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The Class Action Suit under the Age Discrimination in Employment Act: Current Status, Controversies, and Suggested Clarifications

By James D. Lipschultz*

Since its enactment in 1967, the Age Discrimination in Employment Act (ADEA) has posed many problems for the elderly workers it is designed to protect. One major source of these problems is section 626(b) of the ADEA, which adopts the "opt-in" class action of the Fair Labor Standards Act (FLSA). As a result of this incorporation, Rule 23 class action suits generally are not available to elderly workers alleging violations of the ADEA, despite the availability of Rule 23 class actions in other employment discrimination suits. Such class actions are available to elderly workers only when the federal government is the defendant, and not when the alleged violator is a private employer. The reasons for adopting different procedural measures in cases involving claims of age discrimination or for distinguishing between private

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2. Other procedural difficulties encountered in the enforcement of the ADEA, such as giving notice of intent to sue to the Secretary of Labor, invoking the proper statute of limitations, and the availability of liquidated damages, are beyond the scope of this Note. See generally Sheeder, Procedural Complexity of the Age Discrimination in Employment Act: An Age-Old Problem, 18 Duq. L. Rev. 241 (1980); Note, The Procedural Requirements of the Age Discrimination in Employment Act of 1967, 9 Rut.-Cam. L.J. 540 (1978); Note, Procedural Aspects of the Age Discrimination in Employment Act of 1967, 36 U. Pa. L. Rev. 914 (1975).
7. The only distinction between age discrimination and the types of discrimination prohibited by Title VII that is contained in the legislative history of the ADEA is found in the Hearings before the General Subcomm. on Labor of the House Comm. on Education and Labor on H.R. 3651, H.R. 3768, and H.R. 4221, 90th Cong., 1st Sess. 1 (1967). The
and federal government defendants are not clear.

This Note analyzes the application of the FLSA class action device to suits against private employers based on claims of age discrimination. The Note first examines the substance and application of the current statutory provisions, and then surveys the history underlying the “opt-in” requirement to illustrate how its adoption has frustrated the enforcement of the ADEA. The Note also examines current judicial conflicts regarding notice and solicitation under the FLSA class action and suggests approaches to resolving these issues which could increase the effectiveness of the Act.

hearing resulted in H.R. 13,054, 90th Cong., 1st Sess. (1967), which, combined with S. 830, 90th Cong., 1st Sess. (1967), formed the basis for the ADEA. At the hearings, Representative James Burke of Massachusetts stated: “Age discrimination is not the same as the insidious discrimination based on race or creed prejudices or bigotry. Racial or religious discrimination results in nonemployment because of feelings about a person entirely unrelated to his ability to do a job. This is hardly a problem for the older job seeker.” Hearings before the General Subcomm. on Labor of the House Comm. on Education and Labor on H.R. 3651, H.R. 3768, and H.R. 4221, 90th Cong., 1st Sess. 449 (1967). It is not readily apparent why Representative Burke did not believe that such attitudes were not a problem for the elderly job seeker. Any illegal discrimination in employment implies that an employer based hiring and firing decisions on factors unrelated to the worker’s ability to do a particular job.

A more accurate distinction between age discrimination and the types of discrimination prohibited under Title VII has been identified by the Third Circuit Court of Appeals: “Age concededly differs from the Title VII classifications in that, for some jobs, statistically significant correlations might demonstrate that persons above certain middle ages are inherently disabled from performing as satisfactorily as their younger counterparts.” Rodriguez v. Taylor, 569 F.2d 1231, 1236-37 (3d Cir. 1977). The court in Rodriguez added that Congress recognized this distinction and provided employers with the “bona fide occupational qualification” defenses of § 623(f) to a charge of age discrimination. Id. at 1237. The implication of allowing such a defense is that firings and nonhirings based on age are more likely to be justifiable than those based on race, sex, or religion.

The Chairman of the House Subcommittee, Representative John H. Dent of Pennsylvania, stated: “[T]his member of this committee does not want this legislation to be combined with any of the existing anti-discrimination programs which are of a different nature. I don’t want it confused with any other kind of discrimination. It is distinct and separate discrimination and should be recognized as such.” Hearings before the General Subcomm. on Labor of the House Comm. on Education and Labor on H.R. 3651, H.R. 3768, and H.R. 4221, 90th Cong., 1st Sess. 97 (1967). Unfortunately, Representative Dent does not state why age discrimination is distinct from other types of discrimination nor if the distinction implies that different enforcement procedures should be used.

It is doubtful that the Third Circuit’s distinction between age discrimination and Title VII discrimination makes the Rule 23 device any less effective or desirable for the ADEA. Because Rule 23 presently may be used in ADEA suits against the federal government, one could conclude that the distinction is irrelevant. Cf. Nation v. Bank of Cal., 72 F.R.D. 550, 555 (N.D. Cal. 1976) (prior to 1978 amendments to the ADEA).
The stated purpose of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." To accomplish these goals, the ADEA sets forth sweeping prohibitions covering age discrimination practices by employers, employment agencies, and labor organizations. Since 1974, these prohibitions have been extended to age discrimination in most branches of the federal government. Derived principally from the substantive prohibitions of Title VII of the Civil Rights Act of 1964 (Title VII), the prohibitions are intended to remove age as a consideration in employment, except when it "is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business."

Although the substantive prohibitions of the ADEA were derived from Title VII, the enforcement procedures were, with only minor exceptions, adopted from and patterned after those of the FLSA. Both the ADEA and the FLSA establish two mechanisms for enforcement: actions by the Equal Employment Opportunity Commission (EEOC) and private actions by the aggrieved workers. Before bringing any private action, an individual must file a charge with the EEOC alleging unlawful discrimination. The Secretary then must seek to eliminate the unlawful practice through

10. Id. § 633a.
12. Id. § 2000e to 2000e-17. The United States Supreme Court, in Lorillard v. Pons, 434 U.S. 575 (1978), stated: "[T]he prohibitions of the ADEA were derived in haec verba from Title VII." Id. at 584.
13. 29 U.S.C. § 623(f)(1) (1976). This subsection also exempts: (1) bona fide seniority systems and employee benefit plans that are not subterfuges to evade the Act, (2) any practice where the differentiation is reasonably based on factors other than age, and (3) any discharge or discipline of an individual for good cause from the proscriptions of the Act. Id. § 623(f)(2).
17. Id. § 626(d). This subsection also provides that the charge must be filed "within 180 days after the alleged unlawful practice occurred." Id. § 626(d)(1).
informal methods, and if unsuccessful, may bring suit to enforce the employee's rights. The employee may bring a private action only if: (1) after sixty days from the filing of a charge, the EEOC is unsuccessful in reaching an agreement with the employer through informal methods; and (2) the EEOC fails to bring an action on behalf of the employee.

In specifying procedural requirements for private actions brought under the ADEA, the Act expressly adopts certain enforcement procedures of the FLSA, including the class action procedure contained in section 216(b). Section 216(b) creates a statutory class action with only two requirements: aggrieved employees must be “similarly situated” and the employees must file written consent with the court to become party plaintiffs. The latter requirement establishes an “opt-in” procedure in which each person must take positive action to become a member of the class.

18. Id. § 626(d).
19. Id. § 626(c)(1).
20. Id. § 626(d).
21. Id. § 626(c)(1).
22. Id. § 626(b) (1976). This subsection incorporates §§ 211(b), 216 (except for subsection (a)), and 217 of the FLSA. Id.
23. Id. § 216(b) (Supp. III 1979).
24. Id. See, e.g., Riojas v. Seal Prod., Inc., 82 F.R.D. 613, 617 (S.D. Tex. 1979). Courts have been quite reluctant to define “similarly situated.” The court in Burgett v. Cudahy Co., 361 F. Supp. 617 (D. Kan. 1973), however, listed five factors that led it to conclude that the plaintiffs were “similarly situated” within the meaning of § 216(b). They were all (1) between the ages of 60 and 65; (2) longtime supervisory personnel for the employer; (3) fired and rehired by the employer at the same time and for apparently the same reasons; (4) complaining of the same discriminatory behavior and concomitant injury; and (5) seeking the same affirmative relief. Id. at 622. Because there were only four plaintiffs in Burgett, it is reasonable to conclude that in an action involving a larger number of plaintiffs, a court would not require the presence of all five of these factors in order to find that the plaintiffs were similarly situated.
25. 29 U.S.C. § 216(b) (Supp. III 1979). This subsection provides: “An action to recover the liability prescribed . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.” These requirements differ significantly from those of Rule 23. See note 88 infra.
The "opt-in" requirement of section 216(b) is applicable to all FLSA actions and, under section 626(b), to ADEA actions against private employers. Unlike the FLSA, however, the ADEA has a special provision for suits against the federal government.\(^{27}\) Enforcement procedures for these suits are set forth in a separate provision\(^{28}\) and are independent of the other enforcement provisions of the ADEA.\(^{29}\) As construed, ADEA class actions against the federal government are not bound by the "opt-in" requirement adopted by section 626(b).\(^{30}\)

Employee class actions are particularly effective in carrying out the Act's prohibitions against age discrimination. The affirmative defenses allowed under the ADEA enable an employer to escape liability by showing either that age is a qualification reasonably necessary for performance of the job or that the decision to fire or not hire was based on reasonable factors other than age.\(^{31}\) Under these defenses, the burden on an employer to present evidence that an individual was reasonably discharged or disciplined would be much less than would the burden to show that numerous employees had been terminated with proper cause. It thus is more difficult to prove a case of individual, as opposed to class, discrimination. In addition, class action plaintiffs can more effectively use statistical evidence to prove age discrimination than can individual plaintiffs for whom such evidence may not be available.\(^{32}\)

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28. Id. § 633a(b).

29. Id. § 633a(f). Section 633a(f) states that any action brought under § 633a "shall not be subject to, or affected by, any other provision of the [ADEA]," except the age limitation of § 631(b). Prior to the addition of this subsection in 1978, the other enforcement sections of the ADEA were not expressly excluded from use in conjunction with § 633a. Section 633a was enforced in an inconsistent manner. The court in Carter v. Marshall, 457 F. Supp. 38 (D.D.C. 1978), applied the "opt-in" requirement, holding that § 633a could be enforced concurrently with the procedures of § 626. Another court, Bradley v. Kissinger, 418 F. Supp. 64 (D.D.C. 1976), suggested that § 633a was independent of § 626 and allowed consideration of a Rule 23 class action against the federal government.

30. Moysey v. Andrus, 481 F. Supp. 850 (D.D.C. 1979), is the only case to date interpreting § 633a(f). The Moysey court justified its holding by stating that a contrary result would render an action against the federal government subject to the requirements of a separate ADEA provision. This would be in direct conflict with § 633(a). Id. at 853.


32. For an examination of the use of statistical evidence in age discrimination suits, see Note, Statistics as Evidence of Age Discrimination, 32 Hastings L.J. 1347 (1981). For an examination of the use of statistical evidence in Title VII suits, see Braun, Statistics and
Class actions have proved to be an invaluable device in the enforcement of the discrimination prohibitions of Title VII. As with race and sex discrimination, age discrimination is by definition class discrimination. Requiring each individual employee to file separate, identical charges with the EEOC against the same employer would tend to impede the enforcement of these prohibitions. Moreover, the general advantages of class actions—avoiding multiplicity of suits, and more importantly, allowing the prosecution of claims that otherwise might be economically infeasible—help effectuate the goals of the ADEA, and provide the most efficient adjudication of the rights of elderly workers.

Notwithstanding the desirability of allowing class actions in age discrimination suits, a fundamental difference between the Rule 23 class action and the statutory class action prescribed under the ADEA has severely limited the use of the ADEA class action device against private employers. While the Rule 23 class action procedure allows passive binding of class members, the ADEA representative suit places an affirmative procedural burden of “opting-in” on each potential class member.

The three types of class actions allowed by Rule 23 are each inconsistent with the section 216(b) class action because each allows a person to be bound as a class member without taking any affirmative action. In Rule 23(b)(1) and Rule 23(b)(2) actions, the court determines and describes in the judgment which individuals are members of the class. The opportunity for individuals to in-

34. For a discussion of the similarities and differences between age discrimination and other forms of discrimination, see note 7 supra.
38. For an examination of the advantages of a Rule 23 class action as compared with the § 216(b) class action, see notes 88-92 & accompanying text infra.
39. Rule 23(c)(3) provides in part: “The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class.” Fed. R. Civ. P. 23(c)(3).
clude or exclude themselves, although available under section 216(b), is not possible in a Rule 23(b)(1) or Rule 23(b)(2) action. In a Rule 23(b)(3) action, on the other hand, potential class members are notified of the pendency of the action and given an opportunity to “opt-out” of the class. In contrast to a section 216(b) suit, a person who fails to opt-out of a Rule 23(b)(3) action remains a member of the class and is bound by the judgment.

Judicial Interpretation of Section 216(b) in Light of Rule 23

Despite Congress’ express incorporation of the FLSA class action device into the ADEA, arguments have been advanced to allow Rule 23 class actions in ADEA suits. However, only two Rule 23 suits against private employers have been allowed by the courts. In Bishop v. Jelleff Associates, Inc., the court certified a Rule 23 class action, reasoning that Rule 23 and section 216(b) are not fundamentally irreconcilable. The action was certified under Rule 23 after all the plaintiffs had filed their consents with the court in conformity with section 216(b). The plaintiffs were then allowed to proceed as a Rule 23(b)(3) class.

The procedure allowed in Bishop is not in conformity with the requirements of Rule 23. Notice was not provided to potential

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40. Rule 23(c)(2) states: “In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.” Id. 23(c)(2).

41. The second sentence of Rule 23(c)(3) states: “The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.” Fed. R. Civ. P. 23(c)(3).


43. Id. at 6659.

44. Id. Fed. R. Civ. P. 23(b)(3) authorizes class actions in circumstances where the claims involve common questions of law or fact. See note 40 & accompanying text supra.
plaintiffs who had not filed consent, thereby failing to satisfy the mandatory notice requirement of Rule 23(c)(2). Moreover, members of the class were not given an opportunity to "opt-out"—a prerequisite to maintaining a Rule 23(b)(3) class action. The district court's finding that Rule 23 and section 216(b) are not fundamentally irreconcilable has never been supported by an appellate court and is contrary to the findings of five circuit courts of appeals.

The court in Blankenship v. Ralston Purina Co. reasoned that, because the substantive procedures of the ADEA are nearly identical to those of Title VII, procedural devices used in Title VII actions should be allowed in ADEA actions. Because Rule 23 class actions are liberally allowed in discrimination suits under Title VII, the court found that such class actions should also be allowed under the ADEA. The court stated that a strict interpretation of section 216(b) would unduly restrict enforcement of the ADEA and thus contravene congressional intent. While implicitly recognizing Rule 23 and section 216(b) as mutually exclusive, the court failed to confront Congress' explicit preference for FLSA enforcement procedures.

In 1975, the Fifth Circuit decided what has become the leading case on this conflict, LaChapelle v. Owens-Illinois, Inc., which rejected the position adopted by Bishop and Blankenship and held that Rule 23 could not be used to circumvent the unambiguous "opt-in" requirement of section 216(b). The court stated: "There is a fundamental, irreconcilable difference between the class action described by Rule 23 and that provided for by [section

45. The court acknowledged that the plaintiffs had evidence of discrimination against approximately 100 additional employees that would fall into the class who had not filed consents. 6 Empl. Prac. Dec. at 6659.
46. See note 55 infra.
48. See note 12 supra.
49. The court based its holding on its interpretation of the policy underlying the law: "Since Congress clearly defined its policy as remedial with respect to such social problems, the courts have generally looked to the Congressional intent behind the law rather than to procedural restrictions which might impair the law's effectiveness. . . . The federal courts in particular have recognized that the Rule 23 class action is particularly adaptable to situations involving discrimination." 62 F.R.D. at 38.
50. See note 33 & accompanying text supra.
51. 62 F.R.D. at 38.
52. 513 F.2d 286 (5th Cir. 1975) (per curiam).
53. 513 F.2d at 289. See note 56 & accompanying text infra.
Although a number of plaintiffs have continued to assert the contrary, thereby demonstrating a desire that the Rule 23 class action be available in age discrimination suits, every court of appeals ruling on this issue has held the section 216(b) and Rule 23 class actions to be mutually exclusive. Since 1975, courts have unanimously held that ADEA actions against private defendants must be enforced through section 216(b) and cannot be maintained as a class action under Rule 23. These courts have noted that Congress was well aware of Rule 23 at the time the ADEA was adopted and have held that if Congress had wished to permit the Rule 23 enforcement technique for the ADEA, it would not have explicitly stated that the Act was to be enforced in accordance with the provisions of the FLSA.

Despite virtual unanimity on the part of the courts in finding Rule 23 and section 216(b) procedures mutually exclusive, parties continued to argue that the similarities between Title VII and the ADEA were relevant to show congressional intent that Title VII and the ADEA be enforced by similar procedures. These arguments appear to have been put to rest in 1978 by the United States Supreme Court in Lorillard v. Pons.

54. Id. at 288.
55. See EEOC v. Gilbarco, 615 F.2d 985 (4th Cir. 1980); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859 (9th Cir. 1977); Schmidt v. Fuller Brush Co., 527 F.2d 532 (8th Cir. 1976); LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975); Sims v. Parke Davis & Co., 453 F.2d 1259 (6th Cir. 1971) (per curiam), cert. denied, 405 U.S. 978 (1972).
58. Id. at 911.
60. 434 U.S. 575 (1978). The issue before the court in Lorillard was whether there is a right to a jury trial in private civil actions under the ADEA. The ADEA contains no provision expressly granting or denying a right to a jury trial, but because § 626(b) states that the
The Court in *Lorillard* recognized the similarities between the ADEA and Title VII, but rejected the analogies to Title VII by explicitly stating that reliance on these similarities to find a congressional intent that both Acts be enforced under like procedures was misplaced. The Court reasoned that significant differences in the remedial and procedural provisions of the two laws required this conclusion. Moreover, the Court stated that Congress’ failure to adopt Title VII enforcement procedures while using its substantive prohibitions indicates a desire to avoid Title VII procedures in enforcing the ADEA.

The Court in *Lorillard* also emphasized that Congress’ careful selection of certain procedures of the FLSA and departure from others suggests that, except for these departures, Congress “in-

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61. 434 U.S. at 585.

62. The Court set forth two distinctions between the ADEA and Title VII. First, Congress specifically authorized the courts to grant “legal relief” under the ADEA, but did not specifically authorize the availability of such relief under Title VII. Second, the ADEA provides that employers “shall be liable” for amounts deemed to be owed, while the availability of back pay under Title VII is a matter of discretion for the court. *Id.* at 584.

63. “Indeed, to the extent petitioner correctly interprets congressional intent with respect to jury trials under Title VII, the very different remedial and procedural provisions of the ADEA suggest that Congress had a very different intent in mind in drafting the later law.” *Id.* at 585 n.14.

64. The Court set forth three examples of enforcement procedures in the FLSA that were not adopted by the ADEA. First, the ADEA explicitly allows that equitable relief may be appropriate in any action brought under the ADEA, both in private actions and those brought by the Secretary of Labor. 29 U.S.C. § 216(b) (1976 & Supp. III 1979). On the other hand, *Lorillard* noted that the lower federal courts consistently have construed the FLSA to allow equitable relief only in actions brought by the Secretary of Labor. 434 U.S. at 581 (citing Powell v. Washington Post Co., 267 F.2d 651 (D.C. Cir. 1959); Roberg v. Henry Phipps Estate, 156 F.2d 958 (2d Cir. 1946); Bowe v. Judson C. Burns, Inc., 137 F.2d 37 (3d Cir. 1943)).

Second, the Court noted that the ADEA did not adopt the FLSA provision on liquidated damages, 29 U.S.C. § 260 (1976), while incorporating §§ 255 and 259. These latter provisions, it was noted, were added to the FLSA by the same act that added the liquidated damages provision to the FLSA. See *Portal-to-Portal Pay Act of 1947*, 61 Stat. 84 (codified at 29 U.S.C. §§ 251-262 (1976)). Liquidated damages may only be awarded under the ADEA when the violation is willful. 29 U.S.C. § 626(b) (1976). Under the FLSA, however, the court can limit or deny liquidated damages if an employer demonstrates that he or she acted in good faith and reasonably believed he or she was not violating the FLSA. *Id.* § 260.

Third, Congress expressly declined to incorporate the FLSA criminal sanctions, *id.* §
tended to incorporate fully the remedies and procedures of the
FLSA."65 Lorillard expressly recognized that when "Congress
adopts a new law incorporating sections of a prior law,... [it] can
be presumed to have had knowledge of the interpretation given to
the incorporated law, at least insofar as it affects the new stat-
ute."66 The Court thus presumed that Congress was aware of the
effect that judicial interpretation of the FLSA would have on the
enforcement of the ADEA.

Lorillard may be distinguishable from the question of whether
Rule 23 class actions are available in actions brought under the
ADEA. In determining whether the right to jury trial was available
in ADEA actions, the Court in Lorillard noted that section 626(b)
of the ADEA empowers a court to grant "legal or equitable relief,"
and section 626(c) authorizes individuals to bring actions for "legal
or equitable relief."67 In cases in which legal relief is available and
legal rights are determined, the seventh amendment provides a
right to a jury trial.68 The implication of the right to jury trial in
Lorillard most certainly comports with the broad, liberal, remedial
goals of the ADEA; extending the rationale of Lorillard to the is-
ssue of the availability of Rule 23 class actions under the ADEA has
the effect of denying this useful remedial device to plaintiffs.

Despite these distinctions and the different policy considera-
tions relevant to class actions and the right to a jury trial, it is
probable that the Lorillard rationale will preclude judicial imple-
mentation of Rule 23 class actions in ADEA suits against private
defendants. Rather, age discrimination suits against private defen-
dants must use the statutory class action created by section 216(b).
Only in age discrimination suits brought against the federal gov-
ernment, and in discrimination suits brought under Title VII, may
the Rule 23 class action device be used.69

216(a), into the ADEA. Cf. id. § 629 (sanctions available for violations of ADEA). 434 U.S.
at 581-82.
65. 434 U.S. at 582 (emphasis added).
66. Id. at 581. The Court added: "That presumption is particularly appropriate here
since, in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA
provisions and their judicial interpretation and a willingness to depart from those provisions
regarded as undesirable or inappropriate for incorporation." Id.
68. U.S. Const. amend. VII 434 U.S. at 583. See Curtis v. Loether, 415 U.S. 189, 195-
96 (1974).
69. This has been clearly demonstrated in cases alleging violations of Title VII and the
Development of the "Opt-in" Requirement

Prohibiting Rule 23 class actions in ADEA suits against private employers is particularly incongruous when considered in light of the legislative and judicial history establishing the "opt-in" requirement under the FLSA. When enacted in 1938 to impose minimum wage and maximum hour limitations on employers, section 216(b) of the FLSA specifically authorized the use of class actions and agent or representative actions. The class action was construed to be a spurious class action under former Rule 23. The rationale underlying the acceptance of the spurious class action was that judicial economy would be achieved by allowing persons interested in a common question of law or fact to consolidate


70. See notes 42-51 & accompanying text supra. Compare notes 8-13 & accompanying text supra (remedial purposes of the ADEA) with notes 78-80 & accompanying text infra (discussion of curtailing FLSA suits).


72. As originally enacted in 1938, § 216(b) authorized two forms of suits: "Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for or in behalf of all employees similarly situated." 52 Stat. 1060, 1069 (1938) (current version at 29 U.S.C. § 216(b) (1976 & Supp. III 1979)). The first clause created the class action; the second clause created the agent or representative action. See Moore, supra note 33, app. ¶ 23.10[4].

73. Although courts were divided on the precise construction and label to be given to § 216(b) in light of former Rule 23, all of the courts addressing the issue considered it a form of permissive joinder. Some courts refused to call a § 216(b) suit a class suit and treated it as a mere joinder device. See, e.g., Lofther v. First Nat'l Bank of Chicago, 45 F. Supp. 986 (N.D. Ill. 1941); Saxton v. W.S. Askew Co., 35 F. Supp. 519 (N.D. Ga. 1940). Most courts labeled a § 216(b) suit as a spurious class action but treated it as a permissive joinder device. See, e.g., Pentland v. Dravo Corp., 152 F.2d 851 (3d Cir. 1945); Sinclair v. United States Gypsum Co., 75 F. Supp. 439 (W.D.N.Y. 1948); Schempf v. Armour & Co., 5 F.R.D. 294 (D. Minn. 1946).

74. Prior to the 1966 amendments, Rule 23(a) set out three types of class actions: (1) the so-called "true" class action involving "joint, common, or secondary rights;" (2) the "hybrid" class action involving "several" rights relating to "specific property;" and (3) the "spurious" class action involving "several" rights affected by a common question and related to common relief. See 39 F.R.D. 69, 94-107 (1968).
their claims into a single suit.75 Section 216(b) was not intended to create a true class action under old Rule 23;76 such an interpretation would have dictated that every co-worker be estopped by the judgment if he or she brought a separate action against the employer.77

In 1947, section 216(b) was amended to delete the clause authorizing agent or representative actions and to include the requirement of filing consent with the court to become a plaintiff.78 The congressional intent underlying this amendment is clear. The amendment was enacted to curtail the proliferation of suits brought against employers under the substantive prohibitions of the FLSA.79 Requiring plaintiffs to file consent with the court furthered this goal by preventing unnamed, similarly situated employees from asserting surprise claims against employers.80

Significantly, this amendment had little effect on the class action suit as it existed under former Rule 23 prior to 1947. Because the judgment in a spurious class action bound only parties to the action, the requirement of filing consent with the court did not limit or extend the binding effect of the judgment. Rather, it only made the action more difficult to initiate by requiring each plaintiff to file consent personally with the court instead of merely authorizing the existing plaintiffs to proceed in the action. The spuri-

75. See Pentland v. Dravo Corp., 152 F.2d 851 (3d Cir. 1945); Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941); Central Mexico Light & Power Co. v. Munch, 116 F.2d 85 (2d Cir. 1940); Moore, supra note 36, app. Π 23.10[1].

76. See Pentland v. Dravo Corp., 152 F.2d 851, 853 (3d Cir. 1945).

77. Id.

78. The amendment deleted from § 216(b) the phrase, "or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated," and added in its place the phrase, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." Portal-to-Portal Pay Act of 1947, ch. 52, § 5(a), 61 Stat. 87 (current version at 29 U.S.C. § 216(b) (Supp. III 1979)).

79. In 1946, the United States Supreme Court, in Andersen v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), substantially broadened the definition of "working time" for purposes of the FLSA. The decision in Andersen dramatically increased employers' potential liability to their employees under the FLSA. Congress, alarmed that this posed a serious threat to the national economy and the principles of collective bargaining, determined that legislation to counteract this decision was essential. See House Comm. on the Judiciary, H.R. Rep. No. 71, 80th Cong., 1st Sess., reprinted in [1947] U.S. Code Cong. & Ad. News 1029, 1034.

ous class action of Rule 23 was not precluded by this amendment and was still used to enforce the FLSA. However, the requirement of filing consent, combined with employee reluctance to appear to be initiating an action against his or her employer, resulted in very few section 216(b) class actions.

The critical clause of section 216(b) was not characterized as establishing an “opt-in” requirement until Rule 23 was amended in 1966 to establish the conflicting “opt-out” class action. The comments to the 1966 amendment specifically state that the “opt-in” class action of the FLSA was not to be altered, indicating explicit congressional recognition that the spurious class action, inconsistent with and not included in new Rule 23, was still to be used to enforce the FLSA.

Congress was similarly explicit in choosing the enforcement procedures of the FLSA for the ADEA when it was enacted in 1967. However, the reasons for continued use of the spurious class action in FLSA suits appear wholly inapplicable to enforcement of ADEA provisions. There is no evidence in the legislative history of the ADEA that Congress desired to limit available remedies to victims of age discrimination or even considered the advantages of the recently amended Rule 23. Nonetheless, the ADEA unambiguously adopts the enforcement procedures of section 216(b), including the “opt-in” class action.

The Power of the Court to Provide Notice to Potential Plaintiffs

A comparison between the statutory class action of section 216(b) and the Rule 23 class action reveals that the “opt-in” re-

81. See Moore, supra note 36, app. ¶ 23.10[4]. In addition, § 7 of the Portal-to-Portal Pay Act expressly recognized that future class actions may be instituted. 61 Stat. 84, 88 (1947) (current version at 29 U.S.C. § 256 (1976)).


83. See notes 39-41 & accompanying text supra.


85. Kinney Shoe Corp. v. Vorhes, 564 F.2d 859 (9th Cir. 1977).

86. Senator Javits stated: “The enforcement techniques provided by the ADEA are directly analogous to those available under the FLSA; in fact, the ADEA incorporates by reference, to the greatest extent possible, the provisions of the FLSA.” 113 Cong. Rec. 31,254 (1967).

87. See notes 88-91 & accompanying text infra.
requirement of section 216(b) potentially restricts the enforcement of the ADEA. The initial requirements to maintain a Rule 23 class action impose limitations not present in a section 216(b) class action. One major advantage of a Rule 23 action, however, is that it explicitly allows notice to be given to potential plaintiffs. In contrast, the ADEA contains no notice provision. The lack of a notice provision under the ADEA is critical. If notice is not given to potential plaintiffs under section 216(b), age discrimination suits against private employers are severely limited. Many individuals with meritorious claims might be unaware of the existence of an action in which their claims could be adjudicated. Moreover, those individuals with small claims may be precluded from asserting their claims because they believe it is not worth the time and expense to bring an action for a small amount, or more frequently, because many attorneys are not willing to handle such cases for

88. Rule 23 sets forth four requirements to maintain a class action: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

89. See note 19 supra.

90. There are other disadvantages of a § 216(b) action, which, while they do not pose as fundamental a problem as the failure to provide notice, do pose minor obstacles for ADEA plaintiffs. As discussed earlier, § 626(d) requires a plaintiff to file a charge alleging unlawful discrimination with the Secretary of Labor within a specified period following the date the alleged practice occurred—180 to 300 days depending on the violation. See note 17 & accompanying text supra. No such requirement exists for a Rule 23 action. Assuming a plaintiff meets these requirements, he or she still can represent only those individuals who could have complied with the notice requirements themselves. Cavanaugh v. Texas Instruments, Inc., 440 F. Supp. 1124, 1126 (S.D. Tex. 1977). Additionally, most courts have set time limits for potential plaintiffs to file their consents, thus imposing another barrier for those who wish to join the suit. See, e.g., Montalto v. Morgan Guaranty Trust Co., 83 F.R.D. 150, 152 (S.D.N.Y. 1979) (established limit of 90 days from filing the order implementing the decision); Naton v. Bank of Cal., 72 F.R.D. 550, 556 (N.D. Cal. 1976) (30 days from date of court order).

91. Rule 23 contains two notice provisions. The mandatory notice requirement of subdivision (c)(2) provides: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). Subsection (d) provides for optional notice in any Rule 23 class action, at the court's discretion: "[t]he court may make appropriate orders: . . . (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 come into the action." Id. 23(d).
relatively small fees.\textsuperscript{92}

There is presently a conflict concerning whether notice to potential plaintiffs is allowed under section 216(b). The federal courts passing on this issue have adopted one of two approaches. The Ninth Circuit has held that a trial court can only order or allow notice when necessary to protect due process interests.\textsuperscript{93} The Second Circuit, on the other hand, allows notice to potential plaintiffs to be given in “proper cases.”\textsuperscript{94}

Courts adopting the due process theory reason that, because section 216(b) does not expressly grant the plaintiff a right to notify potential plaintiffs of the pendency of the action, notice can only be sent when due process requires it. Potential plaintiffs who do not “opt-in” are not bound by the judgment in a section 216(b) action and cannot be adversely affected. Therefore, no due process interests are violated by failure to provide notice.\textsuperscript{95} Although this approach recognizes that giving notice alerts potential class members to their potential claims, it maintains that alerting potential class members is not an interest that notice is designed to further.\textsuperscript{96}

The Second Circuit has expressly rejected the due process theory of the Ninth Circuit,\textsuperscript{97} holding that even though due process does not require notice, a district court has the power to order notice in a proper case.\textsuperscript{98} The court stressed that its holding com-

\textsuperscript{92} In his dissent in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), Justice Douglas concluded: “The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.” Id. at 186 (Douglas, J., dissenting).

\textsuperscript{93} Kinney Shoe Corp. v. Vorhes, 564 F.2d 859 (9th Cir. 1977).

\textsuperscript{94} Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335 (2d Cir. 1978), cert. denied, 441 U.S. 944 (1979).

\textsuperscript{95} See, e.g., Kinney Shoe Corp. v. Vorhes, 564 F.2d 859 (9th Cir. 1977); Roshto v. Chrysler Corp., 67 F.R.D. 28 (E.D. La. 1975).

\textsuperscript{96} Roshto v. Chrysler Corp., 67 F.R.D. 28, 29-30 (E.D. La. 1975). See also Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). The comments to the 1966 Amendments of the Federal Rules of Civil Procedure state that the various notice provisions of Rule 23 are designed to comply with the requirements of due process. 39 F.R.D. 69, 107 (1967). Significantly, however, the comments do not attempt to limit the potential effects notice may have, beyond stating that notice in a Rule 23 class action should not be given merely to allow solicitation of claims. Id.


ported with both the interest of avoiding multiplicity of suits and the broad remedial purposes of the Act.\(^9\)

Unfortunately, the courts adopting this approach have provided little guidance in defining a "proper case." The courts that have attempted to elaborate on what constitutes a proper case have allowed notice based on one of two factors: whether notice is required by principles of fundamental fairness and whether the four requirements of Rule 23 are satisfied.

When allowing notice based on principles of fundamental fairness, courts have advocated an ad hoc determination of whether the particular facts constitute a proper case. Such a determination is left entirely to the discretion of the trial court.\(^1\) The critical inquiry in this approach has been whether, absent notice, the potential plaintiffs possess meaningful access to the courts.\(^1\)

The second rationale for allowing notice differs markedly from the fundamental fairness test. Rather than relying on the highly discretionary concept of "fairness," courts using the second approach would allow notice when the requirements of Rule 23(a) are met.\(^2\) Unfortunately, the only court to apply this test did not

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\(^9\) 600 F.2d at 336. In Frank v. Capital Cities Communications, Inc., No. 80 Civ. 2188 (S.D.N.Y., filed Jan. 7, 1981), the court stated that "the notice machinery contemplated by the ADEA, by reaching out to potential plaintiffs, may further the statute's remedial purpose."


\(^1\) In Riojas v. Seal Prod., Inc., 82 F.R.D. 613 (S.D. Tex. 1979), the plaintiffs, agricultural field laborers, alleged violations of the FLSA minimum wage provisions. The plaintiffs attached to the complaint a consent form signed by 65 individuals and sought the court to authorize the Texas Rural Legal Aid, plaintiffs' counsel, to send notice to other potential plaintiffs to allow them to file their consents. The court, citing Braunstein, held that § 216(b) would authorize the giving of notice to potential class members. Id. at 619. The court emphasized that under these particular facts—where the potential plaintiffs are poor, difficult to locate, and have little education—allowing notice is nothing more than an act of fundamental fairness. In Geller v. Markham, 19 F.E.P. Cas. 1622 (D. Conn. 1979), the court was even more lenient. Part of the basis for allowing notice in Geller was a mere showing that there was no evidence that the potential plaintiffs were aware of the pending action. Id. at 1623.

\(^2\) See Geller v. Markham, 19 F.E.P. Cas. 1622 (D. Conn. 1979).
state why meeting these requirements makes the case proper to provide notice. 103

From a comparison with the precertification stage in Rule 23 class actions and an analysis of other Federal Rules of Civil Procedure, it appears that the approach of the Second Circuit is preferable to the more restrictive approach of the Ninth Circuit. By only allowing notice when mandated by due process, the Ninth Circuit is ignoring other provisions in the Federal Rules. As in the section 216(b) class action, Rule 23 does not grant an express right to notify potential plaintiffs of the pendency of an action in the precertification stage. However, subsection (d)(2) of Rule 23 grants the court discretion to provide notice at any step in the action, 104 including the precertification stage, regardless of whether due process required notice at that time. 105 The comments to Rule 23 state that this notice should not be used for the mere undesirable solicitation of claims, but is intended for the “fair conduct of the action.” 106 Notice given in a Rule 23 action prior to certification, and in a section 216(b) action, would not only notify potential plaintiffs of a chance to litigate their claims, but would more efficiently adjudicate the rights of existing parties, 107 avoid a multiplicity of suits, and provide fairness to all persons with claims against the

103. The Geller court merely stated that meeting the Rule 23(a) requirements makes it a proper case. Id. at 1623. The court did not state how it applied the requirements to the facts; the court only stated that the requirements were satisfied.

104. Fed. R. Civ. P. 23(d)(2). The comments to Rule 23 provide a nonexhaustive list of occasions on which the court, in its discretion, can require that notice be sent. In “limited fund” cases, members have been notified to present individual claims subsequent to the class certification. Notice has also gone to class members so they can express opposition to the representation. See United States v. American Optical Co., 97 F. Supp. 66 (N.D. Ill. 1951). Notice may also be used to encourage interventions to improve the representation of the class. Cf. Oppenheimer v. F.J. Young & Co., 144 F.2d 387 (2d Cir. 1944) (stricter rule as to adequacy of representation ought to apply where judgment will be held binding on class members not present).

105. The court in Pan American World Airways, Inc. v. District Court, 523 F.2d 1073 (9th Cir. 1975), recognized the availability of notice in the precertification stage, but declined to authorize such notice for the purpose of bringing the claims of unnamed members of the plaintiff class before the court. The court’s refusal to authorize notice was not based on the rationale that notice can be sent only when due process requires notice. Rather, the court was concerned that if Rule 23 requirements were not met and certification was denied, notice would facilitate the joinder of the unnamed members in circumvention of Rule 23. Id. at 1079.


107. See Pan American World Airways, Inc. v. District Court, 523 F.2d 1073, 1082 (9th Cir. 1975) (Schnacke, J., dissenting).
defendant.\textsuperscript{108}

The long-recognized inherent powers of the court\textsuperscript{108} also provide a basis for allowing notice in the absence of due process. Courts have the power to make reasonable rules of procedure to regulate their proceedings to the extent that they do not conflict with existing rules or statutes.\textsuperscript{110} To a large extent, this power has been codified for the federal courts in Rule 42(a)\textsuperscript{111} and Rule 83.\textsuperscript{112} Rule 42(a) recognizes the power of the court to make such orders as may tend to avoid unnecessary costs or delay in pending actions. An order requiring notice in a section 216(b) action should fall within the authorization of Rule 42(a). By assembling potential parties at the earliest possible time, matters such as discovery, depositions, and settlement offers may be handled more easily and more efficiently.\textsuperscript{113}

Rule 83\textsuperscript{114} also provides an appropriate basis for a district court to provide notice to potential plaintiffs in a section 216(b) action. Although the Federal Rules do not cover every possible procedure, Rule 83 allows federal district courts to make or amend rules as long as the new or amended rules do not conflict with the existing Federal Rules or statutes.\textsuperscript{115} Because section 216(b) does not address the use of notice to potential plaintiffs, a district court order permitting such notice would not be inconsistent with any

\textsuperscript{108} See note 99 & accompanying text supra.


\textsuperscript{110} See Franquez v. United States, 604 F.2d 1239, 1244-45 (9th Cir. 1979); United States v. Warren, 601 F.2d 471, 473 (9th Cir. 1979); Schlesinger v. Teitelbaum, 475 F.2d 137, 141-42 (3d Cir.); cert. denied, 414 U.S. 1111 (1973); Woodbury v. Andrew Jergens Co., 61 F.2d 736, 737-38 (2d Cir.); cert. denied, 289 U.S. 740 (1932).

\textsuperscript{111} Fed. R. Civ. P. 42(a).

\textsuperscript{112} Id. 83.

\textsuperscript{113} Pan American World Airways, Inc. v. District Court, 523 F.2d 1073, 1082 (9th Cir. 1975) (Schnacke, J., dissenting). The majority in Pan American rejected this rationale in denying precertification notice in a Rule 23 class action. The court stated that Rule 42(a) only applies to consolidation of actions already pending, not those yet to be filed. Because allowing notice to consolidate actions that are not yet filed would serve the purposes of Rule 42(a)—resolution of common questions of law or fact—this distinction seems overly technical, as the majority appears to admit. Id. at 1080-81.

\textsuperscript{114} Rule 83 provides: “Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.” Fed. R. Civ. P. 83.

\textsuperscript{115} United States v. Warren, 601 F.2d 471 (9th Cir. 1979); Dickinson Supply, Inc. v. Montana-Dakota Utils. Co., 423 F.2d 106, 110 (8th Cir. 1970).
existing statute or rule.

The Federal Rules give district courts a substantial amount of discretion in regulating the manner in which a case is conducted. Thus, the focus of the courts should not be on whether a statute or rule permits giving notice, but rather, whether there is any statute or rule that forbids notice, and whether notice is appropriate in the circumstances of a particular case.

Solicitation of Potential Plaintiffs

In addition to the controversy surrounding the issue of whether a court may order notice to potential plaintiffs, courts will be called upon to determine what independent action the plaintiffs and their attorneys may take to notify and encourage others to join a section 216(b) action. Such action, even when authorized by a court, may constitute illegal or unethical solicitation of claims. This issue takes on added significance because of the unique nature of a section 216(b) class action. If a court will not provide notice informing potential plaintiffs of the opportunity to “opt-in,” notice from the existing plaintiffs may well be the only way these people will ever be informed that redress is available.

The traditional judicial approach has been not to allow solicitation of potential claims in any manner. Courts following this approach use the same due process rationale that forbids notification by the court. If due process does not require potential plaintiffs to be notified, plaintiffs' counsel may only solicit claims if ex-

116. Pan American World Airways, Inc. v. District Court, 523 F.2d 1073, 1082 (9th Cir. 1975) (Schnacke, J., dissenting).
120. This argument was implicit in the Riojas court's decision to allow court-approved notice to potential plaintiffs, see note 126 infra, and is especially important in circumstances such as those in Riojas. See note 101 supra.
121. The court in Roshto v. Chrysler Corp., 67 F.R.D. 28 (E.D. La. 1975), stated: "There are important policy considerations of ancient vintage which militate strongly against the giving of notice where not required by due process. The awakening of sleeping plaintiffs by either the plaintiff or the Court would fly in the teeth of the centuries-old doctrine against solicitation of claims." Id. at 30.
122. See notes 95-96 & accompanying text supra.
pressly granted the right by statute.\textsuperscript{123}

Recent judicial expressions on the issue of solicitation of claims have not been as restrictive. Solicitation in a section 216(b) action has been permitted in the form of notice independently circulated by the plaintiff's counsel\textsuperscript{124} and by judicially authorized notice identifying the plaintiff's counsel.\textsuperscript{125} These decisions indicate that such solicitation will be permitted when the action is not taken for the pecuniary benefit of the soliciting counsel.\textsuperscript{126} Similar solicitation endeavors of the ACLU and NAACP have also been upheld by the United States Supreme Court on constitutional grounds.\textsuperscript{127} The Court stated that such nonprofit activity undertaken to provide access to the courts is a fundamental right within the protection of the first amendment.\textsuperscript{128}

The analogy to Rule 23 class actions in the precertification stage is also helpful with regard to the issue of solicitation of claims. In two recent cases,\textsuperscript{129} courts held that an order limiting communications by parties and their counsel with actual or potential class members while certification of the Rule 23 class is pending amounts to an unconstitutional prior restraint on freedom of

\begin{itemize}
  \item \textsuperscript{126} In Riojas v. Seal Prod., Inc., 82 F.R.D. 613 (S.D. Tex. 1979), the defendants maintained that the consent authorization forms solicited by the Texas Rural Legal Aid amounted to barratrous material. The court disagreed. Emphasizing that the Texas Rural Legal Aid is a free legal assistance organization not receiving money from the plaintiffs, the court reasoned that such an organization could not be accused of barratry when it is merely attempting to carry out its nonprofit goals in an efficient and beneficial manner. In both Frank v. Capital Cities Communications, Inc., No. 80 Civ. 2188 (S.D.N.Y., filed Jan. 7, 1981), and Geller v. Markham, 19 F.E.P. Cas. 1622 (D. Conn. 1979), judicially authorized notice was sent to potential plaintiffs with a proviso that, as potential class members, they could have their own attorney take the requisite action to join the suit. The court in Joyce v. Sandia Laboratories, 23 Empl. Prac. Dec. ¶ 31,043A (N.D. Cal. 1980) was even more liberal, holding that even though pecuniary gain could redound to the plaintiff's private counsel, the rule had not been settled and the court need not forbid plaintiff's counsel from giving notice. The court did not require the proviso used in Frank and Geller. Id. at 16,407.
  \item \textsuperscript{128} 436 U.S. at 426 (citing United Transp. Union v. Michigan Bar, 401 U.S. 576, 585 (1971)).
\end{itemize}
The courts rejected the argument that such orders were necessary to prevent the evils of solicitation and abuses of the class action device. Both courts expressed the opinion that the importance of solicitation to the progress of the class action outweighs any ethical problems caused by the solicitation. This situation is directly analogous to the difficulty raised by section 216(b). By allowing plaintiffs to solicit potential plaintiffs prior to the formal establishment of the class, plaintiffs' first amendment rights are protected and the purposes of the class action device are furthered.

Conclusion

Although over a decade has passed since its adoption, the ADEA still poses questions for judicial resolution and presents other problems for reconsideration. The rationale for the failure of the ADEA to allow Rule 23 class actions in suits against private employers remains inexplicable. There are no factors unique to the age discrimination prohibitions that make the Rule 23 device any less effective or appropriate in enforcing them than the prohibitions against other forms of discrimination in Title VII. Further, there is not any indication that Congress intended broader avenues of redress in suits against the federal government than against private employers. These distinctions seem quite incongruous in light of ADEA's remedial purposes. It is apparent that the "opt-in" requirement is not promoting these purposes. Because the law is unambiguous, legislative change would be the most effective method to remedy this problem. Congress should amend section 626(b) expressly to exclude incorporation of section 216(b). Such an amendment would eliminate the class action difficulty and still allow the ADEA to be enforced with the majority of the FLSA procedures.

130. In Bernard, the court of appeals reversed a district court order prohibiting communications, 619 F.2d at 477; in Zarate, the district court refused defendant's request for such an order, 86 F.R.D. at 105.
131. The Supreme Court in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), stated some of the ethical problems: "stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation." Id. at 461 (footnote omitted).
132. 619 F.2d at 475-76; 86 F.R.D. at 95.
134. See note 7 supra.
Even if congressional action is not taken, proper judicial resolution of the notice and solicitation issues can lessen the detrimental effect of barring Rule 23 class actions. In light of recent cases deemphasizing the problem of solicitation, and in the wake of recent decisions allowing solicitation in the analogous Rule 23 pre-certification cases, the arguments against allowing notice to potential plaintiffs have been substantially weakened. By allowing notice and not prohibiting solicitation, the effectiveness of the ADEA, even while using the section 216(b) class action, can be enhanced.

136. See notes 129-33 & accompanying text supra.