How Far Across-the-Board: The Permissible Breadth of Title VII Class Actions

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To aid in the suppression of discriminatory practices on the part of employers, Congress passed title VII of the 1964 Civil Rights Act.[1] Because discrimination often involves groups of persons alleging that employer practices are aimed against a particular race, color, religion, sex, or national origin, title VII complaints are suitable for class action treatment.[2] Initially, courts liberally interpreted Rule 23 of the Federal Rules of Civil Procedure in order to facilitate the prosecution of title VII actions.[3] The prerequisites to class actions delineated in Rule 23 were accordingly found to be satisfied in an increasingly cursory manner. In *East Texas Motor Freight v. Rodriguez*,[4] the United States Supreme Court demanded that closer attention be paid to the requirements of Rule 23 in title VII class actions.[5] The exact meaning of *Rodriguez*, however, has been the cause of widespread judicial debate.[6]

Because courts have remained uncertain as to the implications of the *Rodriguez* decision, numerous methods of certifying title VII class actions have been utilized. There are generally three interpretations of the effect of *Rodriguez*. A few courts have interpreted *Rodriguez* as merely requiring adequate representation in title VII class action suits while permitting a liberal reading of the other Rule 23 prerequisites.[7] A second view holds that careful attention must be paid to all the requirements of Rule 23.[8] To some courts this interpretation mandates the death of what has been re-

1. *See* 42 U.S.C. § 2000e (1976).

2. In addition to providing plaintiffs with a private cause of action, *id.* § 2000(e)-5(f), title VII implicitly allows an action alleging discrimination to be brought as a class action. Advisory Committee's Note to Proposed Amendments to Rule 23, 39 F.R.D. 69, 102 (1966).

3. *See* Barnett v. W.T. Grant, 518 F.2d 543, 547-48 (4th Cir. 1975); Long v. Sapp, 502 F.2d 34, 43 (5th Cir. 1974); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969). See note 16 *infra* for the text of Rule 23.

4. 431 U.S. 395 (1977).

5. *Id.* at 405.

6. See text & notes 82-87 *infra*.

7. *See* Doe v. First City Bancorp., Inc., 81 F.R.D. 562, 570 (S.D. Tex. 1978); Wajda v. Pennsylvania Mut. Life Ins. Co., 80 F.R.D. 303, 308 (E.D. Pa. 1978); Gill v. Monroe County Dep't of Social Serv., 79 F.R.D. 316, 329 (W.D.N.Y. 1978); see text & notes 88-100 *infra* for a discussion of this liberal interpretation; note 16 *infra* for the text of Rule 23 prerequisites.

8. Under this approach, title VII actions are not automatically afforded class action status. *See* Shelton v. Pargo, Inc., 582 F.2d 1298, 1312-13 (4th Cir. 1978); Tuft v. McDonnell Douglas Corp., 581 F.2d 1304, 1308 (8th Cir. 1978); Doninger v. Pacific Northwest Bell, Inc., 564 F.2d

ferred to as the across-the-board approach for title VII class actions.[9] In the across-the-board approach, an allegation is made that the employer utilizes discriminatory practices on such a broad basis that it can be presumed that all employees suffer from the same discriminatory practices.[10] Finally, the third and most prevalent view of *Rodriguez* accepts the use of the across-the-board approach but requires the presence of a clearly identifiable employer policy or statistical proof of a pervasive practice of discrimination in order to satisfy the requirements of Rule 23.[11] The latter two approaches are essentially the same in the sense that both ultimately demand satisfaction of the Federal Rules of Civil Procedure. Neither would accept a class action based upon the simple allegation that the defendant has discriminated across the board.

This Note will begin with a brief synopsis of the standards for certification of title VII class actions before the *Rodriguez* decision. The various interpretations of *Rodriguez* are then examined, along with the effect of that decision on the Rule 23 requirements for certifying class actions. The prevalent standards for class certification will then be explored and the best of these approaches will be discussed. This Note will recommend an approach that respects both the remedial purposes of title VII and the importance of adhering to Rule 23 of the Federal Rules of Civil Procedure.

A HISTORICAL PERSPECTIVE

Compelled by rampant discrimination and other abrogations of individual freedoms, Congress enacted the civil rights acts of the 1960's.[12] The need for judicial response to these social problems was pressing. Courts were acutely aware of the congressional intent behind these various enactments and responded to this legislative action favorably.[13] Title VII ac-

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1304, 1309-12 (9th Cir. 1977); Local 154, Retail Wholesale and Dep't Store Union v. Standard Brands, 85 F.R.D. 599, 606 (N.D. Ill. 1979); text & notes 114-18 *infra*.

9. *See* Shelton v. Pargo, Inc., 523 F.2d 1298, 1313 n.53 (4th Cir. 1978); Bartleson v. Dean Whitter, 86 F.R.D. 657, 662 (E.D. Pa. 1980). The *Bartleson* court defines "across-the-board" as an approach that "allege[s] a single or unified underlying policy or pattern of discrimination attributable to the defendant-employer and seeks to rectify the various forms in which the discrimination is manifested." *Id.* Some across-the-board allegations of discrimination focus on an identifiable policy. See text & notes 139-52 *infra*. Others point to an identifiable pattern of discrimination. See text & notes 156-58 *infra*. For further references to the across-the-board approach, *see generally* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969) (accepts and discusses the nature of the across-the-board approach); Hauck v. Xerox Corp., 78 F.R.D. 375, 378 (D. Penn. 1978) (across-the-board approach cannot be used where there is no specific uniform practice or policy of discrimination which is applied throughout the defendant's system); White v. Gates Rubber Co., 53 F.R.D. 412, 413-14 (D. Colo. 1971) (overrules the idea that across-the-board approach per se satisfies Rule 23).

10. For cases supporting the view that the *Rodriguez* decision marks the end of the across-the-board approach, *see* Shelton v. Pargo, Inc., 582 F.2d 1298, 1313 n.53 (4th Cir. 1978); Local 194, Retail Wholesale and Dep't Store Union v. Standard Brands, 85 F.R.D. 599, 606 (N.D. Ill. 1979); Jamerson v. Board of Trustees of Univ. of Ala., 80 F.R.D. 744, 746 (N.D. Ala. 1978).

11. Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 280 & n.20 (4th Cir. 1980); Karan v. Nabisco, 78 F.R.D. 388, 405 (W.D. Pa. 1978); Hauck v. Xerox Corp., 78 F.R.D. 375, 378 (E.D. Pa. 1978).

12. *See generally* LEGAL ASPECTS OF THE CIVIL RIGHTS MOVEMENT 7-34, 79-86 (1965).

13. *See* Senter v. General Motors Corp., 532 F.2d 511, 524 (6th Cir. 1976); Rich v. Martin Marietta Corp., 522 F.2d 333, 340 (10th Cir. 1975); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969). In *Bowe*, the court pointed out that "[t]he clear purpose of Title VII is to bring

tions were brought on behalf of broad classes, and the majority of courts adapted the Federal Rules of Civil Procedure to this new form of action, regarding title VII actions as particularly well-suited for class action treatment.[14] By aggregating similar claims, courts simultaneously served the purposes of both Rule 23 and title VII.[15]

Initially, it was not difficult to meet the prerequisites of Rule 23,[16] particularly since the rule itself calls for class certification as soon as practicable.[17] Based on the material before the court, a judge must make a

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an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, whose who have suffered by it." *Id. See also* Note, *Due Process Rights of Absentees in Title VII Class Actions—The Myth of Homogeneity*, 59 BOSTON U.L. REV. 661, 662-63 (1979).

14. *See, e.g.*, Gay v. Waiters' and Dairy Lunchmen's Union, 549 F.2d 1330, 1333 (9th Cir. 1977); Barnett v. W.T. Grant Co., 518 F.2d 543, 547-48 (4th Cir. 1975); Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 250 (3d Cir. 1975); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968). *See also* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.04[1], at 119 (2d ed. 1948); H. NEWBERG, ON CLASS ACTIONS 121 (1977). Moore states that it has been recognized that title VII is " 'perforce a sort of class action for fellow employees similarly situated. . . .' " 3B MOORE ¶ 23.04[1], at 119.

15. *See* Rosen, *Title VII Classes and Due Process: To (b)(2) or not to b(3)*, 26 WAYNE L. REV. 919, 920 & n.7 (1980). The author points out that it is well-settled that plaintiffs alleging employment discrimination can aggregate their claims in the form of a class action. *Id.* at 920. Part of the benefit of class actions in general is that they tend to avoid the multiplicity of suits, thus promoting judicial expediency. 3B MOORE, *supra* note 14, ¶ 23.02[1], at 35; *see* Note, *Developments—Class Actions*, 89 HARV. L. REV. 1318, 1461 (1979).

16. See text & notes 19-23, 27-31, 34-43, 50-52 *infra*. FED. R. CIV. P. 23 provides the following:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
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> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision
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> (a) are satisfied, and in addition:
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> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
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> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
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> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
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> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.
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> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

17. *See* FED. R. CIV. P. 23(c)(1). The rule specifies that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." *Id.* In order to effectuate the remedial purposes of title VII, courts were reluctant to apply strict standards to title VII class action certification. They attempted to avoid

reasonable determination of whether the requirements of Rule 23 have been satisfied.[18] Consequently, the interpretation of the federal rules in regard to title VII affected the ease or difficulty with which a class would be certified.

The first prerequisite of Rule 23(a) is that the class be so numerous that joinder of all aggrieved persons is impracticable.[19] It was usually very simple to satisfy this provision.[20] For example, in *Scott v. University of Delaware*,[21] the District Court of Delaware pointed out that the numerosity requirement is usually not a barrier to title VII class actions because of the class characteristics inherent in discrimination cases.[22] Title VII actions were brought on the part of classes as broad as, for example, all women similarly situated or all blacks working for a particular international company.[23] The breadth of the classes thus included more than enough plaintiffs to render joinder impracticable.

Rule 23(a)(2) also requires that there be questions of law or fact common to the entire class.[24] Before *Rodriguez*, the majority of courts adopted a liberal application of this prerequisite when certifying title VII class actions.[25] Because prior case law and the federal rules themselves did not define these crucial terms,[26] courts were basically free to apply their own interpretations to this subsection of Rule 23. It was this structural vacuum that made broad-based or across-the-board attacks against pervasive discriminatory practices possible. For example, in *Barnett v. W.T. Grant*,[27] a

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imposition of a discouraging barrier to the initiation of employment discrimination attacks. *See* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1975) (J. Godbold, concurring). *See also* Note, *supra* note 15.

18. *See* Blackie v. Barrack, 524 F.2d 891, 900-01 (9th Cir. 1975). Although this case involved securities rather than title VII, the court did discuss the procedure involved in certifying a class. *See id.* at 900-08. In order for a class action to proceed, the judge must determine the propriety of certification on the basis of whatever facts may be presented at that time and the foreseeable course of future litigation. *Id.* Relying on Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the court reasoned that it did not have to consider the merits of the case in rendering the class certification decision. *See* 524 F.2d at 901 n.17.

19. FED. R. CIV. P. 23(a)(1); see note 16 *supra* for the text of this provision.

20. *See* 3B MOORE, *supra* note 14, ¶ 23.05[11], at 150-51. The author states:

> [N]o hard and fast number rule can or should be stated, since numerosity is tied to "impracticability" of joinder under the specific circumstances. Nevertheless, some general tendencies can be observed. While there are exceptions, numbers under 21 have generally been held to be too few.

Id. (footnote omitted).

21. 68 F.R.D. 606 (D. Del. 1975).

22. *Id.* at 608.

23. *See* Barnett v. W.T. Grant, 518 F.2d 543, 550 (4th Cir. 1975) (plaintiff allowed to represent class of all potential black truck drivers and black applicants for supervisory roles); Long v. Sapp, 502 F.2d 34, 42 (5th Cir. 1974) (plaintiff allowed to represent all women working for defendant company); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969) (plaintiff represented a class of all black employees of defendant employer).

24. FED. R. CIV. P. 23(a)(2). For the text of this provision, see note 16 *supra*.

25. *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 256 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969); Oatis v. Crown Zellerback Corp., 398 F.2d 496, 499 (5th Cir. 1968).

26. *See* Note, *supra* note 13, at 668-70. The author points out that words such as "common questions" or "adequacy of representation" are vague. *Id.* Variations among courts as to the true meaning of such phrases are inevitable. *Id. See also* Comment, *Certification of EEOC Class Suits Under Rule 23*, 46 U. CHI. L. REV. 690, 692-96 (1979).

27. 518 F.2d 543 (4th Cir. 1975).

class comprised of all potential black truck drivers and black applicants for supervisory roles was allowed to proceed as a title VII class action.[28] Reasoning that title VII actions are inherently class actions, the court held that the group was homogeneous.[29] In other words, the allegation of discrimination itself could provide the class with the requisite commonality.[30] The *Barnett* court saw the liberal interpretation of Rule 23 as an important means of facilitating the remedial purposes of title VII.[31]

Another pre-*Rodriguez* case, however, closely analyzed the Rule 23 prerequisite of commonality in relation to title VII class actions. In *Harriss v. Pan American World Airways*,[32] the Northern District Court of California characterized its stance as neutral, as opposed to following the liberal trend in favor of easing certification in title VII cases.[33] The court required that the plaintiff come forward with facts showing that Rule 23 had been satisfied and that the case warranted class action treatment.[34] In addition, the court formulated specific criteria to be used in deciding the important issues of commonality, typicality, and adequacy of representation.[35] The district court concluded that though an implicit breadth is part of a Rule 23(b)(2) type of class action, it does not allow for the abrogation of the requirements of Rule 23(a).[36]

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28. *Id.* at 550.

29. *Id.* at 547. *See also* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124 (5th Cir. 1969); Oatis v. Crown Zellerback Corp., 398 F.2d 496, 499 (5th Cir. 1968).

30. *See* Note, *The Proper Scope of Representation In Title VII Class Actions: A Comment on East Texas Motor Freight System, Inc. v. Rodriguez*, 13 HARV. CIV. LIB. L. REV. 175, 187 (1978). The author asserts that "common interest" can be construed so broadly as to consist of the eradication of discriminatory practices. *Id.* A common injury therefore would be discrimination in violation of title VII. *Id.*

31. *See* 518 F.2d at 547.

32. 74 F.R.D. 24 (N.D. Cal. 1977).

33. *Id.* at 38.

34. *Id.* at 36, 41.

35. *Id.* at 39; text & notes 53-56 *infra*. The *Harriss* court stated that the issue of commonality involved "three-fold requirements that the representative plaintiff (a) have an actionable claim sufficient to give rise to a justiciable controversy, (b) be a member of the class on whose behalf the action is to be maintained and (c) assert a claim raising issues common to the class." 74 F.R.D. at 39. In determining the extent to which the above test has been satisfied, the court suggests that the following issues be considered:

(i) What is the nature of the unlawful employment practice charged—is it one that peculiarly affects only one or a few employees or is it genuinely one having a class-wide impact.

(ii) How uniform or diverse are the relevant employment practices of the employer, considering matters such as: size of the work force; number of plants and installations involved; extent of diversity of employment conditions, occupations and work activities; degree of geographic dispersion of the employees and of intra-company employee transfers and interchanges; degree of decentralization of administration and supervision as opposed to the degree of local autonomy.

(iii) How uniform or diverse is the membership of the class, in terms of the likelihood that the members' treatment will involve common questions.

(iv) What is the nature of the employer's management organization as it relates to the degree of centralization and uniformity of relevant employment and personnel policies and practices.

(v) What is the length of the time span covered by the allegations, as it relates to the degree of probability that similar conditions prevailed throughout the period.

Id. at 41.

36. 74 F.R.D. at 46; see note 16 *infra* for the text of Rule 23(a) and (b)(2). It is worth noting that the *Harriss* decision was motivated in part by the fear that broad interpretation of the rules would "result in the loss of claims of absent class members which, had the class been appropri-

A third prerequisite of Rule 23 demands that the claims or defenses of the representative of the class be typical of the claims or defenses of the entire class.[37] This typicality requirement was viewed by some courts as simply an overlap of the commonality requirement and the Rule 23(a)(4) prerequisite of adequacy of representation.[38] Consequently, this criterion often received nothing more than judicial gloss.[39] For instance, in *Long v. Sapp*,[40] the Fifth Circuit determined that the requirement of typicality did not mandate that all members of the class be in the same situation.[41] The court stated that only a sufficient nexus between the representative and the class need be manifested.[42] Typicality thus was analyzed more in conjunction with the adequacy of representation prerequisite than as a distinctly separate requirement.[43]

Although aware of the virtues of facilitating title VII class actions, some courts approached the typicality requirement with more reticence. In *White v. Gates Rubber Co.*,[44] the Colorado District Court refused to gloss over the requirement of typicality, insisting instead that this provision of Rule 23 be given independent meaning.[45] Consequently, the court

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ately framed, might well have been successfully asserted." 74 F.R.D. at 43. The doctrine of res judicata or collateral estoppel would preclude the assertion of a subsequent action. Thus, even where a class is broad and the claims of individual members may be wholly different, all members would be bound by any final decision. FED. R. CIV. P. 23(c)(2) provides:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specific 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.

Thus, persons who are members of the class and have not opted out would not be able to relitigate their claims. *See* Hansberry v. Lee, 311 U.S. 32, 41 (1940). *See also* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974); Gibson v. Local 40, Supercargoes & Checkers Etc., 543 F.2d 1259, 1263 n.2 (9th Cir. 1976).

37. FED. R. CIV. P. 23(a)(3); see note 16 *supra* for the text of this provision.

38. *See* 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1764, at 611 (1972). It is pointed out that courts have held that the mere lack of adversity between the class representative and the members of the class implies that those claims are typical. *Id.* One author claims that courts before the *Rodriguez* decision interpreted typicality so broadly as to "defeat the very purpose of the requirement: insuring that the class representative in a class action could fairly and accurately represent the fundamental interests and rights of the other members of the class." *See* Rosen, *supra* note 15, at 921 n.9.

39. *See* Barnett v. W.T. Grant Co., 518 F.2d 543, 548 (4th Cir. 1975); Reed v. Arlington Hotel, 476 F.2d 721, 722-23 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 425 (8th Cir. 1970). In general, typicality was analyzed simultaneously with Rule 23(a)(4), the requirement of adequate representation. The criterion was often whether there was a "sufficient nexus" between the named plaintiff and the class. Barnett v. W.T. Grant, 518 F.2d 543, 548 (4th Cir. 1975); Long v. Sapp, 502 F.2d 34, 43 (5th Cir. 1974). *But see* H. NEWBERG, *supra* note 14, at 1297. Newberg notes that courts adopting the across-the-board approach reason that typicality could be treated summarily since it is united with the action by "the common thread of discrimination." *Id.*

40. 502 F.2d 34 (5th Cir. 1974).

41. *Id.* at 42. *See also* Donaldson v. Pillsbury Co., 554 F.2d 825, 829-30 (8th Cir. 1977); DuPree v. S.J. Brach & Sons, 77 F.R.D. 3, 8 (N.D. Ill. 1977); Northern Acceptance Trust 1065 v. AMFAC, Inc., 51 F.R.D. 487, 491 (D. Hawaii 1971).

42. 502 F.2d at 42.

43. *See id.* at 42-43.

44. 53 F.R.D. 412 (D. Colo. 1971).

45. *Id.* at 415.

denied certification of a class consisting of black and Spanish-surnamed persons discharged or employed by the defendant.[46] Criticizing the past interpretations of Rule 23(a)(3), the court maintained that a plaintiff must demonstrate that others he purports to represent have suffered the same injury of which he complains.[47] The court refused to accept the notion that the mere utilization of the across-the-board approach implicitly satisfies the requirements of Rule 23.[48] In contrast to the Fifth Circuit decision in *Long*, the *White* court reasoned that broad allegations of discrimination in and of themselves do not insure that the representatives of the class are typical with respect to the claims proposed.[49]

The final requirement of Rule 23(a) provides that a class representative must fairly and adequately represent the members of the class.[50] This requirement was often passed over in a rather cursory manner. Courts considered the adequate representation requisite along with the typicality requirement, the satisfaction of one being used as an implication of the satisfaction of the other.[51] Like the test applied for the typicality requirement, the criteria for adequate representation required a "sufficient nexus" between the named plaintiff and the class.[52]

In *Harriss v. Pan American World Airways, Inc.*,[53] the Northern Dis-

46. *Id.* at 414.

47. *Id.* at 415.

48. *Id.; accord*, Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975). In *Taylor*, the Tenth Circuit affirmed the Colorado District Court's significant narrowing of a class of all black employees of the defendant to those who work in the frozen foods center of the Denver distribution center. *Id.* at 271. Citing the *White* definition of typicality with approval, the Tenth Circuit held that since the plaintiff "failed to show the existence of any discriminatory employment practices by Safeway outside the frozen food warehouse or the existence of any similarly aggrieved Safeway employee outside the warehouse, the trial court has no alternative [but] to limit his class claim to warehouse employees." *Id.* at 270. The court insisted that this was true despite the fact that the plaintiff had adopted an across-the-board approach. "If the mere assertion of widespread employment discrimination were sufficient to satisfy the typicality requirement, subsection (a)(3) would again be rendered superfluous, since it would be unrealistic for a court to compare the claims and defenses of the plaintiff with the hypothetical claims of a hypothetical class." *Id.* at 270-71.

49. 53 F.R.D. at 415. *See also* Harriss v. Pan American World Airways, Inc., 74 F.R.D. 24 (N.D. Cal. 1977), where the court formulated a three-part test to aid in the analysis of Rule 23(a)(3): 1) Is the plaintiff's situation typical to that of the class? 2) Are the circumstances surrounding the plaintiff's grievance typical of those relating to the claim of the class? 3) Will relief sought by the plaintiff benefit the class? *Id.* at 42.

50. FED. R. CIV. P. 23(a)(4); see note 16 *supra* for the text of this provision. This requirement of Rule 23 demands that the named plaintiffs protect the interests of absent class members in a vigorous, tenacious, and effective manner and that the attorneys representing such a class be qualified, experienced, and generally able to conduct class litigation. Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir. 1969); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124-25 (5th Cir. 1969).

51. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1098 (1976). *See also* Long v. Sapp, 502 F.2d 34, 43 (5th Cir. 1974).

52. Long v. Sapp, 502 F.2d 34, 43 (5th Cir. 1974). *But see* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1124-25 (5th Cir. 1969), *citing* Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968). The court implicitly recognized that adequacy of representation is its own Rule 23 requirement and that it warrants separate and careful analysis. *See* 417 F.2d at 1124-25. The court noted that "[a]n essential concomitant of adequate representation is that the party's attorney be qualified, experienced, and generally able to conduct the proposed litigation. Additionally it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class." *Id.*

53. 74 F.R.D. 24 (N.D. Cal. 1977).

trict Court of California resisted the glossing over of the Rule 23(a)(4) factor.[54] In analyzing the adequacy of representation in a class action, the *Harriss* court held that the plaintiff's interests must be shown not to be antagonistic to those of the remainder of the class.[55] The court pointed out that such antagonism is possible even though the class has satisfied the typicality prerequisite of Rule 23(a)(3).[56]

In addition to the Rule 23(a) requirements, class certification also requires that plaintiffs meet the prerequisites under one of the three subsections of Rule 23(b).[57] In title VII actions, class plaintiffs have almost universally chosen the Rule 23(b)(2) criterion,[58] which requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ."[59] If a class is certified under this subsection rather than under an appropriate alternative subsection of part (b) of Rule 23, plaintiffs need not give members of the purported class notice and an opportunity to opt out of the class; class members thus cannot avoid the binding effect of a final decision.[60] The Rule 23(b)(2) class action is therefore often selected for its procedural simplicity.[61] An assumption of class homogeneity is used to justify the relaxed procedural requirements.[62]

An illustration of adherence to the above analysis can be found in *Wetzel v. Liberty Mutual Insurance Co.*[63] There, the Third Circuit held that in order to qualify as a Rule 23(b)(2) class action, plaintiffs had only to show that Liberty Mutual had acted in a way that would make injunctive relief suitable.[64] The court reasoned that once the need for injunctive relief was known, the class was cohesive—unified by the common characteristic of discrimination.[65] Before *Rodriguez*, many courts made the similar assumption that title VII actions were by their very nature homogeneous class actions[66] in order to justify, as did the *Wetzel* court, the

54. *Id.* at 42.
55. *Id.*
56. *Id.* at 44.
57. FED. R. CIV. P. 23(b); see note 16 *supra* for the text of this provision.
58. *See* Note, *supra* note 13, at 665-66. *See also* B. SCHLEI & P. GROSSMAN, *supra* note 51, at 1108. Civil rights cases are the traditional Rule 23(b)(2) class action. *Id.* Apparently no title VII case ever has been certified under Rule 23(b)(1). *Id.* at 34 n.64.
59. FED. R. CIV. P. 23(b)(2); see note 16 *supra* for the text of this provision.
60. FED. R. CIV. P. 23(b)(1); see note 16 *supra* for the text of this provision. *See also* FED. R. CIV. P. 23(c)(1) & (2) for the notice requirements in class actions. See note 36 *supra* for the text of this provision.
61. *See* Note, *supra* note 13, at 665-66.
62. *See* text & notes 63-65 *infra*. *See also* Note, *supra* note 13, at 666. The author points out that "[B]ecause the (b)(3) category anticipates some degree of diversity of interest—common questions need only 'predominate'—the drafters added procedural restrictions not applicable to (b)(1) and (b)(2) actions." *Id.* The author goes on to point out the difficulty of ascertaining the degree of homogeneity that does in fact exist within the class. *Id.*
63. 508 F.2d 239 (3d Cir. 1975).
64. *Id.* at 250-51. Under Rule 23(b)(2), injunctive relief is appropriate when the grounds for the actions of the party opposing the class have been generally applicable to the class. Thus, the same actions would both justify imposition of injunctive relief and constitute part of the requisite commonality. *Id.* at 250-51.
65. *Id.* at 255.
66. *See* text & note 25 *supra*.

need for less stringent procedural safeguards.[67]

Faced with the need to facilitate title VII actions and a desire to serve its remedial purposes, pre-*Rodriguez* courts took a liberal approach to the application of Rule 23. The across-the-board attack was used often, and many courts regarded it as appropriate in title VII actions. This approach was read as implicitly satisfying all the requirements of Rule 23. In the midst of this liberal trend, however, there were a number of courts that refused to gloss over the requirements of the federal rules. Although opinions like *Harriss* and *White* did not object to the across-the-board approach per se, they did reject the notion that across-the-board discrimination allegations somehow implicitly satisfied the requirements of Rule 23. Due to this uncertainty among courts, the time was ripe for the *Rodriguez* decision.

THE *RODRIGUEZ* DECISION

In *East Texas Motor Freight v. Rodriquez*,[68] the United States Supreme Court reversed a Fifth Circuit certification of a title VII class action and affirmed the dismissal of the plaintiffs' claims.[69] The respondent was a Spanish surnamed employee who held the position of a city truck driver, as opposed to an over-the-road or line truck driver.[70] The company's policy disallowed an employee transfer from city driver to line driver.[71] Suit was brought on behalf of all black and Spanish surnamed city drivers and applicants for line driver jobs in petitioner's company, alleging that the defendant's employment practices were racially discriminatory.

The district court dismissed both the individual and class claims since the plaintiffs failed to move for class certification.[72] The Fifth Circuit reversed, ruling that the class action could not be dismissed solely on the ground that the plaintiffs had failed to move for class certification.[73] The court found that it was the responsibility of the district court itself to note existence of the class when necessary.[74] The Fifth Circuit thus certified the class, holding that the claims against the no-transfer rule and the seniority system were legitimate complaints.[75]

The United States Supreme Court reversed the Fifth Circuit's decision.[76] The Court held that certification of the class was not warranted since named plaintiffs were not proper class representatives under Rule

67. Wetzel v. Liberty Mut. Life Ins. Co., 508 F.2d 239, 253 (3d Cir. 1975). The court stated that "the procedural protections of (b)(3), opting out and notice, are necessary because of the heterogeneity of the (b)(3) class. They are unnecessary for the homogeneous (b)(2) class." *Id.* Much of the court's reasoning was motivated by a desire to encourage, rather than to discourage, title VII class action suits. *Id.* at 254.

68. 431 U.S. 395 (1975).

69. *Id.* at 403.

70. *Id.* at 398-99.

71. *Id.*

72. *Id.*

73. *Id.* at 401.

74. *Id.*

75. *Id.* at 402.

76. *Id.* at 403.

23.[77] Relying on the facts as found by the district court, a unanimous Court held that these representatives neither suffered the "same injury" nor possessed the "same interest" as the rest of the class.[78] Because the trial court found that the plaintiffs lacked the qualifications to be hired as line drivers,[79] it was impossible for them to have suffered an injury that was the result of discriminatory practices. The *Rodriguez* Court further added:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of [Rule 23 of the Federal Rules of Civil Procedure] remains nonetheless indispensable.[80]

The interpretations of the *Rodriguez* decision have been far from uniform. The decision's effect on title VII class actions and the across-the-board approach has been the subject of widespread judicial debate.

THE IMPACT OF *RODRIGUEZ*

Since the *Rodriguez* decision was handed down, much confusion has occurred concerning its effect on future title VII class actions. Although the decision focused primarily on the issue of class representation, it also discussed the importance of the rest of the Rule 23 requirements. Since the majority of courts prior to *Rodriguez* had adopted a relatively lax approach to the application of Rule 23,[81] they were able to certify title VII class actions on an across-the-board basis. After *Rodriguez*, however, the future of such broad discriminatory attacks is questionable.

Post-*Rodriguez* courts invariably differ with respect to the real meaning of that decision. Because *Rodriguez* was ultimately decided on the representation prerequisite of Rule 23,[82] some courts take the view that its holding and influence should be confined to that area, dismissing the rest of the opinion as dicta.[83] Other courts inflexibly assert that *Rodriguez* mandates careful and unequivocal adherence to Rule 23.[84] The courts that favor this interpretation maintain that because the burden is clearly on title VII plaintiffs to show satisfaction of the Rule 23 requirements, it signals an end to the traditional across-the-board approach.[85] Finally, a number of courts have adopted what will be referred to as an intermediate approach.[86] This view is quite similar to the so-called strict approach but accepts the possibility of adopting the across-the-board approach when statistics or other empirical facts demonstrate the existence of a pervasive

77. *Id.*
78. *Id.* at 403-05.
79. *Id.* The court added that other factors, such as failure to move for class certification and inter-class antagonism, made these plaintiffs particularly inadequate representatives. *Id.*
80. *Id.* at 405.
81. See text & note 16 *supra*.
82. See text & notes 77-79 *supra*.
83. See discussion of the lenient interpretation of *Rodriguez* at text & notes 88-95 *infra*.
84. See text & note 114 *infra*.
85. *Id.*
86. See text & notes 139-52 *infra*.

pattern of discrimination.[87] These three views will be examined in detail.

The Liberal Approach

The liberal approach to Rule 23 has been argued by some courts to be viable despite the *Rodriguez* decision. Courts base this argument on the fact that *Rodriguez* was a case that dealt primarily with the issue of adequate representation.[88] The language mandating that close attention be paid to the rest of Rule 23 is dismissed as merely dicta.[89] These courts simply insist that the remedial purposes of Rule 23 must be facilitated.[90]

For example, in *Gill v. Monroe County Department of Social Services*,[91] the Western District Court of New York held that a class consisting of all present, past, and potential employees of the defendant was valid despite the fact that the complaint only alleged broad discriminatory practices and policies.[92] *Rodriguez* was distinguished as a pre-certification case concerned primarily with the adequacy of the plaintiffs to represent the entire class.[93] The court held that representation was not a problem in *Gill* since there was a sufficient showing of similarity between the representatives and the class.[94] The district court added that courts should not adopt too restrictive a view of Rule 23 when certifying class actions under title VII because such an approach would thwart the congressional intent and purpose of title VII.[95]

In *Wajda v. Pennsylvania Mutual Life Insurance Co.*,[96] the Eastern District Court of Pennsylvania likewise certified a class consisting of female employees on the basis of an across-the-board attack on the employer's pervasive policy of sexual discrimination.[97] The rationale underlying this holding was that courts must facilitate the remedial purposes of title VII by lessening the burden of bringing title VII class actions.[98] Reasoning that the across-the-board approach allows for a broad view of the common issues of fact or law, the court stated that the result is a "judicial relaxation of the Rule 23(a)(2) and (3) requirements of commonality and typicality in Title VII cases."[99] The *Wajda* court dist-

87. *Id.*

88. *See* Doe v. First City Bancorp., Inc., 81 F.R.D. 562, 570 (S.D. Tex. 1978); Wajda v. Pennsylvania Mut. Life Ins. Co., 80 F.R.D. 303, 308 (E.D. Pa. 1978); Gill v. Monroe County Dep't of Social Serv., 79 F.R.D. 316, 329 (W.D.N.Y. 1978). *See also* text & note 90 *infra*.

89. Cases cited in note 88 *supra*; *see* 431 U.S. at 405 for the language concerning strict adherence to the Rule 23 requirements.

90. *See, e.g.*, Beasely v. Griffin, 81 F.R.D. 114, 116 (D. Mass. 1979); Garrett v. R.J. Reynolds Indus., 81 F.R.D. 25, 29 (M.D.N.C. 1978); DuPree v. E.J. Brach & Sons, 77 F.R.D. 3, 7 (N.D. Ill. 1977).

91. 79 F.R.D. 316 (W.D.N.Y. 1978).

92. *Id.*

93. *Id.* at 329.

94. *Id.*

95. *Id.* at 328.

96. 80 F.R.D. 303 (E.D. Pa. 1978).

97. *Id.* at 307-08.

98. *Id.* at 310. The *Wajda* court stated that "[t]he 'across-the-board' approach, aimed at facilitating enforcement of Title VII, should not be applied narrowly in cases where the broadest discrimination is alleged to have occurred." *Id.*

99. *Id.* at 307. *See also* Barnett v. W.T. Grant Co., 518 F.2d 543, 547 (4th Cir. 1975); Long v.

inguished *Rodriguez* by stating that in *Rodriguez* there was a failure to meet the Rule 23 requirement of adequate representation.[100] This fact alone, the court reasoned, could not have meant an end to all broad allegations of discrimination.[101] Ultimately, the district court found that the requirements of Rule 23 had been satisfied, though this was accomplished by a broad reading of the facts of the case as well as a flexible interpretation of the Rule 23 requirements in title VII cases.[102]

The reasoning of the courts adopting this liberal approach is fallacious in a number of respects. First, *Rodriguez* cannot be confined to the issue of adequacy of representation. Given the fact that all of the Rule 23(a) requirements are interrelated,[103] this view simply is not plausible. Since one cannot represent a class unless claims are similar, a class comprised of antagonistic claims cannot ever be adequately represented.[104] The logistics of Rule 23 suggest that one factor demands the presence of another. Although there can be factual discrepancies,[105] the class representative is utterly impotent if he is atypical of the class he purportedly represents.[106] The language of *Rodriguez* itself implies that adequacy of representation was not the only issue.[107] That language cannot be ignored.

Second, although the aims of this liberal view are sympathetic with aggrieved plaintiffs, the potential hazards of indiscriminate class certification are overlooked.[108] First, because of the nature of the Rule 23(b)(2) class action,[109] no notice or opt-out provision would have to be utilized.

Sapp, 502 F.2d 34, 43 (5th Cir. 1974); Molthan v. Temple Univ., 83 F.R.D. 368, 373 (E.D. Pa. 1979); Ciarrochi v. Provident Nat'l Bank, 83 F.R.D. 357, 360 (E.D. Pa. 1979).

100. 80 F.R.D. at 308.

101. *Id.* The *Wajda* court stated that "it is difficult to understand how *Rodriguez*, which involved (1) class membership, (2) standing, and (3) the adequacy requirement of Rule 23, could be taken as a rejection of the [across-the-board] approach." *Id.*

102. *See id.* at 311. It is worth noting, however, that the court's holding was undercut by the following admonishment: "[C]onsiderations of convenience or 'manageability' should not be smuggled into the commonality analysis required by Rule 23(a)(2)." *Id.*

103. *See* C. WRIGHT & A. MILLER, *supra* note 38, § 1761, at 585.

104. *See* Note, *supra* note 15, at 1458-60. The author points out that the requirement of typicality necessarily involves scrutiny of the relationship between the representatives and the class. *Id.* The same may be said concerning analysis of the adequacy of representation issue. *Id.* at 1460.

105. *See* Long v. Sapp, 502 F.2d 34, 42 (5th Cir. 1978); DuPree v. E.J. Brach & Sons, 77 F.R.D. 3, 8-9 (N.D. Ill. 1977).

106. *See* Strong v. Arkansas Blue Cross & Blue Shield, Inc., 87 F.R.D. 496, 508 (E.D. Ark. 1980). In denying certification to a class consisting of all blacks and all females, the court pointed out that "[b]oth evidenced and innate antagonisms foreclose certifying these black female plaintiffs as representatives both of all blacks and all females." *Id.* The analysis involved consideration of the requirements of Rule 23(a)(4) as well as Rule 23(a)(3). *Id.*

107. *See* 431 U.S. at 405. The *Rodriguez* Court stated the following: "We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable." *Id.*

108. Note, *supra* note 13, at 668. For example, the representative may not be truly adequate and unrepresented plaintiffs will not have their grievances properly asserted. *Id.* "Put simply, may a black chambermaid represent all black chambermaids in one hotel owned by the defendant? In all of the defendant's hotels in the region? In the country?" *Id.* Furthermore, some forms of injunctive relief will satisfy some class members and not others. *Id.* at 673. Some members may want job reinstatement while others might be satisfied with back pay.

109. See text & notes 58-62 *supra*; note 16 *supra* for the text of Rule 23(b)(2).

Homogeneity would be presumed.[110] Thus, if the representative was not truly typical of his class, he might not vigorously assert a dissimilar claim. Yet the class member would receive no notice and would be bound by the decision.[111]

Finally, broad-based attacks on an employer would be allowed to encompass tremendous geographical areas under a mere assumption of homogeneity.[112] Courts have already established that identical questions of law or fact need not be common,[113] but in classes consisting of largely dispersed members, the possibility of antagonistic claims would be great.

The Strict Approach

A second interpretation of *Rodriguez* mandates strict and unequivocal adherence to Rule 23. The courts that favor this interpretation maintain that it can only mean an end to the traditional across-the-board approach.[114] For instance, in *Shelton v. Pargo, Inc.*,[115] the Fourth Circuit took a strict stance on the implications of *Rodriguez*.[116] The court insisted that class actions could not be allowed to proceed indiscriminately since

110. *See* Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 253 (3d Cir. 1975). Although a pre-*Rodriguez* decision, *Wetzel* illustrates the reasoning that title VII actions and all Rule 23(b)(2) actions are inherently homogeneous. *Id. But see* Note, *supra* note 13, at 668. The author points out that while it is possible for a title VII class to consist of a uniform claim, such a group is not necessarily homogeneous. *Id.*

111. FED. R. CIV. P. 23(c)(3). This provision provides in pertinent part: "The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class." *Id.* This provision becomes extremely important since unnamed plaintiffs will not have had an opportunity to opt out or to present their claims. *See* Rosen, *supra* note 15, at 924. Its significance is even greater in title VII class actions which award back pay and money damages. *See* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

112. *See* Hansberry v. Lee, 311 U.S. 32, 41 (1940). Theoretically, absent members of a class would be protected as long as all the requirements of Rule 23 are met. *Id.* This demonstrates the importance of making certain that there is compliance with those requirements. *Id.* Adopting an approach similar to the one used by the *Wajda* court, see text & notes 106 & 108 *supra*, permits dangerous assumptions of homogeneity which may not be realistic in certain situations. *See* Note, *supra* note 13, at 668.

The *Wajda* court's form of reasoning leads to the conclusion that even broad questions of fact or law imply satisfaction of the typicality requirement and adequacy of representation. Wajda v. Pennsylvania Mut. Life Ins. Co., 80 F.R.D. 303, 308 (E.D. Pa. 1978). In White v. Gates Rubber Co., 53 F.R.D. 412, 415 (D. Colo. 1971), however, the Colorado District Court rejected this notion and insisted that the plaintiff must demonstrate that his complaint is the same as the grievances of the class he purportedly represents.

113. Donaldson v. Pillsbury Co., 554 F.2d 825, 831 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977); Gibson v. Local 40, Supercargoes & Checkers of Internat'l Longshoremen's & Warehousemen's Union, 543 F.2d 1259, 1264 (9th Cir. 1976); Karan v. Nabisco, Inc., 78 FRD 388, 403 (W.D. Penn. 1978).

114. *See* Shelton v. Pargo, Inc., 582 F.2d 1298, 1313 (4th Cir. 1978); Local 194, Retail Wholesale and Dep't Store Union v. Standard Brands, 85 F.R.D. 599, 606 (N.D. Ill. 1979); Jamerson v. Board of Trustees of Univ. of Ala., 80 F.R.D. 744, 746 (D. Ala. 1978). In *Jamerson*, the court criticized the across-the-board or "broad brush" approach. "The fallacy of this approach is that it begs the question of compliance with the requirements of Rule 23, Federal Rules of Civil Procedure, in Title VII cases. This presumptive attitude allows no evaluation of the individual's claim as to the suitability of the class method." *Id.*

115. 582 F.2d 1298 (4th Cir. 1978).

116. *See id.* at 1312. The issue on appeal concerned the procedure to be followed by a trial court in ruling on a motion for voluntary dismissal of a class action before the class has been certified under Rule 23(c)(1). *Id.* at 1300. The court was attempting to attain prevention of the misuse of the class action procedure. *Id.* at 1311.

misuse of the class action vehicle could be detrimental to absent members of the class as well as defendants.[117] The court advocated stringent application of the Rule 23 requirements and criticized class suits supported merely " 'by boiler-plate memoranda laden with self-serving conclusions.' "[118]

The Fourth Circuit went on to suggest that *Rodriguez* may indeed sound the "death knell" for across-the-board suits in discrimination cases.[119] The traditional across-the-board approach implicitly calls for a relaxation of the Rule 23(a) requirements. The plaintiffs who brought the action in *Shelton*, however, were unsuccessful in arguing for a lessening of their Rule 23 burden based on the need for the facilitation of the remedial purposes of title VII.[120]

In another post-*Rodriguez* decision, the Northern District Court of Illinois certified a class only after considerably narrowing its scope and allegations. In *Local 194, Retail Wholesale and Department Store Union v. Standard Brands*,[121] plaintiffs sought certification of a class consisting of all persons discriminated against on the basis of race, national origin, or sex.[122] The court noted that the allegations were across-the-board in nature and that the plaintiffs had sought relief accordingly.[123] The district court interpreted *Rodriguez* as necessarily rejecting a liberal reading of Rule 23 with respect to across-the-board title VII class actions.[124] In essence, the court demanded that strict attention be paid to fulfillment of all prerequisites of Rule 23. General compliance was held to be unacceptable.[125]

While the strict approach would undoubtedly prevent the launching of unwarranted class actions,[126] it contains a number of major flaws. First, plaintiffs with cases that can be proven but which contain essentially broad allegations covering wide geographical areas would be dissuaded from

117. *Id.* at 1311. The *Shelton* court adamantly opposed the cavalier treatment of title VII class actions. *Id.* "Discrimination cases do not qualify as per se class actions; they must meet the requirements of 23(c)(1) for class certification the same as any other type of action. . . ." *Id.* at 1312.

118. *Id.*

119. *Id.* at 1313 n.53.

120. See text & notes 103-08 *supra*. *But see* Wajda v. Pennsylvania Mut. Life Ins. Co., 80 F.R.D. 303, 307 (E.D. Pa. 1978), where the court allowed the type of relaxation of judicial standards that the *Shelton* court so adamantly opposed.

121. 85 F.R.D. 599 (N.D. Ill. 1979).

122. *Id.* at 601-02. The complaint alleged that females were laid off more readily, and that males occupied significantly more senior positions. *Id.*

123. *Id.* at 603. In defending against a motion to decertify the class, the plaintiff argued that the approach was across-the-board, rendering it unnecessary that named plaintiffs suffer each and every type of injury allegedly suffered by the class members. *Id.*

124. *Id.* at 605.

125. *Id.* The court stated that *Rodriguez* is an "admonition that compliance with Rule 23(a) remains indispensible in Title VII actions" which mandates "a rejection of the 'across-the-board' theory as an interpretation of the general class action principles." *Id.* at 606.

126. *See* Shelton v. Pargo, Inc., 582 F.2d 1298, 1313 (4th Cir. 1978). The *Shelton* court was concerned about the motive behind the bringing of class actions. *Id.* at 1311. The court noted that attorneys seemed to feel that bringing a class action suit could benefit their professional status. *Id.* The court consequently sought to "checkmate the evils of misuse and prejudice" that could harm absent members, *id.*, and to discourage the use of the class action mechanism for its nuisance value. *Id.* at 1315.

bringing a title VII class action when such an action may be warranted.[127] As will be discussed later in this Note, there may be broad classes that can satisfy Rule 23 with the aid of statistics or a readily identifiable employment policy or practice.[128] Such plaintiffs must not be discouraged before attempts are made to substantiate the existence of a class. Though policy reasons might not be the decisive factor in determining the application of Rule 23, it is imperative that they be considered.[129] Congress had a purpose in mind when title VII was promulgated,[130] and this purpose deserves its due consideration.

The second flaw in reading *Rodriguez* as an unequivocal end to all across-the-board cases of discrimination is actually a criticism of the rationale courts have used for dissuading this type of action. As *Shelton* illustrates, some courts have presumed that adopting the across-the-board approach necessarily involves a relaxation of the requirements of Rule 23.[131] This is not necessarily so. In *Alexander v. Gino's, Inc.*,[132] the Third Circuit upheld a district court's denial of class certification to a class consisting of all women working for the defendant.[133] The plaintiff's argument was that all women working for the defendant were subject to its discriminatory policies in hiring, firing, and promotion.[134] The claim against the defendant was highly individualized in nature, however, and was not related to the issue of the defendant's policies and practices.[135] Consequently, the court emphasized that the claim's failure was not due to the fact that the allegation was across-the-board in nature.[136] Such a claim could be maintained, the court reasoned, if the threshold requirements of Rule 23 were satisfied.[137] The court's decision thus implies that it is possible to satisfy Rule 23 even where an employment policy provides the basis of a claim.[138] Plaintiffs in this case simply did not satisfy the initial re-

127. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1126 (5th Cir. 1969). The *Johnson* court pointed out that courts must not impose discouraging barriers to title VII class actions that would thwart the remedial purposes of title VII. *Id.*

128. See text & notes 129-59 *infra* for a discussion of the across-the-board approach which involves a particular employment policy.

129. *See* Note, *supra* note 30, at 199. The author points out the importance of allowing across-the-board title VII class actions. He states, "If, however, the court is ready to reject such broad class certification, it should first consider its importance both to class action policy and to the effective enforcement of title VII." *Id.*

130. Advisory Committee's Note to Proposed Amendments to Rule 23, 39 F.R.D. 69, 102 (1966).

131. Shelton v. Pargo, 582 F.2d 1298, 1313 n.53 (4th Cir. 1978).

132. 621 F.2d 71 (3d Cir. 1980).

133. *Id.* at 73.

134. *Id.*

135. *Id.* at 72-73. The plaintiff was an assistant manager who consistently received high ratings in her job. *Id.* at 72. Her complaint began when a male in her region was promoted to manager. *Id.* Although plaintiff finally received a promotion also, her ratings went down. *Id.* When sales declined in the area to which she had been transferred, she complained to the area manager. *Id.* She was then transferred again, but the transfer was to another area with low sales volume. *Id.* at 73. When a certain sum of money was missing from the store she managed, the plaintiff was suspended. *Id.* Plaintiff then sought certification of a class of all past and future victims of these practices. *Id.*

136. *Id.* at 75.

137. *Id.*

138. *See id.* at 74-75.

quirements of Rule 23.[139]

The Intermediate Approach

An intermediate approach adopted by some courts lies somewhere between the cases that see *Rodriguez* as an end to the across-the-board approach and those that urge a relaxed or highly flexible application of Rule 23 to title VII class actions. Unfortunately, case law does not fall into such readily discernible categories. At times it may be difficult to determine what test is being applied. In fact, many decisions are confused and render uncertain any interpretation of how to apply the federal rules.[140] It is clear, however, that a vast majority of the courts recognize the *Rodriguez* demand that plaintiffs demonstrate compliance with the requirements of Rule 23. Under the intermediate approach, this burden can be carried in across-the-board cases if facts are introduced that support such compliance. If the plaintiff proves the existence of a particular employment policy or satisfies its burden with the use of statistics, an across-the-board approach is still acceptable.[141]

In *Karan v. Nabisco*,[142] the Western District Court of Pennsylvania explained how the across-the-board approach can be utilized without offending Rule 23.[143] The court affirmed the certification of a class of all present and future female employees and job applicants at Nabisco's bakeries.[144] The claim rested upon an assertion that women placed in male jobs were harassed and that the defendant discriminated against females in layoffs, seniority, wages, job classifications, promotion, job transfer, overtime opportunity, shift selection, job bidding, grooming policies, and maternity leave and benefits.[145] The claim was clearly across-the-board in nature.[146]

The *Karan* court carefully went through all of the prerequisites[147] of Rule 23 and applied them to the facts of the case. The court stated that in title VII cases, courts must be receptive to the use of class actions as a means of affording plaintiffs broad-based relief, but they must also respect

139. *Id.*

140. For example, in Black Grievance Comm. v. Philadelphia Elec. Co., 79 F.R.D. 98 (D. Pa. 1978), the court insisted that broad allegations of discrimination be supported by a showing of a company-wide practice or pattern. *Id.* at 106. But the court went on to adopt a very liberal approach, holding that the across-the-board approach itself might suffice. *Id.* at 107. Thus, while initially it appeared that the court was going to consider each of the Rule 23 requirements in regard to the facts, the decision was actually a prime example of the liberal approach. *See id.* at 106.

141. *See generally* H. NEWBERG, *supra* note 14, at 1268. The author praises the across-the-board approach, pointing out that it "enables the court to scrutinize, not merely individual acts of discrimination, but rather the panorama of unlawful employment policies that may underlie the individual incidents." *Id.* Newberg goes on to state that commonality is always evident when the allegation focuses on a particular rule or practice. *Id.* at 1290.

142. 78 F.R.D. 388 (W.D. Pa. 1978).

143. *Id.* at 403-07.

144. *Id.* at 407.

145. *Id.* at 395.

146. *See id.*

147. *Id.* at 403-07.

the Federal Rules of Civil Procedure.[148] With respect to commonality, the court held that a plaintiff must show that the policy being challenged applied to the whole class and was not an isolated occurrence.[149] When, as in *Karan*, the policy is challenged on a nationwide level, the plaintiff must also show that the various branches of the defendant's company have essentially the same policy.[150]

While diverse factual and legal issues might arise once the action proceeds, the *Karan* court found that certification could still be granted since the court could not foresee confrontation with a multitude of individual fact patterns.[151] The court held that the plaintiff had satisfied the burden of showing that her claims were typical of the entire class and not unique or confined to an individual fact situation.[152] Finding no antagonism between the named plaintiff and the rest of the class, the *Karan* court held that the plaintiff was also an adequate representative under Rule 23(a)(4).[153] By following this type of careful analysis, the court in *Karan* demonstrated how an across-the-board attack could satisfy the requirements of Rule 23.

In *Bartleson v. Dean Whitter & Co.*,[154] the Eastern District Court of Pennsylvania held that a title VII action attacking employment policies brought by a class consisting of all minority groups could not be certified as alleged[155] and required that the class be narrowed.[156] The court went on to discuss the impact of *Rodriguez* on across-the-board class actions, defining its approach as requiring an allegation of a single or unified un-

148. *Id.* at 406.

149. *Id.* at 403-04.

150. *Id.* The amount of proof required of plaintiffs who wish to impute the employment practices of one facility to all of a defendant's facilities often depends on a court's general attitude toward class certification of title VII actions. The more liberal courts are less demanding with respect to facts necessary to support drawing of inferences. One generalization can be made, though, regardless of a particular court's attitude. The burden is on the plaintiff to show, at the very least, a pattern of discrimination throughout the defendant's facilities. *See* Hauck v. Xerox Corp., 78 F.R.D. 375, 378 (E.D. Cal. 1978). The purpose of requiring this type of proof is to insure the homogeneity of the class. The plaintiff must show that all members of the class suffer from a system-wide policy of discrimination "emanating from the central corporate administration." Karan v. Nabisco, 78 F.R.D. 388, 399 (W.D. Pa. 1978). *See also* Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1311 (9th Cir. 1977); I.M.A.G.E. v. Bailar, 78 F.R.D. 549, 555-56 (N.D. Cal. 1978); Martinez v. Bethlehem Steel Corp., 78 F.R.D. 125, 128 (E.D. Pa. 1978); Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 471-72 (N.D. Cal. 1978).

In a decision demonstrating more reverence toward *Rodriguez* than most cases, the Fourth Circuit criticized the lower court for engaging in "leaps of inference" and speculation. Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 278 (4th Cir. 1980). The Fourth Circuit stressed that the dispersion of Southern Bell's work force throughout many geographically separated facilities was a significant factor that had not received sufficient consideration by the lower court in its class certification decision. *Id.* The court therefore proceeded to narrow the proposed class, emphasizing the importance of commonality in multi-facility cases. *Id.* at 280 n.20. The court did state, however, that the commonality requirement could be met by showing "pattern or practice" in a multi-facility setting. *Id.* at 278. The court went on to suggest various methods of proof on this point. *Id. See also* Karan v. Nabisco, 78 F.R.D. 388, 404 (W.D. Pa. 1978); text & notes 161, 173, 177 & 179 *infra* for examples of statistical analyses.

151. 78 F.R.D. at 405.

152. *Id.* at 405-06.

153. *Id.*

154. 86 F.R.D. 657 (E.D. Pa. 1980).

155. *Id.* at 674.

156. *Id.* at 661.

derlying policy or pattern of discrimination.[157] The court reasoned that those who oppose the approach do so because of an erroneous belief that a class representative's situation must be factually indistinguishable from the rest of the class.[158] "We think it evident," stated the court, "that the [*Rodriguez*] Court did not intend to so emasculate the class action device in Title VII suits."[159] The across-the-board approach thus was held to be an effective means of maintaining title VII actions, since Rule 23 can be satisfied when a particular policy is challenged.[160]

Where pervasive discriminatory practices are alleged but no specific policy is identified, it is still possible to satisfy even the most pragmatic interpretations of Rule 23 and *Rodriguez*.[161] The requirements of Rule 23 might still be satisfied if the plaintiff can introduce statistics that empirically demonstrate the existence of a pattern of discrimination.[162] The important thing, however, is that there must be a showing of facts sufficient to support the allegations of discrimination.

In *Doninger v. Pacific Northwest Bell, Inc.*,[163] the Ninth Circuit rejected a liberal interpretation of Rule 23 in insisting that *Rodriguez* demands a demonstration of facts to support the federal rule.[164] Thirty-one female employees of Pacific Northwest Bell brought an action under title VII alleging that the defendant had engaged in illegal sex discrimination practices.[165] The district court denied certification on the grounds that the requirements of Rule 23 had not been met.[166] The Ninth Circuit rejected appellants' argument that a liberal interpretation of the Rule be adopted, stating, "A liberal interpretation of Rule 23 standing alone, however, is no substitute for at least a minimal showing of facts supporting the class action allegations. Mere invocation of the language of Rule 23 in Title VII

157. *Id.* at 662.
158. *Id.*
159. *Id.* at 663.
160. *Id.* at 666. The court did specify, however, that facts must be produced showing the existence of such a policy or practice. *Id. See also* H. NEWBERG, supra note 14, at 1290. This is quite different from the theory adopted by the liberal courts. These courts might certify a class on the basis of a general allegation of discrimination, asserting that commonality is satisfied since the very issue of discrimination would be common to all class members despite any factual discrepancies. *See* Edmondson v. Simon, 86 F.R.D. 375, 380 (N.D. Ill. 1980) ("[w]here an across-the-board or permeating policy of discrimination is alleged in a class action, the requirement under Rule 23(a)(2) of commonality is satisfied"); Ciarrochi v. Provident Nat'l Bank, 83 F.R.D. 357, 360, 364 (E.D. Pa. 1976) (court noted that the across-the-board method can be used but class was denied certification because complaints were individualized in nature); Note, *supra* note 30, at 187.
161. Ciarrochi v. Provident Nat'l Bank, 83 F.R.D. 357, 360-61 (E.D. Pa. 1979). In *Ciarrochi*, the court insisted that an across-the-board approach is not limited to cases where there is a plainly identifiable policy. *Id.* It held that this was really a discovery issue and that plaintiff should be allowed to show facts supporting the issues of commonality and typicality. *Id.* at 362. *See also* Black Grievance Comm. v. Philadelphia Elec. Co., 79 F.R.D. 98, 107 (E.D. Pa. 1978).
162. Garrett v. R.J. Reynolds Indus., Inc., 81 F.R.D 25, 30 (M.D.N.C. 1978) (across-the-board attack can satisfy Rule 23 requirements if allegations are supported by statistics); Doe v. First City Bancorp., 81 F.R.D. 562, 568-69 (D. Tex. 1977) (same). *See also* Peterson v. Albert M. Bender Co., Inc., 75 F.R.D. 661, 666 (N.D. Cal. 1977) (court rejected purported class but stated, as its reason, that the statistics failed to support the general policy of discrimination since the class itself was too broad).
163. 564 F.2d 1304 (9th Cir. 1977).
164. *Id.* at 1312.
165. *Id.* at 1306.
166. *Id.* at 1312.

suits is no mystical legal talisman guaranteeing class treatment."[167]

There are, undoubtedly, complexities involved in analyzing statistics and other empirical evidence of the presence of a discriminatory pattern. Results can be slanted and threshold requirements of what suffices as evidence of such discrimination may vary from court to court. In *Garrett v. R.J. Reynolds Industries, Inc.*,[168] the District Court of North Carolina denied certification of a class on the ground that the evidence failed to show a reasonable inference of discrimination.[169] The class seeking certification consisted of all black applicants and employees of the defendant who had been denied employment or had received only limited employment opportunities because of their race or color.[170] The attack was across-the-board in nature, alleging that statistics demonstrated the existence of discriminatory employment practices.[171]

The district court criticized the plaintiffs for seeking class certification on the basis of the allegations alone rather than by showing adherence to the requirements of Rule 23.[172] The court reiterated the *Shelton* court's admonishment that classes should not be certified when supported by "boiler plate memoranda laden with self-serving conclusions."[173] The court did state, however, that an across-the-board attack of this nature could satisfy the Rule 23 requirements if statistics supported the allegation.[174] The plaintiff here simply failed to sustain that burden.

In *Doe v. First City Bancorp. Inc.*,[175] the District Court of Texas certified a class despite the fact that plaintiffs were employed in different banks and held different jobs.[176] The court held that the members of the class suffered the same interest and injury as required by *Rodriguez*.[177] Plaintiffs were able to meet their Rule 23 burden by proving the existence of a centralized policy through the use of statistics.[178] By using statistical evi-

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167. *Id.*

168. 81 F.R.D. 25 (M.D.N.C. 1978).

169. *Id.* at 28-32.

170. *Id.* at 28.

171. *Id.* at 30.

172. *Id.* at 31. The court stated, "Plaintiff's various briefs never come to grips with the prerequisites of Rule 23. Rather, they seek to attain class certification based mainly on their *allegations* of discrimination." *Id.* (emphasis in original).

173. *Id.* at 29; *see* text & note 118 *supra*.

174. 81 F.R.D. at 30. *See also* Lim v. Citizens Sav. & Loan Ass'n, 430 F. Supp. 802 (N.D. Cal. 1976). In this case, the Northern District Court of California denied certification of a class consisting of all female and Asian employees. *Id.* at 808-09. The complaint contained broad allegations of discriminatory practices on the part of the employer with respect to compensation, promotion, testing and rating, leaves of absence, and opportunities for on-the-job training. *Id.* at 806. Plaintiff introduced statistics supporting the charges and the defendant used statistics to rebut the plaintiff's assertions. *Id.* at 808-09. The *Lim* court disagreed with the plaintiff's use of statistics and stated that the proper standard for analyzing such statistics was to examine the relevant labor pool. *Id.* The evidence must show a racial pattern significantly different from that of the entire pool of applicants. *Id.* at 807-09. Thus, a court is permitted to look at the facts in order to support the drawing of an inference of discrimination. The *Lim* court denied certification both because the plaintiff's statistics were not related to the relevant labor pool and because the defendant's statistics tended to disprove those of the plaintiff. *Id.*

175. 81 F.R.D. 562 (S.D. Tex. 1978).

176. *Id.* at 571.

177. *Id.* at 569-70.

178. *Id.*

dence, they had offered proof beyond the mere allegations. While the court adopted an across-the-board approach, it did pay careful attention to the requirements of Rule 23 before certifying this class.[179]

Both *Garrett* and *Doe* thus demonstrate at least one method of satisfying the Rule 23 prerequisites where broad discriminatory practices are alleged.[180] Keeping in mind that statistics are intended to evince the presence of an underlying policy, courts should adopt a sufficiently high threshold Rule 23 burden such as would make homogeneity of the class as certain as possible. This would allow only truly valid class actions to proceed, while protecting defendants and the courts from plaintiffs who "use the class action as both a sword for discovery purposes and a shield against testing the sufficiency of allegations made as a result of that discovery."[181]

THE FUTURE OF THE TITLE VII CLASS ACTION

Since the *Rodriguez* decision, it is quite apparent that the law is nebulous concerning the requirements for satisfaction of Rule 23. Of the three approaches discussed above, the intermediate view is the most reasonable. *Rodriguez* has not sounded the death-knell for the across-the-board approach in employment discrimination cases. Where the allegations focus on a readily discernible policy, the Rule 23 requirements are not difficult to satisfy.[182] In such a case, it would be safe to assume that the policy is applied to all employees, that is, all members of the purported class. Yet it is also possible to satisfy the class action prerequisites by introducing statistics that evince the existence of an employment policy that is not so readily identifiable, but that nevertheless is pervasive in nature.[183] By demonstrating that the defendant's employment practices have a discriminatory impact on the purported class, plaintiffs may still satisfy their burden of coming forward with facts that reveal a class that is numerous,

179. *Id.* at 570-71.

180. *See* text & notes 149 & 171 *supra*. For an excellent case involving the application of statistics to support the requirement of Rule 23 in an across-the-board attack, *see* Vuyanich v. Republic Nat'l Bank, 82 F.R.D. 420, 430-40 (N.D. Tex. 1979). Other cases suggest that had there been an identifiable policy, a class might have been certified. *See generally* Wheeler v. Anchor Continental, Inc., 80 F.R.D. 93, 97 (D.S.C. 1978) (court denied class certification because class was too broad and not focused upon a particular policy); Gill v. Monroe Dep't of Social Serv., 79 F.R.D. 316, 323 (W.D.N.Y. 1978) (plaintiffs have satisfied commonality requirement by attacking the employer's promotion policies); Hauck v. Xerox Corp., 78 F.R.D. 375, 378 (E.D. Pa. 1978) (court denied class certification but said an across-the-board approach might be adopted where "aggrieved plaintiff was affected by an identifiable policy"). *See also* H. NEWBERG, *supra* note 14, at 1290; Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 277-78 (4th Cir. 1980); Karan v. Nabisco, Inc., 78 F.R.D. 388, 403-07 (W.D. Pa. 1978).

181. Lim v. Citizens Sav. & Loan Ass'n, 430 F. Supp. 802, 809 (N.D. Cal. 1976).

182. A good example of a clear policy, as opposed to a pervasive practice or statistical evidence of an underlying policy, can be found in Eirhart v. Libbey-Owens-Ford Co., 89 F.R.D. 424 (E.D. Ill. 1981). The defendant employer required that all female employees be a minimum of five feet, four inches tall and weigh 100 pounds. *Id.* at 426. The court distinguished similar cases in which class certification was denied on the grounds that they involved patent variations in employment practices among defendant's facilities. *Id.* at 428.

183. *See generally* Gill v. Monroe Dep't of Social Serv., 79 F.R.D. 316, 325 (W.D.N.Y. 1978) (plaintiffs have satisfied commonality requirement by attacking the employer's promotion policies); Hauck v. Xerox Corp., 78 F.R.D. 375, 378 (E.D. Pa. 1978) (court denied certification but said an across-the-board approach might be adopted where "aggrieved party was affected by an *identifiable policy* . . .); *see also* text & notes 149, 161, 173, 177, 179 *supra*.

typical, and united by a common question of law or fact.[184]

The policy reasons for aiding employees in seeking remedial relief for title VII violations are numerous.[185] As Professor Newberg poignantly stated, "It is a fundamental axiom in an industrial society that an individual must first be integrated into the economic community before he or she can assume responsibility in the political and social spheres."[186] Class actions are a useful procedural device for securing this goal.[187] But indiscriminate use of Rule 23 is not necessarily in the best interest of plaintiffs or society as a whole. Abuse of the title VII class action procedure is quite possible. Lacking sufficient evidence to meet the requirements of Rule 23, plaintiffs have sought temporary certification in order to proceed with costly and time-consuming discovery.[188] But plaintiffs should also be aware of the problems cursory certification can pose. The dangers of inadequate representation and the binding effects of any judgment under principles of res judicata and collateral estoppel provide prime examples.[189]

Rule 23 was created to lessen the burden on the courts, when possible, by aggregating the claims of persons with similar grievances.[190] Because of its binding effect on absent members, however, the Rule 23(b)(2) class action must be used with care.[191] One way to guard against potential injustice to both plaintiffs and defendants is to make certain that title VII class actions are as homogeneous as possible.[192]

Most of the criticism of the across-the-board approach is that it assumes a homogeneity that might not, in fact, exist.[193] In cases like *Karan* and *Doninger*, however, it has been shown that a methodical, careful application of the requirements of Rule 23 is still possible when the across-the-board approach is adopted.[194] If this type of analysis is utilized, the truly homogeneous classes will pass the test and be allowed to proceed.

CONCLUSION

Before the *Rodriguez* decision was handed down by the United States Supreme Court, most courts were lenient in their certification of title VII suits as class actions. These courts stressed the need to facilitate the reme-

184. *See, e.g.*, Vuyanich v. Republic Nat'l Bank, 82 F.R.D. 420, 430 (N.D. Tex. 1979); Karan v. Nabisco, Inc., 78 F.R.D. 388, 399 (W.D. Pa. 1978); Doe v. First City Bankcorp., 81 F.R.D. 562, 566-70 (D. Tex. 1978); Lim v. Citizens Sav. & Loan Ass'n, 430 F. Supp. 802, 808-09 (N.D. Cal. 1976).

185. See text & notes 1-13 *supra*.

186. H. NEWBERG, *supra* note 14, at 1213.

187. Advisory Committee's Note to Proposed Amendment to Rule 23, 39 F.R.D. 69, 102 (1966).

188. *See* Lim v. Citizen Sav. & Loan Ass'n, 430 F. Supp. 802, 809 (N.D. Cal. 1976). The *Lim* court expressly disapproved of the use of Rule 23 "as both a sword for discovery purposes and a shield against testing the sufficiency of allegations made as a result of that discovery." *Id. See also* McCray v. Standard Oil, 76 F.R.D. 490 (N.D. Ill. 1970).

189. *See* 3B MOORE, *supra* note 14, ¶ 23.30, at 258.

190. Hansberry v. Lee, 311 U.S. 32, 41 (1940).

191. *See* FED. R. CIV. P. 23(b)(2). *See also* Note, *supra* note 15, at 929; text & notes 57-67 *supra*.

192. See text & notes 57-67 *supra*.

193. *See* Note, *supra* note 13, at 661.

194. See text & notes 141-52, 162-66 *supra*.

dial purposes of title VII and insisted that a liberal application of Rule 23 to these actions would help secure that objective. The result was often a rather cursory application of the federal rule. A few courts, however, advocated strict application of Rule 23. These courts argued that the cavalier treatment of these actions as class actions could be detrimental to plaintiffs as well as to employers, since absent class members would be bound, without notice, by the principles of res judicata and collateral estoppel.

In *Rodriguez* the United States Supreme Court held that the plaintiff failed to satisfy the Rule 23(a)(4) prerequisite of adequate representation and that, furthermore, class actions should not be allowed to proceed unless careful attention has been paid to all of the requirements of Rule 23. The Court held imperative the requirement that class members suffer the same injury in order to insure the homogeneity of the class.

Courts have interpreted *Rodriguez* in many ways. Three views are prevalent. A liberal view is that *Rodriguez* applies only to cases where the plaintiff is not an adequate representative. Under this view, the across-the-board approach with its necessary relaxation of the other requirements of Rule 23 would still apply, since this approach would directly serve the remedial purposes of title VII.

Diametrically opposed to this liberal view is a much more strict approach, which interprets *Rodriguez* as demanding that close attention be paid to the fulfillment of all Rule 23 requirements. Since the across-the-board approach for title VII suits requires a relaxation of Rule 23 and a broad interpretation and application of the facts in a particular case, these courts have consequently held that *Rodriguez* necessarily precludes the continued use of this approach.

An intermediate view rejects the notion that all across-the-board allegations of discrimination should be precluded. This view, which is the soundest of the three, is based on the idea that where a complaint focuses on employment policies of a tangible, discernible nature, plaintiffs can still comply with Rule 23 and *Rodriguez*. Although allegations may be broad, a particular practice can be said to apply to all persons who are similarly situated, permitting the inference that all persons in this situation would suffer the same injustice. If the employment practice is not so readily discernible, it is possible to support this broad allegation with statistics and clear facts. The across-the-board approach, if analyzed carefully, can therefore still be utilized. Once the Rule 23 requirements have been unequivocally satisfied, a homogeneous class warranting protection and relief under title VII would be assumed to exist. This method seeks an intermediate resolution to the conflict between the federal rules and the remedial purposes which title VII was created to serve.