

The realistic and practical approach in *Hill* seems basically correct, even though it appears at first blush to be inconsistent with *Rodriguez* and *Falcon*. Although presumed ineffectiveness may be sufficient to preclude class certification initially, the courts should not require a useless trial when the representative has performed adequately, despite some lack of congruity between his interests and those of the class. *Rodriguez* itself recognized that the facts developed at trial should be taken into account in assessing the viability of a class action.[241]

In this light one might ask why a lack of adequate representation should not be dismissed as harmless error when the class representative has already prevailed, thus eliminating any need to seek a new representative. The answer lies in the fact that it is not always apparent whether the judgment in a structural discrimination case is as favorable to the class as might have been

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235. *Id.* at 387.
236. *Id.* at 388.
237. *Id.* at 389.
238. *Id.* at 388-89.
239. *Id.* at 389.
240. *Id.* For a recent application of *Hill*'s "reinstatement" procedure, see Brown v. Eckerd Drugs, Inc., 564 F. Supp. 1440, 1444-45 (W.D.N.C. 1983) (reconsidered in light of the *Falcon* decision).
241. East Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 406 n.12 (1977).

obtained by a hypothetically adequate representative. Intervention by a new representative following judgment provides a needed double check to ensure that the judgment is adequate before it is adhered to.

B. Obligations of the Court and the Parties to Discover a Substitute Representative

The major issue in such cases is not timeliness but the extent of the obligations of the court and the parties to take steps to discover a substitute representative when the named representative is determined to be inadequate. Some recent Fifth Circuit decisions appear strongly to encourage, if not oblige, the trial courts to take an active hand in ensuring the continuance of the action. For example, in *Newby v. Johnston*,[242] the named plaintiff's claim became moot prior to certification. The court observed that, while the district judge had not abused his discretion in denying intervention under the peculiar facts in that case (another identical action was pending), "ordinarily the district court must take some action to find an appropriate class representative if it finds the named plaintiff to be inadequate."[243] Similarly, on remand in the *Satterwhite* case, the Fifth Circuit directed the district court to "take such action as it may deem necessary to determine whether there is an appropriate class representative" if the district court determined that the action was a proper class action, but that Mrs. Satterwhite was not a proper representative.[244]

On the other hand, several other recent decisions have a notably different and more restrictive tone. In *Ford v. United States Steel Corp.*[245] the district court had initially certified Ford as a substitute class representative after the government's entry of a consent decree in a pattern and practice case. However, following an intervening appeal on the class questions, the trial court decertified the class for lack of "nexus" between Ford's claim and the class claim. On appeal, the Fifth Circuit held that under these unusual circumstances, the district court had an obligation to appoint a new representative to protect the members of the class who might have relied on the certification.

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242. 681 F.2d 1012 (5th Cir. 1982).
243. *Id.* at 1014.
244. 634 F.2d at 231.
245. 638 F.2d 753 (5th Cir. 1981).

But the court emphasized that "the task of the district court on remand is not one which courts must always undertake when confronted with potential class actions."[246] This restrictive approach is also evidenced in *Payne v. Travenol Laboratories, Inc.*[247] In that action, after the district court had excluded black males from the class because the only black male named representative had withdrawn and because the interests of black males were in conflict with those of black females, the panel held that the trial court was under no duty to send a notice to black males in the class inviting intervention.

> The district court thus had discretionary power to give black males notice of their impending exit from the case [under rule 23(d)(2)]. Such action in general is to be encouraged. We cannot say, however, that the court transgressed its authority in failing to recruit a new black male plaintiff to intervene to permit subdivision of the class. . . . The rule that Payne proposes [obligating the trial court to send notice soliciting a new representative] would shift a burden onto the district court that properly remains with the plaintiff. Only if the black males had received notice of their initial inclusion in the class, had relied on the class suit to protect their rights, and would be prejudiced as a practical matter by exclusion from the class might the district court be obligated to take some action to safeguard their interests. . . . Here, there is no showing that black males relied to their detriment on the district court's provisional inclusion of them in the class.[248]

The approach of the Fifth Circuit in *Payne* seems adequate to protect the interests of the absent class members and is consistent with recent Supreme Court authority. For example, in *Geraghty*, the Fifth Circuit had remanded the case, requiring the district court sua sponte to consider the possibility of certifying subclasses to deal with a potential conflict between those harmed by the challenged parole release guidelines and those potentially helped by them.[249] The Supreme Court affirmed the Fifth Circuit's remand, reasoning that this requirement "does not impose undue burdens on the District Courts" and "merely gives respondent the opportunity to perform his function in the

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246. *Id.* at 762.
247. 673 F.2d 798 (5th Cir. 1982).
248. *Id.* at 812-13 (citations omitted).
249. 445 U.S. at 407-08.

adversary system."[250] However, the Court held that on remand, "[I]t is not the District Court that is to bear the burden of constructing subclasses. That burden is upon the respondent and it is he who is required to submit proposals to the court. The court has no *sua sponte* obligation so to act."[251]

Similarly, in the case of intervention to remedy problems of justiciability and adequacy of representation, the district court normally should be obligated to postpone dismissal for a period sufficient to permit adequate representatives with live claims to come forward, reserving notice for those cases in which it appears likely that a significant number of class members may have relied on the action to their detriment.[252] It is unlikely that this less activist approach will harm the members of the class.[253] If any come forward to intervene, they may avoid the bar of the statute of limitations under the *American Pipe* decision.[254] In most cases, if there is an interested class member qualified to represent the class, he or she is likely to come forward without

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250. *Id.* at 408.

251. *Id.*

252. *See* Maddox & Starbuck, Ltd. v. British Airways, 97 F.R.D. 395 (S.D.N.Y. 1983).

253. Class members are likely to be aware of case developments. Whatever uncertainty may have once existed, the Supreme Court's decision in Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981), establishes that there is no general ethical prohibition against named plaintiffs and class counsel communicating with members of the class on matters concerning the continued viability of the action. In *Gulf* the trial court had precluded class counsel from communicating with class members to encourage them to rely on the class action to vindicate their rights rather than to accept the terms of an EEOC conciliation agreement requiring a waiver of their rights. The Supreme Court struck down the order on the ground that it represented an abuse of the discretionary power granted to the trial court by rule 23(d), without reaching the first amendment questions involved. *Id.* at 102-04. The court stated that the order

> interfered with [respondents'] efforts to inform potential class members of the existence of this lawsuit, and may have been particulary injurious—not only to respondents but to the class as a whole—because the employees at that time were being pressed to decide whether to accept a backpay offer from Gulf that required them to sign a full release of all liability for discriminatory acts. In addition, the order made it more difficult for respondents, as the class representatives, to obtain information about the merits of the case from the persons they sought to represent.

Id. at 101. Such a restriction on class communications is not valid unless "based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Id.*

At the very least, *Gulf* establishes that there is no general ethical ban on class counsel's communications with class members for the purpose of advising them of the status of the action and their right to intervene through their own counsel, even accepting that some forms of communication could constitute improper solicitation.

254. American Pipe and Constr. Co. v. Utah, 414 U.S. 538 (1974).

the necessity for formal notice by the court. Of course the court retains discretion to order notice in any case in which it thinks the class may be harmed or in which communication by class counsel would be ineffective or inappropriate.[255]

C. *Intervention by Non-Class Members Claiming to Have Been Inadequately Represented*

Questions of intervention in civil rights class litigation have proved particularly troublesome in connection with objections by nonclass members to the adverse impact of consent judgments, particularly the affirmative action provisions of such decrees. In contrast to cases involving intervention by class members for the purpose of curing problems of adequate representation or justiciability, the courts of appeals have been hostile to efforts by nonclass members to intervene and question the adverse impact of the decree.[256] In these decisions, unlike those I have previously discussed, there are substantial grounds to question the direction some courts appear to be taking.

Illustrative of these decisions are *Garrity v. Gallen*[257] in the First Circuit and *Stotts v. Memphis Fire Department*[258] in the Sixth Circuit. In *Garrity*, local school districts sought to intervene in an action by developmentally disabled citizens against state defendants some four and one-half years after the filing of the complaint and two months after the entry of a consent judgment. The local districts sought to protest potential increases in their fiscal responsibility for special education under the decree. The court of appeals applied the First Circuit's four factor *Culbreath* test[259] in upholding the denial of intervention. The court

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255. *See, e.g.*, Berry v. Harris, 36 Fed. R. Serv. 2d 1475 (Callaghan) (E.D. Tex. 1983)(notice to permit intervention to cure mootness resulting from precertification settlement).

256. *See, e.g.*, Garrity v. Gallen, 697 F.2d 452 (1st Cir. 1983); Stotts v. Memphis Fire Dep't, 679 F.2d 579 (6th Cir.), *cert. denied*, 103 S. Ct. 297 (1982); *see also* Jones v. Caddo Parish School Bd., 764 F.2d 206, 217-21 (5th Cir. 1983)(school desegregation class action); Lelsz v. Kavanagh, 710 F.2d 1040 (5th Cir. 1983) (proposed intervention by class members); United States v. South Bend Community School Corp., 710 F.2d 394 (7th Cir. 1983)(nonclass action); Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980).

257. 697 F.2d 452 (1st Cir. 1983).

258. 679 F.2d 579 (6th Cir.), *cert. denied*, 103 S. Ct. 297 (1982).

259. Culbreath v. Dukakis, 630 F.2d 15, 20-24 (1st Cir. 1980). Under the Culbreath decision, the court considers the following factors in assessing timeliness:

> (1) the length of time the applicants knew, or reasonably should have known, of their interest before they petitioned to intervene . . .; (2) the prejudice to existing parties due to the failure to petition for intervention promptly . . .;

noted (1) that the action had been well publicized and the potential for increased financial responsibilities was well known long before the applicants moved to intervene; (2) that intervention would be detrimental to the members of the class because relief would be delayed or, if the challenge were successful, denied; and (3) that the school districts could challenge any specific increased obligations in future proceedings.[260]

Most notably, the *Garrity* court rejected an argument based on *United Airlines v. McDonald*[261] that the application was timely because the adverse impact of the consent decree on the local districts and the state's failure to adequately represent their interests became apparent only when the actual terms of the decree became known. In the court of appeals' view, the local districts should have been aware well before judgment that their interests were not adequately protected by the state defendants.[262] The court denied intervention to " 'prevent last minute disruption of painstaking work by the parties and the court.' "[263]

One might quarrel with the *Garrity* court's assessment of when the intervenors should have been aware that their interests were not adequately represented by existing parties. Nevertheless, this basic approach to determining when delay is unwarranted seems correct. The inquiry should not center on the length of time during which the intervenors should have known that their interests might be affected hy the outcome of the case, but on the time at which it should have been apparent to them that their interests might not be adequately protected by existing parties. The Supreme Court made just this point in *United Airlines* when it noted that requiring class members to

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(3) the prejudice the applicants would suffer if they are not allowed to intervene; (4) any unusual circumstances militating for or against intervention.

Garrity, 697 F.2d at 455 (citing *Culbreath*, 630 F.2d at 20-24).

The "Culbreath" test was in turn based on the Fifth Circuit's decision in Stallworth v. Monsanto Co., 558 F.2d 257, 264-66 (5th Cir. 1980). *Stallworth* stated that the relevant time for measuring delay was the time at which the proposed intervenors should have known of their "interest in the case." *Id.* at 264. But in that case, the court measured delay from the later time at which the consent decree was entered and the intervenors should have known that their interests had been inadequately represented. *Id.* at 260-61, 264-67. See the discussion of Judge Goldberg dissenting in Jones v. Caddo Parish School Bd., 704 F.2d 206, 229-30 (5th Cir. 1983).

260. *Garrity*, 697 F.2d at 456-58.

261. 432 U.S. 385 (1977).

262. *Garrity*, 697 F.2d at 458; *see also* Lelsz v. Kavanagh, 710 F.2d 1040 (5th Cir. 1983)(proposed intervention by class members).

263. *Garrity*, 697 F.2d at 458 (quoting *Culbreath*, 630 F.2d at 22).

intervene shortly after denial of certification to preserve their right to appeal after final judgment would only encourage the filing of unnecessary "protective motions" by "superfluous spectators" and thus promote the " 'multiplicity of activity which Rule 23 was designed to avoid.' "[264]

Nonetheless, the recent cases have given some indication that knowledge of one's interest in the case should be the critical factor in assessing timeliness of intervention to contest the terms of a consent judgment. The divided opinion of a Sixth Circuit panel in *Stotts v. Memphis Fire Department*[265] is illustrative. In that action nonminority firemen sought to intervene during the comment period on a consent judgment to contest the affirmative action promotion provisions of the decree. The court of appeals applied its own "five factor" test in assessing timeliness.[266] The majority upheld the denial of intervention because the risks that the decree might affect the department's promotion procedures should have been apparent at the outset of the action. In the court's view, the city adequately represented the nonminorities even when it agreed to the affirmative action provisions of the decree because "[n]o legally protected interest of non-minorities is adversely affected by a reasonable affirmative action plan."[267] The court also found that the original parties would suffer significant prejudice if implementation of the decree were further delayed and noted that the proposed

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264. 432 U.S. at 394 n.15 (quoting American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 551 (1974)).

265. 679 F.2d 579 (6th Cir. 1982). Another important recent decision apparently adopting the "interest in the case" standard for judging timeliness of intervention in the school desegregation context is Jones v. Caddo Parish School Bd., 704 F.2d 206, 220 (5th Cir. 1983). The court of appeals also concluded that the proposed intervenor should have known that his *interests were not adequately represented* at an earlier time. *Id.* at 220-21. But the tenor of the decision is that whether or not this was true, Phillips should have intervened and participated in the settlement negotiations rather than attempt to upset them after the fact. If this standard were adopted, much unnecessary "protective" intervention and consequent complexity and confusion would result.

266. The five factors mentioned by the court are as follows:

> 1) the purpose for which intervention is sought; 2) the length of time preceding the application for intervention during which the proposed intervenor knew or reasonably should have known of his interest in the case; 3) the prejudice to the original parties due to the proposed intervenor's failure . . . to apply promptly for intervention; 4) the existence of unusual circumstances militating against or in favor of intervention; and 5) the point to which the suit has progressed.

Stotts, 679 F.2d at 582 (quoting Michigan Ass'n for Retarded Citizens v. Smith, 657 F.2d 102, 105 (6th Cir. 1981)).

267. *Stotts*, 679 F.2d at 583.

intervenors had at least been allowed to present their objections to the decree, although they had been denied the opportunity for additional discovery and further expert analysis that they sought.[268]

Judge Martin dissented in *Stotts* because the nonminorities had a legitimate interest in protecting their promotional opportunities (which had been impaired by the percentage figure imposed by the decree). They had no alternative means to protect their interests, and under *United Airlines*, the time at which the applicant first learns of his interest in the action is irrelevant.[269] Judge Martin reasoned that the proper consideration is the time the applicants first learn that their interests are not adequately protected by the parties.[270] Furthermore, when rule 24(a) (intervention of right) is involved, the prejudice to existing parties to be considered is not that arising from the intervention itself, but that arising from the *delay* in intervention. In *Stotts* that delay was only two weeks from the time the affirmative action provisions of the decree became publicly known, and came in the period for comment during which objections could have been expected from the class members.[271] Finally, the nonminorities did not challenge the decree in its entirety but sought only limited modification of its affirmative action provisions.[272] Judge Martin noted that the Fifth Circuit in *Piambino v. Bailey*[273] had held that a nonparty's right to intervene was triggered by publication of an adverse settlement proposal. In his view the majority's analysis placed "an unfair and unjustifiable burden on a potential intervenor to predict the likely outcome of a complex case."[274]

With due respect, the prevailing analysis in *Stotts* seems erroneous. Nonminorities may have no legally protected interest in continuing discrimination, but they clearly do have an interest in participating in the formulation of the provisions of the remedial decree. Of course, they have no "veto power" over the decree.[275] But it is quite another thing to say that they have no

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268. *Id.* at 584-85 (Martin, J., dissenting).
269. *Id.* at 591.
270. *Id.*
271. *Id.* at 593.
272. *Id.* at 587.
273. 610 F.2d 1306 (5th Cir.), *cert. denied*, 449 U.S. 1011 (1980).
274. 679 F.2d at 594.
275. *Id.* at 583-84; *see* Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117 (2d Cir. 1983).

right to voice their opposition at all when the parties to the action have reached an agreement that may have a significant adverse impact on nonparties.[276]

In *Nuesse v. Camp*,[277] Judge Leventhal observed, respecting rule 24, that "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[278] Similarly, Judge Martin stated in *Stotts* that "[i]ntervention at the remedial stage of complex litigation is often particularly appropriate, because it can provide a court with information necessary for an informed judgment."[279] For these reasons, rule 23(e) itself recognizes the right of class members to participate in the approval of a class action settlement.[280] The interests of nonclass members inevitably affected by the decree may be equally legitimate and deserving of the court's consideration. Indeed, there is increasing recognition that in "public law" litigation of this sort "[t]he importance of according representation to diverging interests in such a 'structural' lawsuit cannot be overemphasized."[281]

There remains the central question whether a court should require such applications for intervention to be made during the negotiation process itself, rather than after the terms of the consent decree are finally known. In one important, recent school desegregation decision, *Jones v. Caddo Parish School Board*,[282] the court of appeals held that intervention challenging the ade-

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It follows, therefore, that although non-minority third parties allowed to intervene in cases which involve consent decrees or settlement agreements implementing race-conscious hiring or promotional remedies do have sufficient interest to argue that the decree or agreement is unreasonable or unlawful, their interest in the expectation of appointment does not require their consent as a condition to any voluntary compromise of the litigation.

Id. at 1126.

276. *Stotts*, 679 F.2d at 589. The Third Circuit's opinion in Society Hill Civic Ass'n v. Harris, 632 F.2d 1045 (3d Cir. 1980) suggests another reason for allowing the nonminorities in *Stotts* to intervene. In *Harris* the court held that nonparties who are not permitted to intervene, and who may be affected by the court's decision, must be allowed to collaterally attack that decision in a subsequent proceeding. Since that intervention is less disruptive of the judicial process than is a collateral attack, intervention should be permitted if appropriate.

277. 385 F.2d 694 (D.C. Cir. 1967).

278. *Id.* at 700.

279. 679 F.2d at 595.

280. FED. R. CIV. P. 23(e).

281. Lelsz v. Kavanagh, 710 F.2d 1040, 1047 (5th Cir. 1983)(denying intervention on timeliness grounds).

282. 704 F.2d 206 (5th Cir. 1983), *aff'd on rehearing en banc*, 735 F.2d 923 (5th Cir. 1984) (8-6 decision).

quacy of a consent decree's desegregation provisions fifteen days after its entry was untimely.[283] The decree had been negotiated between the United States and defendants in an aborted class action that had been pending for sixteen years. The majority of the court of appeals suggested that the proposed intervenor should have known that the interests of the class of black children and their parents were not adequately represented by the United States prior to entry of the decree.[284] But the primary thrust of the court's opinion was that the intervenors were fully aware of the ongoing settlement process and that failure to intervene and participate in that process was fatal. The attempt to intervene after the settlement negotiations had run their course was inconsistent with "any proper regard for the settlement process itself."[285] Intervention after entry of a consent decree should be reserved for "exceptional cases."[286]

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283. *Id.* at 218.

284. *Id.* at 218-20.

285. *Id.* at 221. Similarly, in United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983) the court suggested that nonclass members

> had no identity of interest with the City in the way that the unnamed class member shared an interest with the named class representative in *United Airlines*. From the beginning, the Board and the City represented a wide range of occupations in the public sector and had different cost-benefit settlement interests, and incentives, from those of the BFA members.

Id. at 1516. The proposed intervenors

> knew of their interest in these cases prior to the first trial. They could have moved to intervene then, but chose to wait until after two trials and a long complex negotiation process had taken place. The court's grant of their motion to intervene would plainly have prejudiced the existing parties, since it would have nullified the negotiations with the Board . . . .

Id. at 1517. This rationale apparently assumes that allowing intervention for the purpose of challenging the settlement would allow the intervenors to veto the settlement. That is incorrect. *See* Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117, 1125-26 (2d Cir. 1983).

286. *Jones*, 704 F.2d at 221. In his concurring opinion, Judge Williams elaborated:

> The time for her intervention was of necessity the time while the proposed settlement was still pending. There was ample time then. If she had moved to intervene at that time, the law is clear that she would have been entitled to a hearing and a specific decision on her motion to intervene. But she waited until the matter was all over, until an eighteen year case was finally concluded, and then said that because she did not like the settlement she wanted to intervene, have it thrown out, and start over again with a class action. Her motion to intervene under these circumstances was not timely, and we properly so hold.
>
> Finally, there should be a general observation. No such settlement can ever be expected to be satisfactory to everyone in a community. But, as I stated earlier, there must be a way to end these cases even though not everyone is satisfied.

Id. at 223.

As Judge Goldberg persuasively pointed out in dissent, there is substantial reason to question both the majority's result and its reasoning. On the particular facts, the intervenor may have been aware of the negotiation process. But there was little reason to think that she was or should have been aware that her interests were inadequately represented until the terms of the decree, which left forty-seven percent of black students in predominately one-race schools, became known.[287] Indeed, the decree was strongly at odds with the previous government positions, and may have been the result of a sudden change in policy with the advent of a new administration in 1981.[288] In such circumstances, to require intervention in the negotiation process before the fact of inadequate representation is known would inevitably lead to unnecessary "protective" motions to intervene which would, if granted, immeasurably complicate and perhaps entirely frustrate the settlement process. The opportunity to intervene promptly following entry of the decree for the purpose of raising specific objections to its content is far less disruptive to the orderly administration of justice.

This approach should not invariably or even usually lead to frustration of the settlement process. General principles governing intervention of right require that the proposed intervenor enter the litigation subject to the proceedings that have already occurred.[289] Thus, such belated intervention should be limited solely to the issue of whether the court should modify or reject the settlement because of its unfairness to nonclass members, not to the issue of whether the action should be settled at all.[290] And even on this limited issue, the intervenors have only the right to be heard, not to prevail.[291] Moreover, to require intervention at an earlier time seems contrary to many decisions presuming that public body defendants adequately represent the proposed intervenors with whom they are aligned in interest in analogous circumstances, absent a specific showing that repre-

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287. *Id.* at 231.

288. *Id.*

289. 7A C. WRIGHT & A. MILLER, *supra* note 3, § 1920.

290. The advisory committee's note on the 1966 amendments to rule 24(a) states that "[a]n intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." *Accord*, Southern v. Plum Tools, 35 Fed. R. Serv. 2d 1395 (Callaghan)(11th Cir. 1983). *But see* 7A C. WRIGHT & A. MILLER, *supra* note 3, § 1922.

291. *E.g.*, Kirkland v. New York Stete Dep't of Correctional Servs., 711 F.2d 1117, 1126 (2d Cir. 1983).

sentation has been inadequate.[292] Such a showing would be impossible in the ordinary case until the terms of the decree are known. The proposed nonclass intervenors would thus be placed in an impossible "catch-22" situation: Intervention after the decree is negotiated is too late; but earlier intervention must be decreed because representation is presumed to be adequate. Of course, collateral attack on the terms of the decree may be possible,[293] but the legal system should not promote endless duplicative litigation.

In short, in cases that have been settled by private negotiations, the timeliness of intervention should generally be evaluated with reference to the time at which the allegedly inadequate terms of the decree should have been known, rather than with reference to the length of time the action has been pending.

VI. Conclusion

The advisory committee note on the 1966 amendments to rule 23 emphasized the functional and practical intent of its drafters. After reviewing the inadequacies of the previous rule, in which "[t]he categories of class actions . . . were defined in terms of the abstract nature of the rights involved,"[294] the committee stated:

> *The amended rule* describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.[295]

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292. *E.g.*, United Nuclear Corp. v. Cannon, 696 F.2d 141, 144 (1st Cir. 1982); United States v. South Bend Community School Corp., 692 F.2d 623, 627 (7th Cir. 1982); Delaware Valley Citizens' Council v. Pennsylvania, 674 F.2d 970, 973 (3d Cir. 1982); British Airways Bd. v. Port Auth. of N.Y. & N.J., 71 F.R.D. 583, 584-85 (S.D.N.Y. 1976); 7A C. Wright & A. Miller, *supra* note 3, § 1909. *But see* Trbovich v. United Mine Workers, 404 U.S. 533, 636 (1972), where the Supreme Court held that a possible conflict of interest between a public body and the proposed intervenor was enough to demonstrate inadequacy of representation.

293. Even this is not certain. *See* United States v. Jefferson, 720 F.2d 1511, 1518-19 (11th Cir. 1983). This presumption of adequate representation suggests that there should be no automatic rule distinguishing class members from nonclass members for the purpose of evaluating timeliness of intervention.

294. Fed. R. Civ. P. 23, advisory committee note, 1966 amendments.

295. *Id.*

The Supreme Court's recent civil rights class action decisions should be viewed as broadly as is consistent with this practical orientation. The Court has consistently emphasized the representational character of the action and the consequent necessity to ensure, in actual fact as opposed to theoretical conception, existence of a real class sharing a common grievance with the named class representative. The Court has thus appropriately refused to view the civil rights class action primarily as a substantive instrument of social change, as opposed to a procedural mechanism. At the same time, once a class with a live dispute has been demonstrated to exist, the Court's decisions on class action justiciability, representation, notice and intervention have evidenced a practical recognition of the very real interests of the class as an entity, independent of the particular situation of the originally named representative. In such cases, the Court has shifted the focus from the theoretical puzzle of how an action can proceed absent a class representative with a live article III claim before the court, to the more practical question of whether the ongoing, live interests of the class are adequately represented. This approach has preserved the effectiveness of the civil rights class action as an important instrument for the eradication of forbidden social discrimination.

The Court's focus on practical realities as opposed to theoretical conceptions has raised a host of subsidiary questions, many of which have been reviewed in this discussion. But resolution of most of these questions should not prove to be of insuperable difficulty if the lower federal courts will chart their course with an eye to the central objective of assuring adequate representation of a live claim of injury that has been demonstrated to be held in common by a numerous class.