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A Less Stringent Standard - How to Give FLSA Section 16(b) a Life of Its Own

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NOTES

A "LESS STRINGENT" STANDARD? HOW TO GIVE FLSA SECTION 16(b) A LIFE OF ITS OWN

*Brian R. Gates**

INTRODUCTION

What could Jay Leno's recent anointing of Conan O'Brien as the next successor to the Tonight Show legacy possibly teach us about civil procedure within the federal courts? Not much, perhaps—except that the immediate media speculation as to whether Conan would be embraced by the Tonight Show faithful reminds us of the unenviable challenges a lesser-known newcomer faces in trying to earn acceptance from an established audience. Resistant to change or uncomfortable with the possibility that "new" will translate to "dissatisfying," an audience may make constant comparisons to the older standard-bearer, impose overwhelming pressure on the neophyte to conform to familiar patterns, and saddle the newcomer with expectations of consistent, flawless performance. Conan's pending challenge, of course, is no different from that faced by Leno himself when taking over for Johnny Carson, or by Carson in his turn inheriting the slot from Jack Parr. Nor is the phenomenon unique to the kings of late night talk shows. Witness the challenges faced by Steve Young taking over the helm of the San Francisco 49ers from the legendary quarterback Joe Montana, or those of Sammy Hagar replacing David Lee Roth as the frontman for Van Halen. Witness also the plight of section 16(b) of the Fair Labor Standards Act (FLSA), struggling to find its own place

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in a court system accustomed to the Federal Rules of Civil Procedure.[1] Granted, section 16(b) may not be as glamorous or publicly recognizable as the other examples above. Yet its story still confirms that, whether one is a talk show host, sports icon, rock star, or obscure rule of legal procedure, one must struggle to emerge from the shadow cast by a favored precursor before gaining real acceptance from a skeptical audience.

The challenge faced by section 16(b) of the Fair Labor Standards Act stems in large part from the fact that the Federal Rules of Civil Procedure (hereinafter the Rules) have long served as the federal courts' handbook on how best to conduct any multi-plaintiff lawsuit.[2] Section 16(b), however, also offers potential plaintiffs a unique means of joining together in the specific context of enforcing private rights when challenging various abusive employer practices. Specifically, that section provides as follows:

> An action to recover the liability [for the payment of unpaid wages] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.[3]

This collective action device, characterized primarily by a vague "similarly situated" standard and written consent requirement (customarily identified as an "opt-in" procedure), noticeably lacks the detailed, specific requirements of similar multi-plaintiff provisions in Rules 20 and

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1 Section 16(b) of the Fair Labor Standards Act provides for a collective action enforcement mechanism in private actions brought pursuant to the Act. Fair Labor Standards Act of 1938, ch. 676, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b) (2000)). For purposes of clarity, and because the relevant cases are inconsistent in identifying the provision as section 16(b) or § 216(b), this Note chooses to use section 16(b) as the exclusive identifier of the provision in issue and will modify the language of the cases described below as needed to reflect that choice.

2 Note that section 16(b) does allow aggrieved parties to file a cause of action in any "court of competent jurisdiction," including state courts. 29 U.S.C. § 216(b) (2000). Nevertheless, the overwhelming majority of decisions that have contributed to the development of section 16(b) doctrine have come out of the federal system. Moreover, while some insight into the proper functioning of the collective action mechanism has recently come from the courts of appeals (most notably the Tenth and Eleventh Circuits), by and large the battle to understand section 16(b) has been waged in the district courts.

3 *Id.*

23.[4] Unfortunately, clues that might guide courts in interpreting the "similarly situated" standard in section 16(b) are few and far between, as the congressional record is virtually silent as to how Congress intended for section 16(b) to operate in practice.

Accustomed to the predictability, uniformity, and consistency promised by the more clearly defined Rules, district court judges and practitioners alike have struggled to discern section 16(b)'s proper application. Indeed, so central are the Rules to the functioning of the federal courts that some have argued that section 16(b) should simply be superseded as a nonconforming procedural device. Others argue that, even if section 16(b) is not to be summarily displaced, the Rules are the polestar guiding the federal courts and therefore must necessarily inform any analysis of section 16(b)'s inadequately defined "similarly situated" standard.

Nevertheless, a consensus is growing slowly but steadily among the courts that section 16(b) is entitled to a life of its own. Indeed, a recent refrain arising within the district courts is that section 16(b) presents "less stringent" requirements than the Rules and ought reasonably to function on its own terms without being subsumed by the Rules' related provisions.[5] This Note, however, will question the wisdom of defining section 16(b) as a "less stringent" procedural mechanism. The Note will show that, even if section 16(b) can be accurately described as a "less stringent" device, such a description ultimately runs counter to the long-overdue recognition that section 16(b) should claim its own place in the federal court system.

First, Part I.A of this Note briefly reviews the nascent origins of the FLSA and the Rules to confirm that section 16(b)'s collective action mechanism was never subject to outright supersession by the Rules. Part I.B discusses the subsequent revisions of both section 16(b) and Rule 23, which prompted some practitioners and courts to reconsider the question of supersession in the mid-1970s. Part I concludes that the federal courts have remained true to congressional intent by rejecting section 16(b)'s supersession by the Rules and have acted true to the purposes of the FLSA when endowing section 16(b) with an identity all its own.

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4 Regarding permissive joinder of parties and class action suits, respectively. *See* FED. R. CIV. P. 20, 23.

5 *See, e.g.*, Carter v. Indianapolis Power & Light Co., No. IP102CV01812SEBVSS, 2003 WL 23142183, at *3 (S.D. Ind. Dec. 23, 2003) (providing a representative example of how district courts have adopted language indicating that class certification is "more lenient" under section 16(b) than under the Federal Rules without presenting a clear articulation of how the FLSA certification is in fact more lenient or why it should be so).

Next, Part II examines the reasons why the courts have historically found it helpful to compare section 16(b) to the permissive joinder device in Rule 20. Part II.A focuses especially on the recent reemergence of comparisons between section 16(b) and Rule 20 caused by the *Grayson v. K Mart Corp.*[6] and *Hipp v. Liberty National Life Insurance Co.*[7] decisions coming out of the Eleventh Circuit. Part II.B then explains why such comparisons are no longer useful to the courts, as they will ultimately lead to greater court and practitioner confusion and will frustrate judicial efforts to promote efficient resolution of controversies under section 16(b). In particular, Part II.B points out the reasons why courts and commentators have found section 16(b) to have more in common with class actions under Rule 23 than with Rule 20's permissive joinder device. Those reasons are used as additional justification for questioning the resurgence of interest in Rule 20 as a guide for courts conducting the section 16(b) analysis.

Part III further explores the reasons why courts have found Rule 23 to be particularly useful in interpreting and defining the "similarly situated" standard. Part III.A initially focuses on the district court's logic in the *Shushan v. University of Colorado at Boulder*[8] decision, which provides the best articulated rationale for incorporating Rule 23 requirements into section 16(b) class certification. Part III.A then shows why the *Shushan* argument has not won the support of a majority of district courts, which instead have developed an ad hoc, two-tiered method of section 16(b) class certification. That ad hoc approach rejects the notion that section 16(b) opt-in plaintiffs must meet Rule 23 requirements to proceed against a defending employer. Part III.B then develops a synthesis of the courts' best insights into the functioning of section 16(b) as a class action mechanism. That synthesis shows how, and why, the courts should now move beyond past comparisons to allow section 16(b) to function optimally as a procedural device with characteristics all its own.

As a final consideration, Part IV asks whether pending congressional legislation in the form of a Class Action Fairness Act might have any impact on the courts' understanding of section 16(b). In particular, Part IV argues such potential legislation provides further cause to abandon the growing refrain that section 16(b) provides a "less stringent" mechanism than can be found in the Rules for joining plaintiffs together in a common cause against defendants. The Note concludes that forgoing the identification of section 16(b) as a "less stringent"

6 79 F.3d 1086 (11th Cir. 1996).

7 252 F.3d 1208 (11th Cir. 2001).

8 132 F.R.D. 263, 264 (D. Colo. 1990).

procedural device is a necessary next step in allowing section 16(b) finally to fulfill its purpose as a collective action mechanism no longer overshadowed by the dominating presence of the Rules.

I. THE BIRTH AND DEVELOPMENT OF THE FLSA AND THE FEDERAL RULES

What is the true relationship between the collective action provision in the FLSA's section 16(b) and the multi-plaintiff action provisions of the Federal Rules? On the surface level of their common origins, at least, the FLSA and the Rules appear closely related. The FLSA and the Rules were enacted in the same year and in fact took effect a scant five weeks apart. One and the same Congress, then, ushered both of the separate measures into being. As the following sections show, however, from the beginning section 16(b) and the similar provisions in the Rules served significantly separate purposes. Indeed, despite their shared congressional lineage and close temporal enactment, section 16(b) and the Rules were hammered out in distinctive forges fired by divergent social and political concerns. Though evidence of congressional intent is woefully scant regarding the provisions of section 16(b) itself, the history of the FLSA's enactment nevertheless confirms that Congress has never intended section 16(b) to be summarily superseded by the Rules.

A. The FLSA vs. the Federal Rules: The Initial Case Against Supersession

Our story begins over seventy years ago, in the often tumultuous social milieu of the early 1930s. After thirty years of advocating for the creation of a commission to propose one coherent and comprehensive set of procedural rules for the federal courts, the American Bar Association finally got its wish. Due in no small part to the championing of the cause by Attorney General Homer S. Cummings, in 1934 Congress passed the Rules Enabling Act, which allowed the Supreme Court to promulgate a definitive set of procedural regulations.[9] An

9 In part, the Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2000)), provided as follows:

> Be it enacted . . . [t]hat the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Id., 48 Stat. at 1064.

Advisory Committee was promptly formed, composed of distinguished law school professors, judges, and practicing attorneys. That Committee successfully merged actions at law and suits in equity within the federal courts, creating a system which substantially favored flexibility over rigidity and decisions on the merits over procedural formality. After careful scrutiny, the long-anticipated Federal Rules of Civil Procedure were finally promulgated in the spring of 1938 and became effective on September 16 of that year.

In that same decade, President Franklin Roosevelt's Administration labored to advance various "social" legislation programs in the face of stiff resistance by the Supreme Court. Time and again, the Court determined that congressional measures designed to control price- and wage-fixing in various industries exceeded Congress's constitutional authority.[10] Then, in the spring of 1937 the Court appeared to shift abruptly its view of the constitutionality of such regulations. Buoyed by the Court's decision to uphold the Labor Relations Act in the five Labor Board cases decided on April 12, the Administration quickly drafted a bill designed to regulate hours and minimum wages for laborers while eliminating unnecessary child labor.[11] The first draft of that bill, the original draft of the FLSA, was introduced on May 24, 1937.[12] After significant revision in both houses, which included numerous concessions to the influential American Friends of Labor (AF of L) to help ensure passage of the bill,[13] Congress approved a final version from a joint conference committee on June 13 (in the House) and June 14 (in the Senate). President Roosevelt signed the measure on June 25, and four months later, on October 24, the FLSA took effect.[14]

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10 *See, e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 618 (1936); Carter v. Carter Coal Co., 298 U.S. 238, 310 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

11 *See* Paul H. Douglas & Joseph Hackman, *The Fair Labor Standards Act of 1938* (pt. I), 53 POL. SCI. Q. 491, 493 (1938).

12 Although the identities of the drafters most responsible for crafting particular provisions of the FLSA are lost to history, Professors Douglas and Hackman note: "While Messrs. Black and Connery were the official sponsors of the bill, there is evidence that Senator Pope of Idaho and Assistant Attorney General Jackson played a more active role in the drafting of the legislation." *Id.* at 493 n.9.

13 *See id.* at 506–14 (detailing the influence of the AF of L on revisions to the Act, especially in the House, and concessions made by legislators to minimize AF of L opposition).

14 The fact that some lingering confusion over the respective enactment timelines of the FLSA and the Rules has plagued the courts is reflected by a statement in *Bayles v. American Medical Response of Colorado., Inc.*, 950 F. Supp. 1053 (D. Colo. 1996), where the court identified the FLSA's enactment date (rather than the presidential

After their enactment, the FLSA and the Federal Rules would fatefully cross paths through one minor provision: namely, FLSA section 16(b). That section, dedicated to enforcement of the Act and damages available to plaintiffs, originally provided as follows:

> Action to recover [actual and liquidated damages for withheld minimum wages or overtime compensation] may be maintained in any court of competent jurisdiction by one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated . . . .[15]

This section may indeed appear "minor" given the relatively slight congressional attention evidently paid to the provision in comparison with other aspects of the Act. The congressional record, for instance, is completely silent as to any definition of the "similarly situated" standard and fails to mention why this particular enforcement procedure was selected by Congress. Thus, "[b]eyond what has been quoted from section 16(b), Congress did not explicitly attempt to spell out the metes and bounds intended for these representative actions nor did it suggest procedures to be followed" in the two kinds of representative actions authorized in section 16(b).[16] One point which must be emphasized, however, is that neither the "similarly situated" standard nor the ability to designate a nonparty representative to maintain the action in section 16(b) had any analogue in the class action procedure that had been adopted in Rule 23.

Nevertheless, the representative action enabled by section 16(b) was not a procedural orphan, so to speak. Both Congress and the courts had historically recognized several exceptions to the general

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signing date) as June 25, and went on to surmise that "[i]t may be assumed that Congress considered the proposed Rule 23(a) in 1938 in light of the newly passed [section 16] and consciously decided to create different standards." *Id.* at 1066. In fact, Congress had finished reviewing the Rules before the FLSA was ever signed. The Rules became effective on September 16 only because the Supreme Court wanted to allow three months after the end of the congressional session before the Rules took effect so that the Bar could have ample time to familiarize itself with the Rules before they became operative. The end of the congressional session was June 16. Recall the FLSA was not signed in the House and Senate until the thirteenth and fourteenth of June, respectively. More accurate, then, is the court's later assertion that "[i]t seems entirely plausible that Rule 23, regardless of vintage, should not even be considered in defining 'similarly situated' under [section 16(b)]." *Id.*

15 G. W. Foster, Jr., *Jurisdiction, Rights, and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions*, 1975 WIS. L. REV. 295, 323 (reprinting 29 U.S.C. § 216(b) with explanatory alterations).

16 *Id.* at 324.

rule that a representative party should be a member of the class represented.[17] Moreover, as a practical matter, the enforcement provisions Congress selected make perfect sense in light of the FLSA's purpose and perceived goals. After all, Congress designed the FLSA primarily as a two-pronged attack on unhealthy labor practices, specifically depressed wages and extended working hours without overtime pay. It was reasonable to postulate that, if one employee was suffering from excessive hours without overtime pay or pay below the minimum wage, the employee's situation was not isolated. More likely, the employee was just one of numerous workers enduring unfair conditions caused by a particular practice of the employer. Thus, social and judicial interests in the economical and efficient resolution of controversies argued for allowing one employee to challenge the unfair practice while permitting all similarly affected employees to be present in the action and reap any benefits of a favorable judgment against the violating employer.

Furthermore, the section's unusual authorization of a nonparty designated agent in the enforcement procedure is understandable when one considers the role of labor unions, both actual and potential, in the history and hoped-for success of the FLSA. As mentioned above, the AF of L had a significant voice in the actual shaping of the FLSA in Congress. Also, immediately after the FLSA's enactment, commentators, and surely members of Congress as well, anticipated that labor unions could serve as effective watchdogs guarding employees from employer abuse and FLSA violations. Indeed, as Professors Douglas and Hackman acknowledged early in 1939, "it is probable in many instances the trade unions will become supplementary enforcing agents."[18] In this way, the representative measure of section 16(b) "promise[d] to add to the effectiveness of the enforcement features of the act."[19] Moreover, although unstated in the congressional record, Congress likely recognized the delicate situation employees were in when challenging unfair employment practices. Fear of employer retribution or loss of livelihood could be strong disincentives for individuals to file suit in their own names under section 16(b).[20]

17 *See id.* at 323 n.101.

18 Paul H. Douglas & Joseph Hackman, *The Fair Labor Standards Act of 1938* (pt. II), 54 POL. SCI. Q. 29, 54 (1939).

19 *Id.*

20 Courts attempting to define the scope of representative actions under section 16(b) were in general agreement, however, that actions filed pursuant to that section "should bind only those employees who in some fashion manifested their consent to become involved in the action." Foster, *supra* note 15, at 324. Nevertheless, in Professor Foster's words:

Accordingly, section 16(b)'s representative feature reasonably permitted influential unions and other pro-employee organizations to intercede on an individual's behalf to remedy employer abuses. From the standpoints of reasonableness, logic, and perceived social realities, therefore, the enforcement procedures incorporated into section 16(b) simply made sense.

The above historical overview prompts two observations critical to a proper appreciation of section 16(b)'s intended operation in the federal system. First, because the FLSA took effect five weeks *after* the Federal Rules, even if section 16(b) were found to contain a procedure for certifying multi-plaintiff actions that was inconsistent with the procedures in the Rules, section 16(b) would be safe from the superseding effects of the Rules Enabling Act.[21] Second, and perhaps more importantly, the timeline shows the reasonableness of presuming that Congress did not consider the FLSA to be a law "in conflict" in any way with the Federal Rules. Granted, the Roosevelt Administration may have felt pressured to rush the FLSA into being.[22] Yet it seems implausible to presume that the very Congress that recognized the need to overhaul the federal court system by promulgating the Rules

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> For employees backed by a strong and aggressive union, the risk of employer displeasure was likely to be less in situations where the employer generally had resisted payment of minimum wages or overtime in an atmosphere that left his employees with reason for concern that retaliation could be expected if more effective pressures were brought to bear.

Id. at 325 n.105.

21 *Id.* at 325 n.108 (citing the influential treatise *Federal Practice* by Professor James William Moore, which clarified that "the Rules, having the force of statutes, override statutory procedures in conflict on the date a Rule becomes effective.").

22 Admittedly, even shortly after the FLSA's enactment some speculated that political haste created less than ideal conditions for statutory clarity. For example, in a case determining whether actions brought in state court under the FLSA should be removable to federal court at the option of the defendant, the court in *Booth v. Montgomery Ward & Co.* determined as follows:

> This court considers, therefore, that the act itself, fairly understood, ought to be regarded as a clear indication of the legislative determination that the employee may select, and remain in, the forum of his choice, for the assertion of his civil rights under it. That it might have accomplished its purpose with greater nicety and clarity may be admitted. But one must not neglect the historical fact that the measure, after lying long with scant hope of enactment, was finally passed in the haste incident to congressional adjournment, which notoriously and unfortunately, intercepts adequate parturitional care in the case of much of our most vital national legislation. That circumstance, while it is by no means, a substitute for legislative language, may be reckoned with in weighing language actually employed.

44 F. Supp. 451, 456 (D. Neb. 1942).

would, almost simultaneously, undermine the twin goals of consistency and uniformity in that system by introducing a conflicting procedural device. The better presumption is that Congress, recognizing the particular goals and distinct sociopolitical pressures that spawned the FLSA, believed section 16(b)'s private enforcement mechanism would best serve the federal interests and remedial purposes embodied in the Act. While the Rules certainly embodied the accumulated wisdom of scholars and practitioners on how best to construct *general* court procedure to ensure fairness and efficiency in multi-plaintiff lawsuits, the FLSA reflected Congress's assessment of *specific* social realities calling for a practical yet fair representative enforcement mechanism in a particular act designed to root out employer misconduct. Thus, Congress allowed the FLSA from its inception to contain a procedural device that was something distinct from, but not inconsistent with, the recently enacted provisions in the Federal Rules.

B. Subsequent Amendments and the Reemergence of the Supersession Question

Congress was spurred to amend the FLSA in 1947 after a trilogy of Supreme Court cases substantially broadened the definition of a compensable "workweek."[23] The Court had determined that the workweek definition should include travel time on company premises along with any substantial time spent in preliminary activities such as opening windows, changing clothes, or preparing tools. What most alarmed Congress, however, was the Court's decision to apply the new workweek interpretations retroactively, thereby subjecting employers to liability for unpaid wages (barring an applicable state statute of limitations) all the way back to the effective date of the FLSA. Desiring primarily to relieve employers from such expansive liability, Congress passed the Portal-to-Portal Act on May 14, 1947, to "cut off claims for activities not thought compensable at the time they took place."[24] In

23 Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 691–94 (1946) (holding employees were at work when walking between time clock and worksite, as well as when engaged in preliminary activities "such as putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools."); Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161, 166 (1945) (holding coal miners were "at work" for FLSA purposes when traveling in mine shafts); Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598 (1944) (concluding that miners were "at work" when traveling from the mine entrance to the underground worksite).

24 Foster, *supra* note 15, at 333.

the process, though, Congress also amended section 16(b) through section 5 of the Portal-to-Portal Act, entitled "Representative Actions Banned." In that section, Congress repealed section 16(b)'s representative feature, thereby requiring employees to file suit on their own behalf, even though such employees retained the ability to file on behalf of other employees "similarly situated."[25] In addition, Congress specifically required prospective plaintiffs to "opt-in" to a lawsuit by filing formal consent to be bound by the judgment. Thus, as of 1947 section 16(b) was effectively amended to its present form, which in relevant part states:

> An action to recover the liability [for unpaid wages] may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.[26]

This specific inclusion in section 16(b) of an opt-in requirement to bind prospective plaintiffs caused courts to reconsider the supersession question after Congress amended Rule 23 in 1966 specifically to abolish the opt-in procedural device. Indeed, whereas the initial version of Rule 23 had allowed the creation of what was called a "spurious" class through opt-in consents filed with the courts, the revised Rule 23 was completely rewritten to exclude such spurious classes. Instead, Rule 23 required all class actions to be governed by an "opt-out" procedure in which any member of a prospective class not affirmatively "opting-out" of the pending action would be bound by the judgment rendered. Because Rule 23 was re-promulgated almost twenty years after the amendment to section 16(b) with a clear preference for opt-out over opt-in procedures, courts were soon forced to consider whether section 16(b) was now truly "in conflict" with the rules and subject to supersession by the newly rewritten Rule.

One court to face the renewed supersession argument head-on, and ultimately to reject it, was the District Court for the Eastern District of Pennsylvania in *Paddison v. Fidelity Bank.*[27] In *Paddison*, a plain-

25 Congress appears to have been motivated in part by concerns that allowing representative lawsuits would encourage opportunistic "outsiders" to "stir up litigation." Elizabeth K. Spahn, *Resurrecting the Spurious Class: Opting-In to the Age Discrimination in Employment Act and the Equal Pay Act Through the Fair Labor Standards Act*, 71 GEO. L.J. 119, 129 n.56 (1982).

26 29 U.S.C. § 216(b) (2000).

27 60 F.R.D. 695 (E.D. Pa. 1973).

tiff wishing to pursue an Equal Pay Act (EPA) claim as a class action "constructed an ingenious argument that the promulgation of Federal Rule 23 by the power of the Enabling Act, 28 U.S.C. § 2072 supercedes any previous inconsistent statutory procedural sections."[28] The court rejected the plaintiff's "ingenious argument," however, because of a brief parenthetical in the final version of the Rule 23 Advisory Committee's notes which stated simply that "[t]he present provisions of [section 16(b)] are not intended to be affected by Rule 23, as amended."[29] Based on that unelaborated parenthetical,[30] the court felt "bound" to conclude that the supersession issue was moot and that "the rules laid down by previous decisions concerning the interpretation of [section 16(b) were] still valid."[31]

By the mid-1970s, the federal courts had generally accepted that in section 16(b) Congress presented the courts with a collective action device that was "independent of and unrelated to" similar multi-plaintiff joinder provisions in the Rules.[32] The Advisory Committee's note to amended Rule 23 was independent confirmation for the courts that the reworked Rule was still not to supersede section 16(b). Instead, that section continued to deserve respect as the procedural device of choice in FLSA, EPA, and Age Discrimination in Employment Act (ADEA) actions.[33] Nevertheless, even after the courts had finally laid the supersession question to rest, courts continued to struggle with how best to understand the vague "similarly situated" standard in section 16(b). In the course of that struggle, courts have continued to argue about the proper use of the Rules in informing the "similarly situated" analysis. Indeed, as the next two parts of this Note demonstrate, the courts have repeatedly been unwilling, or even unable, to develop an interpretation of section 16(b) that is not intimately tied to the Rules. While the Rules have never been able to supersede sec-

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28 *Id.* at 700.

29 Amendments to Rules of Civil Procedure Supplemental Rules for Certain Admiralty and Maritime Claims Rules of Criminal Procedure, 39 F.R.D. 69, 104 (1966).

30 As Professor Spahn notes,

> [i]n the absence of published minutes of the advisory committee proceedings, it is difficult to state definitively why the committee exempted [section 16(b)] opt-in classes from the operation of the revised rule. Presumably, the advisory committee believed it had no authority to alter statutorily defined class procedures under the guise of a Federal Rules revision.

Spahn, *supra* note 25, at 131.

31 *Paddison*, 60 F.R.D. at 700.

32 *See, e.g.*, Burgett v. Cudahy Co., 361 F. Supp. 617, 622 (D. Kan. 1973).

33 *See, e.g.*, Schmidt v. Fuller Brush Co., 527 F.2d 532, 536 (8th Cir. 1975) (recognizing the continued vitality of the opt-in mechanism in ADEA cases and raising the Advisory Committee parenthetical in a footnote to support its conclusions).

tion 16(b), the Rules have nonetheless cast a long shadow that has frequently inhibited courts from fully understanding and utilizing section 16(b) on its own terms.

II. SECTION 16(b) AS A PERMISSIVE JOINDER DEVICE: THE SHADOW OF RULE 20

In 1805, Chief Justice John Marshall articulated the following principle of statutory interpretation, which aptly describes the federal courts' historical approach to section 16(b): "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ."[34] Without question, courts and practitioners alike have long labored to develop a procedural framework that could inform the analysis of when potential plaintiffs were "similarly situated" as required by the statute. Congress, having offered courts no guidance within the FLSA itself or in advisory notes on how to construct the "similarly situated" inquiry, implicitly directed the courts to use their inherent authority and discretion to flesh out the statutory standard. In response, and largely by virtue of section 16(b)'s nature as a collective action device, courts logically seized upon similar multi-plaintiff provisions in the Rules to help articulate a functional approach. After all, because courts and practitioners were accustomed to using the Rules as the lens through which all procedural questions were viewed, they naturally succumbed to the temptation to look to the Rules' well developed language for guidance when concrete questions arose concerning section 16(b)'s "similarly situated" standard.

Imagine the following scenario: a plaintiff approaches a district court and asks to be allowed to represent a group of "similarly situated" plaintiffs in a lawsuit against their collective employer under section 16(b). "But wait," counters the employer, "these employees cannot possibly qualify as 'similarly situated' under the statute!" "Why not?" asks the court. "Well," reasons the employer, "isn't section 16(b) just another mechanism for joining plaintiffs in a common cause against a defendant? And doesn't this court have a model of how joinder of plaintiffs is supposed to operate in Rule 20, regarding permissive joinder of parties and claims? If so, isn't it logical to suppose that these employees should meet any standards in Rule 20 to be able to proceed under section 16(b)?" Suddenly, the court is confronted with a host of pressing questions. Is section 16(b) properly characterized as a permissive joinder device analogous to Rule 20? If

34 United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

so, does it make sense to require section 16(b) plaintiffs to meet the same requirements as plaintiffs seeking formal joinder under the Rule? To what extent does, or should, Rule 20 inform the "similarly situated" analysis that the court must now conduct?

A district court confronting these questions would likely find it helpful to learn that, historically, courts and commentators did indeed become accustomed to looking at section 16(b) as a type of permissive joinder device, akin to Rule 20.[35] Because section 16(b) did not *require* the inclusion of "similarly situated" plaintiffs in the lawsuit, and because named plaintiffs were therefore entitled to control the shape and scope of their lawsuits, likening section 16(b) to the Rule on permissive joinder was a natural move. Beginning in the mid-1970s, however, comparisons between section 16(b) and Rule 20 fell out of favor as courts became preoccupied with persistent questions about the relationship between section 16(b) and Rule 23. Nevertheless, a renewed interest in Rule 20's usefulness in understanding the "similarly situated" standard has arisen in the past decade due in no small part to the Eleventh Circuit's opinions in two cases, *Grayson v. K Mart Corp.* and *Hipp v. Liberty National Life Insurance Co.* Despite that rekindled interest, however, our hypothetical district court would be wise to exercise caution in using Rule 20 as its signpost on how to arrive at a proper understanding of section 16(b)'s ideal operation. Indeed, the following sections of this Note briefly review the ways in which section 16(b) has been informed by comparisons to Rule 20, and challenges the prudence of such comparisons.

A. *The Usefulness of Rule 20 in Understanding the "Similarly Situated" Standard*

The initial version of Rule 20, on the permissive joinder of parties, provided as follows:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.[36]

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35 *See, e.g.*, Foster, *supra* note 15, at 335 (interpreting section 16(b) as a permissive joinder device limiting "private damages actions to relief for those employees who commence the action or who, prior to the trial on the merits, intervene or formally give their consent to be included as parties plaintiff").

36 FED. R. CIV. P. 20 (1938) (amended 1966). Note that the quoted language of the Rule has remained virtually unchanged since its initial enactment, the only alteration being that the referent "them" after "question of law or fact common to all" has been changed to "these persons." *See* FED. R. CIV. P. 20.

When we compare the language of section 16(b) with that of the Rule above, we see that section 16(b) resembles a permissive joinder device in three key respects. First, section 16(b) does not require that all similarly affected employees actively participate in a lawsuit initiated by a plaintiff to challenge unfair employer practices. In other words, section 16(b) does not postulate any necessary intervention or joinder of similarly impacted employees. Section 16(b)'s language provides, instead, that one employee may sue on his or her own behalf. The section does not indicate that the individual may do so only where the individual alone has been affected. Congress therefore respected the individual employee's interest in challenging the employer on the merits of that singular employee's own particular circumstance. At the same time, Congress respected any similarly impacted employee's desire to avoid involuntary conflict with the employer. Thus, as G. W. Foster explained, "the individual employee could sue or not as he chose, controlling the litigation of his own rights, not obliged to champion the rights of his fellow employees with similar claims, and free to reject the representation of his rights by others."[37]

Second, neither section 16(b) nor Rule 20 require any quantum of plaintiff participation before a court can find it wise and efficient to resolve the combined disputed issues in one proceeding. That is, like Rule 20, section 16(b)'s language does not insist upon any "critical mass" of similarly affected employees before joinder will be permitted. Conceivably, even under section 16(b) as initially written, any employee or representative could have filed suit against an employer on behalf of just one or two similarly situated plaintiffs. By constructing the statute in this way, Congress enabled the FLSA (and later the ADEA and EPA) to be enforced under section 16(b)'s multi-plaintiff device even when a small employer was challenged or when only a small group of employees agreed to risk a legal confrontation with their employer.

Finally, after section 5 of the Portal-to-Portal Act amended the FLSA in 1947,[38] section 16(b) required prospective "similarly situated" plaintiffs to file affirmative consents with the court to be included in the action and bound by the judgment.[39] Thanks largely to the influential work of Professor James William Moore, the federal courts had grown accustomed to identifying such opt-in class suits as permissive

37 Foster, *supra* note 15, at 310.

38 *See supra* notes 23–26 and accompanying text.

39 The current version provides that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b) (2000).

joinder devices.[40] Taken together, these three similarities convinced a majority of courts that section 16(b) should operate in certain practical, predictable ways as a permissive joinder device. For instance, a majority of the courts understood section 16(b)'s permissive joinder-style operation to require a pretrial determination of the scope of the prospective class, and the courts therefore prohibited plaintiffs from opting in after a favorable decision.[41]

As a general matter, therefore, especially after the 1947 amendments to section 16(b), the federal courts eventually took it for granted that the section demonstrated numerous features characteristic of a permissive joinder device. In one important respect, however, section 16(b)'s operation was clearly not identical to that of Rule 20. Specifically, while a plaintiff under Rule 20 formally appeared as a party before the court and filed a pleading, the party joining a lawsuit under section 16(b) needed only to file a written consent and thereafter neither formally appeared in court nor was included as a named party in the caption of the case. But that difference aside, courts uniformly acknowledged that section 16(b) was akin to Rule 20 in the key respect that a prospective plaintiff could only be included in the action and bound by the eventual outcome by affirmatively acting to be associated with the lawsuit.[42] Having accepted that basic similarity, most courts gave little consideration to any deeper relationship, or lack thereof, between the requirements of Rule 20 and those of the "similarly situated" standard in section 16(b).

Interestingly, however, a revival of thought has recently occurred about the extent to which Rule 20 may be used to understand section 16(b), thanks primarily to the Eleventh Circuit's discussion in *Grayson v. K Mart Corp.*[43] *Grayson* involved an unusual circumstance in which two groups of plaintiffs filed separate actions against K Mart in the Northern District of Georgia in the same year and had their actions assigned to separate judges, even though both groups alleged basically

40 *See* Spahn, *supra* note 25, at 128, 132 (discussing Moore's influence on court views of the opt-in procedure and treatment of opt-in, or "spurious," class suits as permissive joinder devices).

41 *See* Foster, *supra* note 15, at 325–26 (noting that while the FLSA is silent on when opting in needs to occur, and while the remedial purposes of the Act might even indicate that post-decision opting in of plaintiffs should be allowed, because the courts recognized section 16(b) as containing "provisions for permissive joinder," the courts were confined to battling over when, "in the pretrial stages of the action, it was proper to cut off further participation by members of the class" who had not already filed consents to join).

42 *See, e.g.*, Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 264 (D. Colo. 1990).

43 79 F.3d 1086 (11th Cir. 1996).

the same set of facts and legal theories in their age discrimination claims.[44] For whatever reason, neither group initially sought to create an opt-in class pursuant to section 16(b). Therefore, K Mart filed severance motions in both cases, alleging that the claims of the respective plaintiffs were not properly joined under Rule 20. One of the judges granted the motion for severance, evidently agreeing with K Mart that the plaintiffs were not properly joined under Rule 20.[45] Shortly thereafter, the remaining group of plaintiffs amended its complaint in an effort to create an opt-in class under section 16(b).[46] The members of the first group, who had been ruled not properly joined under Rule 20, then filed opt-in notices in the remaining case. K Mart, not surprisingly, argued that because those plaintiffs were already ruled not properly joined under Rule 20, it should follow that the plaintiffs could not qualify as "similarly situated" under section 16(b).[47] Seeking guidance, the judge in the remaining case certified the following question for interlocutory appeal: "Whether the 'similarly situated' requirement of [section 16(b)] is essentially the same as the requirement for joinder of additional plaintiffs under Fed.R.Civ.P. 20 and 42."[48]

The Eleventh Circuit determined that section 16(b)'s "similarly situated" requirement "is more elastic and less stringent than the requirements found in Rule 20 (joinder) and Rule 42 (severance)."[49] Thus, even though the first group of plaintiffs was ruled improperly joined under Rule 20, the group could still band together as opt-in plaintiffs in the remaining case because "the standard for allowing an opt-in joinder class under [section 16(b)] differs from, and is more lenient than," the analogous standards embodied in the Rules.[50] The court went on to find that, under section 16(b)'s "more liberal 'similarly situated' requirement," the potential plaintiffs had presented more than ample evidence to qualify for inclusion.[51]

In 2001, the Eleventh Circuit reaffirmed its evaluation in *Grayson* of section 16(b)'s standard in *Hipp v. Liberty National Life Insurance Co.*[52] In *Hipp*, the defendant challenged the district court's certification of a plaintiff class under section 16(b). While finding that the

44 *Id.* at 1091–92.
45 *Id.* at 1092.
46 *Id.* at 1093.
47 *Id.*
48 *Id.* at 1093.
49 *Id.* at 1095.
50 *Id.* at 1097.
51 *Id.* at 1095–96.
52 252 F.3d 1208 (11th Cir. 2001).

"decision to create an opt-in class under [section 16(b)] . . . remains soundly within the discretion of the district court," the court reiterated that "the similarly situated requirement is not very stringent."[53] Furthermore, at least in the ADEA context, plaintiffs could fulfill the "similarly situated" requirement when they met their "not heavy" burden of supporting substantial, detailed allegations of discrimination with affidavits "'which successfully engage defendants' affidavits to the contrary.'"[54] Finding the *Hipp* plaintiffs had successfully met this burden, the court concluded, "[g]iven the flexibility of the similarly situated requirement under *Grayson*, we cannot find the district court abused its discretion in allowing the opt-in class in this case."[55] *Hipp*, therefore, successfully solidified the Eleventh Circuit's conclusion that section 16(b)'s "similarly situated" requirement presents a "less stringent" standard for joinder than do the comparative standards in Rule 20.

B. *Going Beyond* Grayson *and* Hipp*: Some Problems with the "Less Stringent" Standard Analysis*

Several problems exist with the Eleventh Circuit's decision to characterize the "similarly situated" standard as "less stringent" than the analogous requirements in Rule 20. First, neither *Grayson* nor *Hipp* adequately explains exactly which of the Rule 20 requirements are more demanding than section 16(b)'s "similarly situated" standard. After all, Rule 20 has two prerequisites: "(1) a right to relief arising out of the same transaction or occurrence, or series of transactions or occurrences, and (2) some question of law or fact common to all persons seeking to be joined."[56] To understand fully the implications of the Eleventh Circuit's conclusions, one must compare section 16(b)'s standard to both of those prerequisites and then determine what a "more lenient" standard would entail.

One Florida district court rather bravely attempted just such a task in *Stone v. First Union Corp.* In *Stone*, the court confronted the fact that the Eleventh Circuit had failed to "take the next step of establishing how much less stringent [section 16(b)'s] requirements are in practice, and what this means in terms of application of the criteria."[57] The court therefore had to answer for itself whether the court of ap-

53 *Id.* at 1218–19.

54 *Id.* at 1219 (quoting *Grayson*, 79 F.3d at 1097).

55 *Id.*

56 *See* Stone v. First Union Corp., 203 F.R.D. 532, 541 (S.D. Fla. 2001).

57 *Id.* at 540.

peals considered the "similarly situated" requirement to be less stringent than one or both of Rule 20's prerequisites.

One step of the court's analysis was to determine how section 16(b) could be "less stringent" than Rule 20's requirement for some common question of law or fact. Of course, it is difficult to know what could be *less* demanding than "some common question of law or fact," except for "*no* common question of law or fact." Could it be, however, that the Eleventh Circuit envisioned that district judges would certify a class of prospective section 16(b) plaintiffs where *no* question of law or fact was common to the parties seeking relief? The *Stone* court did not seem to think that the court of appeals intended such a result, but struggled to define exactly what *was* intended. Indeed, according to the court, "[i]f the 'similarly situated' standard is more flexible (than Rule 20), it necessarily follows that some common questions of law or fact, but not all, must be shared among the putative plaintiffs with the named plaintiffs in the common action."[58] In effect, then, the court merely offered a restatement of Rule 20's second prong in its attempt to define the "similarly situated" standard and was strained to show how section 16(b)'s requirements could be less demanding. The court did add that, as a "less stringent" standard, section 16(b) might allow for class certification even in the absence of a unified policy, plan, or scheme of discrimination.[59] Yet finding that a unified plan of discrimination is not essential to a section 16(b) action does not resolve whether *some* question of law or fact must be common to all persons seeking to join in the action.

The *Stone* court fared only slightly better in expounding how section 16(b) could be "less stringent" than Rule 20's requirement of a right to relief arising out of a common occurrence or series of occurrences. The court apparently concluded section 16(b) is "less stringent" insofar as plaintiffs may qualify as "similarly situated" "even if the transactions or occurrences [underlying their claims] are not identical."[60] That is, as a "more elastic standard," section 16(b) may be satisfied where the "common nexus" uniting the plaintiffs is "based upon different transactions or occurrences which are logically connected."[61] Again, though, such an interpretation fails to distinguish section 16(b) from Rule 20 adequately enough to justify a "less stringent" label for section 16(b). After all, the *Stone* court itself acknowledged that "courts treat the term transaction flexibly" when

58 *Id.* at 541.
59 *Id.*
60 *Id.*
61 *Id.*

interpreting Rule 20 and allow the Rule to comprehend a *series* of occurrences that are connected through some ascertainable logical relationship.[62] If so, however, it is difficult to see how a group of plaintiffs seeking joinder under section 16(b) in discrimination claims based upon a series of different yet logically connected instances of employer misconduct would fail to meet the supposedly "more stringent" requirement in Rule 20.[63]

Ultimately, the court's struggle in *Stone* appears to stem largely from a misapplication of *Grayson*'s holding "that a unified policy, plan, or scheme of discrimination may not be required to satisfy the more liberal 'similarly situated' requirement of [section 16(b)]."[64] Evidently, the *Stone* court thought that statement indicated what is ordinarily required to satisfy Rule 20's commonality requirement.[65] Typically, however, the federal courts consider allegations of a pattern or practice of discrimination to satisfy the *transaction* requirement in Rule 20, not the commonality requirement.[66] What the *Grayson* court most likely meant to assert, therefore, was that the "similarly situated" standard is less stringent than Rule 20's transaction prerequisite insofar as joinder under Rule 20 would only be allowed when plaintiffs suffered from a unified plan of discrimination, while such a unified plan is not needed in the section 16(b) context.

If that, indeed, is the correct reading of *Grayson*'s holding, the holding stands on the uncertain presumption that such a unified plan would in fact be *necessary* to support permissive joinder under Rule 20 when plaintiffs cannot otherwise show that they were affected by a *related series* of occurrences. At least one court, however, has found that Rule 20's transaction requirement is met where the alleged discrimi-

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62 *Id.*

63 Note that the Supreme Court has called for a liberal approach to permissive joinder in the interests of judicial efficiency and economy. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966) (emphasizing that, "[u]nder the Rules, the impulse is towards entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged").

64 Grayson v. K Mart Corp., 79 F.3d 1086, 1095 (11th Cir. 1996).

65 *See Stone*, 203 F.R.D. at 541. Note that this reading of *Grayson* was earlier suggested by another panel of Eleventh Circuit judges in *Alexander v. Fulton County, Georgia*, 207 F.3d 1303, 1324 (11th Cir. 2000). It is unclear from reading *Grayson* whether the confusion exists in the subsequent decisions alone or if in fact the *Grayson* court itself was unclear on which Rule 20 prong (or prongs) could be satisfied by the existence of a unified plan of discrimination.

66 *See, e.g., Alexander*, 207 F.3d at 1323 (discussing how a pattern or practice of discrimination has been understood to provide the logical connection between claims necessary to meet the transaction requirement and support joinder of parties).

nation was "general and pervasive" rather than explicitly "unified."[67] Thus, the conclusion in *Grayson* that section 16(b) contains a "less stringent" standard than Rule 20 is ultimately dissatisfying for three reasons, all stemming from the imprecision of the court's analysis: (1) *Grayson* failed to identify exactly which Rule 20 prerequisites the court considers "more stringent" than section 16(b), (2) *Grayson* failed to articulate the practical implications of its decision for district courts wondering what a "less stringent approach" might involve, and (3) *Grayson* did not adequately address a point that is central to its conclusion, namely the apparent presumption that a "unified" plan of discrimination would be necessary to support permissive joinder under Rule 20.

Naturally, groups of prospective plaintiffs will want to engender a particular reading of *Grayson* among the district courts: namely, that under section 16(b)'s "less stringent" standard it should be easier for a prospective group of plaintiffs to join together than it would be for that same group to qualify for joinder under Rule 20. District courts will be quite led astray, however, if they accept that rather skewed interpretation of *Grayson*. For, distilled to its essence, *Grayson* stands for the following propositions only: (1) section 16(b) neither specifically references Rule 20 nor incorporates Rule 20's requirements into its language; (2) to conclude that a group of plaintiffs are "similarly situated," courts need not first determine that plaintiffs would meet Rule 20's two prerequisites; and (3) functionally speaking, *if* it is true that a "unified" practice of discrimination would be necessary for a group of plaintiffs (not otherwise linked together by a common series of occurrences) to meet the transaction requirement of Rule 20(a) in an employment discrimination case, it *may* be the case that a group of plaintiffs filing suit under section 16(b) can still qualify as "similarly situated" even when such a "unified" practice cannot be proved, so long as the plaintiffs can show some other logical relationship between their claims sufficient to convince a court that the plaintiffs are indeed "similarly situated"—keeping in mind that the ultimate decision as to how best to handle the lawsuit remains firmly in the district court judge's discretion as emphasized by *Hipp*. *That* distilled essence, ultimately of questionable benefit to any but a very small subset of potential section 16(b) plaintiffs, is all that district courts should take from the Eleventh Circuit's "less stringent" characterization of section 16(b).

67 King v. Pepsi Cola Metro. Bottling Co., 86 F.R.D. 4, 6 (E.D. Pa. 1979).

C. *Distancing the Courts from Continued Analogies to Rule 20: The Transition to Rule 23*

The court's struggle in *Stone* demonstrates how courts or practitioners who would read *Grayson* and *Hipp* to stand for more than the distilled essence presented above, and who would use those decisions as a springboard to inform the "similarly situated" standard through continued comparisons to Rule 20, will have to spend considerable time and mental energy to supply both the rationale and practical application that are lacking in *Grayson* and *Hipp*.[68] Any potential gains from such an enterprise, however, are likely not worth the costs. Increasingly, courts and commentators are turning away from analogies between section 16(b) and the permissive joinder device in Rule 20, and are articulating several persuasive reasons for doing so. In fact, two such reasons can be found in cases that *Grayson* itself cites in support of its "less stringent" characterization of section 16(b): namely, *Flavel v. Svedala Industries, Inc.*[69] and *Hoffmann-La Roche, Inc. v. Sperling*.[70]

First, in *Flavel*, the district court rejected the defendant's insistance that a group of plaintiffs should not be allowed to proceed collectively in an ADEA action against the employer because the

68 Note that as the primary support for its holding that the "similarly situated" requirement is less stringent than that for joinder under Rule 20(a), the *Grayson* court cites *Flavel v. Svedala Industries, Inc.*, 875 F. Supp. 550 (E.D. Wis. 1994), where the court opined that section 16(b)'s "similarly situated" requirement "'is considerably less stringent than the requirement of [Rule 23(b)(3)] that common questions predominate,' or, presumably, the Rule 20(a) requirement that claims 'arise out of the same transaction or occurrence.'" *Id.* at 553 (citation omitted). Unfortunately, *Flavel* provides little justification for its "presumption" and cites no supporting case law or secondary material. Indeed, the court's "presumption" seems to arise chiefly out of its belief that section 16(b) plaintiffs need not show that their claims arose out of the same transaction or occurrence under Rule 20. *Id*; *see also infra* notes 69–71 and accompanying text. Yet a presumption that section 16(b) is "less stringent" than Rule 20 simply does not follow logically from the bare assertion that Rule 20's standards are inapplicable in a section 16(b) representative lawsuit. Furthermore, the *Flavel* court only supports its assertion that section 16(b) is less stringent than Rule 23(b)(3)'s requirement that common questions predominate with a citation to the district court's opinion in *Heagney v. European American Bank*, 122 F.R.D. 125 (E.D.N.Y. 1988). There, a New York district court simply asserted in a footnote that section 16(b) is "of course" less stringent than Rule 23's requirement, again with no indication of the legal underpinnings of the assertion. *See id.* at 127 n.2. The point is that any court or practitioner who follows the citation trail from *Grayson* looking for any substantial rationale for the court of appeals's characterization of section 16(b) is bound to be frustrated.

69 875 F. Supp. 550.

70 493 U.S. 165 (1989).

plaintiffs' claims did not arise under the same transaction or occurrence under Rule 20(a). The court quickly dispatched that defense, primarily on the basis that filing a claim under section 16(b) "obviates the need to consider permissive joinder requirements under Rule 20(a)."[71] The court further reasoned that a multi-plaintiff claim could be brought either by representative action or by joinder.[72] Because section 16(b) authorized representative actions, "by definition . . . [section 16(b)] is mutually exclusive from a multiple-plaintiff action brought by joinder."[73] In effect, therefore, the court found that section 16(b) presents a form of action more closely akin to Rule 23, "which is the only type of representative action authorized under the Federal Rules."[74]

Similarly, in *Sperling*, the Supreme Court resolved a split among the circuits largely by analogizing section 16(b) not to Rule 20, but rather to Rule 23. The circuits had split on the issue of whether notice to prospective plaintiffs should be provided in ADEA cases filed pursuant to section 16(b). One line of cases, exemplified by the Tenth Circuit's decision in *Dolan v. Project Construction Corp.*,[75] held that, because Rule 23 actions were "diametrically opposed" to section 16(b) actions,[76] courts could not look to Rule 23 for authority to issue notice to prospective plaintiffs. And without that rule, courts lacked any authority to promulgate notice to section 16(b) prospective plaintiffs.[77] The Supreme Court disagreed, emphasizing that the courts should encourage collective actions due to "the advantage [to plaintiffs] of lower individual costs to vindicate rights by the pooling of resources" as well as the benefits to the judicial system of "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity."[78] Furthermore, the Court asserted that the same justification for court-authorized notice in Rule 23 cases, namely "'the potential for abuse [in the absence of court direction], gives a district court both the duty and the broad authority to exercise control over a class action and to enter appropri-

71 875 F. Supp. at 553.

72 *Id.* at 553 n.1. The reader may appreciate the irony that a case emphasizing that section 16(b) contains a "mutually exclusive" form of action from Rule 20 is the primary support for a case which has effectively resurrected court interest in using Rule 20's prerequisites as a beacon for enlightening the "similarly situated" standard.

73 *Id.* at 553.

74 *Id.*

75 725 F.2d 1263 (10th Cir. 1984).

76 *Id.* at 1267.

77 *Id.* at 1268.

78 Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989).

ate orders governing the conduct of counsel and the parties.'"[79] Thus, the Court determined that the same policies of judicial case management and advancement of efficient, just results underlying Rule 23 actions should apply equally to ADEA actions filed pursuant to section 16(b)'s collective enforcement mechanism. As summarized by one district court, "[t]he ADEA class action after *Sperling* is more like the familiar class action under Rule 23 than a permissive joinder device in which the passive role of the court is 'to administer and monitor the litigation process.'"[80]

In addition to the indications from the cases above that courts are better served analogizing section 16(b) to Rule 23 than to Rule 20, one must consider the observations of Professor Elizabeth Spahn. In her article, *Representing the Spurious Class*,[81] Professor Spahn aptly demonstrates how the "determination of important issues, including the availability of notice and, in age discrimination cases, the extent of administrative exhaustion requirements, turns on whether one views the opt-in FLSA action as a permissive joinder device or as a species of class action."[82] Professor Spahn argues forcefully that viewing section 16(b) solely as a permissive joinder device is theoretically and practically inadequate, especially given that section's incorporation as the enforcement mechanism in the ADEA and the EPA. For example, Professor Spahn points out that treating section 16(b) as a joinder device requires a court to assume that allegedly discriminatory acts are isolated occurrences giving rise to distinct individual claims, while treating the section as a class action "allows for the possibility that discrimination has occurred on a more widespread basis."[83] Furthermore, were courts to treat section 16(b) as a true joinder device, each prospective plaintiff in a section 16(b) action would have to meet individually the jurisdictional requirements of the court,[84] and the courts would be unable to provide notice of pending actions to prospective plaintiffs. Finally, in the ADEA context, "[g]iven that nearly half of all ADEA cases fail because of the complex administrative exhaustion requirements, permissive joinder of individuals, each of whom must properly comply with the statutory requirements, is not an effective device for aggregating claims and attacking systemic age discrimina-

79 *Id.* at 171 (quoting Gulf Oil Co. v. Bernard, 452 U.S. 89, 101 (1981)).

80 Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 262, 268 (D. Colo. 1990) (quoting Walker v. Mountain States Tel. & Tel. Co., 112 F.R.D. 44, 47 (D. Colo. 1986)).

81 Spahn, *supra* note 25.

82 *Id.* at 121.

83 *Id.* at 133.

84 *See id.* at 139.

tion."[85] Spahn's proposed solution to these dilemmas, namely to treat section 16(b) as a spurious class action, has not achieved substantial acceptance in the courts. Courts historically have been receptive, however, to the idea that section 16(b) is something more than just a permissive joinder device and in fact should be compared to a class action. It is to that latter comparison in the courts that this Note will now turn.

III. SECTION 16(b) AS A CLASS ACTION MECHANISM: THE SHADOW OF RULE 23

The FLSA contains no references to Rule 23. Nor is there any indication that the FLSA drafters considered section 16(b) to present a true "class action" mechanism that simply offered an alternative path to class certification than did Rule 23. Nevertheless, section 16(b) and Rule 23 have been inextricably intertwined on both theoretical and practical levels, no doubt due at least in part to historical timing and practitioners' confusion. With the advent of the Federal Rules, courts naturally sought to develop coherent concepts and consistent procedures to achieve the uniformity that the Rules sought to bring to the federal system. When confronted with the collective action mechanism in the almost-simultaneously enacted FLSA, courts quite understandably looked to the Rules for guidance on how to handle and manage group lawsuits. Indeed, courts were frequently forced to evaluate the two standards for class certification side by side because practitioners unclear as to how section 16(b) was supposed to work would often attempt to certify an FLSA class under Rule 23. District court judges, faced with such practitioner requests, frequently had to discern for themselves the congressionally intended relationship between section 16(b) and Rule 23.

A. *Reconciling Section 16(b) and Rule 23: Historical Developments and the Present State of the Question*

Initially, the task of reconciling section 16(b) and Rule 23 did not seem such a daunting task for the courts due to certain key similarities between their respective provisions. First, both provisions were apparently drafted with the intent to ease judicial burdens by simplifying resolution of lawsuits where large groups of plaintiffs had a common complaint against an offender. In the original version of Rule 23, the Advisory Committee had generally adopted the test of Equity Rule 38 (Representatives of Class), which required that a class action could

85 *Id.* at 148.

proceed where the question before the court was "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court."[86] Rule 23 substantially incorporated that language and added a definition of what constituted a "common or general interest."[87] A key feature of the original class action rule, then, was what came to be known as the "numerosity" requirement. That is, the courts were willing to recognize a general exception to the principle that a person is not bound to a judgment in personam in a litigation in which that person is not designated as a party only where the sheer size of the class made joinder impracticable. Indeed, as the Supreme Court recognized in *Hansberry v. Lee*,[88] "[t]he class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable."[89]

Recall, the original representative action established by section 16(b) provided no minimum number of plaintiffs that had to be present to form a "similarly situated" group. Nor did section 16(b) provide any cap on the number of plaintiffs on whose behalf the suit could proceed. Section 16(b), then, implicitly allowed a representative action to proceed where it involved so many potential plaintiffs that joinder would otherwise have been impracticable. Thus, section 16(b) incorporated a feature that was similar to Rule 23 insofar as it allowed for efficient resolution in one proceeding of what otherwise would have to be accomplished through innumerable separate trials.

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86 RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES 50 (William H. Dawson ed., 1938).

87 As originally enacted, Rule 23(a) provided as follows:

> (a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
>
> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
>
> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

FED. R. CIV. P. 23(a) (1938) (amended 1966).

88 311 U.S. 32 (1940).

89 *Id.* at 41.

More pointedly, however, after Congress enacted the Portal-to-Portal Act in 1947, section 16(b) and Rule 23 were alike in their common use of an "opt-in" procedure that came to be known as a "spurious" class action device. Until 1966, Rule 23(a)(3) allowed class action suits to proceed when the plaintiff rights to be enforced were "several, and there [was] a common question of law or fact affecting the several rights and a common relief [was] sought."[90] This provision in Rule 23(a)(3) derived its title of "spurious" class action from the influential work of Professor James William Moore.[91] Moore, who had drafted the initial version of Rule 23 and guided interpretation of that Rule through his treatise *Federal Practice*, explained that those class suits under Rule 23(a)(3) involving a common question of law or fact should bind only those class members who opted into the lawsuit.[92] Later, when the Portal-to-Portal Act specifically amended section 16(b) to require an opt-in affirmative consent procedure, section 16(b) and Rule 23 possessed a nearly identical mechanism to create a representative group of plaintiffs. Thus, in both its potential for numerosity and its opt-in requirements, from 1947 until 1966 section 16(b) was recognized as possessing key characteristics common to class action suits under Rule 23.

In 1966, however, Rule 23 was completely rewritten. Added into Rule 23 were four explicit prerequisites to a class action. Deleted from Rule 23 was the "spurious" class action allowing for opt-in representative suits. After the 1966 amendments, therefore, Rule 23 and section 16(b) no longer shared a common procedure for creation of a representative class. Once again, section 16(b)'s procedural device included something distinctly different than what was contained in the Federal Rules, which now uniformly required any plaintiff that did not want to be bound by a certified class action proceeding to "opt-out" of the pending action affirmatively.

Nevertheless, attorneys accustomed to having the world of federal procedure operate in certain predictable and consistent ways would still, from time to time, attempt to certify a class of prospective section 16(b) plaintiffs under Rule 23. One such attempt occurred in the 1975 case of *LaChapelle v. Owens-Illinois, Inc.*[93] In that case, the Fifth Circuit affirmed the district court's dismissal of the plaintiff's ADEA claim brought as a class action under Rule 23. The court opened its

90 FED. R. CIV. P. 23(a)(3) (1938) (amended 1966).

91 *See* Spahn, *supra* note 25, at 127–28 (discussing Moore's influence on the development of Rule 23).

92 *See id.*

93 513 F.2d 286 (5th Cir. 1975).

discussion of the issue with the now ubiquitously appearing conclusion that "[t]here is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by FLSA [section] 16(b)."[94] Indeed, "Rule 23(c) provides for 'opt out' class actions. FLSA [section] 16(b) allows as class members only those who 'opt in.' These two types of class actions are mutually exclusive and irreconcilable."[95] Therefore, according to the court, "Rule 23 cannot be invoked to circumvent the consent requirement of the third sentence of FLSA [section] 16(b)," which unambiguously requires written, filed consent before a party may be included in a suit and bound by a judgment.[96] *LaChapelle* quickly became the leading case cited by courts emphasizing that Rule 23 is simply inapplicable when a group of plaintiffs seek to bring a collective action lawsuit under a statute incorporating section 16(b).[97]

Even after *LaChapelle* and its companion cases, however, the district courts continue to divide over how much Rule 23's various requirements should inform the "similarly situated" analysis. No case has more emphatically argued that Rule 23's requirements should inform section 16(b) than a 1990 case out of Colorado, *Shushan v. University of Colorado at Boulder*.[98] In that case, the district court was very concerned that finding Rule 23 "wholly inapplicable" to class action suits under section 16(b) would render that vague provision "practically formless."[99] The court reasoned that while *LaChapelle* correctly determined that section 16(b)'s opt-in feature is manifestly irreconcilable with Rule 23's opt-out feature, it would be a "*non sequitur*" to conclude that "every other feature of [R]ule 23 is similarly irreconcilable with [section 16(b)]."[100] Moreover, the court found it insensible to suppose that Congress would want the federal courts to "discard the compass of [R]ule 23 entirely and navigate the murky waters of such [section 16(b)] actions by the stars or whatever other instruments they may fashion."[101]

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94 *Id.* at 288.

95 *Id.* at 289.

96 *Id.*

97 One such case is *Church v. Consolidated Freightways, Inc.*, 137 F.R.D. 294 (N.D. Cal. 1991), which, while agreeing "that some of Rule 23's procedures may be helpful in the management of [class actions brought pursuant to section 16(b)]," nevertheless cited *LaChapelle* when emphasizing that "[t]he clear weight of authority holds that Rule 23 procedures are inappropriate for the prosecution of class actions under [section 16(b)]." *Id.* at 305–06.

98 132 F.R.D. 263 (D. Colo. 1990).

99 *Id.* at 266.

100 *Id.*

101 *Id.*

The *Shushan* court further supported its conclusion by heavily drawing upon the Supreme Court's decision in *Sperling*, where the Court concluded that court-supervised notice to prospective plaintiffs was appropriate in ADEA cases. The *Shushan* court recounted how,

> [s]tressing the benefits of collective action to both ADEA plaintiffs and the judicial system, the Court observed that district courts have "the requisite procedural authority to manage the process of joining multiple parties in a manner that is orderly, sensible, and not otherwise contrary to statutory commands or the provisions of the Federal Rules of Civil Procedure."[102]

Thus, although Congress had never explicitly incorporated Rule 23's requirements into section 16(b), the district court in *Shushan* thought that the Supreme Court had issued a firm directive to consider the Rules when interpreting the "similarly situated" standard. After considering the Supreme Court's use of Rule 23's policy and philosophy in *Sperling* and the potential formlessness of section 16(b) without Rule 23's requirements, the *Shushan* court held "that the named representative plaintiffs in an ADEA class action must satisfy all of those requirements of Rule 23, *insofar as those requirements are consistent with* [section 16(b)]."[103]

The court's decision in *Shushan* to apply Rule 23's requirements to section 16(b) has not been widely embraced by the district courts. Nevertheless, there has been a small but very respectful following. Even those districts choosing a different course often acknowledge the *Shushan* court's thoughtful and well-reasoned approach, and have had to contend with the court's conclusions. One such dissenting voice came from the district judge in *Bayles v. American Medical Response of Colorado, Inc.*,[104] who noted that "*Shushan* represents a herculean effort to provide structure to the nebulous 'similarly situated' standard by turning to the time-tested notions of Rule 23."[105] Nevertheless, the *Bayles* court concluded *Shushan* had "adopt[ed] modern Rule 23 standards without explanation"[106] and argued that "if Rule 23's standards apply to § [16(b)] at all, it must be through Rule 23 as it existed prior to 1966."[107] Yet ultimately the *Bayles* court found even the analogy between section 16(b) and pre-1966 Rule 23 unpersuasive, because the court could not explain "why collective actions were

102 *Id.* at 267–68 (quoting Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 170 (1989)).

103 *Id.* at 265.

104 950 F. Supp. 1053 (D. Colo. 1996).

105 *Id.* at 1063.

106 *Id.*

107 *Id.* at 1064.

treated as class actions in the first place."[108] In fact, the judge noted, "[s]ection [16(b)] does not reference Rule 23, and I have not discovered any reason why the definition of 'similarly situated' did not evolve independently."[109] The *Bayles* court therefore lamented that the district courts "appear to have assumed that [section 16] could not stand alone and needed to be pigeon-holed into one of the former Rule 23 categories."[110]

Despite the *Bayles* court's astute observations, it failed to perceive the key thrust of the logic underlying *Shushan.* Central to the *Shushan* court's reasoning was that any class action procedure needs to accomplish two essential objectives: (1) protection of potential plaintiffs and (2) protection of the court's interests in effective and efficient case management. Indeed, in the words of the *Shushan* court, "the procedures embodied in Rule 23 are designed not only to protect the rights of class members, but also to allow effective disposition and management of the litigation."[111] In other words, through all of its various incarnations, Rule 23 has sought to embody those policies that the federal courts have determined most effectively protect the interests of the litigants and the position of the court. *Shushan* looks to modern Rule 23's requirements, therefore, because those requirements present the most up-to-date understanding of how best to serve court and litigant interests in representative actions. Thus, as the paradigmatic expression of how active, managerial courts should promote efficient case resolution and litigant protection, Rule 23 should necessarily inform those representative actions filed pursuant to section 16(b).

Shortly after *Shushan,* however, a California district court offered a counterargument in *Church v. Consolidated Freightways, Inc.*[112] that typifies the response of most district courts to the reasoning in *Shushan.* In *Church,* the court was not persuaded "that in *Sperling* the Supreme Court's discussion of a court's managerial responsibilities of joining multiple parties was intended to invoke, verbatim, the procedures of Rule 23" into cases brought pursuant to section 16(b).[113] In part, the *Church* court rejected the *Shushan* rationale by recognizing that section 16(b)'s opt-in features enable courts to presume that certain protections have already been afforded to prospective plaintiffs. In particular, according to the court, protective measures such as Rule

108 *Id.* at 1066.
109 *Id.*
110 *Id.*
111 Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 267 (D. Colo. 1990).
112 137 F.R.D. 294 (N.D. Cal. 1991).
113 *Id.* at 306.

23(a)(4)'s adequacy of representation requirement and Rule 23(b)(3)'s common questions predominating requirement are "not as crucial [in cases filed pursuant to section 16(b)] because a judgment stemming from a class action does not bind a class member unless that member filed a written consent to join the action."[114] Therefore, the court concluded, because section 16(b) plaintiffs are not bound unless they affirmatively opt in to the action, "they are in less need of Rule 23's protection than opt-out plaintiffs who are bound unless they take affirmative steps with the court to sever themselves from the class."[115]

Agreeing that section 16(b)'s opt-in feature allays at least some of the concerns addressed by Rule 23's requirements, the majority of districts have proceeded to decide certification issues without using the Rule and indeed without even defining the "similarly situated" standard. Instead, the courts have generally been "content to decide the question ad hoc, based upon the plain language of the statute and general principles of judicial economy and fairness to the litigants."[116] One of the earlier, and now leading, cases in the effort to promote a functional ad hoc approach to section 16(b) cases was a 1987 case out of New Jersey, *Lusardi v. Xerox Corp.*[117]

In *Lusardi*, the court decided to decertify a class of opt-in plaintiffs that had previously obtained conditional certification for notice purposes to prospective members of the class. At the earliest stages of the action, the court had issued a Conditional Certification Order to advance the remedial purposes of the ADEA by allowing plaintiffs to

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114 *Id.*

115 *Id.* Note that *Church* further justifies the nonincorporation of Rule 23 requirements into section 16(b) on the grounds that "such a requirement would impede ADEA plaintiffs' opportunity to proceed collectively and, therefore, is contrary to the broad remedial purposes of prohibiting arbitrary age discrimination." *Id.* Nevertheless, the fact that the ADEA, FLSA, and EPA are remedial statutes does not alone justify abandoning Rule 23 requirements, especially Rule 23(b)(3)'s requirement that common questions predominate. After all, Congress has specifically provided that Rule 23 is applicable in class actions brought pursuant to Title VII of the 1964 Civil Rights Act. *See* Spahn, *supra* note 25, at 131–32 (raising the issue of Title VII's enforcement and pointing out the structural similarities and overlap between the ADEA, EPA, and Title VII). It seems nonsensical to posit that the remedial purposes of a statute targeting age discrimination merit a less stringent requirement for class certification than the remedial purposes of a statute targeting sex and racial discrimination.

116 Bayles v. Am. Med. Response of Colo., 950 F. Supp. 1053, 1067 (D. Colo. 1996).

117 118 F.R.D. 351 (D.N.J. 1987), *vacated in part on other grounds*, 122 F.R.D. 463 (D.N.J. 1988).

communicate with prospective members.[118] This early conditional certification, however, was necessarily based upon little more than the initial pleadings and affidavits available at the start of the action. Thus, the *Lusardi* court determined that a second certification decision should be made at or near the close of discovery, when the court could make a more informed decision about the appropriateness of a section 16(b) representative action.[119] The *Lusardi* court then proposed the following four factors to consider at the second stage of certification: (1) the disparate factual and employment settings of the individual plaintiffs, (2) the various defenses available to the defendant that appear to be individual to each plaintiff, (3) fairness and procedural considerations, and (4) the apparent absence of filings required by the applicable remedial statute.[120]

While the *Lusardi* factors have been frequently cited, subsequent district courts have added to or restated the *Lusardi* factors as they have deemed necessary. Indeed, *Am. Jur. 2d Job Discrimination* section 2184 lists as many as fourteen factors that courts commonly consider in analyzing the "similarly situated" class at the post-discovery stage.[121] Despite the lack of agreement among districts as to which factors are conclusive in the two-tiered analysis, the majority of district courts generally agree that the ad hoc, two-tiered approach offers benefits for both plaintiffs and defendants. Plaintiffs can obtain court-approved, court-supervised notice to build the class to meet the remedial purposes of the congressional statutes. Defendants, meanwhile, can obtain the court's assistance in inquiring as to whether a manageable class even exists or whether defendants would be subjected to unfair prejudice through unwarranted solicitation sent to prospective plaintiffs. The courts still recognize, however, that "[a] determination as to whether class members are similarly situated is always fact-specific."[122] Due in large part to this recognition that the facts of individual cases demand a flexible approach, the ad hoc, two-tiered analysis to section 16(b) class certification has taken firm hold in most districts and is now the preferred means of addressing challenges to certification.[123]

118 *Id.* at 354 (quoting the issuing judge's statement that notice was appropriate "to let these people communicate in a meaningful way with that group of people that they say they can prove were wronged").

119 *Id.* at 359.

120 *Id.*

121 45C AM. JUR. 2D *Job Discrimination* § 2184 (2002).

122 Sperling v. Hoffmann-La Roche, Inc., 118 F.R.D. 392, 405 (D.N.J. 1988).

123 *See, e.g.*, Vaszlavik v. Storage Tech. Corp., 175 F.R.D. 672, 678–79 (D. Colo. 1997) (applying the ad hoc approach); *see also* David Borgen & Laura L. Ho, *Litigation of Wage and Hour Collective Actions Under the Fair Labor Standards Act*, 7 EMPLOYEE RTS. &

Nevertheless, the federal courts continue to debate the degree to which Rule 23's various requirements might prove helpful in guiding certification questions arising under section 16(b). The lingering confusion appears to result, at least in part, from a belief that class certification on a practical level is likely to reach the same results regardless of whether or not Rule 23 is used in a court's analysis. Indeed, in *Thiessen v. General Electric Capital Corp.*,[124] the Tenth Circuit reviewed the approaches courts had taken to resolving the "similarly situated" issue and concluded that "there is little difference in the various approaches. All approaches allow for consideration of the same or similar factors, and generally provide a district court with discretion to deny certification for trial management reasons."[125] Perhaps fortuitously for the courts, it did seem for a time that prospective classes of plaintiffs would have been decertified regardless of the approach used.[126] As late as June 1995, the Fifth Circuit was able to note that, based on its review of the case law to that point, "no representative class ha[d] ever survived the second stage of review" where courts had used the ad hoc approach.[127]

To date, the circuit courts have refused to define the "similarly situated" standard precisely or even to mandate that lower courts in the circuits adopt one particular approach to section 16(b) group certification. In fact, only three of the circuits have formally considered the issue of how best to define the "similarly situated" standard. As noted above, the Tenth Circuit found little difference in the various approaches, and while opining that the ad hoc approach is arguably the best of the available alternatives insofar as it is not tied to Rule 23 standards, it held only that the district court did not abuse its discretion in employing the ad hoc approach. The court of appeals issued no formal directive that district courts must follow any particular approach in subsequent cases.

Similarly, the Eleventh Circuit, while noting that the two-tiered approach "appears to be an effective tool" and "suggest[ing] that district courts in this circuit adopt it in the future," also emphasized that "[n]othing in our circuit precedent . . . requires district courts to util-

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EMP. POL'Y J. 129, 135 (2003) ("[A] consensus has been reached on how [section 16(b)] cases should be evaluated. It is clear that the two-step ad hoc approach is the preferred method for making the similarly situated analysis . . . .").

124 267 F.3d 1095 (10th Cir. 2001).

125 *Id.* at 1105.

126 *See, e.g.*, Bayles v. Am. Med. Response of Colo., 950 F. Supp. 1053, 1067 (D. Colo. 1996) (explaining how the prospective class would be decertified regardless of whether Rule 23's requirements had to be met by the prospective class).

127 *See* Mooney v. Aramco Servs. Corp., 54 F.3d 1207, 1214 (5th Cir. 1995).

ize this approach."[128] Thus, the court of appeals refused to overturn the decision of a district judge *not* to utilize the two-tiered approach, a decision that according to the appellant resulted in the erroneous certification of the prospective class. The only other circuit to address the issue, the Fifth Circuit, found it "unnecessary to decide" which of the competing methodologies should be employed in class certification decisions, since in the case before the court the district court would not have abused its discretion in decertifying the class no matter which approach was used.[129]

Thus, for the time being the district courts retain virtually unfettered discretion in deciding which approach to use to consider certification of a proposed group of opt-in plaintiffs under section 16(b). No one set of factors has emerged as definitive considerations in the ad hoc approach. Courts have reached no clear consensus on which combination, if any, of the requirements contained in Rule 23 should be mandatory, or even just advisory, as considerations in certifying the class. As more cases come before the courts, however, and especially as courts increasingly accept the idea that Rule 23 contains "far more stringent" requirements than section 16(b),[130] the departure between class certification under the various standards is certain to become more pronounced. Indeed, the *Hipp* case came before the Eleventh Circuit upon the very charge that a different district court approach to class certification would have yielded different results.[131] Thus, developing a single, comprehensive approach that incorporates the federal courts' best insights into section 16(b)'s proper operation is essential if consistency, predictability, and uniformity are to be preserved in the federal system.

B. A Proposal for Moving Forward: Beyond Comparisons with Rule 23

To advance the effective and consistent application of section 16(b), the federal courts should draw upon the established decisional law to develop an approach that meets several specific goals. First, because the majority of courts have already embraced the ad hoc

128 *See* Hipp v. Liberty Nat'l Life Ins. Co., 252 F.3d 1208, 1219 (11th Cir. 2001).

129 *See Mooney*, 54 F.3d at 1216 (noting that regardless of how the court analyzed the "similarly situated" requirement, "we cannot say that the district court abused its discretion in finding that the 'opt-in' plaintiffs were not similarly situated. In so holding we specifically *do not* endorse the methodology employed by the district court, and *do not* sanction any particular methodology").

130 *See, e.g.*, Church v. Consol. Freightways, Inc., 137 F.R.D. 294, 306 (N.D. Cal. 1991) (referring specifically to Rule 23(b)(3)'s requirement that common questions predominate).

131 *Hipp*, 252 F.3d at 1217.

method as most conducive to the remedial purposes of the relevant statutes and respectful of the fact-specific nature of the certification inquiry, the approach must retain the ad hoc method's basic two-tiered structure and overall flexibility. Second, the chosen approach should highlight the benefits to plaintiffs and courts that can come from utilizing section 16(b)'s opt-in feature. Third, the approach should advance the federal goals of efficient and economical resolution of controversies by respecting the Supreme Court's recognition that district courts have a managerial responsibility in representative lawsuits. Fourth, to promote finality and consistency, the approach should be reviewable under an abuse of discretion standard, avoiding the need or incentive for appellants to seek de novo review of the certification decision. Finally, and perhaps most importantly, the approach must promote justice, fairness, and the remedial purposes of the applicable statutes by adequately protecting the valid interests of all the parties concerned.

As an initial step, the courts should silence the recurring refrain that the "similarly situated" standard is "less stringent" than particular requirements in Rule 23. In the main, courts comparing section 16(b) to Rule 23 use the "less stringent" label when finding that the "similarly situated" standard does not share Rule 23(b)(3)'s requirement that common questions predominate. Yet no true consensus has been reached on the extent to which the "similarly situated" standard is "less stringent" than various other Rule 23 requirements. District courts' time and resources are inefficiently spent when judges must repeatedly survey the available (often confusing and contradictory) case law to discern, explain, and justify to litigants how and where certification issues will be treated less stringently in the section 16(b) context.

Furthermore, repeating the "less stringent" refrain poses increased risks of confusion in the typical two-tiered approach to class certification, where courts already speak of a "fairly lenient standard" being used at the initial stage to conditionally certify a class while speaking of a "higher standard" being used after discovery is complete.[132] Because the courts themselves often seem unclear at exactly which stage(s) the section 16(b) analysis will be "less stringent," practitioners and litigants are bound to be uncertain as to how and when to argue particular decertification challenges before the court. In even the best circumstances, use of the "less stringent" label forces courts to

132 *See, e.g.*, Champneys v. Ferguson Enters., Inc., No. IP 02-535-C H/K, 2003 WL 1562219, at *5 (S.D. Ind. Mar. 11, 2003) (citing Moss v. Crawford & Co., 201 F.R.D. 398, 409 (W.D. Pa. 2000)).

define the "similarly situated" standard against Rule 23. Courts must first consider what results Rule 23 would yield on a particular certification issue and then ask how section 16(b), as a "less stringent" device, may alter the analysis. Thus, because it is imprecise, inadequately defined, confusing in the ad hoc, two-tiered structure, and binds the "similarly situated" analysis to a parallel analysis of the Rules, courts should jettison the "less stringent" label that is presently attached to section 16(b). Court and practitioner interests in clarity, predictability, and efficient allocation of resources are best served by retaining the particular language of the two-tiered method, separate from unnecessary complications caused by comparisons to Rule 23.

For section 16(b) to function fully on its own merits, however, the courts will have to develop an approach to certification issues that emphasizes the practical effects of section 16(b)'s opt-in requirement. Specifically, when prospective class members file affirmative consents under section 16(b), courts may justifiably presume that the class members have thoughtfully considered their options and will actively promote their own interests.[133] Recognizing that section 16(b)'s opt-in feature raises a presumption of active, informed, self-interested class members advances court interests in efficiency by saving courts from having to conduct detailed inquiries into whether each individual class member's interests are adequately represented by the named plaintiff. Moreover, the presumption would have the effect of encouraging the desired plaintiff behavior, as prospective opt-in members would be on notice to look after their own interests and to make informed decisions about the benefits of joining the pending lawsuit over bringing an individual claim.

Furthermore, recognizing this presumptive effect of section 16(b)'s opt-in feature would strengthen the rationale behind the favored ad hoc, two-tiered approach to group certification in FLSA,

133 In *Shushan*, the district court expressed the concern that a person who files a written consent under section 16(b) "should not be expected fully to appreciate actual or potential conflicts between himself and the class representatives" in the same way as would a person who actually intervenes in the action, and therefore the courts should still conduct an independent assessment of whether there is adequacy of representation by the designated plaintiffs and lawyers. Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 267 (D. Colo. 1990). Most courts, however, have been willing to recognize that opt-in plaintiffs who elect to join a suit through formal consent can be afforded the presumption of tending to their own interests and monitoring developments in the lawsuit to ensure their individual goals are in fact advanced. *See, e.g.*, *Church*, 137 F.R.D. at 306 (explaining that the adequate representation requirements of Rule 23(a)(4) are "not as crucial" in the section 16(b) context "because a judgment stemming from a class action does not bind a class member unless that member filed a written consent to join the action").

ADEA, and EPA cases. Courts use the two-tiered approach because, when plaintiffs initially request certification for notice purposes to prospective opt-in plaintiffs, courts do not feel capable of making a completely informed decision because substantial discovery has not yet been completed.[134] The courts are nevertheless concerned that early obstacles to initial group certification would impede the remedial purposes of the statutes by prohibiting plaintiffs from gathering greater information about unfair defendant practices and obtaining support from similarly impacted employees. By recognizing a presumption that consenting class members' interests will be adequately protected and represented, courts can better justify a conditional certification of the prospective class.

Also, by carrying the presumption through the discovery stage and into the trial, the court would place the burden upon any party that would challenge class certification on grounds of insufficient *plaintiff* protections to come forward with substantial evidence to support the charge. Thus, the presumption would further efficient resolution of disputes by requiring challenging defendants to substantiate any charge that consenting members do not in fact know what is best for them. At the same time, the presumption would serve the remedial purposes of the applicable statutes by extending to consenting members the benefit of the doubt that such members are acting in their own best interests.

Recognizing that section 16(b)'s opt-in feature enables courts to reasonably presume that individual consenting members' interests will be adequately protected, however, does not mean that the courts must abandon their managerial responsibility. Instead, the presumption should be a rebuttable one, and when a court is presented with evidence that opt-in members' interests are not being adequately represented or protected, the court should intervene to remedy whatever defects exist in the representation. The Seventh Circuit's decision in *Woodall v. Drake Hotel*[135] provides a model of this approach, as the court recognized that in the unusual circumstances of that case judicial intervention was necessary to protect the rights of two opt-in

134 *See* Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102–03 (10th Cir. 2001); *see also* Vaszlavik v. Storage Tech. Corp., 175 F.R.D. 672, 678 (D. Colo. 1997) (providing an opinion by the same judge who authored the *Bayles* opinion, which applies the ad hoc approach at the notice stage and notes that the ad hoc approach at this stage "'require[s] nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan'" (quoting Bayles v. Am. Med. Response of Colo., Inc., 950 F. Supp. 1053, 1066 (D. Colo. 1996))).

135 913 F.2d 447 (7th Cir. 1990).

plaintiffs who had effectively been left in the dark by a failure of adequate representation and notice.

In *Woodall*, the Seventh Circuit faced a situation in which two out of fifty-four consenting ADEA plaintiffs were left out of a settlement after the district court granted class counsel's unexplained motion to withdraw from representation of those two plaintiffs. Unable to secure other counsel, the two plaintiffs were not included in conferences and negotiations and did not receive notice of proceedings from the court. After being left out of the settlement, the two requested on appeal that the circuit court "apply the protection of Fed.R.Civ.P. 23(e) to an ADEA class action."[136] Under Rule 23(e), "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."[137] While acknowledging that "the procedures for *instituting* a class action under the Federal Rules and under section 16(b) are different and exclusive of each other," the plaintiffs nevertheless contended that, "once an ADEA plaintiff has opted-in, and a Federal Rules plaintiff has not opted-out, both sets of plaintiffs are similarly situated and should be accorded the same protection by a court."[138]

The Seventh Circuit agreed with the basic thrust of the plaintiffs' contention, finding that "[m]any of the policy reasons underlying the requirements of Rule 23(e) are applicable to ADEA class actions."[139] Specifically, Rule 23(e) is intended "to safeguard the rights of class members and allow consideration of the broader implications of a class action settlement"[140] while ensuring that the class representatives or counsel act in the best interests of the class as a whole. Typically, according to the court, ADEA plaintiffs are not "'absent' in the way Federal Rules plaintiffs may be absent" because "[t]he ADEA enforcement mechanism contemplates individual participation in the collective action."[141] Nevertheless, in the circumstance before the court, the two plaintiffs without counsel, "like the 'absent' class members, must rely on the district court as a backstop to insure that the settlement was fair and reasonable."[142] Thus, the court recognized that the general policy embodied in Rule 23 of judicial management of cases

136 *Id.* at 450.
137 FED. R. CIV. P. 23(e).
138 *Woodall*, 913 F.2d at 450–51.
139 *Id.* at 451.
140 *Id.* (quoting Armstrong v. Bd. of Sch. Dirs., 616 F.2d 305, 313 (7th Cir. 1980)).
141 *Id.*
142 *Id.*

for protection of plaintiffs should extend to ADEA class actions in the appropriate circumstances. Therefore, while the court "stop[ped] short of holding that Rule 23(e) should be applied generally to all ADEA class actions," in the case before the court the district court had clearly "abused its discretion by dismissing the class cause of action by reason of settlement" without protecting the "absent" plaintiffs through appropriate notice of the pending settlement.[143]

The *Woodall* case, therefore, stands for the following two essential propositions in the context of understanding section 16(b) on its own merits: (1) courts must maintain an active, managerial role throughout proceedings filed under section 16(b) to intervene when individual consenting members' interests are clearly not adequately protected, and (2) while Rule 23's individual requirements should not be incorporated wholesale into the section 16(b) analysis, section 16(b) as a representative enforcement mechanism should reflect the same policy concerns of just and efficient resolution of controversies that underlie Rule 23. As the *Shushan* decision forcefully reminds us, however, Rule 23 is driven not only by concerns for the protection of absent class members, but also by concerns for efficient and effective dispute resolution.[144] Thus, courts must craft an approach to section 16(b) that is carefully attentive to the needs of both litigants and the courts at both the district and appellate court level.

As seen above,[145] a rebuttable presumption of adequate protections to plaintiff interests afforded by section 16(b)'s opt-in feature advances court interests in efficiency while respecting both plaintiff interests and the remedial purposes of the FLSA, ADEA, and EPA. We must still inquire, however, whether that opt-in feature also helps courts to decide whether common questions should predominate in lawsuits pursuant to section 16(b). As the *Church* court argued, the requirement that common questions predominate, found in Rule 23(b)(3), is primarily geared towards protecting the interests of absent class members in the Rule's opt-out context. Thus, section 16(b)'s opt-in feature effectively renders that requirement inapplicable in section 16(b) cases "because opt-in plaintiffs have presumably decided that the benefits of proceeding as a class member outweigh any benefits of bringing an individual action where claims that

143 *Id.* at 451–52.

144 *See* Shushan v. Univ. of Colo. at Boulder, 132 F.R.D. 263, 267 (D. Colo. 1990) (arguing "the procedures embodied in [R]ule 23 are designed not only to protect the rights of class members, but also to allow effective disposition and management of the litigation").

145 *See supra* notes 133–34 and accompanying text.

predominate over class claims may be pursued."[146] On the other hand, the *Shushan* court insisted that the requirement that common questions predominate has "little to do with protection of class rights and much to do with handling the lawsuit effectively."[147] For the *Shushan* court, therefore, the requirement is primarily directed to the interests of the court in effective case management. Hence, resolving the issue of whether common questions should predominate in the "similarly situated" analysis would seem to depend upon how one characterizes the underlying interests served by the requirement.

The most reasonable conclusion is that there is at least some truth to both the *Shushan* and *Church* positions. That is, the *Shushan* analysis reasonably supports the position that the efficient resolution of representative actions requires *some* critical mass of issues common to all the members. On the other hand, the *Church* analysis reasonably supports the view that a wholesale incorporation of Rule 23(b)(3) into the "similarly situated" analysis would not give due import to the proper operation and effect of section 16(b)'s opt-in requirement. A compromise position does exist, however, which can incorporate the relevant insights of both the *Shushan* and *Church* decisions. The compromise position effectively rephrases Rule 23(b)(3)'s language to the negative. That is, rather than insisting that common questions predominate, the compromise position looks to ensure that *individual* questions *do not* predominate.[148]

Arguably, investigating whether individual questions do not predominate at trial would, in practical operation in the courts, produce negligibly different results than investigating whether common questions do predominate. The rephrasing of the requirement, however, has the distinct advantage of avoiding Rule 23(b)(3)'s language, thereby signaling to courts that the "similarly situated" analysis of section 16(b) does not require uncritical incorporation of Rule 23's requirements. Moreover, the rephrased recommendation[149] empha-

146 Church v. Consol. Freightways, Inc., 137 F.R.D. 294, 306 (N.D. Cal. 1991).

147 *Shushan*, 132 F.R.D. at 267.

148 Indeed, the consideration as to whether individual questions would predominate at trial has already been identified by some courts utilizing the ad hoc approach as a relevant, even key consideration during the second stage of the "similarly situated" analysis. *See* Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1103 (10th Cir. 2001).

149 This Note uses the term "recommendation" rather than "requirement" for the following two reasons: (1) to emphasize that the plain language of section 16(b) does not explicitly "require" that individual questions do not predominate and (2) to remain consistent with this Note's insistence on keeping the certification decision firmly within the discretion of the managerial district court. The courts should not exclude the (albeit unlikely) possibility that in a specific set of circumstances the interests of

sizes the degree to which the presence of a substantial degree of common issues at trial serves both court and defendant interests. Where individual questions predominate, the union of claims in one collective action would not lead to efficient resolution of key disputes and would therefore run counter to policies of judicial economy.[150] At the same time, predominating individual questions could adversely prejudice defendants by resulting in an indefinite trial, confusion of issues, and unreasonable defendant expenses in conducting discovery on the merits of each individual consenting member's claim.

Ultimately, therefore, the recommendation that individual questions must not predominate is just a shorthand way of saying that a court will continue to weigh the interests of both defendants and the courts themselves when deciding whether to recognize a potential group of plaintiffs as "similarly situated" under section 16(b). That is, the court will not certify a class where predominating individual questions would prejudice defendants' ability to defend their cases or where inefficiency and confusion of issues will arise. Thus, the recommendation preserves the discretion of the district courts in promoting the most efficient resolution of disputes. For, in the end, the courts retain discretion to determine when individual questions are so prevalent that court and litigant interests would not be served by allowing the representative action to proceed.

Furthermore, by emphasizing the role of the district courts' discretion, the recommendation that individual questions should not predominate promotes the finality of certification decisions and eases the burden of the appellate courts. Disappointed litigants are less inclined to seek review of unfavorable decisions when they know the appellate court will not conduct a plenary, de novo review of the district court's determination. And where decisions are challenged, the courts of appeals can focus their review upon the district courts' application of a particular standard. That is, the reviewing court can narrow its inquiry to whether the district court abused its discretion in

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all parties are best served by allowing the representative action to proceed to trial even where individual questions predominate. That being said, because prejudice to a defendant, confusion of issues, and inefficient use of court resources is so likely to occur where individual issues do predominate, the "recommendation" will most likely be elevated in practice to the status of a requirement, albeit an implicit one that attaches to section 16(b) collective actions solely by virtue of their nature as representative lawsuits.

150 *See* Bayles v. Am. Med. Response of Colo., 950 F. Supp. 1053, 1067 (D. Colo. 1996) ("[A]voiding the prospect of eighty separate trials upon decertification may serve some measure of judicial economy. However, given the number of individual issues that must be resolved, I am not persuaded that a single trial would save significant time or effort.").

concluding that defendants would be unfairly prejudiced or the court would be unnecessarily burdened by recognizing the proposed group of plaintiffs as "similarly situated." The reviewing court would not need to concern itself with the particular factors the court below selected in its fact-specific analysis, except insofar as those factors, taken together, supported or cast suspicion upon the lower court's ultimate exercise of discretion.

To summarize, when a prospective group of plaintiffs comes to a district court seeking to institute a representative action under the FLSA, ADEA, or EPA, the court should adopt the following approach. First, the court should make it clear to all parties that section 16(b) alone will govern the action and that the requirements of Rule 20 and Rule 23 will not direct the court's analysis. At the early stage of the action, the court should promote the remedial purposes of the applicable statute by using a lenient certification standard marked by a presumption that section 16(b)'s opt-in feature will adequately protect plaintiff interests. Though initially lenient in its analysis, the court's stage one certification decision must take into account the potentially unfair burden of discovery placed upon defendants. Should the court decide to conditionally certify the class, near the end of discovery the court should conduct a more thorough balancing of interests, considering all available facts, to decide whether to recognize the potential plaintiffs as "similarly situated."[151] A key component of that balance is the determination of whether individual questions predominate. Where such predominating individual issues would cause confusion of issues, inefficient use of court resources, or prejudice to defendants, certification should not occur.

Throughout the pretrial process, plaintiffs and defendants should be able to ask the court to consider any reasonable inference, based upon the facts, which would tend to support or question the court's recognition of the opt-in members as "similarly situated." Moreover, throughout the trial the court must be attentive to any substantially supported suggestion that individual opt-in members' interests are not adequately protected or represented. The court must maintain an active, managerial role throughout the trial to be responsive to any evidence that rebuts the presumption of informed opt-in participants whose interests are being adequately advanced by the

151 Courts applying the ad hoc approach have wisely avoided the temptation to insist upon a single definition of the "similarly situated" standard. Because collective action certifications are so highly fact specific and because Congress incorporated section 16(b) into multiple remedial statutes, no single definition could reasonably capture the many considerations that litigants validly raise as critical to the "similarly situated" analysis.

named plaintiff(s). While both plaintiffs and defendants should urge the court to consider whatever factors argue for or against the fairness and efficiency of allowing the representative action to proceed, all parties should accept that, ultimately, the district court has discretion in weighing any factors and balancing all the relevant interests in conducting the "similarly situated" analysis.

IV. A Final Consideration: The Impact of the Proposed Class Action Fairness Act on Section 16(b).

To date, Rule 23 has been the repository of policy and procedure guiding the federal courts in the proper management of class actions. A new, looming presence on the legal horizon, however, threatens to substantially alter the class action landscape. For the past two years, Congress has been seriously evaluating the merits of a Class Action Fairness Act (CAFA), drafted purportedly to remedy perceived abuses in class action procedures. Congress has expressed particular concern that class actions are negatively affecting both the national economy and the respectability of the judicial process.[152] The proposed Act would primarily affect the scope of federal court jurisdiction over interstate class actions,[153] plus would control various aspects of proposed settlement procedure, including calculation of attorneys' fees,[154] distribution of proceeds to class members,[155] and notification of the settlement to federal and state officials.[156] The question which arises is, if the CAFA is a statement of congressional intent regarding the procedures to be followed in interstate group lawsuits, should the procedures in the CAFA also affect judicial analysis of collective actions under section 16(b)?

In section 3(a) of the CAFA, Congress apparently attempts to tie the Act directly to Rule 23.[157] Because Congress wishes to include under the Act's umbrella state actions that are removed to federal

152 Class Action Fairness Act of 2004, S. 2062, 108th Cong. § 2(a) (2004).

153 *See id.* § 4.

154 *Id.* § 3(a) (addressing coupon settlements under § 1712).

155 *Id.* (addressing protection against loss by class members under § 1713).

156 *Id.* (addressing notifications to federal and state officials under § 1715).

157 "Definitions (2) Class Action" reads as follows:

> (2) CLASS ACTION.—The term 'class action' means any civil action filed in a district court of the United States under [R]ule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

Id. (providing definitions under § 1711).

courts and not filed initially under Rule 23, however, the definition of "class action" is broad enough to include any civil action that was "originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action."[158] The proposed CAFA does not address whether Congress intends the Act to inform representative actions under section 16(b). As proposed, the CAFA contains no parenthetical akin to the Advisory Committee note regarding the 1966 amendment to Rule 23 disavowing application to section 16(b). Indeed, the CAFA does not explicitly rule out the possibility that Congress would consider a group of section 16(b) plaintiffs and consenting members to comprise a "class" for CAFA purposes. Most likely, though, it has simply never been brought to Congress's attention that any statement of congressional policy generally targeting "class actions" might directly or indirectly impact federal court analysis of section 16(b).

The very possibility that the CAFA could impact a court's thinking about the "similarly situated" standard, though, highlights a pervasive difficulty with courts' historical approach to section 16(b). As traced in the sections above, when federal courts have been presented with cases filed under section 16(b), the typical response has been to look to categories within the Rules to answer the following questions: "What is this device?" and "How is it supposed to operate?" Recognizing that section 16(b) has characteristics of both a permissive joinder device and of a class action, the courts have termed section 16(b) a "hybrid." The term "hybrid," however, implies that section 16(b) was spawned by combining features of "parent" provisions that exist in "pure" form within the Rules. Treating section 16(b) in this way, however, means that every alteration to the parent provisions causes a reassessment of the hybrid to see if the latter's structure has also been changed. In effect, therefore, the histories of Rule 20 and Rule 23 *become* the history of section 16(b) despite the fact that Congress has never tied section 16(b) to either Rule even at those historical points when it clearly had the opportunity to do so. Both section 16(b) and Rule 23 should be allowed to develop on their own without substantial alterations or additions to one's provisions necessarily impacting the analysis of the other. Thus, the possibility of the CAFA's passage emphasizes the timeliness of allowing section 16(b) to emerge from the shadow of the Rules and be understood as a legitimate, functioning statutory mechanism in its own right.

This is not to say, however, that the proposed CAFA offers nothing of value to the federal courts' future approach to section 16(b).

158 *Id.*

For, at a minimum, the CAFA captures a current mood on Capitol Hill that the courts should carefully consider. That mood is quite clearly characterized by suspicion of attorney practices and concern that defendants are being subjected to inordinate pressure to settle cases when classes of plaintiffs are certified for trial purposes.[159] Indeed, the U.S. Senate Republican Policy Committee's *Legislative Notice No. 42B* explicitly incorporates the term "judicial blackmail" to describe the pressure placed even upon defendants with meritorious defenses to settle a claim rather than face an expensive trial on the merits or risk encountering a "runaway jury."[160] The proposed CAFA, therefore, emphasizes that plaintiff and court interests are not the only interests that deserve, or perhaps even demand, the courts' attention in representative actions. Instead, courts must also consider and protect valid *defendant* interests to preserve the respect due the courts and to minimize any negative economic consequences to society caused by unpredictable class litigation.[161]

The concerns prompting the CAFA, therefore, reinforce the suggested approach to section 16(b) outlined in the previous section of this Note. That is, courts should promote the remedial purposes of the statutes that incorporate section 16(b) by employing the flexible two-tiered, ad hoc approach to certification and by recognizing a presumption of informed, adequately protected, consenting members. Concurrently, the courts must take into account judicial concerns of

159 *See S. 2062—The Class Action Fairness Act*, LEGIS. NOTICE 42B (U.S. Senate Republican Policy Comm., Washington, D.C.), July 7, 2004, at 4–5 [hereinafter *S. 2062*] (bemoaning the "lawyer-driven class action industry" and the costs of "runaway litigation" to the national economy), *available at* http://rpc.senate.gov/_files/L42BClassActionSD.pdf. Consider also the recent comments by President Bush in his State of the Union Address on February 2, 2005. George W. Bush, State of the Union Address (Feb. 2, 2005), *in* 151 CONG. REC. H340–03 (daily ed. Feb. 2, 2005) (emphasizing the need for class action reform), *available at* www.whitehouse.gov/news/releases/2005/02/20050202-11.html.

160 *S. 2062*, *supra* note 159, at 5. It is beyond the scope of this Note to examine to what degree defendants in class action suits are in fact subjected to excessive settlement pressure through improper class certification. It suffices for present purposes to note the current mood on Capitol Hill, and among some judges and commentators, treating class actions as suspect for at least potentially forcing defendants into "blackmail settlements." For a provocative challenge to the validity of the blackmail charge in the class action setting, see Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

161 *See S. 2062*, *supra* note 159, at 5 (complaining of the "higher prices and lower wages" that result when employers are "blackmailed," while noting that "[w]hen litigation costs become too unpredictable, the effect will be to dissuade investment, discourage entrepreneurship, increase the costs of risk planning, and threaten the core activities essential to our economy").

fairness and efficiency as well as valid defendant concerns, in part by ensuring that individual questions do not predominate in the action. Courts must not become so absorbed in defining "similarly situated" through identifying a uniform set of factors to consider that they lose the forest for the trees. That is, courts must not lose sight of the ultimate balancing of plaintiff, defendant, and court interests that must occur for section 16(b) to function optimally as a remedial representative device.

Ideally, if and when a final version of the CAFA is passed, Congress will make explicit that the CAFA is not intended to affect the operation of representative actions filed pursuant to section 16(b). In the absence of such a declaration, the courts will hopefully recognize that, having a life of its own, section 16(b) is not impacted by such amendments to class action procedure under the Rules barring a specific statement by Congress to the contrary. In the meantime, courts should promote an approach to section 16(b) that evinces to Congress that they are already in practice effectively addressing in the section 16(b) context the concerns that have given rise to the CAFA.

CONCLUSION

A Tonight Show audience accustomed to the benign teasing in Leno's "Jaywalking" exploits may well chafe at the crude, in-your-face, confrontational antics of Conan's mascot, Triumph the Insult Comic Dog. Perhaps the audience will pressure Conan to forsake his favored skit-based comedy routines for the longer, stand-up monologue style that Leno uses to open the current show. It may even be that an older audience, pining for the big-band tunes of Doc Severenson, will cringe when Max Weinberg's music introduces Conan to the crowd. Just maybe, though, the audience will come to accept that the Tonight Show under Conan O'Brien will only suffer if his personal creativity is stifled under pressure to "be like Jay," or Johnny, or even Jack. Conan's Tonight Show will surely seek to accomplish familiar goals: entertaining audiences through a mixture of offbeat comedy, personal interviews, fresh comedians, and musical guests. Yet Conan's particular adaptation of the show will never truly be successful if the audience doggedly fixates on comparisons to Conan's predecessors and refuses to let Conan's show develop on its own. Fortunately for Conan, the transition period looms long, and the audience has several years to familiarize itself with Conan's modus opperandi and to grow comfortable with Conan's idiosyncratic style.

The federal courts have had almost seventy years to become familiar with section 16(b) and its "similarly situated" standard. It is

news to no one that district court judges are in the main a conservative audience, who by training, and occasionally by mandate, value consistency, predictability, and uniformity. Judges can be especially hesitant to embrace "squishy" standards when concrete, well-defined rules promise a logical, sequential reasoning process that can be strictly applied.[162] Section 16(b)'s flexibility, however, is critical in judicial efforts to manage FLSA, EPA, and ADEA collective actions while properly respecting the panoply of litigant, court, and even societal interests implicated in those representative suits. At this point, there is ample precedent and history upon which the courts may draw to flesh out section 16(b) without relying upon wholesale incorporation of, or unrelenting comparisons to, any specific provisions within the Federal Rules of Civil Procedure. It is high time for section 16(b) to emerge from the shadows of the Rules and to be appreciated as a unique representative action mechanism deserving of its own identity and function. Given the chance to stand on its own, this less-familiar, seemingly obscure little rule of civil procedure will not disappoint.

162 The contest between flexible standards and carefully delineated tests is played out in many contexts within the courts. For another representative instance of judicial disagreement about the respective merits of flexible approaches and unyielding rules, consider *Illinois v. Gates*, 462 U.S. 213 (1983), where the Supreme Court decided to forsake the two-pronged test to examining the sufficiency of probable cause in warrant applications established in *Spinelli v. United States*, 393 U.S. 410 (1969), in favor of a more "fluid concept" of probable cause and a totality of the circumstances approach. *See Gates*, 462 U.S. at 230, 232.