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TITLE VII AND POSTJUDGMENT CLASS ACTIONS

The purpose of Title VII of the Civil Rights Act of 1964\(^1\) is to eliminate employment discrimination based on race, color, religion, sex or national origin. In the recent decisions of *Sprogis v. United Air Lines, Inc.*\(^2\) and *Danner v. Phillips Petroleum Co.*,\(^3\) the courts of appeals for the Seventh and Fifth Circuits differed on the propriety of court initiated class actions in Title VII suits after a judgment on the merits.

In *Sprogis*, the plaintiff was discharged by United Air Lines for violating a company policy requiring stewardesses to remain unmarried. In granting the plaintiff's motion for summary judgment, the district court held that the no-marriage rule contravened Title VII and ordered Mrs. Sprogis' reinstatement with back pay.\(^4\) Although the complaint sought only individual relief, the court retained jurisdiction to consider extending class action relief.\(^5\) The Seventh Circuit affirmed, holding that in Title VII cases class actions may be initiated by the court after a judgment on the merits.\(^6\)

The plaintiff in *Danner* was discharged by her employer because of an economy move that allegedly eliminated her job. The district court found that Mrs. Danner was actually discharged because she, like all female employees in the defendant's plant, had no seniority or bidding rights to enable her to transfer to another job within the employer's plant.\(^7\) When her position was discontinued her job was assigned to male employees who had these seniority rights. The district court held that

\(3\). 447 F.2d 159 (5th Cir. 1971), modifying 1 CCH EMPL. PRAC. GUIDE ¶ 8336 (W.D. Tex. May 18, 1970).
\(4\). 308 F. Supp. 959 (N.D. Ill. 1970). The court held that United's no-marriage policy violated § 703(a)(1) of the Act because a similar policy was not applied to male cabin attendants on certain foreign flights who performed duties comparable to those of stewardesses. Section 703(a) states, in part:

> It shall be an unlawful employment practice for an employer— (1) to . . . discharge any individual, or otherwise to discriminate against any individual . . . because of said individual's . . . sex. . . .


For an overall discussion of no-marriage rules imposed by airline companies, see Binder, *Sex Discrimination in the Airline Industry: Title VII Flying High*, 59 CALIF. L. REV. 1091 (1971).
\(5\). 308 F. Supp. at 962.
\(6\). 444 F.2d at 1201-02.
\(7\). 1 CCH EMPL. PRAC. GUIDE ¶ 8336 (W.D. Tex. May 18, 1970).
the plaintiff was discriminatorily discharged in violation of Title VII and ordered Mrs. Danner's reinstatement with back pay. The court also granted class relief by both enjoining the defendant from further discrimination against its female employees and by retaining jurisdiction to insure that the defendant would initiate a system of equal seniority rights. The Fifth Circuit Court of Appeals affirmed the lower court decision but modified the judgment. The court held that since Mrs. Danner had brought suit in her name alone and, therefore, had not fulfilled the requirements of rule 23 of the Federal Rules of Civil Procedure, the judgment could not include class relief.

The contrary results of Sprogis and Danner are significant since both the Seventh and Fifth Circuits have repeatedly favored Title VII claimants. This divergence over postjudgment class relief raises serious questions concerning judicial enforcement of Title VII.

THE CONCILIATION PROCESS OF TITLE VII

Passage of the Civil Rights Act of 1964 was "an epic legislative struggle." Much of the Act's controversy centered on Title VII, particularly on its enforcement provisions. The Act ultimately provided for an Equal Employment Opportunity Commission (EEOC), whose

8. Id. at 6993-208.
9. 447 F.2d at 163-64.
10. See generally Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969); Heat & Frost Workers, Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Dent v. St. Louis & S. F. Ry., 406 F.2d 399 (5th Cir. 1969); Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968).
11. Vass, Title VII: Legislative History, 7 B.C. IND. & COMM. L. REV. 431, 445 (1966) [hereinafter cited as Vass]. The Senate debated the bill for 83 days, during which time 87 amendments were offered to the proposed bill. See BNA, THE CIVIL RIGHTS ACT OF 1964 (1964) [hereinafter cited as BNA]; EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 10-11 (1964) [hereinafter cited as LEGISLATIVE HISTORY].
12. The original version of the bill as introduced in the House (H.R. 405) provided for administrative cease and desist orders. This was objected to vigorously by House Republicans. In the Senate a bill introduced by Senator Humphrey (S. 1937) provided for enforcement of equal employment opportunities by an administrator.
13. H.R. 7152, as recommended by the House Judiciary Committee, provided for enforcement by the courts but placed primary responsibility for bringing suits upon the Equal Employment Opportunity Commission. While H.R. 7152 was still being debated on the Senate floor, Senate leaders held a series of conferences that resulted in a Senate substitute amendment, No. 656. This amendment, which was eventually passed by both Houses, removed the Commission's power to bring suit and shifted this responsibility to private individuals. See BNA, supra note 11, at 17-22, 313; LEGISLATIVE HISTORY, supra note 11, at 8-11, 3003-21; 110 CONG. REC. 12721-25 (1964).
function is to investigate charges of employment discrimination and to eliminate such discrimination through conciliation.\textsuperscript{14} Once conciliatory attempts prove unsuccessful the bulk of enforcement responsibility is placed on private litigants through actions brought in federal courts.\textsuperscript{15}

To effectuate the goal of conciliation an intricate procedural framework was built into Title VII. Before an aggrieved individual can bring suit he must file a charge with the EEOC within ninety days of the alleged discriminatory act.\textsuperscript{16} The EEOC, after determining whether reasonable cause exists to believe a violation has occurred, attempts conciliation with the employer.\textsuperscript{17} If conciliation fails, the Commission notifies the complainant of his right to bring an action within thirty days in federal court.\textsuperscript{18}

Although Title VII has procedures to effectuate its policy of conciliation, these guidelines have been ignored frequently in order to insure recovery for claimants.\textsuperscript{19} For example, courts have disregarded filing

\textsuperscript{14} Act § 705(a)-(j); 42 U.S.C. § 2000e-4(a) to (j) (1970).
\textsuperscript{15} If . . . the Commission has been unable to obtain voluntary compliance with this title . . . a civil action may be brought against the respondent . . . by the person claiming to be aggrieved. . . .
If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay. . . .
\textsuperscript{16} Act § 706(d); 42 U.S.C. § 2000e-5(d) (1970). This period is extended if the person first pursues his remedy through a state agency in accordance with § 706(b) of the Act.
\textsuperscript{17} Act § 706(a); 42 U.S.C. § 2000e-5(a) (1970).
\textsuperscript{18} Act § 706(e); 42 U.S.C. § 2000e-5(e) (1970). Section 706(e) gives the EEOC a maximum of sixty days in which to conciliate the charge. For a few months the Commission sent out notice-to-sue letters after sixty days on complaints that had never been submitted to the conciliation process. Eventually, swamped with charges, the EEOC announced that it would no longer adhere strictly to the deadline in § 706(e), but would issue notice-to-sue letters only after conciliation had been attempted and had failed. 29 C.F.R. § 1601.25(a) (1970).
\textsuperscript{19} Courts that have bypassed these procedural requirements have admitted that conciliation is an important policy of Title VII. \textit{See} Hutchings v. United States Indus., Inc., 428 F.2d 303, 309 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969); Dent v. St. Louis & S.F. Ry., 406 F.2d 399, 402 (5th Cir. 1968).
Legislative history has given the courts little help in determining the relative importance of the conciliation policy. There is no committee report or hearing record on Senate Substitute Amendment No. 656, which significantly altered H.R. 7152. \textit{See} note 12 \textit{supra}. There is also no Senate-House conference report, for the House agreed to all the Senate amendments. 110 Cong. Rec. 15897 (1964). Only the congressional debates remain as possible indicators of legislative intent. The result is confusion. Witness the contradictory remarks of Senator Humphrey, a primary spokesman for the bill, found on the same page of the \textit{Congressional Record.}
requirements,\textsuperscript{20} reasonable cause determinations,\textsuperscript{21} conciliation attempts,\textsuperscript{22} and time limitations.\textsuperscript{23} The postjudgment class relief granted in \textit{Sprogis} represents the clearest disregard to date for these procedural requirements.

We do not appoint Commissions as wall decorations. Their job is to do something.

\dots

The individual may proceed in his own right at any time. He may take his complaint to the Commission, he may bypass the Commission, or he may go directly to court.

\textit{110 Cong. Rec. 14188} (1964). See also \textit{Dent} v. St. Louis & S.F. Ry., 406 F.2d 399, 403 (5th Cir. 1969): "The Congressional \dots debates lend great comfort to both sides. This, we believe, leaves no clearly discernible Congressional intent. \dots" Despite the meager legislative history of Title VII, an examination of the entire 1964 Act reveals a clear intention to favor conciliation over court enforcement. Title II, dealing with discrimination in public accommodations, states that after a civil action has been brought, the court may refer the matter to the Community Relations Service as long as the court believes there is a reasonable possibility of obtaining voluntary compliance. Act \S 204(d); 42 U.S.C. \S 2000a-3(d) (1970). Title IV, concerning the desegregation of public education, precludes the Attorney General from filing suit until the school board has had a reasonable time to correct any discriminatory practice. Act \S 407(a); 42 U.S.C. \S 2000c-6 (1970). Title VI, affecting discrimination in federally assisted programs, prohibits discontinuation of federal funding until it is determined that the discriminatory practice cannot be terminated by voluntary means. Act \S 602; 42 U.S.C. \S 2000d-1 (1970). Title X establishes a Community Relations Service to assist in resolving disputes by conference and conciliation. Act \S 1002; 42 U.S.C. \S 2000g-1 (1970).

20. Courts have held that all eligible complainants need not file charges with the EEOC to join in a class action. \textit{Bowe} v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); \textit{Miller} v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); \textit{Oatis} v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

However, courts have never dispensed with the filing requirements entirely, and at least one class member must still have filed a charge. \textit{Oatis} v. Crown Zellerbach Corp., 398 F.2d 496, 497-98 (5th Cir. 1968).


Some courts have taken this line of reasoning one step further and have held that an EEOC finding of "no cause" against the complainant does not bar his suit in federal court. \textit{Robinson} v. Lorillard Corp., 1 CCH EMP. PRAC. GUIDE \S 8267 (4th Cir. July 1, 1971); \textit{Flowers} v. Laborers Local 6, 431 F.2d 205 (7th Cir. 1970). See Development in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, 1204-06 (1970) [hereinafter cited as \textit{Title VII}].

22. Although we agree with \textit{Phillips} that one purpose of Title VII is to enforce voluntary compliance, its contention that EEOC efforts to conciliate are a jurisdictional prerequisite to a Title VII action borders on being frivolous. It is now too well settled to discuss that no EEOC effort to conciliate is required before a federal court may entertain a Title VII action.


These procedures were instituted to facilitate conciliation by insuring that all charges against the employer are aired in the complaint and channeled through the conciliation process. Therefore, Sprogis undermines statutory policy by allowing recovery to a class of potential litigants whose existence was not contemplated throughout conciliation.

Although these results have been justified by assertions that a mere technicality should not bar relief, the most probable reason for this indifference is the ineffectiveness of the conciliation process. Although in fiscal year 1970 the EEOC found reasonable cause to suspect Title VII violations in 16,400 cases, in thousands of instances conciliation was never attempted. Moreover, conciliation was successful or partially successful in only 450 cases. The process is so cumbersome that in the

24. *See*, e.g., Choate v. Caterpillar Tractor Co., 402 F.2d 357 (7th Cir. 1968): [I]t would be unnecessarily harsh and in derogation of the interests of those whom the Act was designed to protect to interpret the statutory language as denying substantive rights in the district court because of procedural defects before the Commission. *Id.* at 360. *See also* Dent v. St. Louis & S.F. Ry., 406 F.2d 399, 403 (5th Cir. 1969).

25. At the close of fiscal year 1970, the Equal Employment Opportunity Commission . . . will have been in operation for 5 years. It is not much closer to the goal of the elimination of employment discrimination than it was at its inception.

UNITED STATES COMM’N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 1971, at 135 (1971) [hereinafter cited as FEDERAL EFFORT]; *see* F. COUSENS, PUBLIC CIVIL RIGHTS AGENCIES AND FAIR EMPLOYMENT 114 (1964) [hereinafter cited as COUSENS]:

[C]reation of the Equal Employment Opportunity Commission did not fulfill either the promise or performance of a federal commission.

Many reasons have been offered for the EEOC’s ineffectiveness, chiefly its lack of enforcement power and grossly inadequate staff and budget resources. (Originally staffed and budgeted for 2,000 complaints per year, the EEOC received nearly 9,000 in its first year alone.) *See* FEDERAL EFFORT, *supra*, at 102, 135.

H.R. 1746, passed by the House on September 16, 1971 and currently being considered by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare would grant the EEOC power to bring Title VII suits itself on behalf of the aggrieved complainant. H.R. 1746, 92d Cong. 1st Sess. (1971). S. 2515, also under consideration by the same Senate Subcommittee, would grant the EEOC cease and desist powers. S. 2515, 92d Cong., 1st Sess. (1971). *See* 78 LAB. REL. REP. 59 (1971).

26. EEOC, FIFTH ANNUAL REPORT—FISCAL YEAR 1970, at 29, 63 [hereinafter cited as FIFTH ANNUAL REPORT]. Of these cases, 11,300 originated in fiscal year 1970; 5,100 were carried over from fiscal year 1969. *Id.* at 64.

27. A successful agreement is one to which the EEOC, the respondent and the charging party are all signatories. In a partially successful conciliation the respondent agrees to end the discrimination cited in the charge but will not sign an agreement saying he has discriminated against the complainant. FEDERAL EFFORT, *supra* note 25, at 104 n.715.

Statistics can be confusing on this issue. The EEOC is successfully conciliating about 38 per cent of the charges it attempts. But, due to backlog and delay, it is only attempting to conciliate seven per cent of the total complaints received. Therefore, its true successful conciliation rate, measured against all charges in which reasonable cause had been found, is only 2.7 per cent. *See* FIFTH ANNUAL REPORT, *supra* note 26, at 63.
first seven months of fiscal year 1971, the backlog of meritorious cases has reached 25,195. As a result, prospective Title VII complainants can now expect a two year delay before their charge is even submitted to conciliation.

STATUTE OF LIMITATIONS PROVISIONS OF TITLE VII

Title VII states that a charge "shall be filed within 90 days after the alleged unlawful practice." This provision, which purports to be the Act’s statute of limitations, has been continually circumvented. As to non-filing class members, courts have held the ninety-day requirement to be only a statutory precondition to filing a charge with the EEOC. Therefore, according to the courts a timely filing by one class member satisfies the requirement for the entire class. Generally, however, the alleged discriminatory offense has been labeled a "continuing violation" for which no particular act would be said to commence the running of the limitation period. Examples of such "continuing violations" are dis-


29. Federal Effort, supra note 25, at 99. The deleterious effects of such a delay are brought out by the New Jersey-Blumrosen study of the effectiveness of state fair employment practices commissions. The study showed that during the drawn-out commission investigation process, many former complainants would seek and find other jobs, thereafter withdrawing their complaints. The study concluded: "The time involved between filing and final disposition was usually too long for most claimants to be without a job." Cousens, supra note 25, at 8.


It is now settled that a class action can be maintained under Title VII, and that only one member of the class need file timely charges with the EEOC. Id. at 897 n.9. See also Madlock v. Sardis Luggage Co., 302 F. Supp. 866, 871 (N.D. Miss. 1969).


Allowing one class member to satisfy the ninety-day filing limitation not only raises questions under Title VII, but conflicts with traditional case law on class actions and statutes of limitations. In a normal class action, the applicable statute of limitations is tolled for the entire class by the original plaintiff. 3B J. Moore, Moore's FEDERAL PRACTICE ¶ 23.90 at 23-1651 (2d ed. 1969) [hereinafter cited as Moore]; 2 W. Barron & A. Holtzoff, FEDERAL PRACTICE AND PROCEDURE § 568, at 315 (C. Wright rev. ed. 1961) [hereinafter cited as Barron & Holtzoff]. However, it is commonly accepted that the applicable statute of limitations must not have been a bar to the ability of other class members to bring an individual action at the time the class action was instituted. See, e.g., Slack v. Stiner, 358 F.2d 65, 70 (5th Cir. 1966); Escott v. Barchris Constr. Corp., 340 F.2d 731, 732-33 (2d Cir. 1965). See also Comment, Class Actions Under New Rule 23 and Federal Statutes of Limitation: A Study of Conflicting Rationale, 13 VILL. L. REV. 370, 373 (1968).
criminatory layoffs,\textsuperscript{32} plantwide racial discrimination,\textsuperscript{33} biased testing procedures,\textsuperscript{34} segregated washrooms,\textsuperscript{35} discriminatory promotional systems\textsuperscript{36} and discriminatory seniority\textsuperscript{37} and retirement plans.\textsuperscript{38}

It has been argued that judicial circumvention of the limitation period is harsh to a good-faith defendant.\textsuperscript{39} An employer will often maintain a long standing policy which all parties believe to be nondiscriminatory. If one employee successfully prosecutes a Title VII claim, however, \emph{Sprogis}-type class relief could expand an employer's liability far beyond

\begin{itemize}
\item \textsuperscript{32} Sciaraffa v. Oxford Paper Co., 310 F. Supp. 891, 896-97 (D. Me. 1970); see Cox v. United States Gypsum Co., 409 F.2d 289, 290-91 (7th Cir. 1969) (fact that plaintiffs explicitly alleged a “continuing” discriminatory layoff was sufficient foundation for an action based on discrimination in failing to recall them to work).
\item \textsuperscript{33} Banks v. Lockheed Georgia Co., 46 F.R.D. 442 (N.D. Ga. 1968).
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id.; Pacific Maritime Ass'n v. Quinn, 1 CCH \textsc{Empl. Prac. Guide} ¶ 8237 (N.D. Cal. May 26, 1971).
\item \textsuperscript{37} Tippet v. Ligget & Myers Tobacco Co., 316 F. Supp. 292 (M.D.N.C. 1970).
\item \textsuperscript{38} Bartness v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir.), \textit{cert. denied}, 40 U.S.L.W. 3212 (U.S. Nov. 9, 1971).
\item \textsuperscript{39} See \textit{Sprogis} v. United Air Lines, Inc., 444 F.2d 1194, 1207 (7th Cir. 1971) (dissenting opinion of Stevens, Cir. J.). That Congress is clearly aware of a potential unfairness is evidenced by the House debate preceding passage of H.R. 1746. Section (e) of the bill amends subsection (h) of § 706 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5] to read, in part:
\begin{quote}
No order made hereafter shall include back pay or other liability which has accrued more than two years before the filing of a complaint with said court under this title.
\end{quote}
Congressman John Erlenborn (R., Ill.), sponsor of the substitute bill which eventually passed as H.R. 1746 stated:
\begin{quote}
At the present time there seems to be no limit to how far back pay awards can be made on behalf of a party who wins one of these actions, except to the beginning of the act, which has the effective date of 1965.
\end{quote}
\begin{itemize}
\item [T]he liability of backpay without limitation would create an horrendous potential liability.
\item We also feel that the cause of due process will be best served if our substitute is adopted providing . . . a statute of limitations so that back pay awards cannot be rendered in the year 2000 all the way back to the year 1965, as the courts are apparently holding at the present time.
\end{itemize}
\item \textsuperscript{117} Cong. Rec. 8473-74 (daily ed. Sept. 15, 1971).
Congressman Erlenborn's efforts are quite subtle. A previous amendment to H.R. 1746 read:
\begin{quote}
[N]o order made hereunder shall include back pay or reinstatement liability which has accrued more than two years \textit{before the filing of a charge with the Commission}.
\end{quote}
\item \textsuperscript{117} Cong. Rec. 8482 (daily ed. Sept. 15, 1971) (emphasis added).
By changing the section to “filing of a complaint with said court” (emphasis added), even more back pay liability is precluded.
his justifiable expectations.\textsuperscript{40} Such unforeseen liability could relate back to the effective date of the Act\textsuperscript{41} for all class members, thereby becoming an unjust surprise to the defendant and a windfall to those who have "slept on their rights."\textsuperscript{42} It must be remembered, however, that Title VII is intended to encourage employers to eliminate discrimination of their own volition.\textsuperscript{48} Consequently, if an employer is uncertain whether his present policy is discriminatory and is convinced that an alternative complies with Title VII, he should voluntarily adopt it. An employer who refuses either to adopt the alternative or to consult the EEOC for an evaluation of his policy cannot be characterized as a good-faith defendant.\textsuperscript{44}

40. A good example of the extent to which courts can go in using the no-limitation loophole is Laffey v. Northwest Airlines, Inc., 1 CCH EMP. PRAC. GUIDE ¶ 8229 (D.D.C. Feb. 11, 1971). In this case a class action was brought under both the Equal Pay Act of 1963 and Title VII. The court divided the class into two subclasses. Class One was the Equal Pay Act Class, defined as all plaintiffs whose claims were not barred by that Act's three year statute of limitations. Class Two was the Civil Rights Act Class. It consisted of current or past employees back to July 2, 1965 (the effective date of Title VII). These employees could seek back pay to that date to the extent the Equal Pay Act's statute of limitations prevented recovery thereunder.


42. The policy behind statutes of limitation has been stated by the Supreme Court: [Statutes of limitation are] designed to promote justice by preventing surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses, have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.


43. If Title VII could only be effective through complaints to the EEOC or through court action, its purpose in eliminating employment discrimination could never be achieved. FIFTH ANNUAL REPORT, supra note 26, at 44. Recognizing this fact, the EEOC has made strong efforts to encourage employer-initiated affirmative action programs. Franklin D. Roosevelt, Jr., former chairman of the EEOC, has stated:

It is our hope that through persuasive and aggressive promotion of affirmative action we may be able to achieve more significant results, both quantitative and qualitative, for minority group workers than through the complaint procedure.


44. The EEOC greatly encourages employers to make inquiries of the Commission
TITLE VII AND CLASS ACTIONS

Although Title VII does not specifically provide for class actions, *Hall v. Werthan Bag Corp.* held such suits permissible. The court's holding was based on its conclusion that racial discrimination was by definition "class" discrimination. *Hall* also held, however, that class members who had not filed charges with the EEOC were limited to injunctive relief.

Subsequent decisions adopted and expanded class action relief but declined to follow *Hall*'s strict application of procedural requirements. For example, *Oatis v. Crown Zellerbach Corp.* held that membership in a class action was not limited to persons who had filed charges with the EEOC. The *Oatis* court reasoned that requiring every class member to submit separate charges would be wasteful duplication of effort. In *Jenkins v. United Gas Corp.*, the plaintiff brought a class action...
alleging that his employer discriminated generally against all black employees and specifically against him by denying a promotion. Although the lower court dismissed the class suit because the defendant subsequently promoted Jenkins, the appellate court held that settlement of the individual claim did not warrant dismissal of the class action. The court determined that the public interest required Jenkins to assume the role of a “private attorney general” suing to end all racial discrimination within the United Gas plant.

This continuing favoritism to class actions was exemplified in Johnson v. Georgia Highway Express, Inc. In Johnson the district court held that membership in a class action brought by a discriminatorily discharged black employee was limited to other employees similarly discharged. The appellate court reversed since the original complainant had alleged “across the board” discrimination and, thereby, could represent all black employees who had been discriminated against in any manner. In the recent case of Taylor v. Springmeier Shipping Co. the plaintiff brought suit, individually and as a class representative, alleging racial discrimination. Although the district court dismissed the individual action as unmeritorious and found Taylor an improper representative of the class, the court retained jurisdiction over the class claim for six months in order to permit any “qualified” representative to come forward. Thus, it appears that an original plaintiff’s illegitimate claim was allowed to fulfill Title VII’s procedural requirements for the entire class.

57. 1 CCH EMPL. PRAC. GUIDE ¶ 8298 (W.D. Tenn. July 9, 1971).
58. The court dismissed Taylor’s action because he had previously processed his charge through the union grievance procedure and had received an adverse determination, precluding him from further court action on the same charge. 1 CCH EMPL. PRAC. GUIDE at 6993-20; see Dewey v. Reynolds Metals Co., 429 F.2d 324, 332 (6th Cir. 1970), aff'd, 1 CCH EMPL. PRAC. GUIDE ¶ 8216 (U.S. June 1, 1971).
59. The court in Taylor is retaining jurisdiction over the class action to permit a “qualified” class member to come forward and litigate Taylor’s claim. Arguably, the court could demand that a new class representative must have previously filed charges with the EEOC, as Taylor had done. Since the court is making every effort to maintain the class action, however, it is not likely that it would put such a limitation upon a potential class representative.
In Sprogis, the Seventh Circuit held that "Rule 23 to the contrary notwithstanding," a federal court could initiate class relief in an individual suit after the decision on the merits. The Fifth Circuit in Danner, however, held that class relief must be predicated upon a "proper class action complaint satisfying all the requirements of Rule 23." This difference of opinion centers on the applicability of rule 23(c)(1), which states in part:

60. 444 F.2d at 1201.
61. Mrs. Danner, however, never took up the banner of women's liberation for all female employees in the Phillips plant. If [other female employees of Phillips] decide to bring a class action, it must be brought and identified as such, and the predicate for class action relief must be carefully laid. In the meantime, Mrs. Danner's victory is for her alone to taste and enjoy.

447 F.2d at 164. The Danner court discussed the possibility that Mrs. Danner's action might not have met Rule 23's requirements had it been brought originally as a class action. This possibility seems unlikely. The court questioned the limited number of beneficiaries of Mrs. Danner's possible class suit, expressing doubt that the number could satisfy Rule 23(a)(1), which states in part:

One or more members of a class may sue . . . on behalf of all only if . . .
the class is so numerous that joinder of all members is impracticable. . . .
FED. R. CIV. P. 23(a)(1). However, seventeen persons has been held sufficient to satisfy this rule, and there were at least thirty female employees in Phillips' plant other than Mrs. Danner. See Arkansas Educ. Ass'n v. Board of Educ., 1 CCH EMP. PRAC. GUIDE ¶ 8292 (8th Cir. July 26, 1971).

The Danner court also expressed doubt that Mrs. Danner might be able to establish herself as an adequate representative of the class, according to the requirements of Rule 23(a)(4), which states in part:

One or more members of a class may sue . . . as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class.
FED. R. CIV. P. 23(a)(4). However, treating the question after the fact (as the district court did) one could not have asked for a more adequate representative than Mrs. Danner, who had already won her suit by proving a class-wide pattern of discrimination.

The Danner court also questioned if Mrs. Danner's possible class suit would meet the requirements of Rule 23(b). This contention is of doubtful merit, for most discrimination suits come easily within the classification of the rule, which states in part:

An action may be maintained as a class action if . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class.
FED. R. CIV. P. 23(b)(2). The Advisory Committee Notes to the present version of Rule 23(b)(2) state:

Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.
Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class. . . .

As 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.62

It appears, therefore, that the circuits differ on two significant issues: (1) whether class actions may be initiated by the court and (2) whether class actions may be allowed after a judgment on the merits.

As to the first issue, the legislative history of rule 23 indicates strong opposition to court-initiated class actions. Subdivision (c)(1) of the 1964 preliminary draft of rule 23 stated in part:

Where necessary for the protection of a party or of absent persons, the court, upon motion or on its own initiative at any time before the decision on the merits of an action brought as a non-class action may order that it be maintained as a class action.63

Adverse commentary on this section was virtually unanimous.64 The commentators reasoned that such judicial power would subject a plaintiff who merely sought personal relief to the extra time, expense and effort of a class action.65 Moreover, since class actions can be voluntarily dismissed only with the approval of the court,66 such conversion could severely limit the original plaintiff's right to settle his personal claim. As a result of this opposition, the above portion of the preliminary draft was excluded from rule 23.67

These arguments, however, seem inappropriate when applied to class actions created after a favorable judgment on the merits. In such

66. A class action shall not be dismissed without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.
situations, no extensive effort is required of the original plaintiff. Furthermore, the plaintiff's right to settle his individual claim is rendered moot by the favorable judgment.

As to the second issue, the legislative history is less revealing. Although the 1964 preliminary draft of rule 23 stated that a class action must be determined "as soon as practicable . . . and before the decision on the merits. . . ." the emphasized language was deleted, without explanation, from the adopted rule. It could be argued that this deletion was made to permit Sprogis-type relief where justice requires. Moreover, the remaining vague limitation of "as soon as practicable" seemingly grants courts broad discretion in deciding when to make a class determination.

A close examination of the reasons for rule 23, however, proves this argument unfounded. The former version of the rule permitted a "spurious" class action in which judgments were binding only on those who consented to class membership. Courts began applying this rule

68. Plaintiff need only amend his original complaint to admit other class members and show to the court that the action satisfies rule 23. The latter burden certainly does not seem difficult since the court has already exhibited its favorable opinion of the propriety of a class action in this case.


70. On March 12, 1965 the Committee on Federal Rules of Civil Procedure of the Judicial Conference of the Ninth Circuit rejected a preliminary draft of the proposed rules which contained the phrase, "before the decision on the merits." 37 F.R.D. 71 (1965). On June 21, 1965 the committee again rejected the preliminary draft but noted certain improvements over the draft of March 12, including deletion of the phrase. 37 F.R.D. 499, 500, 522 (1965).

The statement of an American Bar Association committee is most appropriate on this point:

In modifying its March, 1964 draft the revised notes of the Advisory Committee do not indicate reasons for changes. . . . Since this legislative history is often extremely difficult to reconstruct, it would be helpful, in the future, where the problem may arise, to indicate reasons for changes.


72. The spurious class suit was actually only a permissive joinder device. The sole requirement for class membership was alleged possession of a claim having a question of law or fact in common with that of the plaintiff. No other legal relationship was necessary among spurious class members. They were simply invited to enter the litigation—an invitation they could accept or decline. Traditional permissive joinder differed only in its insistence that jurisdictional prerequisites like diversity of citizenship and sufficient amount in controversy be met by the putative coplaintiff. See Moore, supra note 31, at ¶ 23.10(1); Barron & Holtzoff, supra note 31, at § 562.3.
to permit non-consenting class members to intervene after a favorable decision and to share in the benefits of the judgment. The Advisory Committee’s notes to rule 23, however, indicate a strong policy against this practice of “one-way intervention”:

[O]ne-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

The relief permitted in Sprogis is indistinguishable from “one-way intervention” because nonparticipating individuals gained the benefit of a judgment which would not have bound them in a subsequent action. Such a result is in conflict with the doctrine of mutuality of estoppel, which provides that a party cannot bind his opponent to an issue litigated in a prior suit unless the proponent is also bound by the earlier determination of that issue. The underlying rationale against “one-way intervention” and favoring mutuality of estoppel is one of basic equity. This principle was forcefully stated by Circuit Judge Stevens, dissenting in Sprogis:

A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair.

73. In Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), a group of miners filed a “spurious” class action against certain mining companies, alleging an antitrust violation. After determining the liability of the companies, the court permitted nonparticipating miners to intervene and share in the judgment gained by their participating representatives. The court of appeals concluded:

Defendant's liability and the extent thereof has been competently proven by the named plaintiffs and it would be grossly redundant to say that it must be proven again by the unnamed members of the represented class. Id. at 589. See also York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1945). Cf. Hansberry v. Lee, 311 U.S. 32, 43 (1940).


76. 444 F.2d 1194, 1207 (7th Cir. 1971) (dissenting opinion of Stevens, Cir. J.).
The unfairness of Sprogis-type relief is manifested in two ways. First, it grants the benefits of a favorable judgment to persons who failed to assert their rights and assumed no risks of an adverse judgment. Second, it denies the defendant notice of his potential liability. Although it may be argued that considerations of judicial economy mitigate these forms of unfairness, an important purpose of determining a class action "as soon as practicable" is to give the defendant adequate notice to prepare the legal and financial aspects of his case. In Sprogis, for example, United Air Lines probably would have litigated its case with greater vigor had it known that the resulting judgment might include many former employees. Moreover, a company aware of potential class liability could better prepare to absorb a large financial loss.

**Promotion of Title VII Policies**

The result in Sprogis can be justified in several ways. First, it compensates for the reluctance of employees to enforce their Title VII rights. Of the Title VII charges in which the EEOC has notified complainants of their right to sue, only ten per cent have resulted in actual lawsuits. Most potential Title VII complainants are of modest means and education, with little legal awareness. Furthermore, a worker is unlikely to file a class action because his economic needs force him to think foremost of individual relief. Thus, individual reluctance to initiate lengthy and expensive law suits is not surprising. Application of

77. The defendant in Sprogis has had its "day in court" on the issue of the validity of its no-marriage rule, and it has lost. Requiring similarly discharged stewardesses to relitigate this same issue would only further clog the busy courts. Sprogis-type relief could backfire, however. If such relief becomes common, defendants will, under threat of possible class liability, be forced to litigate every individual suit to the fullest degree.

78. See Weithers, Amended Rule 23: A Defendant's Point of View, 10 B.C. IND. & COM. L. REV. 515, 522 (1969) [hereinafter cited as Weithers]:

Prior to the determination of the class issue, the defendant does not know if the plaintiff represents himself, or a group of persons whose alleged combined loss would be of such magnitude that the very economic life of a defendant would be in jeopardy.

Prompt determination of class actions also benefits potential plaintiffs. See Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 40-41 (1967).

79. FEDERAL EFFORT, supra note 25, at 110.


81. In one class action, the court and counsel consumed over three years in the attempt to resolve questions relating to the identification of members of the class, determination of the amount of the total award and other postjudgment problems. See Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1962); Weithers, supra note 78, at 523.

82. Another reason why employees hesitate to bring Title VII charges is fear of retaliation.
Sprogis-type relief will satisfy these unprosecuted and possibly meritorious claims.

Second, the result fulfills the dual policies of the Act. Title VII is both a public and a private law, concerned with ending employment discrimination as well as with compensating an aggrieved individual. Without judicial activism as exemplified in Sprogis, the purpose of eradicating employment discrimination may fail. The importance of eliminating employment discrimination is emphasized by the United States Civil Rights Commission's study of the impact of civil rights legislation up to 1970:

Evidence . . . indicates that employment discrimination in the private sector is still prevalent throughout the United States.

The plain fact is that some of these laws are not working well. The Federal civil rights effort has been inadequate to redeem in full the promise of true “equal protection of the laws” for all Americans. As a result, many minority group members are losing faith in the Federal Government’s will and capacity to protect their rights. Some are losing faith that equality can be achieved through law. It is important that their faith be restored and that the promise of the hard fought battle for civil rights laws be redeemed.

Although Sprogis violates the policies underlying rule 23, it supports the policies of Title VII as interpreted by the courts. Rule 23

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Experience has shown that in many cases people who have legitimate complaints of discrimination do not file charges. Frequently an individual feels that he has much to lose if he files a complaint. In some companies the individuals who file complaints are branded as troublemakers.

Federal Effort, supra note 25, at 96, n.604 (1971). See also Title VII, supra note 21, at 1228-29.

83. See Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968).

84. Federal Effort, supra note 25, at 96, n.604 (1971). See also Title VII, supra note 21, at 1228-29.

83. See Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968).

84. Federal Effort, supra note 25, at 96, n.604 (1971). See also Title VII, supra note 21, at 1228-29.

85. The House of Representatives has reacted adversely to the courts' expansion
limits class actions because of inequities to the defendant. Courts have sought to end employment discrimination by expanding class relief. The ultimate question, therefore, is one of balancing the inequities to the defendant against the inequities of class discrimination.

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of Title VII relief through class actions. H.R. 1746, passed by the House on September 16, 1971, amends § 706(g) of the original Act to read, in part:

No order of the court shall require the . . . hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual, pursuant to section 706(a) and within the time required by section 706(d), neither filed a charge nor was named in a charge or amendment thereto. . . .


This provision severely limits class actions in Title VII cases. The amendment requires an original plaintiff to name specifically in his EEOC complaint anyone he wishes to include in a class action. Thus, “across the board” plantwide discrimination cases would be prohibited.

Congressman Erlenborn, sponsor of this amendment, explained the section:

We would also provide in a class action a limitation so that those who join in the class action or those who by timely motion intervene could be considered as the proper class, but not all who may be similarly situated but who are not even aware of the fact that a case has been filed.


Congressman Augustus Hawkins (D., Cal.), who opposed the Erlenborn bill, describes the effect of the amendments as follows:

It is not court enforcement which is the main purpose of the Erlenborn substitute but changes in the existing law which will . . . limit if not emasculate, Title VII of the Civil Rights Act of 1964.

Id. at 8464.