COMMENT

The Use of Subclasses in Class Action Suits Under Title VII

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This Comment considers the use of subclasses in class action suits brought under Title VII of the Civil Rights Act of 1964. The author argues that the lack of a systematic approach to subclass use has caused confusion for both judges and practitioners, leading to inconsistent administration of this procedural device. The author defines three categories of subclasses and, through a survey of the case law, describes their unique attributes and the circumstances which prompt their definition. Following this section, the author presents an approach for identifying the need, in a given case, for division of a class into subclasses and discusses practical methods for conducting class litigation after having certified a subclass.

INTRODUCTION

The law surrounding class action suits, controlled by Federal Rule of Civil Procedure 23, can be a procedural nightmare. A particularly problematic area, within the larger procedural morass, involves the creation and use of subclasses in large class suits.1 Although judges appear to recognize the inherent usefulness of the subclass in complex litigation,2 a review of the case law reveals that there is no one systematic

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1. The concept of the subclass was formally codified in the Federal Rules of Civil Procedure in 1966, when Rule 23 was amended to include Rule 23(c)(4)(B). This provision was not in the original rule. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1790, at 185 (1972).

2. See, e.g., Mendoza v. United States, 623 F.2d 1338, 1350 (9th Cir. 1980) (stating subclassification appropriate when "the court believes that subclasses would materially improve the presentation of all relevant considerations"); United States v. United States Steel Corp., 520 F.2d 1043, 1051 (5th Cir. 1975) (stating, where class is large and diverse in composition, "much trouble might be eliminated—though we encourage the district court’s independent judgment on the point—by the use of subclasses"); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968) (suggesting use of subclasses due to inapplicability of some issue to all class members).


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approach to their creation and use. Individual judicial opinions are at odds with one another in terms of when a subclass is needed and what the ramifications of using a subclass may be. This Comment reviews some of the attempts at subclassification and sets out a systematic approach to subclass use which can alleviate the confusion engendered by sloppy judicial administration.

The focus of this Comment will be on subclass use in suits brought under Title VII of the Civil Rights Act of 1964. Until recently classes in such suits often received minimal judicial scrutiny for compliance with the requirements of Rule 23. Courts often certified extremely broad classes and formed subclasses without attention to their propriety under the Rule. Any kind of race or sex discrimination was invariably considered discrimination against the class.

The recent trend, however, heralded by *General Telephone Co. v. Falcon,* has been to emphasize the necessity of careful attention to the requirements of Rule 23. The Supreme Court, concerned about the

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7. The trend toward certifying extremely broad classes reached its zenith with Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969). In that case the Fifth Circuit allowed a black cargo handler, who had been discharged, to maintain a class suit on behalf of all black employees harmed by the employer's alleged discrimination in hiring, firing, promotion, and maintenance of facilities. The so-called "across-the-board" approach is based on the idea that by its very nature, employment discrimination is class discrimination.


binding effect of class litigation on class members,\textsuperscript{10} stressed the need for unity of interest within the class.\textsuperscript{11} Thus, there is a great need to sort out the case law in this area to interpret the requirements of Rule 23 as applied to both subclasses and class actions in general.

This Comment will first address the procedural provisions which authorize the division of a class into subclasses. The author will propose that there are three categories of subclasses and, through a survey of the case law, describe their unique attributes and the circumstances which prompt their formation. Following this section, the author will present an approach for identifying the need, in a given case, for subclassification. Finally, practical methods for conducting class litigation after having certified a subclass will be discussed.

I

PROCEDURAL ASPECTS OF SUBCLASS FORMATION

There are two federal rules of civil procedure a court may make use of in subdividing a class: Rule 23(c)(4)(B) and Rule 23(d). Rule 23(c)(4)(B), added to Rule 23 in 1966, authorizes the division of a class into subclasses when appropriate.\textsuperscript{12} The rule is designed to provide flexibility to the court in the handling of complex cases.\textsuperscript{13} By creating subclasses the court can isolate atypical issues and handle potential or actual conflicts of interest between class members.\textsuperscript{14} This, in turn, may avoid the dismissal of an otherwise properly instituted class suit,\textsuperscript{15} thereby facilitating judicial economy.\textsuperscript{16}

Rule 23(d) grants the court broad power to direct and conduct complex actions.\textsuperscript{17} One court invoked this rule to create subclasses specifi-

\textsuperscript{10} Falcon, 457 U.S. at 161.
\textsuperscript{11} Id. at 156.
\textsuperscript{12} Rule 23(c)(4)(B) provides: "[A] class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." FED. R. CIV. P. 23(c).
\textsuperscript{13} C. Wright & A. Miller, supra note 1, at 185-86.
\textsuperscript{14} See, e.g., Manual for Complex Litigation § 1.42, at 30-31 (5th ed. 1982) [hereinafter Manual] ("Conflicts or wide divergences in . . . interest do not ordinarily warrant denial of class action treatment, but require in many instances the creation of appropriate subclasses.").
\textsuperscript{15} See C. Wright & A. Miller, supra note 1, at 185.
\textsuperscript{16} See Califano v. Yamasaki, 442 U.S. 682, 701 (1979) ("[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.").
\textsuperscript{17} Rule 23(d) provides:
In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of the proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;
cally for management purposes where the issues in the case did not differ substantially and there was no potential or actual conflict between class members. On appeal, the Ninth Circuit held that "adopt[ing] procedural innovations to facilitate management of the class action" was within the scope of 23(d) and thus within the court's power.

Under either of the above-described Rules, the court has wide discretion in the use of subclasses. A court may act on its own initiative to form a subclass; a formal motion by one of the parties is unnecessary. However, because the court is under no obligation to make use of either Rule sua sponte, a party may propose that a class be subdivided. A party seeking subclassification bears the burden of showing that subclassification is appropriate. Thus, practitioners and judges alike must turn to a confusing body of case law for guidance on when and how to make use of this procedural innovation.

Courts often form subclasses without discussing the factors which prompted the division of the proposed class. An analysis of the case law, however, convinces this author that there are actually three distinct types of subclasses: the conflict of interest subclass, the divergent interests subclass, and the subclass for management purposes. The conflict of interest subclass and the divergent interests subclass are both formed under Rule 23(c)(4)(B). The subclass for management purposes is formed under Rule 23(d).

Although the distinctions are not acknowledged specifically, formation of each type of subclass is prompted by the existence of a specific set of circumstances. For example, the existence of an actual or potential conflict between class members prompts the formation of the conflict of interest subclass. Not surprisingly, each kind of subclass carries with it a

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(3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters.

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

18. See American Timber & Trading v. First Nat'l Bank, 690 F.2d 781, 786-87 (9th Cir. 1982).
19. Id. at 786.
unique set of attributes. These categories and their corresponding attributes will be considered below.

Any of the three types of subclasses may be identified at any time during the course of the suit. In fact, Rule 23 does not require a final definition of either the class or subclasses until judgment. Although a court should identify subclasses as soon as possible, it may determine, at any point in the proceeding, that subdivision of the class is necessary.

A. The Two Subclasses of Rule 23(c)(4)(B)

The issue of subclassification most often arises during the class certification process. At this time the proposed class definition is reviewed to assure that the four prerequisites of Rule 23(a), numerosity, commonality, typicality, and adequacy of representation, have been met. Under Rule 23 the class must be "so numerous that joinder of all members is impracticable." There must be "questions of law or fact common to the class." The claims of the representative party must be "typical" of the claims of the class. Finally, the representative party must "fairly and adequately protect the interests of the class."

Should the proposed class fail to meet the prerequisites of Rule 23(a), three possible consequences arise: the action may be dismissed with respect to the nonconforming subgroup, the action may proceed with individual members being represented within the larger class, or a subclass may be formed. The court may select the first option by narrowing the definition of the class, thereby dismissing the action with respect to the subgroup of plaintiffs which prevents the proposed class from satisfying one or more of the Rule 23 requirements. The subgroup members are thus freed to pursue their individual claims independently. Before taking such a step, a judge should consider the impact this will have on these claimants, the remaining class members, and the court system itself.

24. Courts often acknowledge that the need for a subclass may arise at any time during the litigation. See, e.g., Jacobs v. Sea-Land Serv., Inc., 23 Fair Empl. Prac. Cas. (BNA) 1179, 1182 (N.D. Cal. 1980) ("No subclass appears necessary now. Perhaps, as the case develops, conflicting interests will emerge which will require splitting the class."). Courts may also have a change of heart concerning the need for a previously identified subclass. See, e.g., Penk v. Oregon State Bd. of Higher Educ., 37 Fair Empl. Prac. Cas. (BNA) 920-21 (D. Or. 1982); American Fin. Sys., Inc. v. Harlow, 65 F.R.D. 94, 109 (D. Md. 1974) (court combined six subclasses into one class).

25. FED. R. Civ. P. 23(c)(3).


27. FED. R. Civ. P. 23(a)(1).

28. Id. 23(a)(2).

29. Id. 23(a)(3).

30. Id. 23(a)(4).

31. See, e.g., Betts v. Reliable Collection Agency, Ltd., 659 F.2d 1000, 1005 (9th Cir. 1981) (failure to meet Rule 23 requirements requires either dismissal of action with respect to subclass or allowing subgroup members to be represented individually within the main class).
By dismissing a group of plaintiffs, a judge prevents them from enjoying the benefits of maintaining a class suit.32 Some of the dismissed members may be unable to afford or secure legal representation and be forced to give up the pursuit of their claims.33 In turn, the case for the putative class members remaining in the suit may be weakened as a whole by the absence of evidence unique to the dismissed members. The opportunity to share this evidence and collaborate with the attorney representing the proposed class on common issues will be lost.34

The dismissal may also take its toll in terms of judicial economy.35 In order to pursue her cause of action, each dismissed member will have to file a separate suit, representing an arguably unnecessary delay. This potentially represents the filing of numerous duplicative court documents. Additionally, each suit may theoretically be assigned to a different judge, thus requiring many judges to become familiar with the facts with which the dismissing judge is already quite comfortable.36

Dismissal may also prove unfair to the defendant employer.37 The existence of a number of adjudications38 with potentially differing outcomes may subject an employer to inconsistent obligations. Having to defend itself in a number of suits is particularly burdensome as well. If the subgroup of plaintiffs is deemed by the judge to be a necessary party to the suit, dismissal will not be an available option.39

As an alternative to dismissal, the action may proceed with individual members being represented separately by their own counsel, within the larger class.40 This alternative avoids some of the pitfalls of dismissal. Evidence on common issues may be freely shared with counsel for the class and the presiding judge will hear the case with respect to both

32. See supra note 16.
33. See Note, supra note 6, at 626-27.
34. See, e.g., Rutherglen, supra note 9, at 74 ("[A]ttorneys for each subclass can be expected to coordinate litigation strategy to the extent that the interests of their subclasses coincide.").
35. See supra note 16.
36. Filing a Notice of Related Case may lessen the impact of dismissal on judicial economy. Local rules of court often provide this procedure whereby a plaintiff, when filing a suit, may put the court on notice that a similar case is currently before it. The court may, at its discretion, assign the plaintiff’s case to the judge presiding over the related case. See Manual for Complex Litigation, Second § 31.11, at 249 (1985) [hereinafter cited as Manual, Second]. Joinder of the dismissed claims may serve a similar function. See Fed. R. Civ. P. 19, 20.
37. However, most employers argue for as narrow a definition of the class as possible. One commentator has noted that as the class decreases in scope and size, so too do defendant’s potential costs for the particular suit. See Note, supra note 6, at 627.
38. See Rutherglen, supra note 9, at 73-74 ("Dividing a large class into small classes may be more efficient than narrowing the scope of the class or denying certification altogether, which could result in multiple individual actions.").
39. Where plaintiffs seek relief which could adversely affect other employees of the defendant employer, joinder or intervention may be warranted to assure competing interests are represented and to protect the employer from subsequent claims of “reverse” discrimination. See Manual, Second, supra note 36, at 322.
40. See supra note 31.
the individuals and the class. Difficulties may arise, however, in the overall management of the case. As the number of legal representatives increases, the judge may be confronted with juggling the needs and desires of multiple parties. This may unduly hamper the litigation. Thus, if possible, a judge should attempt the third alternative: formation of a subclass.

1. The Conflict of Interest Subclass

The type of 23(c)(4)(B) subclass a judge should form turns on the provision of Rule 23(a) which the proposed class itself fails to satisfy. Where the judge determines that either the commonality prerequisite of Rule 23(a)(2) or the typicality prerequisite of 23(a)(3) has not been met, a divergent interests subclass should be formed. However, if the judge finds an actual or potential conflict of interest, between either the named representative and the putative class members, or among the putative members themselves, then Rule 23(a)(4), the adequacy of representation prerequisite, has not been met. Where this is the case, rather than resorting to the alternatives described above, the court must create a conflict of interest subclass.

It is often difficult to ascertain the specific circumstances which will prompt a court to find that 23(a)(4) has not been satisfied because the Rule itself fails to describe sufficiently the attributes of any of the 23(a) requirements. Thus, their definition has been left to the courts; not surprisingly the definitions adopted vary considerably. The following discussion serves the dual purpose of defining what should prompt courts to form a conflict of interest subclass in the first place and what requirements the new subclass itself must meet.

The adequacy of representation prerequisite, under Rule 23(a)(4), encompasses two distinct components. First, there must be no actual or potential antagonism between the named class representative and the class members and among the class members themselves. The second component focuses on the ability of counsel to represent the class in the suit. Evidence of inexperience or incompetence on the part of the named representative's attorney may prevent the certification of the class itself.

41. The presence of many attorneys most certainly complicates class litigation. See Rutherford, supra note 9, at 74 & n.254.
42. The adequacy of representation prerequisite, unlike the commonality and typicality prerequisites, raises the issue of conflict of interest. Falcon, 457 U.S. at 157 n.13.
44. The class attorney, in addition to being qualified and experienced in handling class actions, must ensure that class members do not have differing or antagonistic interests. Id. at 42-43.
45. See, e.g., East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977) (failure to move for class certification prior to trial a strong factor in showing adequacy of representation not satisfied); Hervey v. City of Little Rock, 787 F.2d 1223, 1227-28 (8th Cir. 1986) (counsel's failure to
When the issue of adequacy of representation arises, it is typically in the context of potential or actual antagonism among class members. An analysis of the case law reveals two distinct categories of conflict: conflicts arising from differences in employee sex or race and conflicts pertaining to employee status. Subclassification along either line should not be automatically dismissed or undertaken; rather, an inquiry into the facts and legal theories in the particular case is in order. As antagonism is not always evident on the face of the pleadings, adequate judicial inquiry requires probing beneath the pleadings to uncover potential or actual conflicts.46

Potential or actual antagonism is often present in large class suits involving both race and sex discrimination. When faced with such a class, it is necessary for the court to inquire whether the interests of the two groups are at odds. Courts will generally refuse to hold as a matter of law that antagonism inherently exists between employees alleging sex discrimination and those alleging race discrimination.47 As the court in *Vuyanich v. Republic National Bank*48 noted, “the proper inquiry must be whether the facts of a particular case indicate that such fundamental antagonism actually exists or is likely to result from dual representation.”49

In *Vuyanich*, a case involving pervasive race and sex discrimination affecting bank employees in every job category, the court found that representation of the black and the female employees by a black woman was inappropriate. Testimony at the class certification hearing and depositions revealed that several black female employees took issue with the allegedly racist attitudes of their white female supervisors and coworkers.50 Thus, dual representation of the groups was not possible under 23(a)(4) and subclasses were needed to manage the conflict. However, the court did note in dictum that theoretically a black woman could represent both groups in a case involving an employer who favored white males.51

Similar problems may arise where more than one minority group
alleges race discrimination. An employer's discriminatory actions may have very different effects on each minority group, thus pitting groups against one another. Such circumstances make dual representation inappropriate. For example, in *Woffard v. Safeway Stores, Inc.*, the court found that Asian store employees were treated differently than other minority groups, noting:

Asians occupy a unique position within the division. Though underrepresented in store and assistant manager positions, they are by plaintiffs' own standard substantially overrepresented in produce manager positions. They have suffered no discrimination in clerical positions. . . . [i]t is clear that defendant has not acted toward them on the same grounds generally applicable to other minorities.  

Thus, the court held that Asians could not be included in the subclass under consideration.

Not all courts have taken a fact-sensitive approach to the need for subclassification. Some have adopted what appears to be a requirement of class homogeneity, making gender and ethnic differences among class members a *per se* violation of the adequacy of representation requirement. Without specific reference to the facts of the case it was considering, the court in *Moses v. Avco Corp.* stated:

It is questionable under plaintiffs' showing that each subclass . . . is sufficiently homogeneous and free of conflicts to merit certification. . . . [T]he Court doubts whether Mr. Moses can fairly represent all hispanics [he was black] . . . and whether Ms. Upchurch, a black female, can adequately represent a subclass of women, including those who inevitably would be competing with the subclass of minority employees.  

Thus, the court dismissed the action. Such an approach is unwise in that, at best, it may unnecessarily delay adjudication for those dismissed and, at worst, it may prevent legitimate plaintiffs from recovering altogether.  

A more troublesome issue, in terms of actual or potential conflict, arises when a class consists of both collective bargaining unit members and employees not represented by a union. Courts have noted that there

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52. 78 F.R.D. 460 (N.D. Cal. 1978).
53. *Id.* at 483.
54. 97 F.R.D. 20 (D. Conn. 1982).
55. *Id.* at 24.
56. See *supra* notes 35, 36 and accompanying text.
57. A plaintiff suing individually is less likely to gain adequate relief. Because the Title VII attorney's fee award often corresponds to the extent of the remedy, an individual plaintiff or small class may have difficulty obtaining representation. In addition, if representation is obtained, the comparatively minimal costs to an employer of an individual judgment may foster a reluctance on the part of the employer to enter into a settlement. If the suit goes to trial, the plaintiff may encounter obstacles to providing the statistical evidence necessary to establish liability. Finally, even if liability is established, some courts have refused to grant broad-based injunctive relief to individual plaintiffs. See Note, *supra* note 6, at 624-30.
are inherent problems with combining union and nonunion employees within one class. At least one court created subclasses to cure antagonism between members of two unions. Although not expressly articulated in the case law, judges may fear that unions will make use of Title VII suits as tactical bargaining weapons. A union might yield to the temptation to compromise the litigation in exchange for concessions in collective bargaining, thus failing to adequately represent nonunion employees.

In addition to this possible motivation for subdividing the class, there are more compelling fact-sensitive reasons for doing so. Where the disputed practice or action involves, either directly or indirectly, a subject covered by a collective bargaining agreement, the bargaining unit members' agenda is likely to differ substantially from that of nonbargaining unit employees. The majoritarian concerns of a union, for example, the desire to preserve seniority as a determinative factor in promotion, are embodied in its collective bargaining agreement. In a suit where such practices are implicated, the union has a strong incentive to advocate a position which preserves its majoritarian interests. Such a stance may pit it against the interests of nonunion discriminatees, making the union an inadequate representative.

In Moses, two plaintiffs sought to represent unit members and nonunion employees. The court noted that an attack on the employer's layoff procedure would “necessarily involve the collective bargaining agreement then existing.” Thus, a nonunion employee could not adequately represent unit members and the plaintiff who belonged to the union could not adequately represent the nonunion employees of the class.

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62. See Rutherglen, supra note 9, at 67-68 (“The danger of union representation is not that it will be unsophisticated or underfinanced, but that it will serve the interests of the majority of employees rather than the interests of each segment of the class.”).
a. The Consequences of Establishing a Conflict of Interest Subclass

A number of consequences should flow from establishing a conflict of interest subclass. Where there is potential or actual conflict of interest between subclass and class members, an attorney should be precluded from representing both groups. Thus, when a conflict of interest subclass is created, new counsel will have to be obtained to represent it.

Similarly, a named class representative should not represent a subclass with a conflict of interest. A subclass member, who has suffered essentially the same injury as the subclass members themselves, must be named to represent the newly created subclass.

While a plaintiff generally must file a charge with the Equal Employment Opportunity Commission and receive a Right to Sue letter before instituting suit under Title VII, the new subclass representative need not have exhausted her administrative remedies in this fashion. Rather, the courts have held that the new representative may make use of a timely charge filed by a representative of the main class. As a general class action principle, however, pursuing the action by making use of the main class charge will prevent the subclass from addressing issues beyond those enumerated by that charge. Since the subclass presumably was formed on the premise that it had views that conflicted with those of the main class, being limited to the boundaries of the class charge could potentially hamper the new subclass as its interests might not be covered by the original charge. Yet, if the interests of the subclass can be said to logically flow from the original charge, this problem should not prove insurmountable.

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65. See American Fin. Sys., Inc. v. Harlow, 65 F.R.D. at 109 (class representative may not represent subclass with conflicting interests); Moses, 97 F.R.D. at 24 (conflicts between representatives and subclasses preclude certification).


68. Penk, 93 F.R.D. at 53; Oatis, 398 F.2d at 499.

69. A cause of action for Title VII employment discrimination may be based, not only upon specific complaints made by the employee's initial EEOC charge, but also upon any kind of discrimination like or related to the charge's allegations, limited only by the scope of the EEOC investigation, that could reasonably be expected to grow out of the initial charges of discrimination.
filed a timely charge herself, it is preferable to make use of it instead. By the very terms of Rule 23(c)(4)(B) each subclass is treated as a separate class. Courts view the litigation with respect to such a subclass as a separate lawsuit. Thus, a court seeking to create a conflict of interest subclass must ensure that it meets the aforementioned prerequisites to class action enunciated in Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. The subclass must also fit one of the three categories of class suits enumerated in Rule 23(b), the final requirement for class certification. Similarly, a party seeking sub-


70. See supra note 12.
72. The number of subclass members considered sufficient to satisfy the numerosity requirement varies considerably. For example, in a recent case, the First Circuit found no abuse of discretion in a lower court ruling that a subclass of 49 members was not sufficient to meet the numerosity prerequisite. Andrews v. Bechtel Power Corp., 780 F.2d 124, 131-32 (1st Cir. 1985). However, classes as small as 20 have been certified. Benton v. Missouri Pac. R.R., 26 Fair Empl. Prac. Cas. (BNA) 1174, 1176-77 (S.D. Tex. 1980) (since classes as small as 20 have been certified, a subclass of 38 satisfies the numerosity prerequisite). It appears that the determination of sufficiency with respect to numerosity is highly fact-sensitive.

Some courts have dispensed with evaluating subclasses for compliance with the numerosity prerequisite altogether. These courts have held that where the main class meets the numerosity requirement, each subclass need not. See 1 H. Newberg, NEWBERG ON CLASS ACTIONS § 3.09, at 150-52 (2d ed. 1985).

74. Rule 23(b) provides:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
or
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(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.

FED. R. CIV. P. 23(b). A discussion of the operation of Rule 23(b) is beyond the scope of this Comment.
classification because of an alleged conflict must allege facts showing that both Rules 23(a) and (b) are satisfied.\textsuperscript{75}

As a separate lawsuit, the conflict of interest subclass should take on a separate identity from that of the main class. Its named representatives, not the main class representatives, will work with counsel to determine the objectives of the lawsuit.\textsuperscript{76} Any decisions substantially affecting the legal rights of the subclass should be made by its representatives, not those of the main class. While counsel for a conflict of interest subclass may collaborate with counsel for the main class,\textsuperscript{77} the attorney representing the subclass owes a duty of confidentiality to the subclass members and should seek consent of the subclass representatives before revealing information relating to their suit, unless impliedly authorized to do so.\textsuperscript{78}

Adherence to the requirements of Rule 23, as manifested in the above-described consequences of forming a conflict of interest subclass and its subsequent treatment by the court and counsel, is essential. There is a significant risk that the rights of absent subclass members will be adversely affected if not adequately represented.\textsuperscript{79} Judge Godbold has warned that a court should not assume that "all will be well for surely the plaintiff will win and manna will fall on all members of the class."\textsuperscript{80} Where the interests of class and subclass members actually or potentially conflict, the necessity of treating the subclass as a separate lawsuit cannot be overemphasized.

2. The Divergent Interests Subclass

    Courts uniformly approve of the use of subclasses when the interests of class members do not necessarily conflict, but are divergent.\textsuperscript{81} For example, class members alleging discrimination in promotion may be subject to very different promotion policies. Some may be evaluated on the basis of written exams, while others are selected via verbal interview. In such cases the commonality and typicality requirements have not been

\textsuperscript{75} See supra note 73.

\textsuperscript{76} The client determines the objectives of the attorney's work. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A) (1981).

\textsuperscript{77} See supra note 34. It should be noted that antagonism or animosity between the main class counsel and the subclass counsel is grounds for decertification. Hervey v. City of Little Rock, 787 F.2d 1223, 1227 (8th Cir. 1986).

\textsuperscript{78} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1981).

\textsuperscript{79} The scope of the class determines whom the judgment will bind. Rutherglen, supra note 9, at 35. Due process requires that judicial procedure protect the interests of absent parties who are bound by it. Hansberry v. Lee, 311 U.S. 32, 42 (1940).

\textsuperscript{80} Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1127 (5th Cir. 1969) (Godbold, J., specially concurring).

\textsuperscript{81} See Mendoza v. United States, 623 F.2d 1338, 1350 (9th Cir. 1980); C. WRIGHT & A. MILLER, supra note 1, at 189.
satisfied. As was the case with the failure to meet the adequacy of representation prerequisite, the court must form a subclass unless it resorts to dismissal or individual representation within the main class.

The circumstances which should prompt a court to form a divergent interests subclass are explored below. As with the previous section, this section defines both the requirements which cause a subclass to be formed, and the requirements that the new subclass itself must satisfy.

a. Rule 23(a)(2): The Commonality Requirement

Rule 23(a)(2) requires that there be "questions of law or fact common to the class" before a class action may properly be maintained. The commonality requirement does not anticipate, however, that every question of law or fact will apply identically to every member of the class. Rather, patterns of discrimination, as they pertain to the policies or practices being challenged, will be identified. As noted by the court in *Wester v. Special School District No. 1*:

The question of whether defendants' policies and practices with regard to hiring, assignment and promotion demonstrate a pattern of disparate treatment against women and American Indians, as well as having a disparate impact upon them, is the central issue in every class member's claim. Class certification is not defeated due to the varying qualifications and ambitions of the individual class members.

Thus, the primary focus of the court in reviewing commonality, should be on the claims, not the characteristics, of the individual class members.

While it is necessary to have the same claim in order to satisfy the commonality requirement, that alone will not be sufficient. For example, where two groups of employees are subject to different sets of policies, it will be inappropriate to allow them to remain in one class. Similarly, where a group of employees has a unique relationship with the employer, as in the case of university extension or other affiliated programs, subclassification may be called for.

Because suits alleging race or sex discrimination are "often by their..."
very nature class suits, involving classwide wrongs,” it is common to
find diverse groups of individuals encompassed within the plaintiffs’ pro-
posed definition of the class. Thus, for example, a proposed class may
consist of professional and nonprofessional employees, supervisory and
nonsupervisory employees, job applicants and present employees, or
present and former employees. The factual situations and interests of
groups of differing status may be divergent. Different types of proof may
be required in the course of the litigation and different, if not conflicting,
remedies sought. In such cases, the requirements of Rule 23(a)(2) will
not be satisfied. Not surprisingly, courts have made use of subclasses to
handle these differences.

As with conflict of interest determination, careful judicial inquiry
into the facts of the case at hand is appropriate. It is a mistake to assume
that individuals in differing groups will have divergent interests. A thor-
ough scrutiny is particularly appropriate where all the members of the
class are present employees. A frequently encountered status difference
is that which separates supervisory and nonsupervisory employees.
Although theoretically the two groups might have differing interests,
where the practice being challenged is administered in a centralized fash-
ion, the courts typically find no need for subclassification. This analysis
is equally applicable to groups of employees working at different geo-
ographical locations and groups of professional and nonprofessional
employees.

Representational problems may also arise when a class consists of
both present and former employees. Once again, it should not automati-
cally be assumed that the interests of the two groups are divergent. As
noted by the Third Circuit in Wetzl v. Liberty Mutual Insurance Co.: [Former] employees may well be interested in the eradication of the
Company’s discriminatory policies and their effect[s]. . . . [They] may

Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966) (“Racial discrimination is by definition class
discrimination. If it exists, it applies throughout the class.”).
92. See Donaldson v. Pillsbury Co., 554 F.2d 825, 827 (8th Cir. 1977), cert. denied, 434 U.S.
95. See Duncan v. Tennessee, 84 F.R.D. 21, 32 (M.D. Tenn. 1979); Kuck v. Berkey Photo,
24, 51 (N.D. Cal. 1977).
96. See Doninger v. Pacific Northwest Bell, Inc., 564 F.2d 1304, 1311 (9th Cir. 1977); Johnson
97. See supra note 91.
 wishes to renew their employment with Liberty Mutual if the discriminatory practices are terminated. . . Here, as we have observed, the interests of the former and present employees are congruent: the elimination of, and relief from, Liberty Mutual's discriminatory policies. 99 However, should differences between the two groups become apparent, subclassification will be required.

In Harriss v. Pan American World Airways, 100 a consolidation of seven different employment discrimination suits all involving similar class certification issues, the court listed five "relevant criteria of commonality" 101 which serves as a useful guide to analyzing this prerequisite:

(i) what is the nature of the unlawful employment practice charged—is it one that peculiarly affects only one or a few employees or is it one which has a class-wide impact;

(ii) how uniform or diverse are the relevant employment practices of the employer, considering workforce size, number of plants, diversity of employment conditions, occupations, and work activities;

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

(iv) how centralized is the employer's management organization as it relates to relevant employment practices; and

(v) what is length of time covered by the allegations—what is the probability similar conditions prevailed throughout the period. 102

In addition to meeting these criteria, a court, in analyzing compliance with the commonality requirement, should look for some evidence of discrimination against the given subgroup members. For example, if in a suit by job applicants, it becomes clear that the class of applicants should be subdivided into a group of employees subject to the minimum wage and hour provisions of the Fair Labor Standards Act 103 and a group not subject to the Act, there should be some evidence that individuals in both groups may be victims of employment discrimination. 104 Determination of the need for a subclass, which rests within the discretion of the trial court, is a question of fact which should be determined on the basis of the circumstances of each case. 105 However, the likeli-

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99. Id. at 253.
100. 74 F.R.D. 24 (N.D. Cal. 1977).
101. Id. at 41.
102. Id. (The factors are paraphrased.) A number of courts have relied on the factors formulated in Harriss. See infra note 118.
104. In Vuyanich v. Republic Nat'l Bank, 82 F.R.D. 420, 438 (N.D. Tex. 1979), the court refused to certify a subclass of "nonexempt" applicants on the ground that there was "insufficient evidence to raise a class question" of discrimination. See also Oliphant v. Charlotte Memorial Hosp., 38 Empl. Prac. Dec. (CCH) ¶ 35,646 at 39,880 (4th Cir. 1985).
105. See Anderson v. City of Albuquerque, 690 F.2d 796, 799-800 (10th Cir. 1982) (court must determine whether there are common questions of fact based on evidence submitted at certification hearing); Ladele v. Consolidated Rail Corp., 95 F.R.D. 198, 200 (E.D. Pa. 1982) (plaintiff must
hood of plaintiffs' success on the merits should not be considered in class certification.¹⁰⁶

While it is clear subclasses may be created using the characteristics of various subgroups of employees, all of whom are challenging a single employment practice, an open question remains as to whether subclasses will suffice to meet the requirements of Rule 23 when separate groups of employees challenge different employment practices. Before the decision in General Telephone Co. v. Falcon,¹⁰⁷ it was not unusual for courts to construct subclasses by separating the claims of subgroups of class members. For example, in Alexander v. Gino's, Inc.,¹⁰⁸ the Third Circuit endorsed the lower court's use of subclasses to separate the claims of discharged female employees from those females denied promotion.

Falcon, however, cast doubt on the use of such broad class suits. In Falcon, a Mexican-American employee alleging that he was a victim of promotional discrimination was permitted, by the district court, to maintain a class action on behalf of Mexican-American employment applicants whom the employer had rejected. The Supreme Court refused to affirm the certification order which had allowed the named plaintiff to represent the rejected applicants. The Court specifically underscored the need for careful attention to the prerequisites of Rule 23(a) and warned against challenging more than one employment practice in a class suit. As noted by the Court: "The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer."¹¹⁰ Thus, it is unlikely that a broad-based challenge to a number of employment practices may be maintained within the framework of a single class, unless the named plaintiff has suffered from each of the allegedly discriminatory practices.¹¹°

The Supreme Court's objective in Falcon was to curb the use of

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¹⁰⁶ See Manual, Second, supra note 36, at 323; Moore v. Hughes Helicopters, 708 F.2d 475, 480 (9th Cir. 1983) (improper to advance decision on the merits at certification stage); Anderson, 690 F.2d at 799 (error to evaluate merits of claim); Avagliano v. Sumitomo Shoji Am., Inc., 103 F.R.D. 562, 573 (S.D.N.Y. 1984) (look to merits only so far as is necessary to evaluate Rule 23 requirements). But cf. B. Schlei & P. Grossman, supra note 9, at 232-33 ("Courts continue to disagree as to the propriety of inquiring into the merits at the certification stage.").

¹⁰⁷ 457 U.S. 147 (1982).

¹⁰⁸ 621 F.2d 71 (3d Cir. 1980).

¹⁰⁹ Falcon, 457 U.S. at 159 n.15.

¹¹⁰ The Court did note in dictum that if the same biased testing procedure was used to evaluate both applicants for hiring purposes and employees for promotional purposes, it could be challenged in a single class suit. Id.
overbroad across-the-board class actions. Evidently, the Court feared that a named plaintiff might represent class members with whom she has little in common. Since Falcon, some courts have used or suggested the use of subclasses as a way of handling representational problems generated by the differing claims of class members. The continued use of subclasses in such cases appears appropriate. By creating subclasses represented by named plaintiffs who do satisfy the Rule 23(a) prerequisites, the Supreme Court's policy, as enunciated by Falcon, may be effectuated. These subclasses are properly classified as divergent interests subclasses.

b. Rule 23(a)(3): The Typicality Prerequisite

The typicality prerequisite, embodied in Rule 23(a)(3), requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." This requirement overlaps substantially with the above-described commonality requirement. Thus, the above discussion on commonality applies with equal force to a discussion of typicality. The sole difference between the two requirements is that the typicality requirement focuses on the named plaintiffs, or class representatives. The court must compare the claims of the class representatives with those of the class, rather than those of members within each class.

Comparisons may be made by considering a number of criteria. The District Court for the District of Connecticut approaches the matter by looking for a "nexus" between the interests and contentions of the plaintiff and those of the individuals she seeks to represent. Similarly, the District Court for the District of Arkansas looks for other members of the class who have grievances similar to those of the class representative. The District Court for the Northern District of California, however, reviews three specific factors to determine whether there is a

111. While recognizing the "proposition underlying the across-the-board rule—that racial discrimination is by definition class discrimination," the Court noted "the error inherent in the across-the-board rule is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)." Falcon, 457 U.S. at 157, 160.

112. The Court noted the "potential unfairness to class members bound by the judgment if the framing of the class is overbroad." Id. at 161. The Court stressed that judges should not tacitly assume "all will be well for surely the plaintiff will win and manna will fall on all members of the class." Id. (quoting Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1127 (5th Cir. 1969) (Godbold, J., specially concurring)).

113. See Hawkins v. Fulton County, 95 F.R.D. 88, 94 (N.D. Ga. 1982) (individuals complaining separately of discrimination in hiring, promotion, and constructive discharge may not bring class action unless they construct subclasses); Nation v. Winn-Dixie Stores, Inc. 95 F.R.D. 82, 88 (N.D. Ga. 1982). See also Rosario v. Cook County, 33 Fair Empl. Prac. Cas. (BNA) 905, 909 (N.D. Ill. 1983) (hearing set to determine steps to be taken to join a representative for nonapplicants).

114. See supra note 29.


sufficient community of interest between the named plaintiff and the class:

(i) is plaintiff's occupation and terms and conditions of employment typical of the situation of those she seeks to represent;
(ii) are the circumstances surrounding plaintiff's grievance typical of those relating to the claim of the class; and
(iii) will the relief sought by plaintiff benefit the class. 117

This more specific enumeration of typicality criteria, as compared to that provided by other courts, presents a useful format for evaluation of the plaintiff's claim. 118

For the purpose of meeting the typicality requirement, the plaintiff must demonstrate that other victims of the defendant's discriminatory practices or policies exist. 119 It is not necessary for the plaintiff to actually name these individuals, however. Rather, it is sufficient to present other materials from which the court may determine the existence and approximate number of potential class or subclass members. 120 It is possible to do this by way of affidavits, 121 answers to interrogatories, 122 hearsay testimony, 123 and statistics. 124

c. The Consequences of Forming a Divergent Interests Subclass

The consequences which should flow from forming a divergent interests subclass are much the same as those flowing from the conflict of interest subclass. As with the conflict of interest subclass, a new named representative who has suffered essentially the same injury as the subclass members should be appointed. 125 Similarly, the new representative need not have filed a charge with the Equal Employment Opportunity Commission. A timely filed charge by a named representative of the main class may be used as long as the issues raised by the subclass are within

117. Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 42 (N.D. Cal. 1977). (The factors are paraphrased.).
119. Leach, 94 F.R.D. at 628-29.
120. Id. at 629.
125. The typicality requirement obligates class representatives to at least demonstrate that there are other members of the class who have similar grievances. . . . Plaintiff's claims are undoubtedly such that she has suffered the same injury and presents the same grievance as other members of this putative class.
the periphery of the issues which the members of the main class could assert.  

Like a conflict of interest subclass, a divergent interests subclass must, under Rule 23(c)(4)(B), be treated as a separate class. It must also independently meet the requirements for maintenance of a class action under Rules 23(a) and (b). The failure of the main class to meet commonality and typicality requirements indicates that the claims of the group are not so interrelated that all interests will be fairly protected. Thus, as is the case with conflict of interest subclasses, it is important to adhere to the strictures of Rule 23 in both the forming and subsequent treatment of the divergent interests subclass to guard against potential unfairness to the members.

Unlike the conflict of interest class, however, there is no need to appoint new counsel to represent a divergent interests subclass. Because there is a lack of antagonism between members of the main class and the divergent interests subclass, counsel may continue to represent both groups. An attorney serving as counsel for both the main class and the divergent interests subclass must be sure to treat the subclass as a separate entity for the purpose of forming strategy for the case and making important decisions affecting the legal rights of the subclass members. This is particularly important at the remedy stage, as will be discussed below. Once a divergent interests subclass is formed, the attorney has a duty to keep its representatives individually informed about the progress of the suit. Should antagonism arise during the course of the litigation, as in a case where a previously undisclosed conflict of interest between the main class and subclass becomes apparent, it will be necessary to obtain a new attorney to represent the subclass.

126. See supra notes 67, 68.
127. See supra note 12.
128. See supra note 73.
129. See Falcon, 457 U.S. at 157 n.13 (commonality and typicality serve as guideposts to determine whether class claims are "so interrelated" that interests of class members will be "fairly protected").
131. An attorney may not represent a client if this representation will be directly adverse to another client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983); See Pennsylvania v. Local Union 542, Int'1 Union of Operating Eng'rs, 469 F. Supp. 329, 390-91 (E.D. Pa. 1979), cert. denied, 106 S. Ct. 803 (1986) (no need for separate counsel if no antagonism between subclasses).
132. See supra note 76.
B. Rule 23(d) and the Management Subclass

A court may wish to make use of subclasses in a complex action even when the class has satisfied all prerequisites of Rule 23. Where a class is defined broadly, and encompasses many subgroups with different characteristics, it may bring order and clarity to the proceeding to create subclasses for management purposes. Through the use of subclasses, a judge may make an otherwise unmanageable class action manageable. For example, in a large class action encompassing numerous job categories, the formation of management subclasses along job classification lines can aid the judge in organizing the facts as they pertain to different groups of employees.

The creation and use of subclasses in Title VII cases is confusing because courts invoke Rule 23(c)(4)(B) under three very different sets of circumstances. As noted above, it is appropriate to divide a class into subclasses when one or more of the requirements of 23(a) is not met. In such cases the subclass should be treated as a separate lawsuit and must independently meet the requirements which caused its creation in the first place.

In complex suits, however, courts often invoke 23(c)(4)(B) in order to make an unmanageable class action manageable. Although the class itself is not plagued by conflicting or divergent interests, by creating subclasses a court may order the presentation of evidence, segregate various issues, or expedite the resolution of a case. Because the representational problems present in both the conflict of interest and divergent interests subclass contexts do not exist in these cases, the courts tend to treat management subclasses informally, almost as if no subclass were created at all. As a result, the consequences of creating a management subclass may be viewed as the converse of the formal consequences which flow from creating the two Rule 23(c)(4)(B) subclasses. There is no need to treat the subclass as a separate lawsuit, hence no need to scrutinize it to assure compliance with Rules 23(a) and (b). Neither the appointment of new named subclass representatives nor counsel is necessary.

A court's desire to forge order out of chaos is understandable. However, the use of subclasses in complex actions can sometimes lead to confusion and inconsistency in the application of Rule 23(c)(4)(B). It is important for judges to carefully consider the circumstances in which they choose to create subclasses, to ensure that the subclass structure is both practical and fair to all members of the class.

134. See C. Wright & A. Miller, supra note 1, at 185-86.
135. Operating Eng'rs, 469 F. Supp. at 391 ("[T]he division into subclass groups performed the minimally beneficial function of logically describing the different work qualification levels among representatives and class members.").
136. See supra notes 12, 71, 73-74.
137. See supra note 134.
138. Operating Eng'rs, 469 F. Supp. at 391 ("[F]or all practical purposes the action proceeded just as if no subclasses had been defined.").
139. A judge need not worry that the interests of the subclass members will be prejudiced or neglected. The main class representatives have already shown, by virtue of satisfying the Rule 23(a) prerequisites, that the interests of the subclass members will be fairly and adequately represented.
ever, the existence of this additional type of subclass only adds to the confusion because it does not engender the formal consequences which flow from a conflict of interest or divergent views subclass. The confusion is exacerbated, unfortunately, because courts rarely articulate their reasons for utilizing subclassification in any given case. Not surprisingly, both plaintiffs and defendants are left wondering which set of consequences to apply when a judge certifies a subclass. This confusion has led courts to develop less than helpful and in fact, rather illogical distinctions. For example, in Pennsylvania v. Local Union 542, International Union of Operating Engineers, the court explained why there was no need to appoint separate counsel for each of three subclasses:

[T]he subclass division was never intended to accommodate antagonism between class representatives or class members. . . . While the division into subclass groups performed the minimally beneficial function of logically describing the different work qualification levels among representatives and class members generally, for all practical purposes the action proceeded as if no subclasses had been defined. There is thus no conflict with rule 23(c)(4)(B)'s implicit requirement, through 23(a)(4), that each subclass be represented by separate counsel.

Such an approach appears to conflict with the wording of Rule 23(c)(4)(B) and with the case law discussed above, which stated that subclasses are to be viewed as separate litigation. It seems highly illogical to justify the creation and subsequent treatment of a subclass by claiming that the case proceeded as if there was no subclass at all.

One court has taken a significant step toward procedural clarity. The Ninth Circuit, evaluating the propriety of creating a subclass in American Timber and Trading v. First National Bank, invoked Rule 23(d), rather than 23(c)(4)(B) to support subclassification for management purposes: "The creation of subclass IV was within the district court's broad power under Fed. R. Civ. P. 23(d) to adopt procedural innovations to facilitate management of the class action. Rule 23(d) confirms the district court's broad discretion to manage a complex class action."

The court went on to add in a footnote: "Because the subclassification was appropriate under Rule 23(d), it is unnecessary to evaluate it under Rule 23(c)(4) for commonality, numerosity, typicality,

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141. Id. at 391.
142. See supra notes 12, 71, 73-74.
143. 690 F.2d 781 (9th Cir. 1982).
144. Id. at 786-87.

This author found only one other case where a court invoked Rule 23(d) when considering subdivision of a class. In American Fin. Sys. v. Harlow, 8 Fair Empl. Prac. Cas. (BNA) 1061, 1070 n.14 (D. Md. 1974), the district court asserted that Rule 23(d) empowered a court to subdivide a class sua sponte, within the meaning of Rule 23(c)(4)(B): "Through the 'housekeeping' powers conferred on the district court by Rule 23(d), a class may be subdivided, certified as to certain issues, and, impliedly, combined with other proposed classes within the meaning of Rule 23(c)(4)."
and adequacy of representation." Thus, the Ninth Circuit acknowledged the existence of a different type of subclass and noted the distinction between it and subclasses which must be formed because the class itself has failed to meet the prerequisites of Rule 23(a).

1. Application to "Across the Board" Actions

Subclasses for management purposes are particularly helpful in across-the-board actions. As discussed above, maintenance of these actions, originally defined by the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., as an attack on all of an employer's discriminatory practices, was limited somewhat by the Supreme Court in General Telephone Co. v. Falcon. The Supreme Court in that case stressed the importance of meeting the Rule 23(a) prerequisites before certifying a Title VII class action. Thus, courts must ensure that there are common questions of law or fact between the claims of the named plaintiffs and the class members they seek to represent. Special attention must be paid to the commonality and typicality prerequisites, making it unlikely that a broad-based challenge to a number of employment practices may be maintained within one class suit, unless the named plaintiff has suffered from each of the allegedly discriminatory practices.

Many courts have continued to certify broad classes, however, where a centralized procedure allegedly has an impact on a number of different employee or applicant groups. In such cases, creating subclasses of these groups may greatly facilitate the presentation of evidence. For example, where an employer uses applicant interviews exclusively to make hiring decisions, the formation of management subclasses along functional lines will enable the judge to focus on the types of questions posed to candidates for jobs in each classification. Furthermore, creating subclasses under 23(d) provides a "complete picture of the district court's mental processes," making review of the record by an appellate court much simpler. By having the record clearly organized in discrete sections the appellate court is able to undertake a more "meaningful review" of the case.

Courts should make extensive use of management subclasses during

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145. Id. at 787 n.5.
146. 417 F.2d 1122 (5th Cir. 1969).
147. 457 U.S. 147 (1982).
148. See supra notes 109-12 and accompanying text.
151. Id.
the relief phase of the litigation. In a suit challenging the maternity leave policy of an airline, one court created subclasses along job classification lines:

While it is true that classes of flight cabin attendants and ground employees would embrace similar issues of law and many similar issues of fact, the court observes that should it be necessary to fashion relief, it would be more expedient to fashion any such relief along the suggested subclass boundaries.\(^{152}\)

Where the representational problems present in both the conflict of interest and divergent interests subclass contexts do not exist there is much sense in invoking Rule 23(d) so that the formal consequences of subclassification under Rule 23(c)(4)(B) do not accrue. Essentially the action may continue as if no subclass was formed.

II

AN APPROACH TO IDENTIFYING THE NEED FOR A SUBCLASS

Thus far, this Comment has identified three types of subclasses and outlined the characteristics of each. It has also reviewed the circumstances under which the courts use these subclasses. This section offers an approach to identifying the need for a subclass in any given case. The factors discussed below, however, are not meant as an exhaustive list of factors which may prompt subclassification.

A. Identify the Practice Challenged

The first step in determining whether subclasses will be needed in a given class suit is to identify the practice being challenged by the named plaintiff. As discussed above, under *Falcon* a plaintiff may not challenge a practice if she has not been injured by it.\(^ {153}\) However, if she has been injured by more than one employment practice, for example, the promotion and compensation policies of an employer, both practices may be challenged simultaneously.

Where just one practice is being challenged, it is important to determine how centralized its use is throughout the employer's organization.\(^ {154}\) For example, if the promotional policy is being attacked, a court must focus on how promotional decisions are made throughout the company. If a written examination is used for part of the workforce, while subjective evaluations are used in another, then a divergent interests sub-

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\(^{154}\) *See supra* notes 95-97 and accompanying text.
class will be needed. Use of a subclass in such a case will enable the class to satisfy the commonality and typicality prerequisites of Rule 23.

If the named plaintiff has been injured by more than one practice, an additional inquiry is necessary. Whether all, or just some, of the putative class members have been injured by both disputed practices will determine the need for a subclass. For example, where there is a challenge to an employer's compensation and promotion policies, if some putative class members have been injured by just one or the other of the policies, divergent interests subclasses, one for each policy, must be formed. Because there is no potential or actual antagonism between the two groups, there is no need for them to be represented by different counsel in a conflict of interest subclass.\(^\text{155}\) Furthermore, class members who have been injured by both policies may be part of both subclasses, as their interests in the attack of each policy will be protected and addressed by the named representatives of the subclasses.

Should the court determine that all putative class members have been injured by the two separate employment policies, use of management subclasses may be advisable.\(^\text{156}\) A subclass covering each policy will help the court and counsel in the organization of the litigation itself.

\section*{B. Evaluate the Employment Status and Characteristics of Class Members}

The second point of inquiry in evaluating the need for subclasses is the determination of the employment status and characteristics of the putative class members. Plaintiffs often seek to represent past, present, and future employees. Similarly, among present employees a named plaintiff may seek to represent groups of employees with differing characteristics. Such differences in status and characteristics may translate into divergent interests or conflicts of interest. Thus, a court must be wary during the certification process.

\subsection*{1. A Class of Past and Present Employees}

The most common objection raised against including past and present employees in a single class is that the two groups are interested in different types of remedial relief. It is assumed that past employees are primarily interested in receiving monetary damages, while present employees are interested in obtaining injunctive relief.\(^\text{157}\) The divergent goals of the groups, it is argued, make representation of one group by a

\footnotesize
155. See supra notes 130-33 and accompanying text.
156. See supra text accompanying notes 134-45.
157. See, e.g., Rutherglen, supra note 9, at 39.
named plaintiff from the other group inappropriate. Thus, as one author stated, employees and former employees "will generally belong in different subclasses."

Rather than assume that the interests of past and present employees necessitate subclassification, a court should carefully examine the claims of the two groups. Where, for example, both groups challenge an employer's promotional policies, monetary relief is likely to benefit present employees as well as past employees. The same would hold for a challenge to an employer's overall compensation scheme.

It should also not be assumed that past employees are not interested in injunctive relief. A past employee desiring reinstatement would seek this remedy. Even if former employees do not seek reinstatement, an attack on a policy for the purpose of obtaining monetary damages may not differ from an attack on the same policy for injunctive relief. Where a plaintiff successfully obtains monetary relief, injunctive relief may follow as a matter of course.

2. A Class Including Future Employees

Inclusion of future employees in the definition of a class raises a number of conceptual problems. In the first place, future employees are not an ascertainable group. It is not possible to have a named class representative from their ranks represent their interests. However, it is arguable that their interests may be fairly represented by past or present employees.

Because future employees do not have rights, such as seniority, which may be compromised for the benefit of past or present employees, conflict of interest questions, under Rule 23(a)(4), will not arise. Rather, attention should be focused on the commonality and typicality prerequisites to assure proper representation. For example, where present employees seek injunctive relief from discriminatory employment

158. See id. ("[P]ast employees should be allowed to represent present employees only if they seek reinstatement and are likely to obtain it.").

159. Note, supra note 6, at 636.

160. If present employees were not interested in monetary relief, but desired only to pursue injunctive relief, subclassification would be appropriate.

161. See, e.g., Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 253 (3d Cir. 1975) ("[F]ormer employees may well be interested in the eradication of the company's discriminatory policies... They may wish to renew their employment... if the discriminatory practices are terminated.").

162. See, e.g., Rutherglen, supra note 9, at 41.

163. See, e.g., Arnold v. Ballard, 6 Fair Empl. Prac. Cas. (BNA) 1022, 1024 (N.D. Ohio 1973) ("Although the interest of future employees and applicants will obviously be considered in this suit, the court is hesitant to join as parties persons who are not ascertainable."); Peltier v. City of Fargo, 10 Fair Empl. Prac. Cas. (BNA) 701, 704 (D.N.D. 1975) (subclass of future applicants rejected as not ascertainable).

164. See Rutherglen, supra note 9, at 45.
practices, there should be little problem in satisfying Rules 23(a)(2) and (3). However, representation of future employees by past employees seeking monetary relief would clearly be improper as the former group could not share in any award of damages. The necessity for careful inquiry during certification is underscored by the fact that future employees, if included in a class, will be bound by the outcome of the suit.165

Where typicality and commonality are not satisfied by a plaintiff who attempts to represent future employees, a court should not consider forming a subclass of future employees to handle the problem. In order to maintain a class action, the class itself must be adequately defined and its members clearly ascertainable.166 Since there is no way of knowing who these future employees are, it is not proper that they be placed in a class by themselves. To the extent that injunctive relief is obtained by a class of present employees, future employees may benefit from the judgment even though not technically included in the class.167

3. A Class with Differing Employment Characteristics

As discussed above, because suits alleging sex or race discrimination are by their very nature class suits, it is common to find diverse groups of employees encompassed within the definition of a class.168 Courts often break broad classes into subclasses of groups such as professional and nonprofessional employees,169 technical employees,170 supervisory and nonsupervisory employees,171 and employees in different organization units.172 The need for forming such subclasses turns on two issues: (1) whether the practices challenged are centralized in nature, and (2) whether one group will present evidence of discrimination implicating another group.

The answer to the first question is obtained by carefully analyzing the organizational structure of the employer's firm and the practices which apply to employees at each level of the organization.173 For example, if promotions are granted for professional and nonprofessional employees on the basis of interviews, there is no need to form a subclass for each group. If, however, in a challenge to an employer's compensation policies a court finds that technical employees are subject to an incentive

165. See id. ("[A] class action can bind future employees whether it results in an injunction for the class or a judgment for the employer.").
166. See supra note 163.
167. See Rutherglen, supra note 9, at 45.
168. See supra text accompanying notes 90-94.
169. See supra note 91.
171. See supra note 92.
172. See supra note 96.
173. See supra notes 95-106.
or bonus plan not applicable to clerical employees, subclassification will be appropriate.

In answering the second question, the court must look to the facts of the specific claims at hand. Where, for example, nonsupervisory employees allege that supervisory employees are making discriminatory promotional decisions, a court should not allow the two groups to be represented within the same class. Forming a subclass of supervisory employees and one of nonsupervisory employees is an appropriate response. A judge should glean such information from the pleadings and by probing beneath the pleadings at the certification hearing.

C. Identify the Type of Discrimination Alleged

It is common for the claims of the class to encompass more than one type of discrimination. Most common are allegations of both sex and race discrimination. Allowing the two groups to coexist within a single class may give rise to conflicts of interest. For example, black men may be disadvantaged by affirmative remedial relief granted to women. Similarly, as in Vuyanich v. Republic National Bank, black women may allege an employer preference for white women, making it impossible for there to be a cohesive class of female plaintiffs. In such cases conflict of interest subclasses must be formed.

The interests of different racial, ethnic, or gender groups may, however, actually be in harmony. Where groups pursue relief from a discriminatory policy which has an impact on all class members it may be appropriate to certify one large class. While one commentator has suggested that inclusion of persons of different race and sex in one class should be the exception rather than the rule, many courts have assumed the opposite and created subclasses only upon a showing of conflict. Given the consequences which flow from creating a conflict of interest subclass, specifically the need for separate counsel and rigid treatment of the subclass as a separate suit, it seems preferable to carefully examine the facts at hand and opt for subclassification only when necessary.

174. Such a situation is analogous to the conflict of interest question between black and female class members in Vuyanich v. Republic Nat'l Bank, 82 F.R.D. 420 (N.D. Tex. 1979). See supra text accompanying notes 48-51.
175. See Rutherglen, supra note 9, at 69.
177. See supra text accompanying notes 48-51.
178. Rutherglen, supra note 9, at 71.
180. See supra text accompanying notes 64-80.
181. See MANUAL, SECOND, supra note 36, at 217 ("Unnecessary classes and subclasses have
III
METHODS OF CONDUCTING THE SUIT AFTER SUBCLASS CERTIFICATION

As noted above, a subclass certified under Rule 23(c)(4)(B) is considered a separate lawsuit. In truth, however, there will be numerous common issues and interests between a subclass and the main class, making coordination of activities in the litigation highly desirable. To prohibit collaboration between the two groups is to invite confusion and a significant waste of money and time. Thus, it behooves the judge, at the outset of the suit, to institute special procedures to accommodate collaboration between the class and subclass, where possible, with respect to discovery and other pretrial activity. While such collaboration is equally desirable during the settlement phase, the need to treat the subclass as a separate entity becomes more apparent at this time, as will be discussed below. This final section suggests practical methods for conducting class litigation after having certified a subclass.

A well thought out discovery plan is especially crucial in complex class actions. The Manual for Complex Litigation, Second\(^\text{182}\) suggests several methods for controlling the discovery process in class suits which, although not specifically designed with subclasses in mind, serve as a useful format for collaboration between a subclass and the main class.

The first method suggested is the use of a pretrial order to establish a specific timeframe for each phase of discovery.\(^\text{183}\) Counsel for the class and subclass should be asked to estimate the length of time that will be reasonably necessary to complete each stage of discovery. Such a schedule should take into consideration possible delays or other contingencies as well.\(^\text{184}\)

Another control mechanism involves ordering that discovery proceed in a specific sequence.\(^\text{185}\) Sequencing is often used in conjunction with the setting of time limits. Using this method, a judge may direct the class and subclass to conduct discovery on certain issues, or for particular time periods, or by location of the desired information, or by the types of discovery desired. All information may be freely shared between the respective counsel of the class and subclass.\(^\text{186}\)

It is also possible to require counsel for the subclass and main class

\(^{182}\) Id. §§ 21.41-21.444, at 41-58.
\(^{183}\) Id. § 21.421, at 44.
\(^{184}\) Id.
\(^{185}\) Id. at 45.
\(^{186}\) See supra note 34.
to submit joint discovery requests and responses on common issues.\textsuperscript{187} This technique relieves the defendant of producing duplicative information. Should any given request require a particularly burdensome response, in the form of voluminous materials, the requesting parties may be required to share a single copy of the response.\textsuperscript{188}

In addition to the formal methods for structuring discovery described above, judges should encourage cooperation between counsel.\textsuperscript{189} Information may be provided by counsel to opposing counsel, and shared between counsel for the class and counsel for subclass, without making use of formal discovery procedures.\textsuperscript{190} However, such collaboration should not be considered a waiver of the work-product rule or the attorney-client privilege.\textsuperscript{191} Attorneys representing a conflict of interest subclass have a duty of confidentiality to their clients and should consult with subclass representatives before revealing any information concerning the suit.\textsuperscript{192}

Although counsel for the main class and the subclass may informally agree to coordinate their activities during the pretrial and trial phases, the court should consider memorializing the tasks and responsibilities of counsel in a formal court order.\textsuperscript{193} An order may incorporate a number of different procedural devices that promote efficiency in the litigation. Each of these procedures essentially involves the appointment of one attorney to act on behalf of other similarly situated attorneys and their clients. In a suit with a class and one or more subclasses, such coordination will only be appropriate with respect to common issues.\textsuperscript{194} Those issues unique to the class or subclass must be handled independently.

In order to coordinate activity on common issues, liaison counsel should be designated at the outset of the suit.\textsuperscript{195} Liaison counsel is responsible for coordinating administrative matters such as receipt of notices, orders, motions, and briefs on behalf of the plaintiff group. Communication with the court, pertaining to matters such as scheduling conflicts, can be handled by liaison counsel in a centralized fashion.

The designation of lead counsel may also prove helpful.\textsuperscript{196} Lead
counsel is typically responsible for coordinating activities such as the initiation of discovery requests and responses, scheduling examination of deponents, employing any experts needed, and assuring that the litigation progresses according to the agreed upon time schedules. Arranging for support services may also be an appropriate role for lead counsel to play.

On the whole, however, the subclass attorney must maintain control over activities such as examination of deponents and examination and cross-examination of witnesses at trial. In this way, the integrity of the subclass as a separate lawsuit will be preserved.\textsuperscript{197}

A class action may not be settled without approval of the district court under Rule 23(e).\textsuperscript{198} The Rule further requires that notice of a settlement proposal be given to all class members at the direction of the court.\textsuperscript{199} Both notice and court approval function to protect the interests of absent class members. Court approval assures that the settlement proposal is the product of "good faith, arm's-length negotiations."\textsuperscript{200} Notice allows class members to come forward with objections to the proposal.\textsuperscript{201} Both notice and court approval are especially important to potential subclass members. Without these safeguards, an entire subgroup of people could be denied relief in exchange for a favorable settlement for the class.

A judge should form a conflict of interest subclass to facilitate the presentation of objections to the settlement proposal. Through the appointment of a new subclass representative and independent counsel, the objectors to the settlement proposal will be assured an adequate hearing.\textsuperscript{202}

Where a conflict of interest or divergent interests subclass is formed before the settlement phase, the settlement of either a class or subclass claim is treated as a separate lawsuit.\textsuperscript{203} Thus, the Seventh Circuit has held that Rule 54(b), which holds that in multiple party suits any order adjudicating fewer than all the claims does not terminate that action finally as to any of the claims,\textsuperscript{204} does not control the settlement of a sub-

\textsuperscript{197} See supra notes 12, 71.

\textsuperscript{198} A class action "shall not be dismissed or compromised without approval of the court." FED. R. CIV. P. 23(e).

\textsuperscript{199} "[N]otice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." \textit{Id.}

\textsuperscript{200} B. SCHLEI & P. GROSSMAN, supra note 9, at 236.

\textsuperscript{201} \textit{Id.} See Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 835 (9th Cir. 1976) ("A proper notice must indicate that a member of the class can object to the proposed settlement . . .").

\textsuperscript{202} Mandujano, 541 F.2d at 835-36 ("To assure adequate [settlement] hearing, the trial court should not hesitate to permit an attorney of the objector's choosing to appear. . . . The creation of subclasses to aid in the evaluation of the settlement is not improper.").

\textsuperscript{203} See supra note 71.

\textsuperscript{204} When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer
class claim. Removing the subclass from the ambit of Rule 54(b) is
important because an order under that provision is subject to revision at
"any time before the entry of judgment adjudicating all the claims" of
the parties. Subjecting a subclass to such a provision would not ac-
cord with the view that a conflict of interest and divergent interests sub-
class is a separate entity with interests distinct from those of the main
class and would work undue hardship on subclass members. Without
the strictures of Rule 54(b), a settlement by any one subclass can be im-
mediately appealed.

When a segment of a subclass objects to a settlement offer, however,
the Fifth Circuit suggests allowing the objectors to pursue their claims as
individuals within the main class, represented by separate counsel. This
prevents the dissenters from having to undertake the substantial
burden of pursuing their claims outside of the proceedings of the present
suit. Presumably, if there are enough objectors to satisfy the numer-
osity requirement, a new subclass of objectors could be formed.

CONCLUSION

Subclasses, on the whole, are a valuable procedural tool. For too
long, however, courts and practitioners have failed to acknowledge the
differences between the three types of subclasses and have appeared un-
sure of when to use them. The confusion engendered by this failure has
led to sloppy administration of Rule 23(c)(4)(B). This is unfortunate, for
by making appropriate use of subclasses, judges may better handle poten-
tial or actual conflicts of interest, isolate atypical issues, and enhance ju-
dicial economy in the management of complex actions. By taking a
systematic, fact-sensitive approach to the use of subclasses in Title VII
cases, as recommended by this Comment, judges can effectively meet the
need for fair, responsive representation of all interests in class suits and
efficiently deter discrimination in the workplace by allowing for broad-
based attacks on discriminatory employment policies.

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than all the claims or the rights and liabilities of fewer than all the parties shall not termi-
nate the action as to any of the claims or parties, and the order or other form of decision is
subject to revision at any time before the entry of judgment adjudicating all the claims and
rights and liabilities of the parties.

FED. R. Civ. P. 54(b).

205. In re General Motors Corp., 594 F.2d 1106, 1117-18 n.11 (7th Cir. 1979), cert. denied, 444
U.S. 870 (1979) ("[T]he settlement of one subclass' suit arguably should be treated as a separate
lawsuit outside the ambit of Rule 54(b). This practical view of the position of subclasses accords
with the legal effect of creating a subclass under FRCP 23(c)(4).").

206. See supra note 204.

207. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1182 n.27 (5th Cir. 1978).

208. Id. at 1182.