NOTES

REINSTATING VACATED FINDINGS IN EMPLOYMENT DISCRIMINATION CLASS ACTIONS: RECONCILING *GENERAL TELEPHONE CO. v. FALCON* WITH *HILL v. WESTERN ELECTRIC CO.*

Recently, in *General Telephone Co. v. Falcon*,[1] the Supreme Court severely restricted the ability of private plaintiffs to bring Title VII[2] employment discrimination class actions.[3] Before *Falcon*, some federal courts allowed across-the-board employment discrimination class actions.[4] In these courts, a plaintiff alleging one type of employment discrimination could represent a class alleging several types of employment discrimination. The *Falcon* Court, however, relying on the commonality and typicality requirements of Federal Rule of Civil Procedure 23,[5] held that class representatives alleging employment discrimination can represent only the class of people alleging the "same harm or injury" as themselves.[6] A private plaintiff alleging discrimination in promotion practices, for example, can no longer represent a class alleging discrimination in hiring practices.[7]

The end of the private across-the-board approach to Title VII employment discrimination class actions means that victims of different

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1. 457 U.S. 147 (1982).

2. 42 U.S.C. §§ 2000e-2000e-17 (1976).

3. *See infra* notes 26-33 and accompanying text.

4. *See infra* notes 18-21 and accompanying text and note 25.

5. Federal Rule of Civil Procedure 23(a) provides in relevant part:

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

FED. R. CIV. P. 23(a).

6. 457 U.S. at 156-61; *accord* East Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 403 (1977) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974)). This rule applies only to private actions. The Equal Employment Opportunity Commission (EEOC) has special statutory authority to bring class actions under 42 U.S.C. § 2000e-5(f)(1) (1976) and therefore need not comply with Rule 23. *Falcon*, 457 U.S. at 156; General Tel. Co. v. EEOC, 446 U.S. 318, 323 (1980). This note deals only with private actions.

7. This was the holding in *Falcon*. *See infra* notes 26-33 and accompanying text.

types of employment discrimination must be represented separately unless they can prove a "general policy of discrimination."[8] Because of the difficulty of proving such a policy,[9] the novelty of the exception,[10] and the narrow definition of "same harm or injury,"[11] judgments for class representatives bringing broad class actions will often be reversed on appeal for violating the commonality and typicality requirements of Rule 23.[12] These reversals generally require costly recertification of improperly represented subclasses and retrial of the substantive issues.

In *Hill v. Western Electric Co.*,[13] the Court of Appeals for the Fourth Circuit suggested a procedure to reduce the need for such recertification and retrial. The *Hill* court provided for reinstatement of the original trial court's findings if proper plaintiffs intervene on remand and reinstatement would not prejudice either side.[14]

This note first reviews the recent treatment of the "same harm or injury" requirement and examines its probable impact on employment discrimination class action litigation.[15] Next, the note analyzes the *Hill* proposal in light of *Falcon*.[16] Because the *Hill* proposal involves reinstating findings that have been vacated, the note then analyzes the

8. *Falcon*, 457 U.S. at 159 n.15; *see infra* notes 36-37 and accompanying text.

9. *Cf.* Abron v. Black & Decker, Inc., 654 F.2d 951, 955, 961 (4th Cir. 1981) (Murnaghan, J., dissenting) (The "same harm or injury" requirement is a "procedural barrier which will effectively limit the substantive rights of minority employees under Title VII . . . . Few employers have a 'single' promotion practice from which all employees discriminatorily denied promotions suffer in exactly the same way. The Title VII employer's promotion practices would typically be numerous and varied.").

At least one court has held that a complaint failed to meet the standard required by the footnote 15 exception. *See* Warren v. ITT World Communications, Inc., 95 F.R.D. 425, 429 (S.D.N.Y. 1982); *see also infra* note 37 and accompanying text.

10. *See infra* note 37.

11. The *Falcon* Court narrowly defined what is to be considered the "same harm or injury." The Court held that discrimination in hiring practices was sufficiently different from discrimination in promotion practices, thereby precluding class certification under the commonality and typicality requirements of Rule 23. Similarly, job placement, firing, and compensation practices are arguably different. *See* Ladele v. Consolidated Rail Corp., 95 F.R.D. 198 (E.D. Pa. 1982) (claim that employee was paid less because of his race has no common questions of law or fact with claim that employee was discriminated against in promotions).

12. For an independent opinion that the footnote 15 exception will be the source of much litigation, see *Employment Discrimination - ABA Convention*, 51 U.S.L.W. 2141-42 (Aug. 31, 1982).

13. 672 F.2d 381 (4th Cir.) [*Hill II*], *cert. denied*, 103 S. Ct. 318 (1982). The same case had previously reached the Court of Appeals for the Fourth Circuit on a different issue. In Hill v. Western Elec. Co., 596 F.2d 99 (4th Cir.) [*Hill I*], *cert. denied*, 444 U.S. 929 (1979), the Court of Appeals for the Fourth Circuit adopted the strict "same harm or injury" test on the basis of the Supreme Court's decision in East Tex. Motor Freight Sys. v. Rodriguez, 431 U.S. 395 (1977); *see infra* notes 23-25 and accompanying text.

14. *See infra* notes 54-64 and accompanying text.

15. *See infra* notes 18-67 and accompanying text.

16. *See infra* notes 68-99 and accompanying text.

proposal in view of recent developments in the law of mootness.[17] The note concludes that the *Hill* proposal is consistent with *Falcon* and may save time and money in handling certain class representation problems.

I. BACKGROUND: THE "SAME HARM OR INJURY" REQUIREMENT

A. *The Situation Before* General Telephone Co. v. Falcon

Before *Falcon*, some federal courts applied an across-the-board approach to the Rule 23 commonality and typicality requirements in Title VII employment discrimination class actions.[18] These courts allowed plaintiffs alleging one type of employment discrimination to represent a class asserting several different types of employment discrimination.[19] In *Johnson v. Georgia Highway Express,*

17. *See infra* notes 100-146 and accompanying text.

18. Two cases, Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968), and Jenkins v. United Gas Corp., 400 F.2d 28 (5th Cir. 1968), foreshadowed the emergence of the across-the-board approach in the Court of Appeals for the Fifth Circuit. *See* Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 709-10 (1980).

19. A number of courts applying the across-the-board approach reasoned that the very nature of Title VII actions eliminates commonality and typicality problems. *See, e.g.,* Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); Long v. Sapp, 502 F.2d 34, 42 (5th Cir. 1974); Johnson v. ITT-Thompson Indus., 323 F. Supp. 1258, 1261-62 (N.D. Miss. 1971); Wilson v. Monsanto Co., 315 F. Supp. 977, 979 (E.D. La. 1970). *But see* Wells v. Ramsay, Scarlett & Co., 506 F.2d 436, 437-38 (5th Cir. 1975) ("One may not represent a class of which one is not a part."); Cooper v. Allen, 467 F.2d 836, 839 (5th Cir. 1972).

According to the courts employing this reasoning, the common question in Title VII actions was simply whether there had been racial discrimination. The "Damoclean threat of a racially discriminatory policy hangs over the racial class [and] is a question of fact common to all members of the class." Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969) (quoting Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966)). Typicality "lies in the common thread of discrimination." 4 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 7983 (1977) [hereinafter cited as H. NEWBERG].

The expansive across-the-board approach was justified on a number of grounds, including congressional intent. *See* Long v. Sapp, 502 F.2d at 43 ("The 'across-the-board' approach has proved an effective means of implementing the congressional purpose embodied in the civil rights acts."); Mack v. General Elec. Co., 329 F. Supp. 72, 74 (E.D. Pa. 1971) ("A narrow construction of Title VII would unduly restrict, if not frustrate, the Congressional purpose reflected in the passage of this legislation."). *See generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113-19 (1971) [hereinafter cited as *Developments*].

Promoting the public interest was another reason cited in support of the across-the-board approach. *Mack*, 329 F. Supp. at 76 (E.D. Pa. 1971) (quoting *Developments*, *supra*, at 1220). The *Mack* opinion also mentioned that the across-the-board approach provided a way to protect the rights of those discriminated against but afraid to sue. *Id.* Furthermore, the *Mack* court stated that the across-the-board approach conserved time and resources. *Id.*; *accord* Rosario v. New York Times Co., 84 F.R.D. 626 (S.D.N.Y. 1979). The *Rosario* court stated that the across-the-board approach "avoids piecemeal examination of an employer's alleged discriminatory practices where general discrimination is being attacked. It provides an efficient means of disposing of

Inc.,[20] for example, the Court of Appeals for the Fifth Circuit let a former black employee who alleged he had been fired in violation of Title VII represent "the class harmed by the alleged discrimination in hiring, firing, promotion, and maintenance of facilities."[21] Other federal courts, however, refused to adopt this across-the-board approach.[22]

The Supreme Court first addressed the across-the-board approach in 1977 in *East Texas Motor Freight System v. Rodriguez*.[23] The *Rodriguez* decision, however, did not clearly resolve whether across-the-board class actions violate the commonality and typicality requirements of Rule 23. Some courts held that *Rodriguez* precluded across-the-board class actions;[24] other courts distinguished *Rodriguez* and continued to use the across-the-board approach.[25]

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complaints in this area, especially when judicial economy is a pressing problem." *Id.* at 629-30. Chief Justice Burger does not share this view: "Rather than promoting judicial economy, the 'across-the-board' class action has promoted multiplication of claims and endless litigation." *Falcon*, 457 U.S. at 147 (Burger, C.J., concurring in part, dissenting in part).

20. 417 F.2d 1122 (5th Cir. 1969).

21. *Id.* at 1124.

22. *Compare, e.g.,* Tipler v. E. I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971) *and* Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970) *and* Mack v. General Elec. Co., 329 F. Supp. 72 (E.D. Pa. 1971) (upholding across-the-board class actions) *with* Pointer v. Sampson, 62 F.R.D. 689 (D.D.C. 1974) *and* White v. Gates Rubber Co., 53 F.R.D. 412 (D. Colo. 1971) *and* Hyatt v. United Aircraft Corp., 50 F.R.D. 242 (D. Conn. 1970) (rejecting across-the-board class actions).

Some confusion was generated when certain courts of appeals failed to apply the across-the-board approach consistently. *Compare, e.g.,* Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975) (upholding an across-the-board claim) *with* Doctor v. Seaboard Coast Line R.R., 540 F.2d 699 (4th Cir. 1976) (rejecting across-the-board claim). Judge Widener of the Fourth Circuit has stated: "Admittedly, this court has not been consistent in its attitude toward the breadth of classes in employment discrimination litigation." *Hill*, 672 F.2d at 397 (Widener, J., dissenting).

23. 431 U.S. 395 (1977). In *Rodriguez*, three Mexican-Americans sued on behalf of all Blacks and Mexican-Americans who had been "denied equal employment opportunities with the company because of their race." *Id.* at 399. The plaintiffs alleged that a no-transfer rule perpetuated past discrimination by locking minorities into discriminatorily assigned positions.

The Supreme Court held that the plaintiffs "were not members of the class they purported to represent" and did not " 'possess the same interest and suffer the same injury' as the class members." *Id.* at 403 (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974)). Because the plaintiffs stipulated they had not been discriminated against when hired, "they were hardly in a position to mount a classwide attack on the no-transfer rule . . . on the ground that these practices perpetuated past discrimination and locked minorities into the less desirable jobs to which they had been discriminatorily assigned." *Rodriguez*, 431 U.S. at 404.

24. *See, e.g.,* Hill v. Western Elec. Co., 596 F.2d 99, 101-02 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979).

25. According to the Court of Appeals for the Fifth Circuit, the problem in *Rodriguez* was that the Court determined at the start that the plaintiffs did not have valid individual claims:

> *Rodriguez* involved named plaintiffs who lacked a nexus with the class as a result of the lack of merit of their individual claims . . . . It is not necessary that the representative

B. General Telephone Co. v. Falcon *and After.*

1. *The* Falcon *Decision.* The Supreme Court settled the across-the-board controversy in 1982 when it decided *General Telephone Co. v. Falcon*.[26] In *Falcon*, the plaintiff alleged he had been denied a promotion because he was Mexican-American, but sued on behalf of a class including Mexican-Americans who had been denied employment altogether. The Court of Appeals for the Fifth Circuit, using the across-the-board approach, upheld the district court's certification of the class.[27]

The Supreme Court rejected the across-the-board approach. The Court distinguished the question whether an individual has been harmed by an employer's promotion practices from the question

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suffer discrimination in the same way as other class members, but it is necessary that she suffer from the discrimination in some respect.

Satterwhite v. City of Greenville, 578 F.2d 987, 993 n.8 (5th Cir. 1978), *vacated on other grounds*, 445 U.S. 940 (1980).

This situation should be distinguished from "headless class" cases in which a plaintiff who originally alleges a proper individual claim and is a member of the certified class fails to prove his individual claim.

> In such a case, the class claims would have been tried already and, provided the initial certification was proper and decertification not appropriate, the claims of the class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims.

Rodriquez, 431 U.S. at 406 n.12.

The *Satterwhite* court suggested that *Rodriquez* only stood for the proposition that a plaintiff must have suffered at least *some* injury before he can represent a class. Other courts distinguished *Rodriguez* the same way and continued to apply the across-the-board approach. *See, e.g.,* Scott v. University of Del., 601 F.2d 76, 85 n.19 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); Bartelson v. Dean Witter & Co., 86 F.R.D. 657, 663-65 (E.D. Pa. 1980); Rosario v. New York Times Co., 84 F.R.D. 626, 629 (S.D.N.Y. 1979); Beasley v. Griffin, 81 F.R.D. 114, 116-17 (D. Mass. 1979); Wajda v. Penn Mutual Life Ins. Co., 80 F.R.D. 303, 307-09 (E.D. Pa. 1978); Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 473-77 (N.D. Cal. 1978); *see also* Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 YALE L. J. 868, 882-83 (1979) ("The conflict between the permissive and the rigorous approaches to the Rule 23(a) prerequisites was not settled by the Supreme Court's treatment of 23(a) in *Rodriguez*."). *But see* Hill v. Western Elec. Co., 596 F.2d 99 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979); Tuft v. McDonnell Douglas Corp., 581 F.2d 1304, 1307-08 (8th Cir. 1978); Shipp v. Memphis Area Office, 581 F.2d 1167, 1170-72 (6th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979). *See generally* Comment, *The Proper Scope of Representation in Title VII Actions: A Comment on East Texas Motor Freight System, Inc., v. Rodriguez*, 13 HARV. C.R.-C.L. L. REV. 175 (1978). In later cases the Court of Appeals for the Fifth Circuit firmly established its interpretation of *Rodriguez* as not precluding across-the-board class actions. *See, e.g.,* Shepard v. Beaird-Poulan, Inc., 617 F.2d 87, 89 (5th Cir. 1980); Davis v. Roadway Express, Inc., 590 F.2d 140, 143 (5th Cir. 1979); Camper v. Calumet Petrochemicals, Inc., 584 F.2d 70, 71-72 (5th Cir. 1978).

Interestingly, in Payne v. Travenol Laboratories, Inc., 565 F.2d 895 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978), a pre-*Satterwhite* case, the Court of Appeals for the Fifth Circuit allowed an across-the-board approach without specifically distinguishing *Rodriguez*.

26. 457 U.S. 147 (1982).

27. Falcon v. General Tel. Co., 626 F.2d 369, 374-76 (5th Cir. 1980).

whether the individual's claim is typical of the class claim.[28] According to the *Falcon* Court, proof that the employer discriminated against the plaintiff in some way does not justify the inference that discriminatory treatment typifies the employer's promotion practices, that it pervades the company, or that it exists in other practices of the employer.[29]

The Court was particularly concerned that if it allowed the across-the-board approach "every Title VII case would be a potential company-wide class action."[30] The Court found "nothing in [Title VII] to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation."[31] The *Falcon* Court also pointed out that overly broad class certification makes it harder for courts to determine whether there is adequate class representation and makes it more likely the employer will not know how to defend.[32] The Court also noted the potential "unfairness to the class members bound by the judgment if the framing of the class is overbroad."[33]

2. *The Aftermath of* Falcon. Courts deciding cases arising after *Falcon* have abandoned the across-the-board approach.[34] The *Falcon* decision, however, did not completely eliminate the across-the-board employment discrimination suit. The Equal Employment Opportunity Commission (EEOC) can still bring such actions because it need not comply with Rule 23.[35] In addition, footnote fifteen of the *Falcon* opinion provides a loophole for private litigants: "Significant proof that an employer operated under a general policy of discrimination conceiv-

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28. Justice Stevens' opinion stated:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Falcon, 457 U.S. at 157.

29. *Id.* The Court added that these "additional inferences demonstrate the tenuous character of any presumption that the class claims are 'fairly encompassed' within [the plaintiff's] claim." *Id.* at 158.

30. *Id.* at 159 (footnote omitted).

31. *Id.*

32. *Id.* at 161 (quoting Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125-27 (5th Cir. 1969) (Godbold, J., concurring)).

33. 457 U.S. at 161.

34. *See, e.g.*, Richardson v. Byrd, 7 LAB. REL. REP. (BNA) (32 Fair Empl. Prac. Cas.) 603, 605-06 (5th Cir. July 22, 1983); Wheeler v. City of Columbus, 686 F.2d 1144, 1147 n.3 (5th Cir. 1982); Falcon v. General Tel. Co., 686 F.2d 261, 261-62 (5th Cir. 1982); Jackson v. City of Belle Glade, 95 F.R.D. 384, 385-86 (S.D. Fla. 1982); Ladele v. Consolidated Rail Corp., 95 F.R.D. 198, 200-05 (E.D. Pa. 1982); Hawkins v. Fulton County, 95 F.R.D. 88, 92-94 (N.D. Ga. 1982); Nation v. Winn-Dixie Stores, Inc., 95 F.R.D. 82, 85-86 (N.D. Ga. 1982).

35. *See supra* note 6.

Until courts agree on a standard of proof, appellate courts will inevitably find improper class certification because of the class representative's failure to meet the footnote fifteen standard.[38] When this happens, findings made by the trial court concerning the improper portion of the originally certified class will be vacated.[39] Proper plaintiffs can then sue on behalf of these sub-classes, but without the benefit of the original trial court's findings. These subsequent actions, therefore, will often require repeating parts of the original trial, at great expense. This inefficiency might be acceptable as a necessary consequence of avoiding the problems of overly broad classes identified by the Supreme Court in *Falcon*.[40] In *Hill v. Western Electric Co.*,[41] however, the Court of Appeals for the Fourth Circuit suggested that, under certain circumstances, the inefficiency could be avoided by reinstating the original trial court's findings.[42]

II. *HILL V. WESTERN ELECTRIC CO.*

A. *Background.*

In *Hill*, six black plaintiffs alleged that they had been discriminated against in job placement and promotions. They sought relief on behalf of the class discriminated against in hiring, placement, and promotions. The district court certified the class on the authority of *Barnett v. W.T. Grant Co.*,[43] a decision by the Court of Appeals for the

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such, both applicants and employees were adversely affected by the same practice." 17 LAB. REL. REP. (BNA) (32 Fair Empl. Prac. Cas.) at 605-06.

Richardson is significant because it does not seem to impose a difficult proof requirement on a plaintiff who is either an applicant or an employee and who seeks to represent a class of both applicants and employees.

For another court's discussion of possible standards for meeting the footnote 15 exception, see Nation v. Winn-Dixie Stores, Inc., 95 F.R.D. 82, 87-88, (N.D. Ga. 1982).

38. The *Hill II* proposal may also apply to *any* case in which appellate courts hold classes to be improperly certified because of the plaintiff's failure to meet the *Falcon* Court's "same harm or injury" requirement. *See supra* notes 56-64 and accompanying text.

39. Although no appellate court has yet considered the consequences of the plaintiff's failure to meet the footnote 15 standard, it is common practice to vacate findings when the plaintiff is found on appeal not to satisfy the *Falcon* standard. *See, e.g.*, Eckerd Drugs, Inc. v. Brown, 102 S.Ct. 2952 (1982) (mem.).

40. *See supra* notes 30-33 and accompanying text.

41. 672 F.2d 381 (4th Cir.), *cert. denied*, 103 S. Ct. 318 (1982).

42. *See infra* notes 56-64 and accompanying text.

43. 518 F.2d 543 (4th Cir. 1978). In *Barnett*, a black plaintiff who worked for a trucking division of a large corporation was denied "the company's normal 60-day probationary period for fledgling over-the-road drivers because he was black." *Id.* at 545. The district court held that the plaintiff could only represent "that group of black persons who have unsuccessfully applied for or requested road driving jobs with the Company." *Id.* at 547. The Court of Appeals for the Fourth Circuit reversed, citing several cases from other jurisdictions upholding the across-the-board approach. The court held that the plaintiff could represent all Blacks who had applied for over-the-

Fourth Circuit that upheld an across-the-board approach in an analogous fact situation.[44] The class in *Hill* consisted of those blacks and females "who have applied for employment . . . or who will hereafter apply."[45] The district court found that Western Electric had discriminated against blacks and women in hiring, job placement, and promotions.[46]

In *Hill I*,[47] the Court of Appeals for the Fourth Circuit reversed in part and remanded in part. The court interpreted the *Rodriguez* opinion[48] strictly, requiring that the plaintiffs allege the "same harm or injury" as all class members and rejecting the across-the-board approach.[49] According to the court, because the plaintiffs were all employed, they could not represent the class of rejected job applicants. The court, therefore, vacated the district court's findings of discrimination in hiring for lack of proper class representation and remanded the hiring issue to the district court.[50]

Three new plaintiffs then filed motions in the district court to intervene, pursuant to Federal Rule of Civil Procedure 24,[51] on behalf of the class of rejected job applicants. The potential intervenors alleged that the defendant had refused to employ them because of their race. The district court interpreted the terms of the remand as allowing inter-

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road jobs, had been discouraged from applying, or had been kept ignorant of openings for over-the-road jobs because of the employer's discriminatory practices. *Id.* at 547 n.4. The appellate court also permitted the plaintiff to represent present, past, and future black employees who had been or would be denied promotion to supervisory positions because of their race. *Id.*

44. The opinion of the *Hill* district court is reported at 12 Fair Empl. Prac. Cas. (BNA) 1175 (E.D. Va. 1976).

45. 672 F.2d at 384.

46. *Id.* The court ordered Western Electric to "institute priority hiring and promotion of blacks and females to remedy past discrimination." *Id.* Moreover, the court required the company to develop and use new non-discriminatory hiring and promotion criteria. The court also awarded the plaintiffs their lost salaries "as determined by a special master." *Id.*

47. 596 F.2d 99 (4th Cir.) [*Hill I*], *cert. denied*, 444 U.S. 929 (1979).

48. *See supra* note 23.

49. In *Hill I*, the Court of Appeals for the Fourth Circuit refused to follow the courts that had interpreted *Rodriquez* as only holding that a plaintiff must have suffered at least *some* injury before he would be allowed to represent a class. *See supra* note 25.

50. *Hill I*, 596 F.2d at 107.

51. Federal Rule 24 provides as follows:

> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

FED. R. CIV. P. 24(b).

vention but nonetheless exercised its discretion to deny the motions, giving two reasons for its decision. First, the trial court wanted to end an already lengthy case.[52] Second, intervention would have delayed relief on the job assignment claims that had been upheld by the appellate court because intervention would have required a separate hearing on the hiring claims. The district court stated that it was "impractical if not impossible to be running part of the case here and part before the master on the job assignment claims."[53]

B. *The* Hill II *Proposal.*

In *Hill II*,[54] the Court of Appeals for the Fourth Circuit vacated the district court's denial of the motion for intervention and remanded the case, declaring that the district court had abused its discretion.[55] The court also stated that on remand "the original findings of discrimination in hiring might be *reinstated* were intervention allowed and the intervenors found in the process to be adequate representatives."[56] The court cited two advantages of reinstatement: conservation of judicial resources and avoidance of inconsistent decisions.[57]

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52. Hill v. Western Elec. Co., 672 F.2d 381, 385 (4th Cir.) [*Hill II*], *cert. denied*, 103 S. Ct. 318 (1982).

53. *Hill II*, 672 F.2d at 385. An alternative ground for this result may be found in Fed. R. Civ. P. 54(b), dealing with partial entries of judgment.

54. Hill v. Western Elec. Co., 672 F.2d 381 (4th Cir.), *cert. denied*, 103 S. Ct. 318 (1982).

55. 672 F.2d at 387. The *Hill II* court discounted the delay argument, pointing out that bifurcation of proceedings is common in Title VII class actions. Western Electric, in its petition for rehearing, argued that the bifurcation referred to by the court of appeals as common in Title VII class actions was different from the bifurcation rejected by the trial judge. "Bifurcating Title VII cases is a procedure commonly used to divide proof of liability from proof of individual damages." Petition of Appellee for Rehearing and Suggestion for Rehearing En Banc at 3, Hill v. Western Elec. Co., 672 F.2d 381 (4th Cir. March 15, 1982). In *Hill II*, the court of appeals held that the trial judge abused his discretion by refusing to split the case, leaving "one portion of the case in the initial stages of a Phase I inquiry [the hiring claim] while the other portion proceeds to final judgment on the question of individual settlement to relief." *Id.* Western Electric argued that rejecting such an unusual procedure was not an abuse of discretion.

56. 672 F.2d at 387 (emphasis added). The district court's denial of the motion for intervention was oral and did not explicitly mention the possibility of reinstating the original trial court's findings. The court of appeals found that the would-be intervenors had presented this possibility to the court. The court of appeals therefore considered it appropriate to "take that factor into account on appeal." *Id.* at 387 n.2.

57. *Id.* at 387. The *Hill II* court was concerned that the would-be intervenors, if denied the right to intervene, would bring the class claim in a new action. By pointing out the danger of "inconsistent sequential adjudication of the critical issues," *id.*, the court presumably meant that a new trial might result in findings of fact different from the findings in the original trial. But if the defect in class representation in the original trial caused the findings to be different, it would be improper to compare any new findings to the original findings; the original findings would have been wrong. Before this argument for intervention and reinstatement is applicable, it must be true that the original findings were not affected by the defect in class representation. *See infra* notes 58-64, 69-94 and accompanying text.

In essence, the *Hill II* proposal seeks to avoid repeating the original trial because of mere technical defects in class representation. The *Hill II* court conditioned reinstatement on a finding that the defect at the original trial "probably" did not affect the result.[58] The court also fashioned safeguards specifically designed to prevent injury to either party.[59]

To protect the defendant, the district court must determine whether the employer would be unfairly prejudiced by reinstatement.[60] In making this determination, the district court must allow the defendant to introduce evidence of events and circumstances occurring after the findings were made that demonstrate prejudice.[61] The court must, however, temper its inquiry by remembering that any reinstated findings can be reviewed on appeal.[62]

To protect the plaintiff class, the district court must consider whether the intervenors support reinstatement of the findings and whether the original defect in class representation resulted from a "technical lack of identity of interest and injury," rather than inadequate representation.[63] The *Hill II* court reasoned that if the intervenors did not support reinstatement, or if there was inadequate representation at the original trial, then the defect probably affected the original findings of the trial court.[64]

Judge Widener, dissenting in *Hill II*, opposed the majority's proposal for several reasons. He argued that vacated findings are absolutely void and cannot be reinstated under any circumstances.[65] Moreover, he stated that the majority's proposal was inconsistent with

58. 672 F.2d at 388.

59. *See infra* notes 61-64 and accompanying text.

60. 672 F.2d at 389.

61. *Id.* at 391-92.

62. *Id.* at 389.

63. *Id.* One court has cited this language to support its holding that a class need not be decertified after the original plaintiff is found to be an inadequate class representative provided the class was certified before the inadequacy was determined. In Scott v. City of Anniston, 682 F.2d 1353 (11th Cir. 1982), a class was certified pursuant to a stipulation. After remand on a different issue, the district court found the original plaintiffs to be inadequate class representatives. The district court, therefore, dismissed the otherwise viable class claim.

The Court of Appeals for the Eleventh Circuit held that it was error for the district court to decertify the class. According to the court, there was "no indication that the representation was deficient or less than vigorous." *Id.* at 1357. The court cited *Hill II* for the proposition that the "determination of inadequacy [of class representation] . . . may have been concerned only with a technical lack of identity of interest and injury between representative and class." *Id.* (quoting *Hill II*, 672 F.2d at 389).

64. *Hill II*, 672 F.2d at 388-89.

65. *Id.* at 397-99 (Widener, J., dissenting).

the *Falcon* "same harm or injury" requirement.[66] According to the dissent, the *Hill II* proposal would enable a district court to conduct a class action without following *Falcon*. The class could correct any representation problem arising on appeal through intervenors and seek reinstatement of the findings.[67]

As the dissent illustrated, the *Hill II* proposal appears to be at least a technical violation of the *Falcon* rule that plaintiffs must allege the "same harm or injury" as the class members; the proposal purports to give legal effect to findings made at a trial in which the plaintiffs did not allege the "same harm or injury" as the class members. Whether the *Hill II* proposal actually contravenes the *Falcon* rule, however, can be more accurately determined by examining the policies behind the rule.

III. THE COMPATIBILITY OF THE *HILL II* PROPOSAL WITH *FALCON*

In rejecting the across-the-board approach in favor of the "same harm or injury" requirement, the *Falcon* Court recited three policy concerns: 1) avoiding prejudice to the defendants, 2) avoiding prejudice to the plaintiff class members, and 3) avoiding practical problems for the trial court.[68]

A. *Prejudice to the Defendants.*

The *Falcon* Court's first concern was that across-the-board class actions might be unfair to defendants. Courts may require an employer to prove that an individual was not discriminated against, but asking an employer to prove that he has never discriminated against anyone in the class would be overly burdensome.[69] Moreover, proving the absence of such pervasive discrimination is more difficult for the

66. *Id.* at 395-97 (Widener, J., dissenting). Judge Widener could not cite *Falcon*, of course, because the case had not yet been decided. Instead, he cited *Rodriguez*, a case the Court of Appeals for the Fourth Circuit had interpreted as supporting the "same harm or injury" requirement. *See supra* notes 26-33, 48-49 and accompanying text.

Judge Widener asserted two additional grounds. First, he argued that the district court did not abuse its discretion in denying the motion for intervention because of the delay involved and the potential for prejudice to the defendants resulting from having to defend an overly broad, "unmanageable" action. 672 F.2d at 392-93 (Widener, J., dissenting). Second, Judge Widener argued that the district court did not abuse its discretion because none of the intervenors were members of the class. *Id.* at 393-95 (Widener, J., dissenting).

67. *Id.* at 397-99 (Widener, J., dissenting).

68. *See supra* notes 28-33 and accompanying text.

69. *Falcon*, 457 U.S. at 157-61. The *Falcon* Court did not say that it was impossible for an employer to defend adequately against an across-the-board class claim, just that it was difficult. *Id.* at 160-61.

employer because the issue is not closely related to what the plaintiff must prove to support his individual claim.

When the plaintiffs satisfy the *Falcon* "same harm or injury" requirement, however, there is substantial similarity between the individual and class claims. It is therefore not unreasonably difficult for the employer to defend both claims at the same trial. The *Falcon* footnote fifteen exception to the abolition of the across-the-board class action is presumably justified on similar grounds. To bring a footnote fifteen across-the-board class action the plaintiffs must prove that a general policy of discrimination exists and manifests itself throughout the employer's practices.[70] Both the class claim and the individual claim will be based on the general policy of discrimination. Thus, defending against the individual claim will be similar to defending against the class claim.

The *Falcon* Court's holding was directed at preventing improper across-the-board class actions from getting started. The *Hill II* proposal, however, is applicable only *after* an across-the-board class has been incorrectly certified and the class issues tried. The employer will already have defended against the across-the-board class claims without the presence of proper class representatives. The *Falcon* Court's original concern about prejudice to the defendant therefore translates into a concern whether, because of representation defects, the employer actually defended inadequately, causing the trial court to make adverse findings.

The *Hill II* proposal addresses this concern. According to the proposal, the trial court must decide whether the representation defect "did or did not probably affect the merits."[71] The court also must decide whether the defendant "will be unfairly prejudiced by the reinstatement."[72] Thus, if the representation defect made it so hard for the employer to defend that it "probably" resulted in the trial court making prejudicial findings, then such findings should not be reinstated.[73]

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70. 457 U.S. at 157 n.15; *see supra* notes 36-37 and accompanying text.

71. *Hill II*, 672 F.2d at 388. More specifically, the *Hill II* court stated that the general inquiry the trial court is to make when considering reinstatement is whether the representation defect "did or did not probably affect the merits in a way making reinstatement inappropriate." *Id.* The phrase "in a way making reinstatement inappropriate" presumably adds the conditions that the change be material and prejudicial. *See infra* notes 72-73 and accompanying text.

72. *Hill II*, 672 F.2d at 388.

73. If the trial court does reinstate its original findings, the defendants have two additional protections: the right to appeal the findings for substantive review as if there had never been a certification error and the right to present evidence of events and conditions arising after the original findings were made that indicate prejudice to his side. *Id.* at 391; *see supra* text accompanying notes 61-62.

As stated before, the "same harm or injury" requirement is designed in part to ensure that the employer will be able to defend itself adequately against all claims.[74] Implicit in this aspect of the *Falcon* requirement is the notion that the class representative's failure to meet the "same harm or injury" test not only *might* make it harder for the employer to defend, but will *likely* make it harder for the employer to defend. Otherwise, the "same harm or injury" requirement would not protect the employer's ability to defend. Thus, violation of the "same harm or injury" requirement seems to raise a presumption that the employer will not know how to defend properly—in other words, a presumption of prejudice.

The *Hill II* court did not incorporate this presumption into its proposal because it did not expressly allocate the burden of proof. To be consistent with the *Falcon* Court's presumption of prejudice to the defendant, the *Hill II* proposal should require that the intervenors prove that the original defect in class representation did not affect the court's findings on the merits.[75]

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74. *See supra* note 32 and accompanying text.

75. The *Hill II* opinion offers little guidance for a court making such a determination. Arguably, if the defendants would have conducted the earlier litigation differently had the intervenors been the original named plaintiffs, the defect in representation possibly "infected" the merits. In Dickerson v. United States Steel Corp., 582 F.2d 827 (3d Cir. 1978), certain class members who were not named plaintiffs testified at the trial and were later permitted to intervene. The district court granted them relief based on their testimony. *See* Dickerson v. United States Steel Corp., 439 F. Supp. 55 (E.D. Pa. 1977). The Court of Appeals for the Third Circuit reversed, pointing out that

> the defendants' trial strategy was based on the assumption that the class-member witnesses' testimony was relevant only to the class-wide claim, or, perhaps, the individual claim of the named plaintiffs. Defendants, in deposing and cross-examining the witnesses, focused on the allegations of the class-action racial discrimination; defendants had no reason to challenge individual allegations of wrongdoing not predicated on class-wide discrimination.

582 F.2d at 832. If the intervenors in *Dickerson* had been named plaintiffs at the trial, the defendants would have conducted their case differently. Thus, the intervenors should not be granted relief.

The *Dickerson* court did not suggest what the relationship should be between the change in the defendants' conduct of their litigation and the merits of the case. The court did not require as a condition to a finding of prejudice to the defendants, for example, that the change in the conduct of the defendants' case "necessarily" or "probably" affected the merits. The court merely found that because the defendants would have conducted their case differently there was "severe" prejudice. *Id.*

The converse of *Dickerson* is Mullaney v. Anderson, 342 U.S. 415 (1952). In *Mullaney*, after permitting new plaintiffs to join on appeal in order to correct a newly discovered standing problem, the Supreme Court noted that joinder was proper because the earlier presence of the new parties would not "have in any way affected the course of the litigation." *Id.* at 417. The *Mullaney* Court also did not specify a required relationship between earlier joinder and the outcome of the case. As in *Dickerson*, the likely explanation is that the Court decided that because there definitely would have been no effect on the outcome of the case, there was no need to establish a required relationship.

B. *Prejudice to the Class Members.*

A second concern of the *Falcon* Court was "the potential unfairness to the class members bound by the judgment if the framing of the class is overbroad."[76] The *Hill II* proposal is designed to address this concern. To protect the plaintiff class from prejudicial findings the district court must consider whether reinstatement would be unfair to the class.[77] Reinstatement presumably would be unfair to the class if the representation defect "probably" affected the findings made by the original trial court to the detriment of the class.

The *Hill II* court suggested two considerations for assessing whether the representation defect "probably" affected the findings. The first consideration is "whether the new class representative desires or resists reinstatement."[78] "If properly qualified new representatives are satisfied with generally favorable findings . . . it can reasonably be assumed that the class members' primary interests in fairness . . . have been served."[79] Intervenors must be adequate representatives before reinstatement will be considered,[80] and thus they will be assumed to act

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Dickerson and *Mullaney* suggest that one factor affecting the outcome of a case is any change in the way one side conducts its case because of a defect in representation. A court applying the *Hill II* proposal should consider whether potential changes to a party's strategy make it "probable" that the merits were affected by the defect in representation.

76. *Falcon*, 457 U.S. at 161. According to the *Falcon* Court, the commonality and typicality requirements of Rule 23(a) "serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* at 157 n.13. These requirements "tend to merge" with each other and with the adequacy of representation requirement. *Id.* If the commonality and typicality requirements are not met, the class may not be adequately represented.

The *Falcon* Court also pointed out the possibility that the across-the-board approach could result in a judgment unfavorable to the class. *Id.* at 161. Citing Judge Godbold's concurring opinion in Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969), *see supra* notes 20-21 and accompanying text, the Court identified "the error of the 'tacit assumption' underlying the across-the-board rule that 'all will be well for surely the plaintiff will win and manna will fall on all members of the class.'" *Falcon*, 457 U.S. at 161 (citing *Johnson*, 417 F.2d at 1127 (Godbold, J., concurring)). The defect in class representation implicit in across-the-board class actions could cause the class's claim to be inadequately advanced in a way that harms the whole class, just as the defect could cause the employer's defense to be inadequate. The dissimilarity between the proof required to establish the representatives' individual claims and the proof required to establish the class claim makes it harder for a plaintiff not meeting the *Falcon* "same harm or injury" requirement to adequately bring the class claim. *Cf. supra* note 69 and accompanying text (analyzing how the dissimilarity in proof makes it harder for the employer to defend).

77. *Hill II*, 672 F.2d at 388-89.

78. *Id.* at 388.

79. *Id.* at 389.

80. *Id.* at 390 ("If a proposed intervenor is found not formally qualified to act as a class representative, the intervention inquiry as to that person obviously need proceed no further. If the district court finds any of the proposed intervenors formally qualified to represent the class it should then reconsider the motion for intervention . . . .").

for the benefit of the class.[81] Under the *Hill II* proposal, if the intervenors do not want the original findings to be reinstated, then it is assumed that the class does not desire reinstatement either. Presumably, the class's opposition to reinstatement suggests that the original class representation was so inadequate that it "infected" the findings of the original trial court.[82]

It does not necessarily follow from the intervenors' opposition to reinstatement, however, that the defect in representation affected the findings. Although the intervenors' resistance to reinstatement may be evidence that the original findings were prejudicial to the class, there is no implicit causal connection between resistance and "infected" merits.[83] Other motives might lead the intervenors to resist reinstatement. For example, if the original findings were not sufficiently favorable to the class, intervenors might not support reinstatement, preferring to take the chance that a new trial would yield more favorable findings. Such a decision might be made in the interests of the class, but it would not necessarily indicate that the original defect in representation affected the merits. Intervenors would want a new trial if they thought for any reason that they would have a good chance for more favorable findings.[84] Therefore, district courts should be wary of undue reliance on intervenors' opposition to reinstatement.[85]

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81. *Id.* at 389.

82. *Id.* at 388.

83. *See id.* at 391 (The desires of the intervenors for reinstatement "*can* be taken as an indication that the class, for its part, considers that the representation provided the class members' interests in litigation . . . was 'fair and adequate.' " (emphasis added)). Presumably the converse is true: resistance to reinstatement by the intervenor may be taken as an indication that the class does not consider its interests to be adequately protected.

84. For example, a class reprsentative, acting for the benefit of the class, would probably want a new trial if the representative had hired better counsel, had located better witnesses, or had unearthed helpful information. Because the intervenors probably will not volunteer matter such as new information or theories without an extensive discovery process, the trial court will often not be aware of these factors. Discovering other factors such as the intervenors' belief that the trial judge or jury simply erred in the first trial and will not do so again would involve an analysis of the findings themselves. It may be true, however, that the court will be limited to just such an analysis rather than directly evaluating the intentions of the intervenors because of a lack of better information. When information that indicates the intervenors' resistance to reinstatement is not based on inadequate prior class representation is revealed to the court, the court should not allow reinstatement.

85. In their Petition for Rehearing and Suggestion for Rehearing En Banc, Western Electric argued that considering the desires of the intervenors in determining whether to allow reinstatement would allow proper plaintiffs to wait until findings are reached at the first trial before deciding whether to validate the findings by intervening and requesting reinstatement. Two factors minimize this possibility. First, the would-be intervenors would risk losing at trial and then carrying the burden of showing that the named plaintiffs were unproper on appeal. Second, even if the intervenors are willing to assume this risk, the trial court could consider their motives in making its decision whether to reinstate.

The second consideration is whether the defect in class representation "was based solely upon a formal lack of identity of interests and injury between representative and class or upon demonstrated ineffectiveness of representation."[86] The *Hill II* court reasoned that, to the extent the defect in representation is based on inadequate representation as well as "technical lack of identity of interest and injury,"[87] the defect may affect the determination of the merits.[88] Furthermore, to the "extent inadequacy is based solely upon lack of sufficient identity of interest, any presumed adverse effect on the merits stemming from this may in fact be utterly belied by the outcome."[89]

This language responds to the *Hill II* dissent's criticism that the *Hill II* proposal robs the *Falcon* "same harm or injury" requirement of its "virtue."[90] One virtue of the *Falcon* requirement is that it prevents inadequate representation of the class by requiring a sufficient identity of interests between the class and the class representative.[91] Implicit in this virtue is the notion that if there is insufficient identity of interests, then inadequate representation is not only *possible*, but *likely*. Otherwise, the "same harm or injury" requirement would not protect the class's interest in adequate representation. The failure of the class representative to meet the "same harm or injury" requirement, however, does not *necessarily* mean that the class representation will be inadequate. Courts applying the *Hill II* proposal must judge whether the class representation was in fact inadequate by analyzing the outcome of the original trial.[92] The *Hill II* proposal does not rob the "same harm or injury" requirement of its virtue because the proposal does not mandate reinstatement unless the danger the *Falcon* Court sought to prevent—inadequate representation in fact—is not present.

The *Hill II* proposal could, however, rob the *Falcon* requirement of some of its virtue if the courts do not allocate properly the burden of proof. Just as the failure of the class representative to meet the "same harm or injury" requirement creates a presumption of prejudice to the defendant,[93] the failure gives rise to a presumption of prejudice to the

86. *Hill II*, 672 F.2d at 388.

87. *Id.* at 389.

88. *Id.*

89. *Id.*

90. *Id.* at 397 (Widener, J., dissenting).

91. *See Falcon*, 457 U.S. at 161 (justifying "same harm or injury requirement" on grounds of potential unfairness to class).

92. The trial court's analysis, on remand, of whether class representation in the earlier proceeding was adequate will involve the same problems as the court's analysis of whether the defect in class representation changed the findings sought to be reinstated to the detriment of the defendants. *See supra* note 75.

93. *See supra* note 75 and accompanying text.

class. To preserve this presumption, the intervenors, as the moving parties, should have the burden of showing no prejudice to the class, just as the intervenors should have the burden of showing no prejudice to the defendants.[94]

C. *Practical Problems.*

The third concern of the *Falcon* Court was that "without reasonable specificity the court cannot determine whether the representation is adequate."[95] A trial court confronted with a proposed across-the-board class may find it difficult to determine if a proposed class representative will adequately represent class interests.

The *Hill II* proposal requires a court to examine a prior proceeding to determine if there was adequate representation.[96] In making this determination, the court would have available for its consideration not only the proposed class and class representative but the record of the prior proceeding. Because the court would be exercising hindsight instead of foresight, its task would be easier, and the *Falcon* concern would be mitigated.

There may, however, be other practical problems in applying the *Hill II* proposal. For example, the proposal envisions a hearing at which the opposing sides argue the reinstatement issue.[97] This additional litigation could arguably consume the judicial time and resources saved by the reinstatement. On the other hand, refusing reinstatement in cases in which it might be appropriate would constitute an even greater waste of judicial resources.[98] Furthermore, requesting a reinstatement hearing might become a dilatory tactic in intervention cases.

A possible solution to these problems is to make the decision to hold a hearing on reinstatement discretionary with the court. If the trial court believes the case appropriate for such a hearing, then a hearing could be held.[99] Because of the danger of prejudice, however, find-

94. *Id.*

95. *Falcon*, 457 U.S. at 161 (quoting Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969) (Godbold, J., concurring)).

96. *See supra* notes 86-92 and accompanying text.

97. *Hill II*, 672 F.2d at 391-92.

98. *Cf.* Mullaney v. Anderson, 342 U.S. 415, 417 (1952) ("To dismiss the present petition [for joinder] and require the new plaintiffs to start over in District Court would entail needless waste and runs counter to effective judicial administration . . . ."). For discussions of *Mullaney*, see *supra* note 75, *infra* note 143.

99. The trial court's decision whether to allow reinstatement would not be easy. The trial court would focus on a prior proceeding that may have taken place years ago. The inquiry is also largely subjective. The court would be examining factors such as the motives and desires of the intervenors, *see supra* notes 78-85 and accompanying text, and whether the defendants would have

ings should not, in any case, be reinstated without a hearing.

IV. Reinstating Vacated Findings

The viability of the *Hill II* proposal depends on whether findings vacated because of a defect in class representation can be given any legal effect upon reinstatement. The *Hill II* dissent argued that they cannot.[100] The main argument against reinstating vacated findings is that the defect in class representation made the class claim moot. If the class claim was moot, then the original trial court did not have a "case or controversy" under article III[101] and thus did not have jurisdiction to make the findings sought to be reinstated.

There are two arguments for reinstating vacated findings under the *Hill II* proposal. First, the class claim was never moot and therefore reinstatement is proper whenever the defect in representation did not prejudice the defendants. Second, even if the trial court lacked jurisdiction to make findings concerning the class claim, jurisdiction can be conferred retroactively.

A. *Mootness of the Class Claim.*

Whether the failure of named plaintiffs to meet the commonality and typicality requirements of Rule 23 renders the class claim moot hinges on the article III "case or controversy" requirement.[102] The "case or controversy" requirement has two elements; it "involves both

conducted their prior litigation differently had the intervenors been named plaintiffs in the original proceeding, *see supra* note 75.

Another concern of the *Falcon* Court was that "every Title VII case would be a potential company-wide class action." 457 U.S. at 159 (footnote omitted). The Court stated that it found "nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation." *Id.* This concern is probably not a separate issue in analyzing the *Hill II* proposal for two main reasons.

First, there is a split of authority over whether Congress intended to authorize private across-the-board class actions when it passed Title VII. *Compare, e.g.,* H. NEWBERG, *supra* note 19, § 7973a ("The Congressional purpose expressed in the civil rights acts, of eliminating job bias, is best accomplished by permitting any individual alleging unlawful discrimination to sue to rectify all prejudicial activities involved.") *and Developments*, *supra* note 19, at 1220 ("the 'across-the-board' class action conception goes a long way toward effectuating the public interest") *with* Rutherglen, *supra* note 18, at 724 ("Congressional policy, as expressed in Title VII and its legislative history, does not reflect a judgment of sufficient force and clarity to displace the usual operation of rule 23.").

Second, even if Congress did not intend to authorize across-the-board class actions when it passed Title VII, it is reasonable to assume Congress and the *Falcon* Court shared the same concerns. If the *Hill II* proposal does not violate the three *Falcon* concerns, then it probably also does not violate congressional expectations.

100. *Hill II*, 672 F.2d at 397-98 (Widener, J., dissenting).

101. U.S. CONST. art. III, §2, cl. 1.

102. *Id.*

constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise."[103] The constitutional limitation arguably focuses on a minimal requirement of concrete adverseness.[104] Prudential limitations include such policies as refusing standing to litigate generalized grievances[105] or to assert third-party rights.[106]

Plaintiffs who try to bring Title VII class actions must meet both individual and class representative standing requirements.[107] These requirements address distinctly different issues. Individual standing requirements refer to the article III "case or controversy" requirement,[108]

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103. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)); *see also* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 80 (1978) ("Our prior cases have, however, acknowledged 'other limits on the class of persons who may invoke the courts' decisional and remedial powers,' which derive from general prudential concerns . . . .") (quoting *Warth*, 422 U.S. at 499) (citation omitted); Williamson, *Fourth Amendment Standing and Expectations of Privacy:* Rakas v. Illinois *and New Directions for Some Old Concepts*, 31 U. FLA. L. REV. 831, 861 (1979) (Standing "involves both constitutional and prudential limitations on federal court jurisdiction and its exercise.").

104. *See, e.g.*, LeBel, *Standing After* Havens Realty*: A Critique and an Alternative Framework for Analysis*, 1982 DUKE L.J. 1013, 1033 ("Article III . . . arguably requires only an adversary relationship between the parties on opposite sides of the litigation.").

105. *See* United States v. Richardson, 418 U.S. 166, 178 (1974) (standing refused because plaintiff's grievances were "shared with 'all members of the public' ") (quoting *Ex parte* Levitt, 302 U.S. 633, 634 (1937)).

106. *See Warth*, 422 U.S. at 499. Some commentators have argued that such prudential limitations have "become a surrogate for decisions on the merits." Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663-64 (1977). "Decisions on questions of standing are concealed decisions on the merits of the underlying . . . claim. The Court finds standing when it wishes to sustain a claim on the merits and denies standing when the claim would be rejected were the merits reached." *Id.* at 663; *see also* Williamson, *supra* note 103, at 835 (Rakas v. Illinois, 439 U.S. 128 (1978), "represents the first case in which the United States Supreme Court has expressly acknowledged the close relationship between the concept of standing and the merits of the substantive claims presented by the litigants.").

107. Both mootness and standing are aspects of the general doctrine of "justiciability" under the "case or controversy" requirement. Mootness is "the doctrine of standing set in a time frame." United States Parole Comm. v. Geraghty, 445 U.S. 388, 397 (1980). Standing is the satisfaction of article III requirements at the beginning of the litigation; mootness is the satisfaction of article III requirements throughout the litigation. *Id.* For discussions of individual and class representative standing requirements, see H. NEWBERG, *supra* note 19, §§ 7973-7983; C. WRIGHT, LAW OF FEDERAL COURTS § 72 (3d ed. 1976); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1759-1771 (1975). The distinction between "individnal" and "class representative" standing is unsettled. The requirement that the plaintiff be a member of the class arguably overlaps the Rule 23 commonality and typicality requirements. *But see Falcon*, 457 U.S. at 157 n.13 ("The commonality and typicality requirements . . . tend to merge . . . . Those requirements . . . also tend to merge with the adequacy of representation requirement."). Newberg argues that individual standing requirements should be analyzed separately from the adequacy of representation requirement. For an argument that the typicality requirement is superfluous, see Comment, *Federal Rule of Civil Procedure 23(a)(3) Typicality Requirement: The Superfluous Prerequisite to Maintaining a Class Action*, 42 OHIO ST. L.J. 797 (1981).

108. U.S. CONST. art. III, § 2, cl. 1.

the Title VII "aggrieved person" requirement,[109] and arguably the requirement that the plaintiff be a member of the class.[110] Class representative standing requirements concern Rule 23 prerequisites such as a common question of law or fact, typicality of claims or defenses, and adequate representation.[111] Because the "same harm or injury" requirement comes from the commonality and typicality requirements of Rule 23, the failure to meet the "same harm or injury" requirement is a defect in class representative standing. Therefore, the failure to meet a class representative standing requirement, such as the "same harm or injury" requirement, does not necessarily imply that an individual standing requirement, such as the "case or controversy" requirement, is not met.

The constitutional element of the "case or controversy" requirement is met whenever the *Hill II* proposal is applicable. To satisfy this element the parties must allege "such a personal stake in the outcome"[112] as to ensure that "the dispute sought to be adjudicated will be presented in a form historically capable of judicial resolution."[113] This "personal stake" standard is minimal,[114] arguably calling only for an adversarial relationship between the parties.[115] In cases in which the *Hill II* proposal is applicable this adversarial relationship requirement is satisfied because the parties, by definition, will have litigated the

109. 42 U.S.C. §§ 2000e-5(b), 2000e-5(f)(3) (1976). Most courts have given a broad meaning to the term "aggrieved person." These courts "hold that the 'conditions of employment' nomenclature of Title VII protects the total work environment." H. NEWBERG, *supra* note 19, § 7973a. The "conditions of employment" nomenclature comes from 42 U.S.C. § 2000e-2(a) (1976):

> It shall be unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Thus, "any employee functioning in an atmosphere affected by discrimination has suffered the requisite injury in fact to make him or her an 'aggrieved person.'" H. NEWBERG, *supra* note 19, § 7973a; *see also* Carr v. Conoco Plastics, 423 F.2d 57 (5th Cir.), *cert. denied*, 400 U.S. 951 (1970) (standing of plaintiffs upheld even though they were not personally and directly exposed to the discrimination); EEOC Case No. YSF 9-108, CCH EEOC Decisions (1973) ¶ 6030 (June 26, 1969) (a white employee was "aggrieved" by discrimination directed at blacks because the situation was a condition of his work environment).

110. For a discussion of membership in the class as an additional individual standing requirement, see H. NEWBERG, *supra* note 19, § 7973d. Individual standing is a prerequisite for asserting a class claim and also satisfies constitutional requirements.

111. Federal Rule 23(a) is set out in relevant part, *supra* note 5.

112. Baker v. Carr, 369 U.S. 186, 204 (1962).

113. Flast v. Cohen, 392 U.S. 83, 101 (1968).

114. *See* LeBel, *supra* note 104, at 1037 ("If the constitutional barriers to standing are lowered to the level suggested above, all but the few suits that can be labeled 'collusive' will clear the Article III hurdle.") (footnote omitted); Tushnet, *supra* note 106, at 680 ("Thus, standing in its pure article III form imposes only a very minor limitation on the availability of a federal forum.").

115. *See supra* note 104.

class claim in a fully adversarial proceeding without prejudice to either side.

The "case or controversy" requirement's prudential concerns are not controlling in cases in which the *Hill II* proposal is applicable. For example, the prudential limitation on plaintiffs asserting third-party rights does not apply. The Supreme Court, in *Warth v. Seldin*, stated that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."[116] Congress authorized class actions by approving Rule 23, thereby circumventing the prudential limitation on third-party causes of action.[117]

It is also inappropriate to bypass the merits of cases in which the *Hill II* proposal is applicable by invoking other prudential limitations. The proposal saves judicial time and resources.[118] Moreover, the proceeding by definition will have been fair.[119] Invoking the "case or controversy" requirement's prudential limitations in such cases would waste time and money and would contravene long-standing antidiscrimination policies.

This note's conclusion that the class claim is not moot in cases in which the *Hill II* proposal is applicable is consistent with the two most recent Supreme Court decisions linking the "case or controversy" requirement to class claims. In *Deposit Guaranty National Bank v. Roper*,[120] the district court refused to certify a class, ruling that the class did not meet the requirements of Rule of 23(b)(3).[121] The defendant then tried to settle the case with the named plaintiffs, offering to pay them the maximum sum they might have recovered from their individual claims. The plaintiffs rejected the offer. The district court entered judgment in favor of the plaintiffs based on the defendant's settlement offer. The plaintiffs appealed the district court's class certification ruling, despite the defendant's argument that the entry of judg-

116. 422 U.S. 490, 501 (1975).

117. *See* Tushnet, *supra* note 106, at 679 ("By providing for class actions within the Federal Rules of Civil Procedure, Congress conferred standing on [plaintiffs] who, absent congressional action, would not have been allowed to litigate the underlying substantive issues.").

In Sosna v. Iowa, 419 U.S. 393 (1975), the Supreme Court held that post-certification failure of the plaintiff's individual claim did not moot the class claim. Professor Tushnet states that *Sosna* stands for the proposition that "a *retrospective* determination that a case *has been litigated* in a concrete setting allows a court to reach the merits of a controversy. Article III seems to require no more." Tushnet, *supra* note 106, at 679 (emphasis added). Concluding that cases in which the *Hill II* proposal is applicable are not moot involves just such a retrospective determination.

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

119. *See supra* notes 58-64 and accompanying text.

120. 445 U.S. 326 (1980).

121. The district court opinion is not reported.

ment rendered the case moot. The Court of Appeals for the Fifth Circuit rejected the mootness argument and ordered the district court to certify the class because Rule 23 had been complied with.[122]

The Supreme Court affirmed, holding that although the district court's entry of judgment ended the plaintiffs' individual claims, the plaintiffs still had an assertable economic interest in the certification of the class.[123] Specifically, the *Roper* Court noted that certification would enable the named plaintiffs to spread their litigation costs.[124]

In a companion case, *United States Parole Commission v. Geraghty*,[125] the plaintiff's individual claim was rendered moot just before the district court denied certification. The Supreme Court held that the plaintiff could appeal the ruling denying class certification even though his individual claim was moot. According to the *Geraghty* Court, the article III "case or controversy" requirement has two parts. First, there must be a continuing "live" controversy. Second, there must be some party with a "personal stake" in the outcome of the case.[126] In applying the "personal stake" requirement, the Court held that although the plaintiff had never alleged any personal interest in the certification question,[127] he nonetheless satisfied the requirement because he "continue[d] to vigorously advocate his right to have a class certified" in a concrete factual setting capable of judicial resolution.[128]

Under *Roper* and *Geraghty* the class claim in a *Hill II* situation is not rendered moot by the class representative's failure to meet the commonality and typicality requirements of Rule 23. The first requirement—that there be a continuing "live" controversy—is met because the class controversy has actually been litigated.[129]

The original class representative contemplated by the *Hill II* proposal also meets the liberal "personal stake" standard established in *Roper* and *Geraghty*. The *Geraghty* Court emphasized the "flexible character" of the article III requirements.[130] The Court stated that "the

122. Roper v. Consurve, Inc., 578 F.2d 1106, 1111-16 (5th Cir. 1978), *aff'd sub nom.* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980).

123. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 328-40 (1980).

124. *Id.* at 334 n.6, 338 n.9.

125. 445 U.S. 388 (1980).

126. *Id.* at 395-97. This two-part test has been acknowledged. *See* Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1041-42 (5th Cir. 1981); Ford v. United States Steel Corp., 638 F.2d 753, 760 (5th Cir. 1981).

127. *See Geraghty*, 445 U.S. at 420 (Powell, J., dissenting).

128. *Id.* at 404.

129. The *Geraghty* Court found a "live" controversy because class members were trying to intervene. 445 U.S. at 396; *see also* Ford v. United States Steel Corp., 638 F.2d 753, 760 (5th Cir. 1981). The *Hill II* proposal by definition involves intervention.

130. *Geraghty*, 445 U.S. at 400.

purpose of the 'personal stake' requirement is to assure that the case is in a form capable of judicial resolution."[131] That is, there must be "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions."[132] The *Roper* Court characterized an economic interest in spreading litigation costs as a sufficient "personal stake."[133] In a *Hill II* situation, the plaintiff, by qualifying as an "aggrieved person" within the meaning of Title VII,[134] probably satisfies the "personal stake" requirement.[135] Because a named plaintiff in a *Hill II* situation would by definition have litigated the claims without prejudice to either side, he would meet the "personal stake" requirement by having asserted "sharply presented issues"[136] and by "vigorously advocating opposing positions."[137] Finally, the plaintiff would have an economic interest in spreading litigation costs similar to that of the plaintiff in *Roper*.[138]

B. *Retroactive Jurisdiction.*

The second rationale for allowing reinstatement of vacated findings—retroactive assignment of jurisdiction—applies even if the class claim was moot and the trial court was therefore without power to make findings concerning the class. The United States Court of Appeals for the Fifth Circuit developed this retroactive jurisdiction concept in *Finn v. American Fire and Casualty Co.*[139] *Finn* arose on remand from the Supreme Court's holding that the federal district court had no jurisdiction over the case, due to the lack of complete

131. *Id.* at 403.

132. *Id.*

133. *Roper*, 445 U.S. at 334 n.6, 338 n.9; *see Geraghty*, 445 U.S. at 400.

134. *See supra* note 109 and accompanying text.

135. In Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270 (10th Cir. 1977), the court allowed a plaintiff to represent the class simply because he had a "present, past and future interest" as an employee in stopping his employer's discrimination. *Id.* at 277. *See generally* Comment, *The Headless Class Action: The Effect of a Named Plaintiff's Pre-Certification Loss of a Personal Stake*, 39 MD. L. REV. 121, 141-52 (1979).

136. *Geraghty*, 445 U.S. at 403.

137. *Id.*

138. The decision of the Court of Appeals for the Eleventh Circuit in Scott v. City of Anniston, 682 F.2d 1353 (11th Cir. 1982), *see supra* note 63, supports the proposition that a "case or controversy" can exist between a class improperly represented and a defendant. In holding that a class need not be decertified after the original plaintiff was found to be an inadequate class representative provided the class was certified before the determination of inadequacy, the *Scott* court addressed the question whether a continuing controversy existed. According to the court, although certain relief the class had requested was no longer necessary because the defendant had altered its behavior, the class could still pursue other relief. 682 F.2d at 1358. This holding implicitly recognizes the existence of a controversy at least as to the other relief between the improperly represented class and the defendant.

139. 207 F.2d 113 (5th Cir. 1952), *cert. denied*, 347 U.S. 912 (1954).

diversity among the parties.[140] The plaintiffs sought to dismiss as to certain dispensable parties and thereby perfect diversity and jurisdiction. The trial judge, however, refused to reinstate his original findings, pointing out his lack of power to make them in the first place.[141]

The Court of Appeals for the Fifth Circuit reversed, holding that the plantiff's dismissal as to the dispensable parties would be given retroactive effect, so long as the remaining defendant had not been prejudiced in the prior proceeding because of the jurisdictional error.[142] In the absence of such prejudice, the court noted, "[e]very consideration of promptness and dispatch in the administration of justice demands that the first trial should be preserved."[143]

These same considerations of promptness and dispatch apply in a *Hill II* situation. The intervention of new plaintiffs essentially corrects a "jurisdictional" error. Because the *Hill II* proposal requires that reinstatement not prejudice either side, retroactive assignment of jurisdiction to the original trial proceedings would be consistent with *Finn* and would allow reinstatement of the trial court's findings.

This argument is also consistent with the established principle that amendments correcting jurisdictional defects in complaints are to be liberally allowed to prevent dismissals because of technicalities.[144] Such amendments are allowed even after final judgment has been en-

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140. The Supreme Court's opinion is reported at 341 U.S. 6 (1951).

141. 207 F.2d at 115. The opinion of the district court is not reported.

142. *Id.* at 115-16.

143. *Id.* at 116. The Court of Appeals for the Fifth Circuit applied *Finn* in Eklund v. Mora, 410 F.2d 731 (5th Cir. 1969). The *Eklund* court held that when "the first trial was free from error apart from a jurisdictional matter, a new trial was not mandatory and judgment could be entered on the original verdict after the correction of the jurisdictional flaw." *Id.* at 732.

In Burleson v. Coastal Recreation, Inc., 572 F.2d 509 (5th Cir. 1978), the Court of Appeals for the Fifth Circuit held that a winning plaintiff dissatisfied with the damages awarded could not overturn the trial court's judgment for lack of jurisdiction when an indispensable party to the judgment could be dismissed to correct the jurisdictional error. The court cited *Finn* as controlling.

Similarly, in Mullaney v. Anderson, 342 U.S. 415 (1952), the Supreme Court permitted new plaintiffs to join after trial in order to correct a standing problem that had been raised on appeal. According to the Court, the joinder of the new plaintiffs merely put "the principal, the real party in interest, in the position of his avowed agent." *Id.* at 417. The Court also noted that earlier joinder would not have affected the course of the original litigation, and that to deny joinder would waste judicial resources. *Id.*

Finn, Eklund, Burleson, and *Mullaney* stand for the proposition that a court lacking jurisdiction may be deemed to have had jurisdiction if, during the same case, the jurisdictional error is corrected without prejudice to the defendants.

144. *See* Miller v. Davis, 507 F.2d 308, 311 (6th Cir. 1974) ("Amendment to establish jurisdiction is broadly permitted, so as to . . . avoid dismissals on technical grounds."); FED. R. CIV. P. 15(a) ("leave [to amend] shall be freely given when justice so requires").

tered.[145] Amending a complaint after final judgment in effect assigns jurisdiction retroactively. The *Hill II* proposal is consistent with this practice because it, in effect, also corrects a technicality after a final judgment has been entered. Moreover, these amendments are confined to the same case, cousistent with the coustitutional notion that jurisdiction is meant to be defined in terms of a case, rather than an issue.[146]

V. CONCLUSION

A district court implementing the *Hill II* proposal on remand should adopt the following procedure. The court must first determine whether the intervenors are adequate class representatives. If they are not, intervention should be denied. If the intervenors are proper plaintiffs, intervention should be permitted, and the court must consider whether to allow reinstatement of its previous findings.

145. *See* Cohen v. Illinois Inst. of Technology, 581 F.2d 658, 662 (7th Cir. 1978), *cert. denied*, 439 U.S. 1135 (1979) (although amendment is generally not permitted after a final decision, "an amendment can be allowed with leave of the Court of Appeals."); Eklund v. Mora, 410 F.2d 731, 732 (5th Cir. 1969) ("Upon leave of the court a party may amend defective allegations of jurisdiction, even after judgment has been entered or an appeal taken."); 28 U.S.C. § 1653 (1976) ("Defective allegations of jurisdiction may be amended, upon terms, in the trial of appellate courts.").

146. The Constitution refers to "cases," not "questions." U.S. CONST. art. III. The doctrine of pendent jurisdiction permits a federal court to assume jurisdiction over state claims related to federal claims. If the federal claim, the basis for jurisdiction, is dismissed during trial, the court can decide the state claim because the court has already been deemed to have jurisdiction over the "case." The relationship between the state and federal claims determines the scope of the "case." Retroactive jurisdiction in a situation in which the *Hill II* proposal is applicable never violates this relationship requirement because the findings sought to be reinstated arise out of the same claim that intervention has given the court the power to decide. There does not seem to be a logical distinction between a case that has "technical" jurisdiction at the beginning, and then loses it, and a case that lacks "technical" jurisdiction at the beginning and then acquires it. In the first situation, jurisdiction is deemed to exist throughout the case. In the latter situation jurisdiction also can be deemed to have existed throughout the case without violating constitutional requirements. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 19 (3d ed. 1976); 13 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3567 (1975). This "same case" requirement distinguishes cases in which the *Hill II* proposal is applicable from the line of cases holding that vacated findings have no res judicata effect. *See, e.g.*, Continental Casualty Co. v. Canadian Universal Ins. Co., 605 F.2d 1349 (5th Cir.), *cert. denied*, 445 U.S. 929 (1979); Simpson v. Motorists Mut. Ins. Co., 494 F.2d 850 (7th Cir.), *cert. denied*, 419 U.S. 901 (1974); De Nafo v. Finch, 436 F.2d 737 (2d Cir. 1971). *But cf.* Dunlop v. Rhode Island, 398 F. Supp. 1269 (D.R.I. 1975) (vacated holding of prior case has no collateral estoppel effect, but findings of fact of prior case may be adopted if no new evidence is presented). The argument against the *Hill II* proposal would be that because vacated findings cannot be given legal effect as binding precedent, they cannot be given legal effect by being reinstated. The res judicata line of cases is distinguishable, however, because in those cases courts are prohibited from giving legal effect to vacated findings in cases *different* from the one in which the findings were made. To justify reinstating findings in a res judicata situation, it would have to be proper for a court in one case to retroactively apply its jurisdiction to a different case. The *Hill II* proposal only involves retroactive assignment of jurisdiction to the "same case."

Reinstatement should be allowed only when neither side is prejudiced. To determine if there would be prejudice, the district court should consider holding a hearing at which the central inquiry would be whether the defect in class representation at the original trial "probably" affected the findings sought to be reinstated. If the district court finds that the prior defect in class representation did not "probably" affect the merits, then reinstatement should be allowed. The intervenors should, however, have the burden of proving that the findings were not affected.

When applied in this manner, the *Hill II* proposal is consistent with the *Falcon* Court's purposes for establishing the "same harm or injury" requirement. The *Hill II* proposal's requirements that there be no prejudice to either side mirror the *Falcon* Court's concerns. The likelihood that the *Hill II* proposal can save considerable time and resources argues for its availability in appropriate cases.

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