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Thomas H. Barnard

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TITLE VII CLASS ACTIONS: THE "RECOVERY STAGE"

THOMAS H. BARNARD*

Title VII of the Civil Rights Act of 1964¹ and the class action² have developed contemporaneously, and neither would be quite what it is today were it not for the other. When Title VII was enacted to provide remedies for employment discrimination, the Equal Employment Opportunity Commission (EEOC) was not empowered to grant relief, but only to seek it by the informal settlement procedure of conciliation.³ After traversing this procedural obstacle course, the aggrieved employee ultimately was left to file his own civil action in federal district court.⁴

Because the EEOC was not authorized to grant initial relief in the way that the National Labor Relations Board (NLRB), for example, may issue cease and desist orders,⁵ the primary responsibility for developing and legitimizing the Title VII theories of action and forms of relief fell to the federal courts and the plaintiffs' lawyers. Unquestionably, this development has been affected materially by the availability of the class action under rule 23 of the Federal Rules of Civil Procedure.⁶ The 1966 amendment to rule 23 expanded the class action's availability, giving fangs to a Title VII originally considered toothless.⁷

*B.A., University of Puget Sound; LL.B., Columbia University; LL.M., Case Western Reserve University. Partner, Squire, Sanders & Dempsey, Cleveland, Ohio.

1. 42 U.S.C. §§ 2000e to e-15 (1970), as amended, 42 U.S.C. §§ 2000e to e-17 (Supp. II, 1972).

2. See FED. R. CIV. P. 23.

3. 42 U.S.C. § 2000e-5(a) (1970), as amended, 42 U.S.C. § 2000e-5(b) (Supp. II, 1972).

4. See *id.* § 2000e-5(e), as amended, 42 U.S.C. § 2000e-5(f) (Supp. II, 1972).

5. The remedies available to the Board are provided by statute as follows:

. . . If upon the preponderance of the testimony taken the [National Labor Relations] Board shall be of the opinion that a person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board . . . shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . .

29 U.S.C. § 160(c) (1970). Provisions for court review and enforcement of NLRB orders also are provided by statute. *Id.* §§ 160(e)-(g).

6. FED. R. CIV. P. 23.

7. See Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1214 (1966); Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 510 (1969); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1218-22 (1971) [hereinafter cited as *Developments—Title VII*].

Because the 1972 amendments to Title VII gave the EEOC expanded power to seek relief,⁸ private litigation under Title VII may well be nearing its high-water mark. Moreover, because prior litigation has eliminated the earlier procedural obstacles and established liberalized theories for imposing liability on employers, the focus has shifted from procedural maneuvering to what the Court of Appeals for the Fifth Circuit has characterized as the "recovery stage,"⁹ that is, the practical design and implementation of remedies for discrimination.

Title VII authorizes the federal courts to enjoin any discriminatory employment practice and, where applicable, to order affirmative relief.¹⁰ While the practical problems of fashioning such relief are complex in the individual Title VII action, the complexity is accentuated in the class recovery context, in which there is a vacillating interface between the rights of aggrieved persons, unnamed and only loosely identified, and fairness to respondent employers or unions. Recent appellate court efforts to alleviate the tensions created by these competing interests have not succeeded; rather, they have decreed class relief in manners inappropriate to redress employment discrimination, thereby hampering district court attempts to design relief founded upon the equities and practicalities of a case. Several recent cases, by awarding classwide back pay have evidenced a growing trend toward the punitive use of damages in Title VII class actions. This inappropriate practice has been encouraged by the developing concept of "fluid recovery" and by some misconceptions about the federal class action procedure. Thorough consideration of these problems can isolate the sources of judicial misdirection and restore more appropriate use of the class action procedure.

COMPENSATORY RELIEF AS A REMEDY IN TITLE VII CLASS ACTIONS

Several recent federal appellate court decisions indicate that

8. See 42 U.S.C. §§ 2000e to e-17 (Supp. II, 1972), amending 42 U.S.C. §§ 2000e to e-15 (1970). These amendments empower the EEOC to bring a civil action against employers accused of unlawful employment practices if it has been unable to secure an acceptable conciliation agreement. The aggrieved person has a right to intervene in such an action; if the Commission dismisses the charge filed with it or fails to bring a civil action, he may bring suit in his own right. *Id.* § 2000e-5(f)(1). The federal district courts have jurisdiction over suits brought by the EEOC or aggrieved plaintiffs. *Id.* § 2000e-5(f)(3).

9. *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380 (5th Cir. 1974).

10. 42 U.S.C. § 2000e-5(g) (Supp. II, 1972). Such affirmative relief most often involves reinstatement and back pay.

compensatory relief to the class is now a routine remedy in Title VII class actions. In particular, three cases¹¹ decided by courts well experienced in Title VII litigation presage what probably will become a common form of relief, classwide compensatory back pay awards.

Each case involved perpetuation of past discriminatory practices by facially neutral policies such as departmental seniority and employment tests. In *Johnson v. Goodyear Tire & Rubber Co.*,¹² the Court of Appeals for the Fifth Circuit found that Goodyear had locked black employees into the previously segregated labor department by requiring a high school diploma for an interdepartmental transfer. Other facially neutral policies found to contribute to discrimination were the administration of unvalidated preemployment and employment tests and the maintenance of a departmental seniority system.¹³ The Court of Appeals for the Sixth Circuit found in *Head v. Timken Roller Bearing Co.*¹⁴ that racial discrimination in hiring prior to the effective date of Title VII, when coupled with a continuing departmental seniority system, constituted a policy of racial assignment.¹⁵ Likewise, in *Moody v. Albemarle Paper Co.*,¹⁶ the Court of Appeals for the Fourth Circuit held that facially neutral testing procedures not shown to have a substantial business justification had a "differential impact on minority employment," rendering the practices unlawful.¹⁷

Both *Head* and *Moody* are significant because they held that an award of back pay should accompany any finding of discrimination, unless special circumstances are found to nullify such a presumption.¹⁸ Even more specific was the statement in *Johnson* that "as a

11. *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Moody v. Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973), cert. granted, 95 S. Ct. 654 (Dec. 16, 1974) (No. 74-389).

12. 491 F.2d 1364 (5th Cir. 1974).

13. *Id.* at 1368-75. The departmental seniority system was the source of continued discrimination even after the more patently discriminatory devices were terminated. Until 1965, the labor department was exclusively black and, although blacks were accepted into other departments as early as 1962, not until 1968 were employees allowed to transfer from the still essentially all-black labor department to other sections. Even then the departmental seniority system acted as an effective deterrent to any transfers, however, because anyone changing departments lost all seniority, amounting in some cases to more than 20 years. *Id.* at 1369.

14. 486 F.2d 870 (6th Cir. 1973).

15. *Id.* at 875.

16. 474 F.2d 134 (4th Cir. 1973), cert. granted, 95 S. Ct. 654 (Dec. 16, 1974) (No. 74-389).

17. *Id.* at 138-40.

18. "[T]he clear intent of Congress that the grant of authority under Title VII should be broadly read and applied mandate[s] an award of back pay unless exceptional circumstan-

matter of law . . . the members of [a] class of discriminatees are presumptively entitled to an appropriate award of back pay unless evidence is adduced to establish as a matter of fact that such discriminatory practices did not adversely affect a particular claimant (or claimants)."¹⁹

While the appropriateness of a presumption of qualification for back pay awards certainly is open to question, of more immediate concern is the nature of these awards. Although these awards are alleged to be compensatory, when they are computed, the awards take on a distinct aura of being punitive.²⁰

Class Back Pay Awards: Compensatory or Punitive?

Because Title VII actions are equitable in nature, most courts have recognized that equitable considerations apply to the conduct of the proceedings.²¹ Similarly, relief awarded to an aggrieved party also should be grounded on equitable principles,²² since there has been explicit recognition that the power to award damages is a corollary of the statutory grant of equitable jurisdiction.²³ Courts

ces are present." 486 F.2d at 876. "[A] plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust." 474 F.2d at 142. *See also* Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) (presumption of recovery of attorney's fees in successful Title II suits).

19. 491 F.2d at 1374.

20. *See, e.g.,* Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973), *rev'd in part and aff'd in part sub nom.*, EEOC v. Detroit Edison Co., 10 FEP CASES 239 (6th Cir. 1975); Tooles v. Kellogg Co., 336 F. Supp. 14, 18 (D. Neb. 1972).

21. *See, e.g.,* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969); McQueen v. E.M.C. Plastic Co., 302 F. Supp. 881, 884 (E.D. Tex. 1969). *See also* Davidson, "Back Pay" Awards Under Title VII of the Civil Rights Act of 1964, 26 RUTGERS L. REV. 741, 771-73 (1973).

22. Title VII provides that a court may enjoin an unlawful employment practice and order affirmative action such as back pay, reinstatement, "or any other equitable relief." 42 U.S.C. § 2000e-5(g) (Supp. II, 1972). The appellate court in EEOC v. Detroit Edison Co., 10 FEP CASES 239 (6th Cir. 1975), held that the statutory phrase "or any other equitable relief," provided no authority for the award of punitive damages. "We know of no authority which holds that the awarding of punitive damages is equitable relief. . . . While affirmative action may not be limited to the reinstatement or hiring of employees with or without back pay, we believe that it is limited to relief of the same general kind, that is, equitable relief in the form of restitution." *Id.* at 244.

23. "The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it." *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969); *accord*, Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1376 (5th Cir. 1974); Head v. Timken Roller Bearing Co., 486 F.2d 870, 876 (6th Cir. 1973); Moody v. Albemarle Paper Co., 474 F.2d 134, 142 (4th Cir. 1973).

repeatedly have stressed that back pay awards are to be compensatory, not punitive.²⁴ The courts in both *Head*²⁵ and *Moody*²⁶ cited with approval *Robinson v. Lorillard Corp.*,²⁷ in which the Court of Appeals for the Fourth Circuit stated that "[a] back pay award is not punitive in nature, but equitable — intended to restore the recipients to their rightful economic status absent the effects of unlawful discrimination."²⁸ The *Johnson* court reiterated this proposition, stating that "back pay awards are not designed to punish the employer but to economically elevate the victims to the status which is rightfully theirs."²⁹

That back pay awards are to be made only to those class members who are able to demonstrate injury from discrimination³⁰ further indicates the impropriety of punitive damages in Title VII recovery. The Court of Appeals for the Sixth Circuit expressly instructed district courts that a "back pay award is limited to damages that are actually suffered."³¹ This instruction was applied by that court in *Stamps v. Detroit Edison Co.*,³² which expressly held that Title VII provided no authority for the award of punitive damages.

In *Detroit Edison* the district court had held that the affected class included not only those black employees hired prior to its decree and actively employed during the effective term of Title VII, but also all black individuals who applied for employment after the effective date of Title VII and were rejected, as well as blacks who would have applied but for Detroit Edison's discriminatory hiring practices.³³ In addition to an injunction against further discrimina-

24. See also *Developments—Title VII*, *supra* note 7, at 1259-69.

25. 486 F.2d at 876.

26. 474 F.2d at 142.

27. 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

28. *Id.* at 802.

29. 491 F.2d at 1376.

30. See *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1375 (5th Cir. 1974); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 878 (6th Cir. 1973); *Moody v. Albemarle Paper Co.*, 474 F.2d 134, 142 (4th Cir. 1973).

31. *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 878 (6th Cir. 1973); *accord*, *United States v. Masonry Contractors Ass'n*, 497 F.2d 871, 876 (6th Cir. 1974).

32. 365 F. Supp. 87 (E.D. Mich. 1973), *rev'd in part and aff'd in part sub nom*, *EEOC v. Detroit Edison*, 10 FEP CASES 239 (6th Cir. 1975). Punitive damages were suggested as a remedy in appropriate Title VII actions in *Tooles v. Kellogg Co.*, 336 F. Supp. 14, 18 (D. Neb. 1972) (denial of motion to strike portion of complaint). The Court of Appeals for the Ninth Circuit has declined to rule on the propriety of punitive damages in such actions. *Gregory v. Litton Systems, Inc.*, 472 F.2d 631, 632 n.1 (9th Cir. 1972).

33. 365 F. Supp. at 121-22, 124.

tion and an award of compensatory relief in the form of back pay and preferential hiring, the district court also ordered Detroit Edison to pay this expansive class four million dollars in punitive damages.³⁴

While punitive damages are a recognized means to punish and deter particularly egregious conduct,³⁵ the absence of any such conduct in *Detroit Edison* is striking. The court did not find, for example, that the employer had maintained segregated facilities; instead, there was an inference of unlawful discrimination drawn from a statistical imbalance between white and black employees, insufficient job posting, maintenance of departmental seniority, hiring of friends and relatives of current employees, and use of unvalidated tests.³⁶ Even if punitive damages were an accepted means of redress under Title VII, their use in such a factual context cannot be justified.

Compensatory Relief: A Remedy Only for Persons Actually Injured and Injuries Actually Suffered

Fashioning compensatory relief for discrimination never has been simple, even in an individual suit. In class actions, it may be unmanageable to mold remedies for a class containing thousands of loosely identified individuals, many of whom may never have suf-

34. *Id.* In addition to the employer, one local union, named as a codefendant, was assessed \$250,000 in punitive damages. *Id.* at 124.

However, the Court of Appeals for the Sixth Circuit in *EEOC v. Detroit Edison Co.*, 10 FEP CASES 239 (6th Cir. 1975), reversed that portion of the district court's decision which involved the composition of the class to benefit from the award of back pay. The inclusion of the two groups composed of black individuals who had been rejected for employment and those blacks who did not apply for employment as a result of the employer's alleged "discriminatory practices," within the bounds of this class action, was rejected by the appellate court on the following grounds: first, a formal class action determination was never made and the parties proceeded to trial on the basis of a court order which had the effect of limiting the class to current black employees; second, the requirement of rule 23 (a)(4) that the individual plaintiffs have a community of interest with both sub-classes was not met in this case. *Id.* at 245. The court thus concluded that "[t]he private plaintiffs in the present case, did not by pleading or proof, sufficiently advise the court for it to define a class represented by these plaintiffs as including anyone but black employees of Edison." *Id.* at 246.

35. See, e.g., *Lundgren v. Freeman*, 307 F.2d 104, 119 n.13 (9th Cir. 1962) (exemplary damages allowed in Oregon when a defendant's malice, fraud, or gross negligence persuades the court that additional damages are justified by way of punishment and as a warning to others); *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9, 12 (5th Cir. 1962) (punitive damages permitted in Florida right-of-privacy actions that include an element of malice); 15 U.S.C. § 15 (1970) (treble damages for federal antitrust violations).

36. 365 F. Supp. at 116-19.

ferred from the unlawful employment practices found by the court. Consequently, the appellate courts that have considered the question of compensatory relief to a class uniformly have limited back pay awards to damages actually suffered.³⁷ Typifying this approach, one court has held that, when back pay is ordered, not every class member is necessarily entitled to recovery.³⁸

This principle, that only persons actually injured by individual practices should be compensated and those only for injuries actually suffered, is consistent with due process of law and familiar tenets of equitable discretion.³⁹ The complexity of designing affirmative relief in class actions seems to strain this precept unduly, however, causing it to be mislaid in practice.

An example of the violence done in the name of justice to the principle of compensatory relief is furnished by *Pettway v. American Cast Iron Pipe Co.*⁴⁰ Prior to 1961, the company had maintained a strict delineation of jobs as exclusively black or exclusively white. Thus, although departments within the company were not totally segregated, they were predominately of one race. Despite the discontinuance of this formal separation, the court found that the employer's facially neutral testing program and educational requirements, in combination with a departmental seniority system and job posting and bidding practices, continued to lock black employees into lower paying jobs and to bar admission into apprenticeship and on-the-job training programs, thereby perpetuating past discrimination.⁴¹

In its decree dismantling this system, the *Pettway* court also ordered an award of back pay to put in their rightful places those who were injured by the company's employment practices.⁴² Although

37. See note 30 *supra* & accompanying text.

38. In *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1375 (5th Cir. 1974), the court stated:

Individual circumstances vary and not all members of the class are automatically entitled to recovery. There should be a separate determination on an individual basis as to who is entitled to recovery and the amount of such recovery. . . .

. . . The relief herein ordered is intended to restore those wronged to their rightful economic status absent the effects of the unlawful discrimination. As to monetary relief, nothing more is required; nothing less is acceptable.

39. See H. OLECK, DAMAGES TO PERSONS AND PROPERTY § 1 (1961).

40. 494 F.2d 211 (5th Cir. 1974).

41. *Id.* at 235-36.

42. *Id.* at 252.

recognizing "the impossibility of calculating the precise amount of back pay,"⁴³ the court was undeterred by the prospect of a "quagmire of hypothetical judgments"⁴⁴ and permitted award of back pay merely upon a showing that an individual was a member of the affected class.⁴⁵ No obligation was imposed upon class members to demonstrate the fact or degree of any injury; rather, the company was required to show by clear and convincing evidence that the alleged class member was not entitled to back pay.⁴⁶ Such a procedure belies the court's stated purpose of only putting victims of unlawful practices in a position equivalent to that which they would have occupied but for the discrimination.⁴⁷

This questionable conceptualization of compensatory relief in class actions has been employed similarly in other cases. The district court's decision in *Stamps v. Detroit Edison Co.*⁴⁸ aptly illustrates the use of inference upon inference to formulate an approximate class award, even though there is no factual basis in the class, or even in the individual case, for drawing such inferences. There all members of an expansive class were to be paid an amount equal to the average earnings of certain "skilled trades high opportunity

43. *Id.* at 260.

44. The court stated:

There is no way of determining which jobs the class members would have bid on and have obtained if discriminatory testing, seniority, posting and bidding system, and apprentice and on-the-job training programs had not been in existence. Class members outnumber promotion vacancies; jobs have become available only over a period of time; the vacancies enjoy different pay rates; and a determination of who was entitled to the vacancy would have to be determined on a judgment of seniority and ability at that time. This process creates a quagmire of hypothetical judgments.

Id. See also *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379 (5th Cir. 1974), where the court noted: "All of the employee's previous actions were taken against a backdrop of discrimination. It is now extremely difficult for a court to separate a discriminatee's psychological or motivational outlook which [was] so totally intertwined with the discriminatory atmosphere at the . . . plant. What a laborer would have subjectively done in an atmosphere free of racial discrimination is now a matter of pure conjecture."

45. 494 F.2d at 259-60.

46. *Id.*

47. *Id.* at 252. The court stated: "Under Title VII . . . the injured workers must be restored to the economic position in which they would have been but for the discrimination — their 'rightful place.'" The court set out two principles governing its back pay award: (1) unrealistic exactitude is not required in back pay awards; (2) uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer. *Id.* at 260-61.

48. 365 F. Supp. 87 (E.D. Mich. 1973). See notes 33-36 *supra* & accompanying text.

jobs," less actual earnings, from the effective date of Title VII.⁴⁹ Such a windfall hardly could be considered compensatory; recipients of back pay would include blacks who had never applied for a higher level job, those unqualified to perform in skilled classifications, and those who would not have been promoted even under a lawful promotional scheme because the number of eligible employees exceeded the available promotional opportunities.

Sabala v. Western Gillette, Inc.,⁵⁰ provides a similar example. In *Sabala* the district court held that proof of specific discrimination against a member of the affected class was not prerequisite to collecting back pay.⁵¹ Thus, a black "city driver" need never have applied for a job as an "over-the-road" driver in order to receive back pay. Instead, he need only accept such an opportunity, which the company was required to offer him, in the future. If he did accept, he would receive, in addition to the earnings of his new position, a lump sum equal to 1.56 times his total city-driver earnings for the period during which his seniority would have enabled him to become a road driver, less actual earnings and a 10 percent road expense factor.⁵² The *Sabala* court, in an attempt to do justice to the class, clearly disregarded the *raison d'être* for compensatory damages: the compensation only of those actually injured for damages actually suffered.

The impropriety of the *Sabala* approach is demonstrated by the recent decision in *Thornton v. East Texas Motor Freight*.⁵³ In a factual situation virtually identical to *Sabala*, the Court of Appeals for the Sixth Circuit approved a district court ruling that black city drivers, members of the affected class, first must demonstrate their past expression of interest in over-the-road positions before becoming a part of the "recovery class."⁵⁴ The court noted: "[T]he prospect of a large back pay award invalidates present intention as an accurate indication of past intention. An employee who may not have wanted on-the-road employment in the late 1960's because of

49. 365 F. Supp. at 121-22.

50. 371 F. Supp. 385 (S.D. Tex. 1974).

51. *Id.* at 391.

52. The award was based on the ratio of the earnings of a reasonably prudent over-the-road driver to the earnings of a comparable city driver (1.56 : 1), with deductions based on expenditures by a reasonably prudent employee in connection with his employment as an over-the-road driver (10 percent of gross annual pay). *Id.* at 391-92.

53. 497 F.2d 416 (6th Cir. 1974).

54. *Id.* at 421-22.

the increased number of hours of work and time away from home, might well change his mind now if the prospect of a large back pay windfall is presented."⁵⁵

There are, of course, class actions to challenge discriminatory employment practices in which back pay relief can be categorized accurately as compensatory, such as the discriminatory layoff of a class⁵⁶ or equal pay claims when the class is reasonably determinable.⁵⁷ In some other familiar areas of Title VII class action practice, however, such as perpetuation of past discriminatory practices by departmental seniority, unvalidated tests, and failure to hire or promote evidenced by statistical analyses,⁵⁸ the classes usually are quite amorphous and the characterization of back pay relief to the class as "compensatory," rather than "punitive," is highly questionable.

In class action distributions of the amorphous type there is often simply no way to know if each class member is an injured person; damages frequently are uncertain and speculative. In the Fifth Circuit, however, there is now such a strong presumption of injury to a member of the class that the defendant must come forward with "clear and convincing evidence"⁵⁹ to show that the claimant was not injured. The burden, both in time and expense, as well as in fact, is so virtually unsustainable that the court in *Pettway* has suggested negotiating a formula-type approach.⁶⁰ Ironically,

55. *Id.* at 422.

56. See, e.g., *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). In *Bowe*, women discriminatorily laid off were to be compensated "at the highest rate of pay for such jobs as they would have bid on/and qualified for if a non-discriminatory seniority scheme would have been in existence." *Id.* at 721. Thus, uncertainties in determining the rate of compensation persisted to some extent even in this case.

57. In *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973), the airline was found to have violated Title VII by, among other means, paying stewardesses lower salaries and pensions than male pursers for equal work. *Id.* at 789. Pay claim equalization, if ordered under these facts, would award similar compensation to all members of the affected class.

58. These questions are precisely the kind involved in *Johnson, Head, Moody, and Pettway*. See notes 12-17, 40-47 *supra* & accompanying text.

59. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 259-60 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379-80 (5th Cir. 1974).

60. 494 F.2d at 262 n.152. The court proposed a number of possible approaches. In less complex cases fairly precise determinations of what each individual claimant's position would have been, but for the discrimination, might be possible. *Id.* at 261. Where greater complexity enters into the determination, awards might be based on average pay in positions from which the discriminated group has been excluded, *id.* at 262, or on comparisons with the earnings of groups of employees, not injured by discrimination, similar in size, ability, and length of employment to the discriminatees, *id.* at 262-63.

the court still speaks of individual claims while acknowledging that they are almost impossible to compute.⁶¹

Courts have paid lip-service to the concept of compensatory relief while ignoring its fundamental characteristic when rendering an award. Indeed, these decisions to "compensate" the victims have been made to make examples of the defendants in an effort to hasten the demise of discrimination; relief of this sort, however, once again resembles exemplary or punitive rather than compensatory damages. Compensatory damages generally "will compensate the injured party for the injury sustained, and nothing more."⁶² No windfall or profit is to be accorded in such an award. Nevertheless, that is clearly the outcome when class members are not required to prove affirmatively their injury and the precise amount thereof.

Moreover, when courts recognize the "impossibility of calculating the precise amount of back pay"⁶³ and suggest negotiations or gross awards⁶⁴ that ignore the individual right of recovery upon which a class suit is premised, the computation and award of back pay becomes more than a question of imprecision. Awards for uncertain and speculative damages, contingent upon numerous assumptions, realistically cannot masquerade as compensatory relief,⁶⁵ and would not be tolerated in any other area of the law.

61. Courts frequently have noted the difficulty of calculating the appropriate amount of a back pay award. *See, e.g., Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974); *Sabala v. Western Gillette, Inc.*, 371 F. Supp. 385, 392 (S.D. Tex. 1974) ("The variety of formulae by which individual back pay due this class of discriminatees can be computed is bewildering . . .").

62. *McKnight v. Denny*, 198 Pa. 323, —, 47 A. 970, 971 (1901). *See generally Morgan v. Southern Pac. Co.*, 95 Cal. 501, 30 P. 601 (1892); *Sachra v. Town of Manilla*, 120 Iowa 562, 95 N.W. 198 (1903).

63. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974).

64. *Id.* at 260-63.

65. Even precisely calculated back pay awards may be more punitive than compensatory. For example, in cases in which departmental seniority systems are said to perpetuate past discrimination, any back pay award against the employer is clearly punitive, because employers had no notice that such a system would lead to liability under Title VII. In most instances, in fact, the employer probably has suffered an economic loss because of the use of such systems, which generally were not employer-created, but rather resulted almost entirely from union pressure. The employer certainly would prefer the ability to place employees in those jobs for which it believes they are best qualified, regardless of length of service. For example, in *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974), the defendant employer tried unilaterally to modify its collective bargaining agreement, which imposed departmental seniority; the attempt was thwarted, however, by a preliminary injunction obtained by the union. *Id.* at 1381-82.

Class Back Pay Awards and "Fluid Recovery"

A conclusion to the controversy over class back pay awards is not in sight. Significantly, in *Bowe v. Colgate-Palmolive*,⁶⁶ tried in 1967 as one of the first major cases awarding classwide back pay, the final details of the pay arrangement have not yet been settled. This complex and time-consuming process raises serious questions about the efficacy of class actions in Title VII for any purpose other than pure injunctive or declaratory relief. The difficulties thus engendered appear to be leading courts increasingly to consider ordering negotiated or gross awards of back pay instead of making individual determinations.

The concept of the gross award has been confronted in class actions in areas other than Title VII. In the celebrated *Eisen v. Carlisle & Jacquelin* cases,⁶⁷ a district court, a circuit court, and the Supreme Court wrestled with the method by which damages were to be computed to compensate a class of several million people victimized by a monopolization scheme in stock trading. The district court estimated that damages to the six million class members would not exceed sixty million dollars,⁶⁸ but instead of computing individual claims, the court computed the total injury to the class and granted a gross award.⁶⁹ Thereafter, individuals who came forward with claims would have them satisfied, and the residue would be used to pay attorney fees, defray administrative costs, and possi-

66. 489 F.2d 896 (7th Cir. 1974), *modifying* 416 F.2d 711 (7th Cir. 1969). See note 94 *infra*.

67. See *Eisen v. Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974), *vacating* 479 F.2d 1005 (2d Cir. 1973). The case was heard on three occasions by the Court of Appeals for the Second Circuit. In *Eisen I* the court ruled that denial of class action status by the district court was appealable as a final order. *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). Then, in *Eisen II*, the dismissal of the class action was reversed. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968). Upon remand, the district court issued an order holding the suit maintainable as a class action, and suggesting a "fluid class" recovery that would distribute damages to future members of the aggrieved class rather than to specific class members who actually were injured. *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971). See notes 70-71 *infra* & accompanying text. Objecting to notice requirements set out by the district court, the court of appeals issued *Eisen III*, ordering the suit dismissed as a class action. *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973). On certiorari, the Supreme Court remanded the case to the trial court, finding that the district court's resolution of the notice problem failed to comply with rule 23(c)(2), which was held to require notice to each ascertainable member of the class with the costs of notice to be borne by the plaintiff. *Eisen v. Carlisle & Jacquelin*, 94 S. Ct. 2140 (1974).

68. *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 257, 265 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 94 S. Ct. 2140 (1974).

69. *Id.* at 264-65.

bly lower the future cost of odd-lot trading.⁷⁰

This "fluid recovery" concept, by which a gross award is computed in lieu of aggregating the estimated individual claims, is dangerously related to the approaches suggested in *Detroit Edison* and *Pettway*. Unfortunately, when confronted with the difficulties of fashioning the actual mechanics of an individualized award, many courts may resort to fluid recovery even if not so denominated. Fluid recovery, moreover, is an even more questionable concept than the Title VII awards granted in cases such as *Pettway*, and it ultimately was found deficient in the consumer class action in *Eisen*.⁷¹

Unjustified fluid recovery should not be allowed to engulf Title VII relief. The grave inequities that can be inflicted by punitive back pay awards can no more be justified by expediency in this context than in the area of consumer protection. The *Eisen* decisions not only have illustrated the need to analyze carefully the relief to be granted in Title VII class actions; they also have elicited a need to review the overall impact of the requirements of rule 23 of the Federal Rules of Civil Procedure upon the issue of back pay awards.

THE MISAPPLICATION OF RULE 23 IN TITLE VII CLASS ACTIONS

The General Distinction Between Rules 23(b)(2) and 23 (b)(3)

Many of the deficiencies of class back pay awards in Title VII cases stem from a misapplication by some courts of the Federal Rules of Civil Procedure, particularly rules 23(b)(2) and 23(b)(3).⁷²

70. *Id.*

71. In *Eisen III*, the Court of Appeals for the Second Circuit found the fluid recovery concept violative of the class action provisions, of due process, and of rule 23 of the Federal Rules of Civil Procedure. Writing for the court, Judge Medina concluded:

Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads amended Rule 23 contemplates and provides for no such procedure. Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure. We hold the "fluid recovery" concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.

479 F.2d at 1018.

72. FED. R. CIV. P. 23(b)(2), (3). For a detailed discussion of the history of class actions, culminating in rule 23, and the distinctions between rules 23(b)(2) and 23(b)(3), see Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 375-400 (1967). Those who misinterpret the proper function of rule 23(b)(3) see it simply as the modern counterpart of the old spurious action. Rule

A class action is maintainable under rule 23(a) provided certain prerequisites,⁷³ such as numerous class members,⁷⁴ common factual and legal questions,⁷⁵ and representativeness,⁷⁶ are present. Class actions also must conform, however, to certain requirements in rule 23(b). A class action may be maintained under rule 23(b)(2) if "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" Rule 23(b)(2) was designed in part to facilitate civil rights class actions such as those brought under Title VII.⁷⁸ Nevertheless, the Advisory Committee on the civil rules noted that rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages,"⁷⁹ but is intended to serve primarily as a vehicle for injunctive or declaratory relief.⁸⁰

23(b)(3) has as its purpose the protection of the many parties who are injured as a result of the defendant's act or omission affecting a great mass of people. Rule 23(b)(2) is narrower in scope and has been considered well adapted to incidents of employment discrimination because an entire discriminatory situation is treated at once with no opting out. *Id.*

73. FED. R. CIV. P. 23(a) provides:

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.

74. FED. R. CIV. P. 23(a)(1). Although the class must be shown to be large enough to preclude joinder, it has been held that "[i]f it is unnecessary to name names . . . extensively . . ." *Williams v. Local 19, Sheet Metal Workers*, 59 F.R.D. 49, 52 (E.D. Pa. 1973).

75. FED. R. CIV. P. 23(a)(2).

76. FED. R. CIV. P. 23(a)(3), (4). The representativeness requirements are to be construed broadly in civil rights litigation because Congress' purpose in establishing these civil rights laws was to end all discrimination, not only that proved to be aimed at one employee by one employer. Thus the individual employee necessarily acts on behalf of all those whose rights have been denied. *Jenkins v. United Gas Corp.*, 400 F.2d 28, 32-33 (5th Cir. 1968); *Mack v. General Elec. Co.*, 329 F. Supp. 72, 75-76 (E.D. Pa. 1971). Regarding the adequacy of representation necessitated by rule 23(a)(4), two criteria are called for by the courts. First, the attorney must be qualified, experienced, and able to conduct the litigation. Second, the suit can neither be collusive nor can the plaintiff's interests be antagonistic to those of the rest of the class. *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968).

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

78. See FED. R. CIV. P. 23(b)(2), 1966 Advisory Committee Note, in 3B J. MOORE, *FEDERAL PRACTICE* ¶ 23.01 [10.-2], at 23-28 (2d ed. 1974).

79. *Id.*

80. *Id.*; see *McAdory v. Scientific Research Instruments, Inc.*, 355 F. Supp. 468, 472 (D. Md. 1973).

Rule 23(b)(2) does not require any particular form of notice to the class nor does it permit class members to opt out of the lawsuit. Rule 23(b)(3),⁸¹ on the other hand, adds significantly to the requirements of rule 23(a). Certification of a class action under rule 23(b)(3) requires special notification under rule 23(c)(2) and permits class members to request exclusion from the class.⁸² Rule 23(b)(3) also differs significantly by not requiring a class action to be brought primarily for injunctive or declaratory relief instead of monetary damages.⁸³

The distinctions between rules 23(b)(2) and 23(b)(3) bear heavily upon a consideration of Title VII classwide back pay awards and perhaps other monetary relief. A fundamental question is whether an action is primarily for injunctive relief when substantial back pay is sought. By considering back pay to be equitable in nature and accordingly incidental to injunctive relief, as several recent decisions have done,⁸⁴ recovery has been permitted in class actions

81. FED. R. CIV. P. 23(b)(3) provides:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

• • • •

(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.

82. 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 specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

83. See 3B J. MOORE, *supra* note 78, ¶¶ 23.40, 23.45 [1], at 23-654, 22-678; 7A C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1775, at 22-23 (1972).

84. See, e.g., *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 251-54 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1375 (5th Cir. 1974); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 876 (6th Cir. 1973); *Moody v. Albemarle Paper Co.*, 474 F.2d 134, 142 (4th Cir. 1973).

brought pursuant to rule 23(b)(2),⁸⁵ without the significant safeguards that are provided by rule 23(b)(3). Such a shortcoming can only worsen the already severe strains being placed upon the Title VII class action.

Applicability of Rule 23(b)(2) in Title VII Class Actions

While class actions brought pursuant to rule 23(b)(2) must be primarily for injunctive or declaratory relief,⁸⁶ back pay can be awarded as an additional equitable remedy. In *Robinson v. Lorillard Corp.*⁸⁷ a class action was brought on behalf of blacks hired by the defendant when overt discrimination was practiced prior to enactment of Title VII. Alleging that the existing seniority system at Lorillard perpetuated the effects of the earlier discrimination, the plaintiffs sought declaratory relief as well as damages in the form of back pay. The Court of Appeals for the Fourth Circuit affirmed the lower court ruling that the plaintiffs and their class were entitled to all forms of relief requested,⁸⁸ stating that the back pay award was rooted in grounds uniformly applicable to the class and that it should be considered as one element of an equitable remedy.⁸⁹ The court noted, however, that the decision to award back pay to the class was not the equivalent of giving back pay to each class member. Individual relief would not be appropriate, the court said, until each member proved a loss resulting from the practice.⁹⁰ An argument that a class certification pursuant to rule 23(b)(2) precluded a classwide back pay award did not persuade the court.⁹¹

85. See notes 87-90 *infra* & accompanying text. Cf. *Baxter v. Savannah Sugar Ref. Corp.*, 350 F. Supp. 139, 141 (S.D. Ga. 1972), *aff'd in part, remanded in part, rev'd in part on other grounds*, 495 F.2d 437 (5th Cir. 1974).

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

87. 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1972).

88. *Id.* at 795.

89. *Id.* at 801-02.

90. *Id.* at 802 n.14.

91. The court noted: "There is nothing in [Professor Moore's treatise], in the Advisory Committee's Note, or in any case cited to us which supports the proposition that no monetary relief may be ordered in a class action under Rule 23(b)(2)." *Id.* at 802.

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974), echoes this belief. The *Pettway* court, when awarding substantial classwide back pay, stated:

Subdivision (b)(2) is "keyed to the effect of the relief sought, and the pragmatic ramifications of adjudication in each situation, rather than any special attributes of the class involved". . . . [Rule 23(b)(2)] is not to be read as saying "thereby making appropriate *only* final injunctive relief or corresponding declaratory relief." All that need be determined is that conduct of the party

Although it thus may not seem improper to award this form of monetary recovery in rule 23(b)(2) class actions, superior alternatives have been adopted by other courts. In *Paddison v. Fidelity Bank*,⁹² for example, a district court rejected the reasoning of *Robinson* by holding that only individually named plaintiffs could recover back pay.⁹³ The *Paddison* court recognized that the extreme inefficiency of classwide back pay awards⁹⁴ detracted from the fundamental benefit of class actions, efficiency of disposition. Moreover, its holding would prevent the avoidance of the more appropriate procedure of rule 23(b)(3):

In a nutshell, these cases have allowed the very real administrative and substantive problems raised in the determination of back pay awards to individual class members to avoid the scrutiny under the criteria of 23(b)(3) to which they would normally be subject by denominating them equitable relief in the context of a Title VII action. The motivation of these decisions is admirable—a desire for full justice—but full justice includes procedural fairness to a losing defendant as well. Style it what you will, back pay disputes raise all the traditional (b)(3) problems.⁹⁵

The court also rejected the use of “subclasses” to alleviate the burdens of a classwide award,⁹⁶ and concluded: “It is not in the best

opposing the class is such as makes such equitable relief appropriate. This is no limitation on the power of the court to grant other relief to the established class

Id. at 256-57.

92. 60 F.R.D. 695 (E.D. Pa. 1973).

93. The court circumscribed the proper limits of rule 23(b)(2):

[C]lass actions administered solely under (b)(2) were to remain as free of the pitfalls of past money disputes as is consistent with the complete litigation of the causes of action of the named plaintiffs, whether or not those disputes might in some sense be called “equitable.” Thus it is our position that pursuant to a (b)(2) designation standing alone, named plaintiffs may recover past damages but unnamed class members may not.

Id. at 697.

94. Such inefficiency is epitomized by the extensive haggling over formulas and technicalities in the *Bowe v. Colgate-Palmolive Co.* litigation. See *Bowe v. Colgate-Palmolive Co.*, 489 F.2d 896 (7th Cir. 1973); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969), *rev'g in part* 272 F. Supp. 332 (S.D. Ind. 1967).

95. 60 F.R.D. at 698.

96. *Id.* The *Paddison* court observed:

It has been suggested that past damage issues in a (b)(2) class action might properly be handled by the creation of ‘sub-classes’, but this does not really solve any problems, or face the fact that many parts of a broad-based (b)(2)

interests of the orderly administration of justice that (b)(2) should be used for (b)(3) functions."⁹⁷

This conclusion in *Paddison* accords with the holding of the Court of Appeals for the Seventh Circuit in *Air Line Stewards Local 550 v. American Airlines, Inc.*⁹⁸ Partially because of the substantial back pay recovery sought,⁹⁹ the court of appeals held that the trial court's certification of a class pursuant to rule 23(b)(2) was erroneous, although the challenge to the defendants' pregnancy discharge policy was allowed to continue as a rule 23(b)(3) action.¹⁰⁰ The question of class certification arose when the trial court refused to permit absent class members to opt out of the class, a right that they would have only in a rule 23(b)(3) case. Reversing the district court's decision, the appellate court described the true nature of the suit: "When the airlines ended their discharge policy, the actions became virtually moot as far as the currently employed stewardesses were concerned, and purely prospective relief against the practice became of little moment. The (b)(3) character of the actions, while always present to the discharged stewardesses, became even more obvious."¹⁰¹

It may be presumed that the class in *Air Line Stewards* was large; nevertheless, it cannot be denied that the suit was an appropriate one for back pay relief, since compensatory damages were not speculative but readily ascertainable for each class member.¹⁰² Significantly, however, because the unlawful practice had been discontinued, the court of appeals astutely perceived the case as one essentially for back pay, thus properly to be confined to a rule 23(b)(3) action. The requirement of rule 23(b)(2) that a class action be primarily for injunctive or declaratory relief similarly would not seem to accommodate back pay suits when a class or subclass of former employees complain, because as in a challenge to discontinued conduct, the only logical benefit to be derived from a determi-

Title VII class should possibly not properly have issues of past money damages adjudicated through the class action device at all. The problems of proof and *res judicata* are often simply too great.

Id.

97. *Id.*

98. 490 F.2d 636 (7th Cir. 1973).

99. *Id.* at 642-43.

100. *Id.* at 643.

101. *Id.*

102. See notes 56-57 *supra* & accompanying text.

nation of unlawful employment practices is the recovery of back pay.¹⁰³

At least one district court within the Fifth Circuit has recognized that a challenge to a discontinued discriminatory policy belongs within rule 23(b)(3) rather than rule 23(b)(2). In *Baham v. Southern Bell Telephone & Telegraph Co.*¹⁰⁴ several provisions of a collective bargaining agreement, not present in the agreement effective at the time of suit, were challenged in a Title VII class action. The court found that the suit was not primarily for injunctive relief and therefore was inappropriate for rule 23(b)(2) certification. The court stated:

Class actions under 23(b)(2) are not appropriate for the type of relief which is sought here. . . . Rule 23(b)(2) is simply not designed to require the court to examine the particular circumstances affecting each individual member of the class. Class suits developed as a tool in equity to promote the *efficient* litigation of certain types of controversies. The use of rule 23(b)(2) in the suggested fashion would hardly promote efficiency; indeed, one can envision the potential for unmanageability inherent in this unintended use of the device.¹⁰⁵

This language is not necessarily irreconcilable with the recent decisions of the Court of Appeals for the Fifth Circuit in *Johnson* and *Pettway*, because the *Baham* court left open the possibility of a rule 23(b)(2) suit that demanded prospective as well as monetary relief.¹⁰⁶ Nevertheless, *Baham* leaves hope that the Court of Appeals for the Fifth Circuit may align itself with the *Air Line Stewards* rationale when confronted with a case involving discontinued unlawful practices.

An additional consideration is involved when the defendant alters its previously unlawful policy while a class action is pending. In *Arkansas Education Association v. Board of Education*¹⁰⁷ the Court

103. In *Chrapliwy v. Uniroyal, Inc.*, Civil No. 72-5-243 (N.D. Ind., Feb. 27, 1974), *Air Line Stewards* was construed by a district court in the Seventh Circuit to require class certification under rule 23(b)(3) whenever substantial classwide back pay is sought. *Id.*

104. 55 F.R.D. 478 (W.D. La. 1972).

105. *Id.* at 480-81.

106. The court stated: "A question could also arise concerning whether the addition of a demand for prospective relief coupled with the demand for monetary relief might, under certain circumstances allow both actions to be brought under Rule 23(b)(2). Since the question of prospective relief is moot, the question does not arise here." *Id.* at 481.

107. 446 F.2d 763 (8th Cir. 1971).

of Appeals for the Eighth Circuit concluded that under such circumstances a class action otherwise properly brought under rule 23(b)(2) could not be dismissed, thus apparently accepting the remedial approach of the Fourth and Fifth Circuits to the question of back pay claims in rule 23(b)(2) suits.¹⁰⁸

When substantial classwide back pay is sought in a Title VII class action, it can be seen that no consensus exists regarding the proper approach to class certification. Although the courts permitting use of rule 23(b)(2) have been deluded by an unfulfilled hope for efficiently managed claims, and conceivably by a desire to avoid the complexities of rule 23(b)(3), an alternative exists that can provide a more rational treatment of these suits. Before the cases became clouded by guilt reactions to the history of racism in the United States, Professor Moore had suggested that, in actions in which classwide back pay is sought, the court should bifurcate the action, creating a rule 23(b)(2) class for injunctive relief and a rule 23(b)(3) class for monetary relief.¹⁰⁹ Certification of the latter class could await determination of the merits of issues raised in the injunction suit.¹¹⁰

A bifurcated approach would allow isolation of those class members actually injured by the practices enjoined in the preliminary branch of the lawsuit.¹¹¹ In the subsequent rule 23(b)(3) portion of the action, the class could be certified to conform to the Title VII mandate that compensatory relief be accorded only to those individuals who have suffered actual injury from the unlawful practice. This appropriate class would be more manageable than the unwieldy classes that contain numerous uninjured claimants; moreover, the sometimes crushing burden of providing notice to the rule 23(b)(3) class would be diminished.¹¹² The unfairness generated by the frequent misapplication of rule 23(b)(2) thus can be avoided by confining its use to injunctive, rather than back pay, actions, while

108. The change in meaningful remedy was an insufficient reason to the court to dismiss the suit: "Our conclusion is that a class action for injunctive relief and damages properly brought under Rule 23(a) and (b)(2) should not be dismissed merely because a subsequent change in policy by the defendant has eliminated the necessity for future injunctive relief, leaving only the question of past damages for determination by the court." *Id.* at 768. See *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 256-58 (5th Cir. 1974). See also notes 87-91 *supra* & accompanying text.

109. 3B J. MOORE, *supra* note 78, ¶ 23.45[1], at 23-708.

110. *Cf. id.* at 23-709.

111. *Id.*

112. See *Eisen v. Carlisle & Jacquelin*, 94 S. Ct. 2140, 2150-52 (1974).

securing the important safeguards of rule 23(b)(3) certification to all parties involved.¹¹³

CONCLUSION

Although Title VII may be one of the most significant legislative attempts to redress the ills of discrimination, its effects may be limited without a proper procedural vehicle for the delivery of its benefits. Rule 23 of the Federal Rules of Civil Procedure holds much potential as a device for obtaining the substantive benefits of Title VII, but its recurrent misuse not only has limited the rule's effectiveness, it also has deterred providing full equitable relief. By permitting unmanageable classes to be certified under the guise of injunctive suits, many courts have lost themselves in unworkable mazes of futility.

Careful distinction between class actions primarily for injunctive relief and those principally for recovery of monetary damages in the form of back pay is an absolute requirement for the beneficial use of the class action. Appropriate injunctive and declaratory relief should not be forced to bear the weight of improperly conceived, primarily punitive, classwide back pay awards not grounded on actual injury of complaining parties properly before the court. Preservation of the particular strengths of the different class action procedures can minimize inefficient litigation and avoid needless delay in dismantling the vestiges of employment discrimination.

113. See generally *Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.*, 285 F. Supp. 714 (N.D. Ill. 1968). Action under rule 23(b)(3) was maintained against all parties involved in infringement suits under certain patented processes; other parties, not involved in such suits, using the patented processes, with respect to whom injunctive and declaratory relief would be appropriate, were grouped in a second subclass under rule 23(b)(2). *Id.* at 723-27.