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I. Introduction

A split in the Circuit Courts of Appeal has the potential effectively to destroy the class action tool for age discrimination plaintiffs. Since 1977, six circuit courts have ruled on whether plaintiffs in an action brought under Section 216(b) of the Fair Labor Standards Act ("FLSA")[1] can send notice of the pending action to other potential plaintiffs.[2] This issue was first decided in the negative by the prestigious Ninth Circuit.[3] During the following eight years, five other appeals courts considered the issue of notice and each court reached a different conclusion.[4] The result is uncertainty for plaintiffs and plaintiffs' counsel, including the possibility of risking court displeasure or, perhaps, disciplinary proceedings for communicating with persons who may have a legal right to join an FLSA class

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1. 29 U.S.C. § 216(b) (1977), discussed at length in this article. *See generally infra* text accompanying notes 64-73.

2. The enforcement scheme of § 216(b) does not specifically provide for sending notice to prospective plaintiffs to the action. This contrasts with the notice provisions of FED. R. CIV. P. 23(c)(2).

3. Kinney Shoe Corp. v. Vorhes, 564 F.2d 859 (9th Cir. 1977).

4. Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335 (2d Cir. 1978), *cert. denied*, 441 U.S. 944 (1979) (nothing in the Act prohibits the giving of notice; therefore, the district court may give notice in appropriate cases); Woods v. New York Life Ins. Co., 686 F.2d 578 (7th Cir. 1982) (the district court has the power to regulate the content and distribution of notice to potential plaintiffs, but the notice should bear no indicia of judicial sponsorship); Haynes v. Singer Co. Inc., 696 F.2d 884 (11th Cir. 1984) (the court ruled that the issue of notice was not properly before it and refused to rule on it); Dolan v. Project Constr. Corp., 725 F.2d 1263 (10th Cir. 1984) (nothing in the Act permits the district court to authorize notice; plaintiffs may be able to give notice providing they do not violate the rules regarding client solicitation); McKenna v. Champion Int'l Corp., 747 F.2d 1211 (8th Cir. 1984) (no notice to potential plaintiffs by the court, the attorneys, or the actual named plaintiffs allowed). Lower court decisions have split on the notice issue. *See generally* Annot., 67 A.L.R. Fed. 282 (1984) (collecting § 216(b) notice cases). *See also infra* note 62 for the Third Circuit's and the District of Columbia Circuit's treatment of the issue.

action.[5]

The Age Discrimination in Employment Act of 1967 ("ADEA"),[6] enacted as an amendment to the FLSA, incorporates the enforcement procedures of section 216(b). Thus, the resolution of the notice issue is of great concern to ADEA plaintiffs' counsel to ensure that this "remedial" legislation is not weakened by a restraint on the class action procedural tool.[7] Unless clear guidance is forthcoming from the United States Supreme Court, Congress should amend the FLSA specifically to allow notice to potential class action plaintiffs.[8]

II. The Split in the Circuits: What's a Plaintiff to Do?

In the 1977 case, *Kinney Shoe Corp. v. Vorhes*,[9] the Ninth Circuit Court of Appeals determined that plaintiffs in an FLSA suit could not send notice of the pending action and consent-to-join forms to other potential plaintiffs. The next year the Second Circuit Court of Appeals read the statute as permitting a district court to order notice in an "appropriate" case.[10] Several years later the Seventh Circuit Court of Appeals added another interpretation in a case brought under the ADEA. In *Woods v. New York Life Insurance Co.*[11] the Seventh Circuit Court of Appeals was clear in its opinion that notice could not be forbidden, but rejected as improper the action of a district court in sending out notices on court letterhead. The court specifically approved the procedure whereby plaintiffs sought a court order on the content of the notice to give the court the opportunity to regulate both the content and the distribution of the notice.[12] When the issue of notice came before the Eleventh Circuit Court of Appeals, that court refused to issue a definitive statement, deciding simply that the case before it was not an "appropriate" one

5. It is possible that providing notice reaches the level of attorney solicitation proscribed by rules of professional conduct. See Partlow v. Jewish Orphan's Home of Southern California, 645 F.2d 757 (9th Cir. 1981); Baker v. Michie Co., 93 F.R.D. 494 (W.D. Va. 1982); Johnson v. American Airlines, 531 F. Supp. 957 (N.D. Tex. 1982); Monroe v. United Airlines, Inc., 90 F.R.D. 638 (N.D. Ill. 1982).

6. 29 U.S.C. § 621-634 (1982).

7. Several writers have questioned whether effective group relief through private action under the FLSA is possible. See Foster, *Jurisdiction, Rights, and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions*, 1975 WIS. L. REV. 295, 328-29 (1975) [hereinafter Foster], where the writer examined whether class actions are emasculated by the procedural problems of the FLSA.

8. *See infra* Section VII.

9. 564 F.2d 859 (9th Cir. 1977). *See infra* text accompanying notes 18-56.

10. *Braunstein*, 600 F.2d at 336. *See infra* text accompanying notes 57-61.

11. 686 F.2d 578 (7th Cir. 1982).

12. *Id.* at 581.

for notice.[13] The Tenth Circuit Court of Appeals affirmed a district court decision affirming its Magistrate's opinion denying the plaintiff's motion for "Leave to Give Notice to Class Members."[14] Finally, the Court of Appeals in the Eighth Circuit held that neither the district court, nor plaintiff's counsel, could properly contact prospective class members.[15]

The decision of the Court of Appeals for the Seventh Circuit to allow notice is correct in light of the legislative history of both the FLSA and the ADEA.[16] Unless the Supreme Court hears a case and sorts out the confusion on this issue,[17] the denial of notice in age discrimination class actions will promote a proliferation of lawsuits and deny an intended remedy to many age discrimination victims.

III. The Ninth Circuit Decision

In *Kinney Shoe Corp. v. Vorhes*, the Ninth Circuit Court of Appeals ruled that class action plaintiffs in an FLSA action are prohibited from sending notice of the pending action to other potential plaintiffs.[18] The decision rests on three bases: (1) an FLSA section 216(b) class action is different from a class action under Rule 23 of the Federal Rules of Civil Procedure, and the adoption of any portion of Rule 23 procedures in an FLSA section 216(b) proceeding would be contrary to congressional intent;[19] (2) the due process concerns inherent in a Rule 23 Class action compelling notice to potential plaintiffs do not exist in an FLSA section 216(b) proceeding;[20] and (3) the policy concern of avoiding additional solicited litigation prevents notification of potential plaintiffs.[21] An analysis of the Ninth Circuit's reasoning on each of these points, however, reveals questionable legal conclusions in this precedent setting case.

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13. Haynes v. Singer Co., 696 F.2d 884 (11th Cir. 1984).

14. Dolan v. Project Constr. Corp., 725 F.2d 1263 (10th Cir. 1984). Arguably, the district court disagreed with the magistrate's interpretation of the legal standard, but felt bound by a limited scope of review. The Court of Appeals intimated that if the court is not involved in sanctioning notice, plaintiffs or plaintiff's counsel may be able to provide notice. *Id.* at 1268.

15. McKenna v. Champion Int'l Corp., 747 F.2d 1211 (8th Cir. 1984).

16. *See infra* text accompanying notes 62-103.

17. The United States Supreme Court has not granted *certiorari* in any case, including *Braunstein*, 600 F.2d at 335.

18. *Kinney Shoe*, 564 F.2d at 864.

19. *Id.* at 862.

20. *Id.* at 864.

21. *Id.* at 863.

A. FLSA Section 216(b) Actions are Different than Rule 23, FRCP Actions

There can be no disagreement with the statement that FLSA Section 216(b) actions are different than Rule 23, Federal Rule of Civil Procedure actions. The issue only warrants discussion because of the historical relationship between FLSA Section 216(b) and Rule 23. Both the Fair Labor Standards Act and the Federal Rules of Civil Procedure were originally enacted in 1938, and both provided for class action remedies. The original language of section 216(b) of the FLSA stated that one or more employees could maintain an action to recover minimum wages or overtime compensation "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 . . . ."[22] An action under section 216(b), therefore, could be maintained by an employee, by a group of employees, or by an agent/representative who might or might not be an employee.[23]

The original Rule 23 provided for class actions in a variety of different contexts.[24] Its categories, "true," "hybrid," and "spurious," proved extremely difficult, however, for courts to interpret and apply consistently. Moore's description of the Rule 23 categories described the "true" class suit in terms of joinder: since the right to be en-

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22. Fair Labor Standards Act, Pub. L. No. 75-718, § 16, 52 Stat. 1060, 1069 (1938).

23. An example of an agent/representative suit was when a nonemployee union representative brought an action on behalf of a group of employees, thus insulating individual employees from employer displeasure. See Foster, *supra* note 7, at 323 n. 101.

24. FED. R. CIV. P., 23 (1963). The original Rule 23 read as follows:

> CLASS ACTIONS
>
> (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.

The categories of Rule 23 class actions, supposedly divided by the nature of the rights involved, became identified as "true" class actions (23(a)(1)), "hybrid" class actions (23(a)(2)), and "spurious," class actions (23(a)(3)). See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570-76 (1937). *See also* Keefe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 CORNELL L.Q. 327, 329-30 (1948) [hereinafter Keefe, Levy & Donovan].

forced was joint, common, or derivative, without the class action device the joinder of all interested persons would be essential.[25] In contrast, the "spurious" class suit was described as a permissive joinder device to be utilized by numerous persons having a common question of law or fact.[26] Theoretically, what distinguished further the categories of Rule 23 was the effect of the judgment upon class members. In a "true" class action, the judgment was supposed to be binding on the entire class, whether parties or not.[27] In the "spurious" class action, a decree did not bind anyone who was not a party to the action.[28] In part, the effect of the judgment may have turned on the question of whether proper notice had been given to the purported class.[29] Adding perhaps one more level of confusion, in the period between 1938 and 1966, FLSA section 216(b) lawsuits were most often considered to be "spurious" class actions under Rule 23.[30]

In 1947, Congress amended the FLSA.[31] The confusion surrounding the binding effect of class action judgments was addressed specifically by requiring each prospective plaintiff in a section 216(b) lawsuit to consent affirmatively, or "opt into" the lawsuit, in order to be bound by the judgment.[32] Not until 1966 did amendments to the

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25. *See supra* note 24.

26. *Id.*

27. *See* Farmers Co-op Co. v. Socony-Vacuum Oil Co., 133 F.2d 101, 104-05 (8th Cir. 1942).

28. Ayer v. Kember, 48 F.2d 11 (2d Cir.) *cert. denied*, 284 U.S. 639 (1931); Carrol v. Associated Musicians of Greater New York, 206 F. Supp. 462 (S.D.N.Y. 1962); Cutler v. American Federation of Musicians, 211 F. Supp. 433 (S.D.N.Y. 1962). The question whether one could become a party and intervene after judgment had been rendered in a case also raised troubling questions for the courts. Allowing post-judgment intervention provided a logical distinction between Rule 23(a)(3) and the Rule 20 permissive joinder provisions. See Kalven, Jr. and Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); Foster, supra note 7, at 325-27; Comment, *The Spurious Class Suit: Procedural and Practical Problems Confronting Court and Counsel*, 53 NW. U. L. REV. 627, 628 n. 10 (1958).

29. The 1966 Advisory Committee Notes discuss the difficulties under original Rule 23, specifically the fact that the classification system proved "obscure and uncertain . . . . The courts had considerable difficulty with these terms . . . . Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions." FED. R. CIV. P. 23 Advisory Committee Note (1966). See Keefe, Levy & Donovan, *supra* note 24, at 327.

30. Pentland v. Dravo Corp., 152 F.2d 851 (3d Cir. 1945); Sinclair v. United States Gypsum Co., 75 F. Supp. 439 (W.D.N.Y. 1948). Some courts decided that Rule 23 and FLSA § 216(b) did not need each other to exist. See Smith v. Stark Trucking, 53 F. Supp. 826 (N.D. Ohio 1943). One writer who analyzed early FLSA opinions concluded that they had a "makeshift character" about them. See Foster, *supra* note 7, at 326.

31. Portal to Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84 (1947) (codified as 29 U.S.C. §§ 201-9 (1976)).

32. The new language read: "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." 29 U.S.C. § 216(b) (1976). Portal to Portal Act of 1947, Pub. L. No. 80-49, 61 Stat. 84 (1947) [codified at 29 U.S.C. § 216(b) (1976)].

Federal Rules of Civil Procedure produce a wholly new Rule 23.[33] Discarding the confusing "pure," "hybrid," and "spurious" classifications, the new Rule 23 described

> in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.[34]

The new Rule 23 provided that judgments would bind each member of a potential class unless a member affirmatively "opted out" of the lawsuit. To ensure that a class member had an opportunity to "opt out" of the lawsuit, Rule 23(c)(2) provided for notice to be given to every potential class member.[35] The Advisory Committee Notes to revised Rule 23 indicate that the Rule 23 revisions were not intended to affect section 216(b) of the FLSA.[36]

Apparently the Ninth Circuit concluded in *Kinney Shoe* that since modern Rule 23 and FLSA section 216(b) class actions had irreconcilable differences,[37] no aspect of Rule 23 procedures (e.g., notice) can be utilized in a section 216(b) class action.[38] To reach this conclusion, however, two hurdles not considered by that court should have been cleared.

First, it is important to consider historically whether notice was allowed, or at least not prohibited, in FLSA section 216(b) or pre-1966 Rule 23 "spurious" class actions. Although the issue is rarely discussed, early FLSA or spurious class action cases suggest that notice was utilized by courts, or at least was assumed to be available.[39]

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33. FED. R. CIV. P. 23.

34. FED. R. CIV. P. 23, Advisory Committee Note (1966).

35. FED. R. CIV. P. 23(c)(2). Specifically, the rule required that in a class action maintained under subdivision (b)(3), the court direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members identified through reasonable effort. Further, "the notice [must] advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel." Id.

36. FED. R. CIV. P. 23, Advisory Committee Note (1966).

37. The Court of Appeals noted that "[a]t least two circuits have held that Rule 23 and § 216(b) class actions are 'mutually exclusive and irreconcilable.'" *Kinney Shoe Corp.* 564 F.2d at 862.

38. *Id.*

39. Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941); Cherner v. Transitron Electronics Corp., 201 F. Supp. 934 (D. Mass. 1962); Hormel v. United States, 17 F.R.D. 303 (S.D.N.Y. 1955); Deckert v. Independence Shares Corp., 39 F. Supp. 592 (E.D. Pa. 1941); Webster Eisenlohr v. Kalodner, 145 F.2d 316 (3d Cir. 1944); Timberlake v. Day & Zimmer-

The possibility that attorney notice to nonparties might involve improper solicitation was advanced in some early cases.[40] But no court explicitly prohibited notice. Neither the 1947 Amendments to the Fair Labor Standards Act nor the 1966 Amendments to the Federal Rules of Civil Procedure made any mention of, or change to, the practice of providing notice to potential plaintiffs in a section 216(b) "spurious" class action.[41]

A second point the Ninth Circuit Court of Appeals apparently overlooked is that notice is not peculiarly a post-1966 Rule 23 option. Rather, notice is a procedure the judiciary utilizes to manage its workload.[42] The Court misplaced its focus on the obvious differences between Rule 23 and FLSA section 216(b), without addressing whether there are inherent prohibitions to the giving of notice in a section 216(b) action. Nothing in the legislative history of either section 216(b) or Rule 23 prohibits the court from allowing notice to be given to "spurious" class action plaintiffs.

B. Due Process Does Not Require Notice Under FLSA Section 216(b)

The second principal relied upon by the court of appeals in *Kinney Shoe* is that the due process concerns which compel notice to potential plaintiffs in a Rule 23 class action do not exist in FLSA section 216(b) proceedings.[43] Even those courts which disagree with the *Kinney Shoe* court's conclusion that notice cannot be given to potential plaintiffs agree with the court on this point.[44] Notice to Rule 23(b)(3) class action plaintiffs must be given as a matter of due process because those plaintiffs who do not "opt-out" of the lawsuit will be bound by its judgment.[45] In an FLSA section 216(b) lawsuit, no one who has not specifically consented to be bound by the judgment will be bound.[46] Therefore, the due process concerns compelling notice in a Rule 23 class action are absent from a section

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man, Inc., 3 Wage & Hour Cas. (BNA) (S.D. Iowa 1943).

40. *Cherner*, 201 F. Supp. at 936-37; People v. Ashton, 180 N.E. 440 (Ill. 1932).

41. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 702-03 (1979) (Congress acquiesces in common-law interpretation when it does not change statute).

42. FED. R. CIV. P. 42(a) and 83. *See also* Lipschultz, *The Class Action Suit under the Age Discrimination in Employment Act: Current Status, Controversies, and Suggested Clarifications*, 32 HASTINGS L.J. 1377, 1395 (1981); Note, *Notice of Collective Actions Under the Fair Labor Standards Act: McKenna v. Champion Int'l Corp.*, 54 U. CIN. L. REV. 665 (1985).

43. 564 F.2d at 863.

44. *See Braunstein*, 600 F.2d at 336; *Woods*, 686 F.2d at 579-80.

45. Bullock v. Adm'r of Estate of Kircher, 84 F.R.D. 1, 9 (D.N.J. 1979).

46. Pan American World Airways, Inc. v. United States Dist. Court for the Cent. Dist. of Cal., 523 F.2d 1073 (9th Cir. 1975).

216(b) lawsuit. This conclusion, however, does not add anything to the resolution of the notice issue. A notice provision was legally necessary in revised Rule 23. This does not compel the conclusion that notice in a section 216(b) proceeding should be prohibited. Historically, notice was sometimes given in "spurious" class actions.[47] The advent of the 1966 changes to Rule 23 did not suddenly prohibit the practice of notice in "spurious" class actions, e.g., in FLSA section 216(b) proceedings.

C. *The Improper Solicitation of Claims*

The final basis for the Court's ruling in *Kinney Shoe* is the policy concern of involving the plaintiff or the court in the solicitation of claims.[48] Although there may be a historical basis for this concern,[49] the Ninth Circuit's conclusion is incorrect, especially in light of recent Supreme Court cases providing First Amendment protection to lawyer advertising and communications with class members.

Both the majority opinion of the Supreme Court and Justice Marshall's concurring opinion in *Ohralik v. Ohio State Bar Assn.*,[50] are instructive. In *Ohralik*, the Court upheld the discipline of an attorney who solicited business from potential clients in person. The Court stated: "Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."[51] Justice Marshall, after citing the obligation of all lawyers to ensure that legal aid is available to members of the community, enlarged upon the opinion in his concurrence as follows:

> The provision of such information about legal rights and remedies is an important function, even where the rights and remedies are of a private nature involving no constitutional or political overtones . . . . Where honest, unpressured "commercial" solicitation is involved . . . I believe it is open to doubt whether the state's interests are sufficiently compelling to warrant the restriction on free flow of information which results from a sweeping nonsolicitation rule and against which the First Amendment

47. *See supra* note 39 and accompanying text.

48. 564 F.2d at 863.

49. *See* Johnson v. American Airlines, Inc., 531 F. Supp. 957, 960 (N.D. Tex. 1982) (this decision makes reference to Roshto v. Chrysler Corp., 67 F.R.D. 28, 30 (E.D. La. 1975)).

50. 436 U.S. 447, 468 (1978) (Marshall, J., concurring).

51. *Id.* at 457.

ordinarily protects.[52]

Cases litigated under section 216(b) of the FLSA which are consistent with the Supreme Court's reasoning have recognized that giving notice to potential plaintiffs does not constitute improper solicitation so long as the notice is neither misleading nor deceitful, and it does not pressure any plaintiff to hire the particular lawyer already employed by the named plaintiff or plaintiffs.[53] Rather, notice simply insures that potential plaintiffs hear of the lawsuit so they can make an informed decision whether to join the action. This promotes the "avoidance of multiple law suits" but avoids the "unabashed solicitation of law suits for private pecuniary gain."[54] Since the FLSA and the ADEA are "remedial" pieces of legislation, they are to be afforded a liberal interpretation to effectuate their purposes whenever necessary and possible.[55] Some writers have concluded that without an effective class action remedy, the elimination of age discrimination in employment will be difficult, if not impossible.[56] The *Kinney Shoe* opinion reaches the conclusion that notification of potential plaintiffs necessarily flies in the face of prohibitions against claim solicitation. This conclusion is legally unwarranted, and it effectively emasculates the class action remedy in ADEA suits.

IV. The Seventh Circuit Decision

In *Woods v. New York Life Insurance Co.*[57] the Court of Appeals for the Seventh Circuit was the first Court of Appeals to consider the question of notice in a lawsuit brought specifically under the Age Discrimination in Employment Act. In *Woods*, plaintiffs convinced the district court to mail notice of the suit to prospective members of the plaintiff class on the letterhead of the district court, signed by the clerk of court. The district court then certified the notice issue for interlocutory appeal under 28 U.S.C. section 1292(b).

The Court clarified the issue under the "power to notify":

> [I]f the question meant to be asked is whether the plaintiff in a section [2]16(b) action may communicate, under terms and con-

52. *Id.* at 476 (Marshall, J., concurring).
53. Frank v. Capital Cities Communications, Inc., 88 F.R.D. 674, 676 (S.D.N.Y. 1981).
54. Lusardi v. Xerox Corp., 99 F.R.D. 89, 93 (D.N.J. 1983), dismissed, 747 F.2d 174 (3d Cir. 1984).
55. *Braunstein*, 600 F.2d at 336.
56. Lipschultz, *supra* note 42; Foster, *supra* note 7; 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 (1982) [hereinafter Spahn].
57. 686 F.2d 578 (7th Cir. 1982).

> ditions prescribed by the court, with other members of the class, we think the answer is yes. But if the question meant to be asked is whether the notice should go out on court letterhead over the signature of a court official, we think the answer is no.[58]

The decision is preeminently practical. The court discussed the fact that plaintiff or plaintiff's counsel can communicate without restraint with potential class members *prior to* filing a lawsuit. Once a lawsuit has been commenced, however, the court inferred from section 216(b) itself and from Rule 83 of the Federal Rules of Civil Procedure the duty for plaintiffs and their counsel to notify defendants of communications with potential plaintiffs and the power of the court to regulate the content and distribution of such notice. "Once a section [2]16(b) action is commenced, the defendant has a vital interest in, and the court a managerial responsibility regarding, the joinder of additional parties plaintiff, and these concerns support the modest duty and power that we infer."[59]

Specifically rejecting the idea that the power to regulate notice could include a complete prohibition of notice, the Court recognized that section 216(b) authorized a "representative" action.

> This authorization surely must carry with it a right in the representative plaintiff to notify the people he would like to represent that he has brought a suit, and a power in the district court to place appropriate conditions on the exercise of that right. It also follows that counsel for the representative plaintiff could seek from the district court an order approving the notice, to protect himself from being accused of stirring up litigation in violation of state law . . . .[60]

Finally, the court determined that the district court had no power to communicate directly with nonparties, because the nonparties might mistake the court's communication as implying a court-sanctioned lawsuit.[61]

V. The Circuits Revisited[62]

The Tenth Circuit Court of Appeals found the reasoning in the

58. *Id.* at 580.
59. *Id.*
60. *Id.* (citation omitted).
61. *Cf.*, 686 F.2d at 582 (Eschbach, C.J., concurring in part and dissenting in part).
62. Two Circuit Courts of Appeals not already discussed have also considered the notice issue, but not on interlocutory appeal under 28 U.S.C. § 1292(b). The District of Columbia Circuit was faced with the notice issue in an unusual case, Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982). Plaintiffs brought class action claims under Title VII of the Civil Rights Act

Seventh Circuit's 1982 decision unpersuasive, when it considered the notice issue in 1984.[63] To formulate its opinion on the procedural scope of a section 216(b) action, the court focused on the legislative history of section 216(b). Its conclusions were not warranted by that history.

A. Section 216(b) of the FLSA in Historical Context

Enacted in 1938, the Fair Labor Standards Act established rules on minimum wage and overtime compensation to protect the American worker.[64] In addition to a specific scheme for public enforcement by the Secretary of Labor, the Act provided in section 216(b) for both individual and "representative" actions to enforce its provisions.[65] In 1946, the United States Supreme Court greatly expanded employer liability under the Act by holding employers responsible to pay for the time employees spent walking to and from their work stations after arriving at the work place.[66] The result of this revised interpretation of the FLSA was a voluminous number of lawsuits pressing for additional wages.[67] These lawsuits were brought under section 216(b) of the Act, often by a "representative" suing on behalf of a "class" of employees.[68] The 1947 Amendments to the

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of 1964, 42 U.S.C. § 2000e (1976) and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976). As an amendment to the FLSA, the Equal Pay Act utilizes the enforcement scheme of § 216(b) of the FLSA, just like the ADEA. After conditional certification of the Title VII class under Rule 23, Federal Rules of Civil Procedure, plaintiffs moved for notice to be sent to potential Equal Pay Act plaintiffs pursuant to Rule 23(d) ("for the protection of the members of the class or otherwise for the fair conduct of the action"). The judge denied the motion, but died before the case was finished. The successor judge subsequently denied the motion when it was raised again before him. The District of Columbia Circuit affirmed on the basis that no reversible error had been committed, but with no apparent understanding that if notice had been ordered under § 216(b) of the FLSA, it should not have been pursuant to Rule 23(d) of the Federal Rules. In a footnote the court intimated no view on the propriety of notice in a dual Title VII and § 216(b) lawsuit, and cited *Braunstein* and *Kinney Shoe* as conflicting opinions on the notice issue. 678 F.2d at 270, n.8.

In Lusardi v. Xerox Corp., 747 F.2d 174 (3d Cir. 1984) plaintiffs alleging age discrimination sought class certification for their action. The district court judge recognized that a Rule 23(b)(2), FED. R. CIV. P. class action would be improper, but nevertheless conditionally certified an "opt-in" class and authorized plaintiffs to send notices to the potential members of the class. The court declined to certify its decision for interlocutory appeal, and the employer appealed to the Third Circuit Court of Appeals under the collateral order doctrine of Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949). Finding the collateral order doctrine not applicable to the case, the Third Circuit dismissed the appeal for want of appellate jurisdiction.

63. Dolan v. Project Constr. Corp., 725 F.2d 1263, 1267 n.3 (10th Cir. 1984).

64. Fair Labor Standards Act of 1938, ch. 676 §§ 6 & 7, 52 Stat. 1060, 1062-63 (1938).

65. *See supra* text accompanying notes 22-23; Annot., 67 A.L.R. FED 282 (1984). *See also* 29 U.S.C. § 202 (1976) for the Congressional findings and declarations of policy.

66. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).

67. *See* Portal to Portal Act of 1947, *supra* note 31, at § 1(a).

68. *See* McNicholas v. Lennox Furnace Co., 7 F.R.D. 40 (N.D.N.Y. 1947).

FLSA, also known as the Portal to Portal Act, were designed to end these lawsuits.[69]

The "policy" of Congress in the 1947 amendments was declared to be, in part, "to define and limit the jurisdiction of the courts" since the judicial interpretation cited above had created "wholly unexpected liabilities" under the Act which could not be "permitted to stand." Without the Act, "the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged."[70]

The 1947 Act also amended section 216(b) under the title of "Representative Actions Banned." The amended section provided:

> Action to recover such liability may be maintained in any 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.[71]

The 1947 amendments thus made two changes. First, they eliminated the provision in the original Act whereby a designated agent or representative could maintain the lawsuit on behalf of employees. Senator Donnell, chairman of the Senate Judiciary subcommittee that conducted hearings on the Portal to Portal Act, had referred to the agent/ representative actions as

> [C]ases in which an outsider, perhaps someone who is desirous of stirring up litigation without being an employee at all, is permitted to be the plaintiff in the case, [and] may result in very decidedly unwholesome champertous situations which we think should not be permitted under the law.[72]

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69. *See* Portal to Portal Act of 1947, *supra* note 31, at 84-85.

70. *Id.* at 84. The House Report also stated the following:

> The procedure in these suits follows a general pattern. A petition is filed under Section 216(b) by one or two employees on behalf of many others. To this is attached interrogatories calling upon the employer to furnish specific information regarding each employee during the entire period of employment. The furnishing of this data alone is a tremendous financial burden to the employer.

H.R. REP. No. 71, 80 Cong., 1st Sess. 4 (1947) *reprinted in* 1947 U.S. CODE CONG. SERVICE 1029, 1032. This statement on the discovery burden for employers under the Supreme Court's interpretation of the FLSA has been used out of context in recent Court opinions considering the notice issue. See Dolan v. Project Constr. Corp., 725 F.2d 1263, at 1267 discussed *infra* in text accompanying notes 74-83.

71. Portal to Portal Act, ch. 52, § 5(a), 61 Stat. 84, 87 (1947) (codified as 29 U.S.C. § 216(b) (1982)).

72. 93 CONG. REC. 2182 (1947) (statement of Sen. Donnell (R.-Mo.)).

The second change in the amended section 216(b) addressed the old problem of how to determine who was bound by judgment in a "spurious" class action. The amended section 216(b) required each prospective plaintiff to consent affirmatively or "opt into" the suit in order to be bound by the judgment.[73]

B. Tenth Circuit Analysis

The Court in *Dolan v. Project Construction Corporation* recited some of the legislative history for the 1947 Amendments, but did not place it in the context of the original Supreme Court cases compelling those amendments.[74] The Tenth Circuit Court of Appeals misread Congressional intent when it stated: "The opt-in language of § 216(b) was a direct result of this clear Congressional dissatisfaction with the original class action provisions of the FLSA. In fact, the relevant language of § 216(b) was entitled 'Representative Actions Banned' in the Portal-to- Portal Act."[75] In fact, as pointed out above, the "opt-in" language simply clarified the procedure for a section 216(b) "spurious" class action so that any plaintiff wishing to benefit from an FLSA class action had to sign up before, not after, trial. Furthermore, although "Representative Actions Banned" did refer to the elimination of the nonemployee agent/representative suits, the procedural scheme for FLSA actions obviously still envisioned representative ("on behalf of other employees similarly situated") actions.[76] When the Tenth Circuit stated that "[C]learly, Congress sought to limit the nature of a class action suit based upon an alleged FLSA violation,"[77] it was correct only in one respect. Namely, the agent/representative suit was abolished in 1947. There is no evidence that Congress intended to further limit class actions under the FLSA.[78]

After these incorrect historical conclusions, the Tenth Circuit compared section 216(b) and Rule 23 actions and suggested that diametrically opposed policies underlie each. The court stated:

> The Rule 23 action encourages 'litigation in which common interests, or common questions of law or fact prevail, disposed of

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73. Spahn, *supra* note 56, at 129. *See also supra* text accompanying notes 22-36.
74. Dolan v. Project Constr. Corp., 725 F.2d 1263 (10th Cir. 1984).
75. 725 F.2d at 1267.
76. The Tenth Circuit itself recognized that the FLSA still provided for "collective and representative actions." 725 F.2d at 1267.
77. *Id.*
78. Indeed, in 1947 it was still nineteen years before Rule 23 would be amended to eliminate "spurious" class actions.

> where feasible in a single lawsuit.' This policy of encouraging a single suit is served by the opt-out procedure. However, the § [2]16(b) action tends to discourage collective litigation by virtue of the requirement of an affirmative act by each plaintiff.[79]

It is possible to argue that collective litigation has been discouraged by the way in which the courts have interpreted section 216(b), but to suggest that the inherent policies of Rule 23 and section 216(b) are diametrically opposed is not supported by law or by history. If section 216(b) is the old Rule 23 "spurious" class action, the Rule 23 policy concern (at least between 1947 and 1966) to promote a single lawsuit where feasible would have been identical with that of section 216(b). Although Rule 23 was amended in 1966, the coincidence between section 216(b) and old Rule 23(a)(3) in the years between 1947, when the opt-in language was adopted, and 1966 suggests that the Tenth Circuit's conclusion is wrong. This calls into question the court's decision that it has "passive duties and limited jurisdiction" in a section 216(b) lawsuit simply because it is not a Rule 23 class action.[80]

The Tenth Circuit decision provides additional contradictory guidance. After concluding that "the court is without authority to issue notice to all potential plaintiffs,"[81] several paragraphs of dicta follow by which a plaintiff or plaintiff's counsel could conclude that they may not be restricted from "noticing" potential plaintiffs. The court wrote: "[R]ecent United States Supreme Court cases regarding legal communication dictate the allowance of a level of reasonable communication by the plaintiff and counsel with those parties he can discover without judicial assistance."[82] The court distinguished certain situations, such as under the ADEA, in which political objectives may override those of pecuniary gain in the solicitation of clients, and communication therefore should not be limited. The court noted that it should be "hesitant to restrict written communication in light of the ability to monitor such communications for statements that are likely to deceive."[83] If, however, courts cannot be involved in the notice issue, it is doubtful that those courts could "monitor" that notice. The tenor of the opinion suggests that notice should not be

79. 725 F.2d at 1267 (citation omitted).

80. *Id.*

81. *Id.* at 1268.

82. The Tenth Circuit concluded, however, that the court "may not order the production of names of all possible plaintiffs for the sole purpose of establishing or notifying the class." *Id.* at 1267.

83. *Id.* at 1268.

limited, at least in some types of cases, if the court does not take an active role in discovery or contacting parties. Yet the holding in the case, and the confusion in the opinion could be expected to curtail any plaintiff from "noticing" additional potential plaintiffs without court approval. Whether that approval would be forthcoming is far from clear.

C. Eighth Circuit Analysis

In *McKenna v. Champion International Corp.*,[84] the Eighth Circuit Court of Appeals focused its attention on the issue of whether plaintiff's counsel can contact prospective class members. Starting with the premise that such contact serves primarily "to procure remunerative employment,"[85] the court analyzed the attorney's right to send the notice in the context of commercial speech.[86] If this premise is incorrect, however, the court probably reached the wrong conclusion. Securing basic rights to employment for older citizens could be the primary purpose for notice, and this purpose is not necessarily or exclusively for the purpose of economic gain. First, nonprofit organizations are not the exclusive guardians of all public rights.[87] Second, a lawyer seeking to make the best case for his or her individual client may quickly realize that it would be of great benefit to the client for the action to proceed as a class action.[88] Finally, if only those older persons who qualify for free legal assistance can hope for the possibility of notice to prospective class members, a system has been created whereby middle and upper class plaintiffs are denied an effective remedial tool — the class action — under the ADEA.

The court's reasoning belies its conclusion that attorney notice is improper. Concern about stirring up litigation — the "heightened susceptibilities of nonparty class members," and the possibilities of "false and misleading"[89] communications — is probably best dealt with by court supervision of these communications. The court stated: "An invitation from counsel to particular plaintiffs to join a particu-

84. 747 F.2d 1211 (8th Cir. 1984).

85. *Id.* at 1214.

86. *Id.*

87. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (1982); ABA Comm. on Professional Ethics and Grievances, Formal Op. 320 (1968).

88. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(5) (1982); ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 88-91 (1979). Halverson v. Convenient Food Mart, 458 F.2d 927 (7th Cir. 1972).

89. 747 F.2d at 1215.

lar lawsuit is potentially a champertous communication."[90] If the court assumed a supervisory role and reviewed the invitation before it was sent, champerty could be avoided.

The court admitted that a compelling argument had been made in *Woods* and *Dolan* that the creation of a class action must carry with it some right to notify class members. The court's response begs the question. The court reasoned: "In ADEA actions, we may assume that potential class members have constructive knowledge of their rights. Employers are required by the EEOC to post a notice in a conspicuous place on the premises. The notice advises individuals of the right to file suits charging unlawful age discrimination."[91] An unsuccessful job applicant may not have been on the employer's premises to see the notice and/or would have little reason to suspect age discrimination as the reason for being turned down for the job. Furthermore, even if potential class members do have constructive knowledge of their right to be free from age discrimination, this hardly resolves the issue of a right to notify other potential class members once a lawsuit is filed.

VI. The Age Discrimination in Employment Act

When the Age Discrimination in Employment Act (ADEA) was enacted in 1967,[92] the enforcement provisions of the Act were engrafted onto the Fair Labor Standards Act,[93] not the Civil Rights Act of 1964 which proscribed discrimination on the basis of race, sex, religion, and national origin.[94] Since Rule 23 class actions are allowed for cases brought under the Civil Rights Act, it is necessary to understand why the ADEA uses the enforcement procedures of the FLSA to negate the possibility that Congress meant to preclude notice similar to Rule 23 notice to potential plaintiffs in ADEA actions.

The Civil Rights Act of 1964 contained a provision requiring the Secretary of Labor to study the causes of discrimination in employment because of age, and to recommend legislation to prevent that discrimination.[95] This requirement was the result of a Congres-

90. *Id.* at 1217.

91. *Id.* (citation omitted).

92. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1968) (codified at 29 U.S.C. §§ 621-34 (1982)).

93. 29 U.S.C. §§ 1-7 (1982) (describing the enforcement of the ADEA under the provisions of the FLSA).

94. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000e-2 (1982)).

95. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241 (codified at 42

sional compromise which excluded a prohibition against discrimination based on age in the Civil Rights Act of 1964.[96] Testimony on the issue of age discrimination during hearings on the 1964 Act indicated that the cause of discrimination on account of age might be different than the cause of race or sex discrimination. Congress decided that a study by the Secretary of Labor was needed before legislation to end age discrimination in employment was drafted.

The Secretary's Report was submitted to Congress in June 1965. The main distinctive characteristic of age discrimination, compared to race or sex discrimination, was stated to be "rejection because of assumptions about the effect of age on [the] ability to do a job *when there is in fact no basis for these assumptions.*"[97] The study recommended educational programs to attack ill-founded assumptions about older persons' ability to work, as well as appropriate re-education, training and counseling services for older persons.[98]

In 1966, Senator Jacob Javits and others suggested amendments to the Fair Labor Standards Act to bar age discrimination in employment, but the provisions were rejected in committee. Under the heading "Additional Views" in the Senate report, several senators joined Javits in expressing the view that the barriers confronting older workers were: (1) arbitrary and unjust age limits on hiring, imposed by employers because of prejudice or misunderstanding; and (2) insufficient skills or education to qualify for entry into an increasingly technological job market.[99] Relying on the 1965 Secretary of Labor report, the senators reiterated the nation's urgent need for an age discrimination bill. Furthermore, they indicated that placing enforcement within the Wage and Hour Division of the Department of Labor, which already enforced age provisions affecting child labor, would be most effective.[100] The 1966 Amendments to the FLSA, however, only required the Secretary of Labor to submit to Congress his specific recommendations for appropriate legislation.[101]

The stage that was set in 1967 was, therefore, very different from that preceding the Civil Rights Act of 1964. The "problem"

U.S.C. § 715 (1982)).

96. Spahn, *supra* note 56, at 156 n.230.

97. Report of the Secretary of Labor to Congress, *The Older Am. Worker, Age Discrimination in Employment* 2 (1965) (emphasis added).

98. *Id.* at 21-22.

99. Senate Committee on Labor and Public Welfare, *Fair Labor Standards Amendments of 1966*, S. REP. No. 1487, 89th Cong., 2d Sess. 3002 (1966) (Additional views of Mr. Javits, Mr. Prouty, Mr. Murphy and Mr. Griffin are located at 3045).

100. *Id.* at 3046.

101. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 606, 80 Stat. 830, 995 (1967).

Congress ostensibly was trying to resolve had been defined as amenable to solution primarily through nonlegal methods such as education. Senator Yarborough, floor manager of the bill on age discrimination, discussed the enforcement provisions of the bill prior to its passage. He stated:

> While the bill includes enforcement procedures which are adopted from the Fair Labor Standards Act, *it is the hope of the sponsors of this legislation that such procedures will not be needed very often.* Rather, it is the fact that our national policy as declared by this bill will be to stop invidious distinctions in employment because of age. Everyone who testified at our hearings felt that the greatest need in this area was to *educate employers to the facts* — facts which show that older workers are at least as productive as younger workers and that on average they stay with their employers for a longer period of time. Despite the general notion to the contrary, it is the younger workers who are the big job shifters. Older workers are usually more experienced and more stable workers. It will be the *major job of the Department of Labor under this bill to educate the country to the fact that older workers are just as capable employees as younger workers.*[102]

In the Senate Report, reference is made to the fact that the bill did authorize an individual as well as the Secretary of Labor to seek remedies through court action. There is nothing in the legislative history, however, to indicate that any thought was given to what type of class action might be appropriate or necessary for those discriminated against on account of age.[103]

VII. What Should Be Done

It is extremely doubtful under the conflicting precedents now in place that a consistent sanctioning of a notice procedure for FLSA plaintiffs will happen. This effectively removes a procedural tool for victims of age discrimination in employment. To remedy the situation, the most efficient course is for the United States Congress to amend section 216(b) to specifically allow notice to potential plaintiffs in actions brought under the FLSA. Revised section 216(b) could read, in part:

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102. 113 CONG. REC. 31253 (1967) (emphasis added).

103. The Administration Bill had proposed agency type hearings before the Secretary of Labor for its enforcement scheme (i.e., the NLRB model) but this idea was rejected by the Congress in favor of the already established FLSA enforcement mechanism. S. REP. No. 723, 90th Cong., 1st Sess. 13 (1967).

> An action . . . may be maintained . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. *Such employee, or employees, may notify other similarly situated employees of the pendency of the action, provided that notice must be approved by the court in which the action is brought.* No employee shall be a party plaintiff . . . [unless his] consent is filed in the court in which such action is brought.[104]

The suggested revision removes the judicially-imposed prohibitions against notice, while making clear that FLSA class actions still require potential plaintiffs to "opt-into" the action. Therefore, unless or until Congress decides that all class actions should be brought pursuant to Rule 23, any FLSA plaintiff "may" send notice to potential plaintiffs, but is not required to do so by considerations of due process. The revision would preserve and sanction the management role of the judiciary, prevent champertous solicitation on the part of attorneys, promote effective implementation of Congressional policy, and ensure that victims of age discrimination are not denied an intended remedial tool.

104. The underlined sentence is a proposed addition to 29 U.S.C. § 216(b).