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Chad Blumenfield
Chad.Blumenfield@chicagounbound.edu

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Towards an Adequate Certification Policy in Title VII Employment Discrimination Class Actions Involving Supervisors and Non-Supervisors

Chad Blumenfield

Now that America has rid itself of the morally reprehensible institutions of slavery and segregation, racial discrimination may find its most common remaining expression in the workplace. As the Supreme Court has noted, "racial discrimination is by definition class discrimination." It is not surprising, then, that plaintiffs wishing to remedy racial discrimination in the workplace often find class actions to be the most effective vehicles for their suits. Congress sought to eliminate discrimination from the workplace by enacting Title VII of the Civil Rights Act of 1964 ("Title VII"). In the immediate aftermath of Title VII's passage, many courts embraced the "across-the-board approach," which placed more emphasis on righting the moral injustice of racial discrimination than on a rigid adherence to Federal Rule of Civil Procedure 23 ("Rule 23"). To remedy racial discrimination, the approach permitted certification of classes that did not conform with the requirements of Rule 23. Now that the Supreme Court has mandated in General Telephone Co of Southwest v Falcon that courts should only certify classes that conform with Rule 23's

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1. B.A. 1999, University of Wisconsin; J.D. Candidate 2004, University of Chicago.
4. 110 Cong Rec S 6564-65 (1964).
5. See, for example, Johnson v Georgia Highway Express, Inc, 417 F2d 1122 (5th Cir 1969) (using the across-the-board approach to certify a class despite Rule 23 concerns).
6. See, for example, Johnson, 417 F2d at 1124. The across-the-board approach adopted in Johnson enabled classes to be certified even if they did not meet all of Rule 23's requirements. The approach arose out of a perceived need to remedy racial discrimination, coupled with a recognition that racial discrimination is necessarily discrimination against a class.
This uneasy attempt to balance procedure and philosophy is exemplified by the uncertainty over whether or not supervisors and non-supervisors should be permitted to occupy the same class. If a court finds that a serious current or potential conflict of interest exists between class members, it will refuse to certify the class because of concerns that the class representative is unable to adequately represent the class. Courts often express concerns that the structure of the workplace creates sufficiently divergent interests for supervisors and non-supervisors that their interests are likely to conflict during the course of litigating a class action. In light of Rule 23(a)(4)'s requirement that the representative class member "fairly and adequately protect the interests of the class," courts must decide when conflicts within a putative class are sufficiently troubling to warrant decertification.

Courts have reached widely divergent conclusions about whether the presence of supervisors and non-supervisors in the same class should lead to decertification because of adequacy concerns. When the Supreme Court struck down the across-the-board approach in Falcon, it did not provide meaningful guidance to lower courts faced with decisions about whether a conflict of interest is sufficiently serious to warrant decertification. One court lamented the confusion that has arisen in Falcon's wake: "[r]ecognition [that racial discrimination is by definition class discrimination] has left uncertain the degree of permissiveness tolerable in applying the requirements of Rule 23 in Title VII litigation, and has promoted a difference of opinion as to the proper standard for certifying Title VII classes." This Comment proposes a framework that courts can apply to determine whether the presence of both supervisory and non-supervisory employees in a class should lead to decertification because of Rule 23(a)(4) adequacy of representation concerns. The Comment summarizes the confusion that has beset this area, and

7 Id at 160 ("The District Court's error in this case, and 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).")
8 See, for example, Wagner v Taylor, 836 F2d 578, 595–96 (DC Cir 1987).
9 See id; Appleton v Deloitte & Touche LLP, 168 FRD 221, 233–34 (M D Tenn 1996).
10 FRCP 23(a)(4).
12 Wagner, 836 F2d at 588.
then sets out several principles that courts can apply in the future to create more consistent and well-reasoned decisions. The framework compiles the holdings of various courts, focusing most extensively on the decision of the District of Columbia district court in *McReynolds v Sodexho Marriott Services, Inc.*13 Courts need not choose between the principles of Title VII and the procedural mandates of Rule 23(a)(4). Applying the framework suggested in this Comment will enable them to strike an effective balance between these two important objectives.

Part I discusses the interaction between Rule 23(a)(4) and Title VII, and explains how the *Falcon* decision altered the relevant legal landscape. Part II explores the analysis of these issues by the *McReynolds* court, and contrasts the court’s analysis with the approaches used by other courts. Part III proposes that courts adopt a liberal certification policy in order to satisfy both Title VII and Rule 23(a)(4).

Finally, Part IV recommends a framework courts can use to implement this policy, setting forth specific guiding principles that courts can use in the future. The framework recommends that courts not decertify classes simply because supervisors and non-supervisors are in the same class. It analyzes issues that have concerned courts over the years, and provides recommendations about which adequacy of representation problems courts should be most aware of and which are less troubling. Finally, it recommends ways for courts to take a more active role in uncovering conflicts where they exist and permitting classes to move forward where they do not. By applying this framework, courts will be able to make well-reasoned certification decisions in keeping with the spirit and reasoning of *Falcon*.

I. BACKGROUND: INTERACTION BETWEEN TITLE VII AND RULE 23

This Part introduces the tension between Rule 23’s requirements and Title VII’s goal of eliminating discrimination from the workplace. It begins by describing the moral appeal of the across-the-board approach, then explains the rationale behind the Supreme Court’s eventual decision to strike it down. It proceeds to explore the adequacy of representation requirement of Rule 23(a)(4) in detail. This Part concludes with a critique of decisions

13 208 FRD 428 (D DC 2002).
by courts that have taken the Court’s rejection of the across-the-board approach to an unnecessarily formalistic extreme.

A. Falcon Strikes Down the Across-the-Board Approach

1. Advent of the across-the-board approach.

In the years immediately following the passage of Title VII, many courts utilized the across-the-board approach to repair broad injustices in the area of racial employment discrimination. First advocated by the Fifth Circuit in Johnson v Georgia Highway Express, Inc., the across-the-board approach exhibited a willingness to certify classes even if they did not strictly satisfy the requirements of Rule 23. In recognition of the fact that racial employment discrimination suits are archetypal class action suits, and likely in an attempt to promote the spirit of Title VII, the across-the-board approach permitted class certification even in cases that prompted significant Rule 23 concerns. The approach was so effective in encouraging litigation that in 1976 alone, plaintiffs filed 1,174 class action employment discrimination suits in federal district courts. The Johnson court expressed a willingness to overlook factual differences among the class members’ claims in light of their common complaints regarding their employer’s unequal employment practices. This is the essence of the across-the-board approach.

The across-the-board approach had appeal because Title VII employment discrimination claims were considered an excellent

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14 See, for example, Johnson, 417 F2d at 1124 (initiating the across-the-board approach). See also Shively, 23 U Ark Little Rock L J at 930–31 (cited in note 2) (noting the great deference that courts gave to employment discrimination class actions and the relative ease with which classes were certified immediately after the enactment of Title VII).
15 417 F2d 1122 (5th Cir 1969).
16 See id at 1124.
17 See Falcon, 457 US at 157 (recognizing that racial discrimination is necessarily discrimination against a class); East Texas Motor Freight System, Inc v Rodriguez, 431 US 395, 405 (1977) ("Suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs.").
18 See, for example, Johnson, 417 F2d at 1124 (noting that despite different factual allegations among class members, the class should be certified as an across-the-board class).
19 See Shively, 23 U Ark Little Rock L J at 926 (cited in note 2). This stands in stark contrast to the thirty-two filings in 1991, following the Supreme Court’s rejection of the across-the-board approach. Id.
20 See, for example, Johnson, 417 F2d at 1124.
fit with the class action mechanism. When Congress enacted Title VII, it did so in an effort to eliminate race discrimination from the workplace. Specifically, it enacted Title VII in order to prevent employers from acting because of race-based invidious motives. Title VII enables plaintiffs to bring both disparate impact and disparate treatment claims for discrimination "on the basis of race, color, religion, sex, or national origin." Title VII class actions enable plaintiffs to bring common claims against an employer whose discrimination is more apparent when viewed in concert with other employees. Courts advocating the across-the-board approach facilitated these class actions by certifying classes that may not have deserved certification under a formal interpretation of Rule 23.

The specific holding in Johnson indicated that any victim of racial discrimination in employment could maintain an across-the-board attack on all unequal employment practices alleged to have been committed by the employer pursuant to a policy of racial discrimination. In Johnson, an African-American employee who had acted as a spokesman for other African-American employees had been discharged from employment, allegedly because of his race. The court refused to narrow the class to other African-American employees who had been discharged, reasoning that the scope of the lawsuit was "an 'across the board' attack on unequal employment practices alleged to have been committed by the [employer] pursuant to its policy of racial discrimination."

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21 See, for example, Reed v Arlington Hotel Co, 476 F2d 721, 723 (8th Cir 1973), quoting Parham v Southwestern Bell Telephone Co, 433 F2d 421, 428 (8th Cir 1970) ("The very nature of a Title VII violation rests upon discrimination against a class characteristic.").
24 42 USC § 2000e-2(a)(1) (2000). A "disparate treatment" claim alleges that the defendant intentionally based an employment decision on the race, color, religion, sex, or national origin of the plaintiffs. Disparate treatment claims can involve an isolated incident of discrimination against a single individual, or allegations of a "pattern or practice" of discrimination affecting an entire class of individuals. A "disparate impact" claim alleges that the defendant based an employment decision on a criterion that, although "facially neutral," nevertheless impermissibly disadvantaged members of a protected group. McReynolds, 208 FRD at 440.
25 See Shively, 23 U Ark Little Rock L J at 930–31 (cited in note 2) (describing the ease with which employment discrimination class actions achieved certification in the early years of the across-the-board approach).
26 417 F2d at 1124.
27 Id at 1123.
28 Id at 1124.
The court noted that despite the differing factual allegations of the class, the pervasive threat of a racially discriminatory policy supplied a question of fact shared by all members of the class.29

The across-the-board approach enabled courts to certify a class even when the class members were dissimilar in certain critical senses. As the court observed in Wagner v Taylor, "by this technique, any case featuring a proposed class composed of all members of a minority group connected in some fashion with a particular employer is deemed to present common questions of law or fact, regardless of individual variations in terms of discriminatory practices suffered or injuries sustained."30 In Reed v Arlington Hotel Co,31 for example, the Eighth Circuit permitted an African-American employee who had been discharged to represent various employees who had not been discharged.32 The court reasoned that despite the differences between the class representative and other members of the class, the representative provided adequate representation because he had been subject to the same racially discriminatory treatment as the other employees.33

2. The fall of the across-the-board approach.

The across-the-board approach, however, clashed with the procedural requirements of Rule 23(a). The Supreme Court eventually struck down the across-the-board approach in Falcon, mandating a closer adherence to the requirements of Rule 23(a).34 The Court voiced its philosophical approval for the principles behind the across-the-board approach, noting that "[w]e cannot disagree with the proposition underlying the across-the-board rule—that racial discrimination is by definition class discrimination."35 Nevertheless, the Court expressed concern that an allegation of a discriminatory policy should not in and of itself satisfy the requirements of Rule 23(a):

29 Id.
30 Wagner, 836 F2d at 588 (emphasis added).
31 476 F2d 721 (8th Cir 1973).
32 Id at 723.
33 Id. See also Jordan v County of Los Angeles, 669 F2d 1311, 1322 (9th Cir 1982), vacd on other grounds, 459 US 810 (1982) (certifying class including individuals from various job categories).
34 457 US at 160–61.
35 Id at 157.
Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.\(^\text{36}\)

The Court did not hold that courts should generally refrain from certifying classes bringing such claims. Instead, it demanded that lower courts pay greater heed to the requirements of Rule 23 in their certification decisions.\(^\text{37}\) It indicated, "[t]he District Court's error in this case, and 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)."\(^\text{38}\) Following the Court's ruling in *Falcon*, then, courts need to ensure that classes satisfy all of the criteria of Rule 23.

B. The Adequacy of Representation Requirement

One of the four requirements of Rule 23(a) is the requirement that the representative class member must "fairly and adequately protect the interests of the class."\(^\text{39}\) The Supreme Court has explained that in order to demonstrate adequate representation, "[a] class representative must be part of the class and possess the same interest and suffer the same injury as the class members."\(^\text{40}\) Courts generally apply a two-part test to determine whether a class meets this requirement. According to the test, adequacy requires that "1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representatives must appear able to vigorously prosecute the interests of the class through qualified counsel."\(^\text{41}\)

\(^{36}\) Id.

\(^{37}\) Id at 160–61.

\(^{38}\) *Falcon*, 457 US at 160.

\(^{39}\) FRCP 23(a)(4).


\(^{41}\) *McReynolds*, 208 FRD at 446, quoting *National Association for Mental Health, Inc v Califano*, 717 F2d 1451, 1458 (DC Cir 1983).
In addition to fulfilling the adequacy of representation requirement, classes must fulfill the numerosity, typicality and commonality components of Rule 23(a). If these four prerequisites are satisfied, then a class can be certified if the class also satisfies one of the criteria of Rule 23(b).

C. Judicial Overreaction to Falcon in Title VII Cases

With the across-the-board approach now a remnant of a bygone era, courts have become much less willing to hold that classes fulfill the adequacy of representation requirement. While their reasoning should conform with the policy behind Title VII, courts are often more careful to adhere to the procedural mandates of Rule 23 than the philosophical ideals of Title VII. The presence of both supervisory and non-supervisory employees should lead courts to investigate the possibility that the interests of the two groups will conflict, but courts too often engage in analyses that make their presence tantamount to automatic decertification.

In some cases, courts make broad statements that "supervisory employees and nonsupervisory employees should not be in the same class because their interests potentially conflict" and deny certification without further analysis. One court reasoned that supervisors cannot be in the same class with non-supervisors if they have evaluated other members of the class, even if the evaluations have had minimal impact on the non-supervisors' careers. Another placed an unrealistic burden on the plaintiffs by requiring them to disprove the existence of a conflict with respect to all members of the class.

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42 FRCP 23(a) states that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

44 See Gonzalez v Brady, 136 FRD 329, 333 (D DC 1991).

45 See id.

46 Appleton v Deloitte & Touche LLP, 168 FRD 221, 233 (M D Tenn 1996).

47 See id. See also Fewlass v Alyn & Bacon, Inc, 1978 US Dist LEXIS 14329, *4 (D Mass) ("Despite her good faith intentions to represent the full class, plaintiffs supervisory position necessarily weds her to interests manifestly antagonistic to those of the class she seeks to represent.").

48 See Appleton, 168 FRD at 233.

49 See Gonzalez v Brady, 136 FRD 329, 333 (D DC 1991) (requiring putative class to prove the absence of a conflict amongst 1,400 different class members).
more complex and multi-faceted analysis of adequacy than the overly simplistic analysis engaged in by these courts. The remainder of this Comment is devoted to examining the positive and negative features of courts’ analyses of the adequacy requirement, then proposing a framework that incorporates the best features of those analyses.

II. HOW COURTS HAVE DEALT WITH ADEQUACY OF REPRESENTATION DECISIONS

This Part moves from the general background supplied by Part I to the more specific issue of whether courts have permitted supervisors and non-supervisors to occupy the same class in employment discrimination class actions. The recent McReynolds decision exemplifies the kind of logic courts should use in determining whether a putative class fulfills the adequacy requirement of Rule 23(a)(4). In explaining its decision to uphold adequacy in a class containing both supervisors and non-supervisors, the court noted that decertifying a class action solely because of the presence of those two groups could perversely reward the employer for its alleged discrimination. Yet this is precisely what many courts do when they deny adequacy without regard for the gravity of the conflicts that exist between the two groups. This Part explores the features of the McReynolds court’s reasoning that should be extrapolated to other courts. It then delves into the overgeneralizations that have beleaguered the law in this area, and concludes with an analysis of the approaches that other courts have adopted.

A. McReynolds v Sodexho: Finding the Appropriate Balance

In McReynolds, the court certified a class composed of non-supervisory and supervisory employees, all of whom were bringing claims of racial discrimination in employment. The plaintiffs sought to certify a class consisting of the following employees:

[All African-Americans who are or were salaried employees of Sodexho at any time from March 9, 1998, to the present, and who held or sought to obtain (1) an upper-level managerial, supervisory, or professional position . . . or (2) a job that would lead to such a position, and who have

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50 McReynolds, 208 FRD at 447–48.
51 Id at 430.
been, continue to be, or may in the future be adversely impacted by Sodexho’s racially discriminatory policies and practices affecting promotions or advancement.\(^{52}\)

The court held that the plaintiffs satisfied the commonality requirement because they had specific, similar complaints, and their interests were well-aligned with one another.\(^{53}\) It found that the plaintiffs had made a “significant showing of a common policy of discrimination.”\(^{54}\) As a result of that pervasive policy of discrimination, the court held that the plaintiffs also satisfied the typicality requirement,\(^{55}\) which requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.”\(^{56}\)

The court then turned its attention to the adequacy of representation prong,\(^{57}\) ultimately concluding that the mere presence of supervisory and non-supervisory employees in the same class should not necessarily destroy adequacy.\(^{58}\) It noted, “[t]he holding of Wagner has been interpreted to mean that ‘the existence of a supervisory relationship between class members could undermine the adequacy of the representation of the class members in that relationship.’”\(^{59}\) The court recognized the existence of valid concerns over some class members supervising other class members.\(^{60}\) Because some class members evaluated others and made

\(^{52}\) Id at 433, quoting Plaintiff’s Motion for Class Certification at 1.

\(^{53}\) McReynolds, 208 FRD at 443–44 (noting that despite Sodexho’s decentralized decisionmaking structure, the class satisfied the commonality requirement). To satisfy the commonality requirement, plaintiffs must demonstrate “questions of law or fact common to the class.” See FRCP 23(a)(2).

\(^{54}\) McReynolds, 208 FRD at 441 (internal quotations omitted).

\(^{55}\) Id at 445 (noting that typicality was satisfied, but only for employees who worked at the same company as the class representatives).

\(^{56}\) FRCP 23(a)(3). “The analysis of commonality applies equally to typicality. Because plaintiffs have made a convincing showing of a common policy of discriminatory treatment that extends across divisions, units, and geographic regions, including those where the proposed representatives worked, they have made a sufficient demonstration that the claims of the class representatives are largely typical of those of the class.” McReynolds, 208 FRD at 445.

\(^{57}\) The defendants contested only the potential conflict of interest portion of the adequacy requirement, as plaintiffs’ counsel was clearly competent. Id at 446.

\(^{58}\) Id at 447.


\(^{60}\) McReynolds, 208 FRD at 447. Earlier in its discussion, the court cited the leading case in the circuit, Phillips v Klassen, for the standard to be used in making adequacy determinations. Id at 446. In Phillips, the court noted that “[c]lass members whose interests are antagonistic in fact to, or even ‘potentially conflicting’ with, the interests of the ostensibly representative parties cannot be bound, consistent with the requirements of
disciplinary and termination decisions that greatly impacted their careers, the court recognized the defendant's concerns about a potential intra-class conflict. Nevertheless, the court concluded that the conflicts did not rise to a sufficient level to preclude class certification.

The court concluded its analysis by noting the danger of aggressively decertifying classes because of concerns over potential conflicts. It cautioned, "[t]o thwart a class action because of the presence of both supervisors and non-supervisors in the class would actually reward defendant for its alleged discrimination." The court reasoned that while potential conflicts might arise, this would be an acceptable sacrifice in light of the comprehensive remedy that the court could provide. It noted, "an injunction against a few supervisory members of the class—who most likely did not exert significant influence over departmental policymaking—is fairly characterized as de minimis relative to the value of such an injunction in protecting those same supervisors from epidemic discrimination." This analysis illustrates a court's attempt to craft an effective class-wide remedy that conformed with the adequacy requirement of Rule 23.

B. Wagner v Taylor: A Well-Reasoned Decision, An Unfortunate Byproduct

Several months prior to the McReynolds decision, the D.C. Circuit had found that a class had not satisfied adequacy of representation in a case somewhat factually similar to McReynolds. In Wagner v Taylor, the facts differed substantially enough from McReynolds so the outcomes can be reconciled with one another. Nevertheless, subsequent courts have cited Wagner for the general principle that supervisors and non-supervisors should never be placed in the same class as one another. This is an unfortunate mischaracterization of the court's analysis.

due process to an adjudication taken in their name." Phillips v Klassen, 502 F2d 362, 366 (DC Cir 1974).

61 McReynolds, 208 FRD at 447.
62 Id.
63 Id at 448.
64 Id at 447-48.
65 836 F2d 578 (DC Cir 1987).
66 See, for example, Appleton v Deloitte & Touche LLP, 168 FRD 221, 233 (M D Tenn 1996) (ignoring the Wagner court's measured analysis and citing only the general presumption against allowing supervisors and non-supervisors in the same class).
In Wagner, the plaintiff alleged that his employer, the Interstate Commerce Commission (ICC), discriminated against its black professional, administrative, and technical employees above a certain employment category. Wagner worked for the ICC as an executive, but sought to represent employees at varying levels within the corporation in a class action against ICC.

After holding that Wagner was an inappropriate class representative for typicality and commonality reasons, the court expressed serious doubts about whether Wagner could fulfill the adequate representation requirement of Rule 23(a)(4). The court voiced its general concern that "[s]upervisory employees are often inappropriate representatives of non-supervisory employees because the structure of the workplace tends to cultivate distinctly different interests between the two groups."

In this particular instance, the court reasoned that the groups' interests had already conflicted with one another. The court indicated that adequacy was lacking because supervisors who were members of the proposed class had been responsible for evaluating other class members. Importantly, it also observed that Wagner had accused his own supervisor, a potential class member, of racial discrimination against Wagner himself.

The problem with the Wagner decision was not the decision itself, but the broad generalization the court used to support its ultimate conclusion. In light of Wagner's specific allegations against another potential class member, the court was appropriately wary about his ability to effectively represent the class. It is difficult to quibble with the court's ultimate resolution of the issue. However, the court's general statement that "[s]upervisory employees are often inappropriate representatives of nonsupervisory employees because the structure of the workplace tends to cultivate distinctly different interests between the two groups" illustrates the type of overgeneralization that has plagued courts' rationales in this area. The court cited several decisions in sup-

67 836 F2d at 581.
68 Id at 581–83.
69 Id at 590–95.
70 Id at 595–96.
71 Wagner, 836 F2d at 595.
72 Id.
73 Id.
74 Id.
75 Wagner, 836 F2d at 595.
76 Id.
port of that general principle, but a closer inspection of those decisions reveals less support for it than the court implied. This calls attention to the unfortunate reality that it is difficult to summarize a court's nuanced interpretation of an issue in a single sentence.

The cases cited by the Wagner court for its general statement regarding supervisory and non-supervisory employees provided less clear support for the position than the court's words implied. The courts in Wells v Ramsay, Scarlett & Co, and Sperling v Donovan denied class certification based on a failure to meet the typicality and commonality requirements rather than because of adequacy concerns. The court in Grant v Morgan Guaranty Trust Co did raise concerns about the ability of supervisory and non-supervisory employees to co-exist in the same class, noting that the defendant had raised "substantial conflict of interest questions arising out of plaintiff's attempt to represent both black males and white females, as well as managers who process promotions and employees who apply for them." Nevertheless, the court based its decision not to certify primarily on the failure to achieve typicality.

The Steur v ITT Continental Baking Co and Rodgers v United States Steel Corp courts also provided only marginal support for the general proposition cited in Wagner. In Rodgers, the court noted its concern about allowing a supervisor to represent the diverse group of employees. Yet it further noted, "[i]t does not follow, however, that adequate representation is lacking in this case. Plaintiff Rodgers's position is entirely consistent with class interests, and there is every indication that, through

77 Id at 595 n 119.
78 506 F2d 436 (5th Cir 1975).
79 104 FRD 4 (D DC 1984).
80 Wells, 506 F2d at 437 ("We conclude after studying the record that there was no nexus between plaintiff, a foreman, and the longshoremen named in the class."); Sperling, 104 FRD at 6 ("[Plaintiffs] have not shown how their claims would be typical of the claims of such a diverse group of employees. Only race unifies that group.").
81 548 F Supp 1189 (S D NY 1982).
82 Id at 1193.
83 Id ("The statistical and documentary evidence submitted by plaintiff is insufficient to demonstrate that there is in fact a class of persons in need of protection.").
84 80 FRD 624 (E D Va 1977).
85 69 FRD 382 (W D Pa 1975).
86 Rodgers, 69 FRD at 389 (noting that inclusion of supervisory class members necessarily leads to the possibility of a conflict with non-supervisory class members, particularly in a 23(b)(2) class action).
counsel, he will faithfully pursue and protect those interests." Finally, the Steur court used typicality as the main basis for its refusal to certify, noting that, "[f]rom her own deposition, it is clear that Mrs. Steur is not 'a part of the class' which she seeks to represent."

Accordingly, the Wagner court’s general statement was based on several decisions that provided only questionable support for it. It should not be surprising, then, that the Wagner court’s principled analysis has not resonated as loudly as its general statement regarding the prudence of supervisory and non-supervisory employees occupying the same class. It, too, has been cited for the same general principle disfavoring mixed supervisor/non-supervisor classes. Ignoring the Wagner court’s measured analysis, the court in Appleton v Deloitte & Touche LLP noted that "[s]everal courts have held that supervisory employees and non-supervisory employees should not be in the same class because their interests potentially conflict." The first decision it cited for this proposition was Wagner.

C. Approaches Taken By Other Courts

Courts have adopted a wide range of philosophies in determining whether supervisors and non-supervisors can occupy the same class. Some courts indicate that the mere presence of supervisory and non-supervisory employees in the same class destroys adequacy. Other courts take a slightly more permissive approach to the adequacy requirement, finding that the presence of both types of employees in the same class leads to only a presumption of conflict. In Gonzalez v Brady, the district court in the D.C. Circuit noted that "it is generally true that supervisory and nonsupervisory employees are not placed in the same class due to the potential for a conflict of interest." The court then

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87 Id.
88 Steur, 80 FRD at 625.
89 Wagner, 836 F2d at 595.
90 168 FRD 221 (M D Tenn 1996).
91 Id at 233.
92 Id.
93 See id. See also Gilchrist v Bolger, 733 F2d 1551, 1555 (11th Cir 1984) ("We find no abuse of discretion in the court's eliminating applicants and supervisors from the proposed class.").
94 136 FRD 329 (D DC 1991).
95 Id at 333 n 12.
implied that the plaintiffs had failed in their duty to successfully rebut this presumption.  

Many courts undertake a closer inquiry into the particular facts of each case to determine whether an actual or potential conflict of interest exists among class members. *McReynolds* provides an excellent example. The court in *McReynolds* recognized that some class members supervised others, but held that these relationships did not create sufficient concerns to preclude certification.  

In *Hyman v First Union Corp*, the district court in the D.C. Circuit found that the two groups could co-exist in the same class because although some class members supervised others, their evaluations appeared to have had a negligible impact on the alleged discrimination. Additionally, because the plaintiffs were suing because they had been terminated from employment, the supervisory relationships had been terminated, meaning that the conflict of interest was not ongoing.

*Zachery v Texaco Exploration and Production, Inc* and *Smith v Texaco* provide additional examples of courts certifying classes despite adequacy concerns about potential conflicts of interest among class members. In *Zachery*, a district court in Texas recognized that “some courts have found that supervisory personnel make poor representatives of employees in class actions.” It concluded, however, that because only a few class members had been promoted to supervisory positions, and even then to relatively minor supervisory positions, the potential for conflict seemed relatively low under those circumstances.

In *Smith*, another district court in Texas held that despite the class representatives having unique educational backgrounds and supervising some class members, they could adequately represent...
the class. It reasoned that if the class's allegations were true, the claims of the class members were sufficient to outweigh the possibility of conflict among class members.

III. COURTS SHOULD VIEW ADEQUACY DECISIONS IN RACIAL DISCRIMINATION CASES THROUGH THE LENS OF TITLE VII

This Part proposes a general principle for resolving adequacy concerns in cases involving supervisors and non-supervisors, based loosely on the analysis used by the McReynolds court. The first half of this Part recommends a liberal certification framework that will enable courts to adhere to both the philosophical requirements of Title VII and the procedural requirements of Rule 23(a)(4). The second half of this Part considers and responds to two likely critiques of this proposal.

A. Courts Should Reconcile Title VII with Rule 23(a)(4)

Courts should adopt a liberal approach to certification that is nonetheless consistent with the procedural mandates of Rule 23(a)(4). As the Falcon court acknowledged, the across-the-board approach is philosophically appropriate for Title VII employment discrimination claims. The Supreme Court rejected the across-the-board approach because it failed to give appropriate weight to the Federal Rules of Civil Procedure. In no way, however, did the Court indicate that other courts should ignore the principles of Title VII in deciding whether or not to certify classes in Title VII employment discrimination cases. Accordingly, courts should not refuse to certify a class because of adequacy of representation concerns unless the circumstances of a case clearly indicate that this is the proper conclusion.

To understand why this is appropriate, it is helpful to consider the rationale for the across-the-board rule. The court in

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105 88 F Supp 2d at 678.
106 Id.
107 See 457 US at 157 (noting that racial discrimination is inherently discrimination against a class).
108 Id at 160 (criticizing courts for paying insufficient attention to the requirements of Rule 23).
109 Id at 157 (noting continuing support for the proposition underlying the across-the-board rule).
Johnson, which instituted the across-the-board approach, explained its merit:

While it is true, as the lower court points out, that there are different factual questions with regard to different employees, it is also true that the Damoclean threat of a racially discriminatory policy hangs over the racial class, and is a question of fact common to all members of the class.

The court determined that justice required it to ignore Rule 23 concerns and certify the class. Although Falcon forces courts to pay closer attention to Rule 23, courts should continue to bear in mind the principle from the across-the-board approach.

This argument should not be misconstrued, however, as advocating a return to the across-the-board approach. In Falcon, the Supreme Court appropriately pointed out the flaws inherent in a basic disregard for Rule 23. Courts should give appropriate deference to Rule 23(a)(4), and should not certify classes when supervisors and non-supervisors clearly possess conflicting interests. In Allen v Chicago Transit Authority, for example, the court appropriately held that a class should not be certified when certain supervisors had made negative employment decisions with respect to other non-supervisory class members. The court cited tangible examples of these decisions, effectively illustrating tension that had arisen in the past. Similarly, the Ninth Circuit has indicated that unless defendants identify specific issues where employees' interests conflict, a court need not find the existence of a conflict of interest.

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111 Johnson, 417 F2d at 1124 (internal quotations omitted).

112 Id.

113 457 US at 161 (quoting the rationale in the concurring opinion in Johnson, which noted that, "without reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate, and the employer does not know how to defend").


115 Id at *36–37.

116 Id (indicating that specific class members had decided not to promote others, and that various class members had competed with one another for promotions).

117 Staton v Boeing Co, 327 F3d 938, 958–59 (9th Cir 2003) (noting the District Court's finding that defendants failed "to identify a substantive issue for which there is a conflict of interest between two or more sets of employees").
In contrast, the court in Gonzalez relied on a vague fear of "potential conflicts" as a basis for refusing to certify a class. It noted, "[o]ver 1,400 potential class members must be protected from such a conflict of interest, and plaintiffs provide no testimony from potential class members to assure the court that members at all levels have grievances susceptible to class-wide solutions which effectively cut across all levels." It is unrealistic to expect plaintiffs to prove at the certification stage that there will not be conflicts of interest among 1,400 class members. The court's approach to this issue, forcing the class representatives to overcome an apparent presumption against adequacy, implies that the plaintiffs would have encountered great difficulty in obtaining class certification no matter how meritorious their claims. The court had other valid concerns about typicality and commonality, but this type of apparent presumption against adequacy should be avoided by other courts.

B. Countering Critiques Regarding Impartiality and Settlement Implications

Opponents of a liberal certification policy might argue that courts should be completely impartial as they decide these types of cases, and not give any preference to either plaintiff employees asserting discriminatory practices or employer defendants refuting their claims. Certainly, judges should retain their impartiality, but they should remain cognizant of the principles underlying Title VII. It is important not to confuse the argument regarding adequacy as an argument applicable to all facets of Rule 23(a). Courts after Falcon must respect the criteria of Rule 23, and should not certify a class that contains clear conflicts of interest. If plaintiffs in a class action cannot satisfy typicality and commonality, then they most likely do not have sufficiently common interests with the rest of the class to merit certification. A court should not certify a class in that situation; Wagner is an excellent example of a court appropriately decertifying a class in such a case. In many cases, supervisory employees simply do not have enough in common with non-supervisory employees to merit their

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118 136 FRD at 333 n 12.
119 Id at 331–33.
120 See Wagner, 836 F2d at 590–94 (engaging in a well-reasoned analysis of why the class failed to satisfy the requirements of Rule 23(a)).
inclusion in the same class.\textsuperscript{121} If class members can overcome these hurdles, however, concerns about the adequacy of representation requirement should not destroy the class in the absence of a tangible and meaningful conflict. It is quite possible, and desirable, for courts to allow putative classes a bit of latitude in certification decisions while still cautiously adhering to the guidelines of Rule 23(a)(4).\textsuperscript{122} Nothing in \textit{Falcon} indicates otherwise.

Another argument against liberal certification concerns the settlement implications of certification. Courts must balance conflicting concerns when deciding whether or not to certify a class in this context. On the one hand, courts should give a great deal of thought to the certification decision. Certification of a class is often the first step toward settlement.\textsuperscript{123} On the other hand, the Supreme Court's decision in \textit{Eisen v Carlisle & Jacquelin},\textsuperscript{124} instructs courts not to "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."\textsuperscript{125}

Some courts have questioned the \textit{Eisen} philosophy, arguing that certification is too procedurally important for courts to certify classes in weak cases simply because of a refusal to delve into the merits. In \textit{In re Rhone-Poulenc Rorer Inc},\textsuperscript{126} for instance, the Seventh Circuit refused to certify a class, basing its decision on a controversial inquiry into the merits.\textsuperscript{127} It reasoned that certifying a class in a case that appeared so weak on the merits would have shifted the balance of power unfairly to the plaintiffs.\textsuperscript{128} While the same kinds of practical considerations led the Supreme Court to demand a "rigorous analysis" of Rule 23 requirements in \textit{Falcon},\textsuperscript{129} \textit{Eisen} nevertheless precludes courts from investigating beyond the factual allegations of the parties' claims.\textsuperscript{130} Some critics

\textsuperscript{121} See, for example, id at 594–95 (noting that the class representative's vague conclusory allegations failed to satisfy the requirements of Rule 23(a)).

\textsuperscript{122} Part IV sets forth a framework for achieving this balance.

\textsuperscript{123} See, for example, \textit{In re Rhone-Poulenc Rorer, Inc}, 51 F3d 1293, 1298 (7th Cir 1995).

\textsuperscript{124} 417 US 156 (1974).

\textsuperscript{125} Id at 177.

\textsuperscript{126} 51 F3d 1293 (7th Cir 1995).

\textsuperscript{127} Id at 1304.

\textsuperscript{128} Id at 1299–1300. See also \textit{Szabo v Bridgeport Machines, Inc}, 249 F3d 672, 675–77 (7th Cir 2001) (stressing both the settlement pressure imposed on the defendant by a "bet-your-company" class action and the need for a preliminary merits inquiry to make the Rule 23(b)(3) certification determinations).

\textsuperscript{129} 457 US at 161.

\textsuperscript{130} 417 US 156 at 177 ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").
feel that this approach encourages courts to make uninformed certification decisions and then attempt to justify their decisions after the fact, which may have dire unintended consequences on settlement dynamics.\(^\text{131}\)

This raises a valid concern, and courts should be aware of the practical considerations advanced by the Seventh Circuit in Rhone-Poulenc. However, courts also should not err on the side of refusing certification at the early stages of litigation. The opportunity to modify a certification decision or to decertify a class entirely provides ample opportunity to restructure the suit as discovery develops.\(^\text{132}\) While this may place additional strain on limited resources, the principles underlying Title VII justify close attention from courts.\(^\text{133}\)

IV. PRINCIPLES TO GUIDE CERTIFICATION DETERMINATIONS

The McReynolds court distinguished the Wagner holding by interpreting it as a presumption against class certification that could be overcome under the right circumstances.\(^\text{134}\) In certifying the class before it, the McReynolds court reasoned that while the presence of supervisory and non-supervisory employees in the same class could destroy adequacy, this conclusion was not mandatory.\(^\text{135}\) Using principles developed in McReynolds and other cases, this Comment now suggests a framework that courts should use to determine whether classes satisfy the adequacy requirement. By applying these principles, courts will be able to adhere to both the policy ideals of Title VII and the procedural requirements of Rule 23(a)(4).

\(^{131}\) See, for example, Robert G. Bone and David S. Evans, Class Certification and the Substantive Merits, 51 Duke L J 1251, 1276 (2002) ("This kind of ad hoc—indeed post hoc—process of justification is especially problematic in the class action setting where certification has a potentially serious impact on settlement dynamics."); Bartlett H. McGuire, The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits, 168 FRD 366, 368 (1996) (criticizing the rule laid down in Eisen as "unsound as a matter of policy, inaccurate as an interpretation of Rule 23, and inconsistent with later Supreme Court statements" as applicable to actions for money damages).

\(^{132}\) See, for example, Smith, 88 F Supp 2d at 678 (noting the court's ability and responsibility to modify the class as necessary as the case moved forward).

\(^{133}\) For a more detailed response to this concern, see Subpart IV G.

\(^{134}\) McReynolds, 208 FRD at 447 (indicating that the class members did not allege that other class members had discriminated against them).

\(^{135}\) Id (quoting Pepco's interpretation of Wagner and stating that "the existence of a supervisory relationship between class members could undermine the adequacy of the representation of the class members in that relationship") (emphasis in original).
The first principle lays the foundation for the rest of the framework. It cautions courts against decertifying a class simply because of the presence of supervisors and non-supervisors in the same class. The second principle recommends that courts consider how much actual authority supervisors exerted over non-supervisors in order to determine the potential severity of the conflict of interest. If class members have specifically alleged that other class members have discriminated against them, the third principle advocates that courts should seriously consider decertification. The fourth principle cautions courts against certifying a class if class members are seeking remedies that conflict with one another. In contrast, the fifth principle advises courts not to give undue weight to the concern that class members might have competed with each other for promotions.

The sixth and seventh principles contain advice that courts can use as they manage employment discrimination class actions. The sixth principle recommends that courts elicit testimony from various class members while deciding whether to certify the class. Finally, the seventh principle urges courts to consider alternatives, such as conditional certification or narrowing the class, if conflicts between supervisors and non-supervisors render the class impracticable. Applied together, these principles offer courts a comprehensive framework to determine when supervisory and non-supervisory employees can occupy the same class.

A. Mere Presence Insufficient to Decertify

The mere presence of supervisory and non-supervisory employees in the same class should not destroy adequacy. The Wagner court wisely asserted that if supervisory and non-supervisory employees are in the same class, this may destroy adequacy. The presence of members of both groups should raise adequacy concerns about conflicts of interest, as essentially every court addressing the issue has recognized. Supervisory employees in a class action with non-supervisory employees ostensibly owe a dual allegiance, to their employer on one hand and to the non-supervisory class members on the other. Their presence in a class with non-supervisory employees should cause courts to investigate further to determine whether a conflict of interest exists.

136 Wagner, 836 F2d at 595.
This concept is wholly uncontroversial, since all courts closely scrutinize adequacy under these circumstances.\footnote{See, for example, id.}

Courts should not, however, decertify a class due to adequacy concerns absent specific reasons to do so. The mere presence of both supervisory and non-supervisory employees in the same class should be insufficient to destroy adequacy. When the Supreme Court struck down across-the-board certification, it did so because of procedural, not philosophical, concerns.\footnote{Falcon, 457 US at 157, 160 (noting that although the principles of the across-the-board approach were sound, its fatal flaw was a lack of attention to Rule 23's requirements).} Accordingly, courts should continue to promote Title VII's policies against racial discrimination.\footnote{Title VII was intended primarily to prevent racial discrimination in the workplace. See 110 Cong Rec S 5423 (Mar 17, 1964).} Courts would therefore act consistently with Title VII by only decertifying classes if the class presents real and substantial concerns about adequacy. Sweeping generalizations that pay little attention to the specific facts of an individual case should not be used to reject adequacy. Hence, the court in Appleton, which simply cited the conclusory statement that "supervisory employees and non-supervisory employees should not be in the same class because their interests potentially conflict," should have engaged in a more fact-specific analysis instead of relying on a sweeping generalization.

Requiring courts to point to a reason beyond the mere presence of supervisory and non-supervisory employees in the same class may alter the determination of whether the adequacy requirement is satisfied. In Smith, for example, the court indicated that it would not infer the existence of a conflict of interest from the mere presence of both types of employees in the same class.\footnote{Id.} It noted, "[t]he court cannot find any antagonistic interests between class members and their representatives."\footnote{Smith, 88 F Supp 2d at 678.}

In contrast, the court in Gonzalez placed the onus on the plaintiffs to prove that no conflict existed, and accordingly, found adequacy lacking.\footnote{Gonzalez, 136 FRD at 333-34.} It criticized the class for not assuring the court that no conflicts would arise amongst the over 1,400 potential class members.\footnote{Id at 333 n 12.} Absent a tangible rationale to support the existence of a conflict—which the court did not provide—the court
in *Gonzalez* should not have required the plaintiffs to elicit testimony from such a large group in order to refute the possibility of a conflict.

The *McReynolds* court engaged in a more robust analysis. The court noted, "[t]he mere fact that some putative class members were involved in the supervision and rating of other class members does not mean that the supervising class members perpetuated or contributed to any of Sodexho's alleged discriminatory policies." The court in *Staton v Boeing Co* used similar reasoning, noting that the determination of whether a class contains unworkable conflicts is context-specific, and that the workforce structure concerns in that case did not preclude a finding of adequacy. The *Staton* court, like the *McReynolds* court, held that despite the presence of supervisors and non-supervisors in the same class, the class fulfilled the adequacy requirement.

### B. Actual Authority

Courts should inquire whether supervisors exerted actual authority over non-supervisory class members. A proper inquiry into whether supervisors and non-supervisors can be in the same class should include an investigation into the actual authority that the supervisors exerted over the non-supervisors. As one court noted, "the potential conflict is greatest when one class member has, as supervisor, evaluated another class member who now challenges the evaluation system." Indeed, if the supervisors have extensive authority to evaluate employees and then make promotion decisions based on those evaluations, then a supervisor in a class with non-supervisors would have a potentially serious conflict of interest. She would potentially have to challenge the decisions that she made in the context of her job in order to advance the plaintiffs' case. However, in a more centralized decisionmaking structure, where immediate supervisors have less control over employee evaluation and promotion, the potential conflict would be lessened significantly.

The *McReynolds* court effectively analyzed this issue. As discussed above, the court declined to find a lack of adequacy on the basis that some class members had supervised and evaluated

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145 *McReynolds*, 208 FRD at 447.
146 327 F3d 938 (9th Cir 2003).
147 Id at 958–59.
148 Id.
149 *Zachery*, 185 FRD at 241.
other putative class members. The court reasoned that while these evaluations created concerns about possible conflicts, the need for a class action outweighed these concerns in the instant case. Because the supervisors in the class "most likely did not exert significant influence over departmental policy-making," it found that the value of protecting the supervisors from "epidemic discrimination" superseded the adequacy concerns. Similarly, in 

Hyman, the court noted that "[p]laintiffs have presented credible evidence that even if the evaluations had any impact on the termination decisions, it was a negligible impact." This reasoning sharply contrasts with the rationale used in the Appleton case. There, the court engaged in the kind of overgeneralization that is too often involved in racial discrimination cases:

MEMBERS of the proposed class who are supervisors have likely been responsible for evaluating the performances of other members of the class—evaluations these nonsupervisory personnel may challenge as discriminatory. For example, one of the potential class members who has filed an affidavit . . . raises a discriminatory evaluation claim. Defendant indicates, however, that one of the supervisors who evaluated [that class member] was African American, and himself potentially a member of the proposed class.

This type of argument assumes that whenever some class members evaluate others, the class representative cannot adequately represent the class. This assumes too much. Evaluations among class members raise the specter of a conflict, and may be the primary factor in decertifying classes, but courts should remain faithful to the precepts of Title VII and not give this undue credence. Courts should deny adequacy only if the evaluations raise sufficient concerns over conflicts to justify the decision, not simply because some class members supervised others.

150 McReynolds, 208 FRD at 447.
151 Id at 447–48.
152 982 F Supp at 5. See also Zachery, 185 FRD at 241 (finding that although some class members evaluated others, the potential for conflict was "somewhat limited under the circumstances" because the great majority of the class was situated similarly to one another).
153 Appleton, 168 FRD at 233.
C. Specific Allegations Are Troubling

Specific allegations of discrimination by some class members against other class members should generally destroy adequacy. The *McReynolds* court found it notable that the “plaintiffs [had] not alleged discriminatory treatment by other potential class members with respect to promotions.” Similarly, in certifying the class in *Hyman*, the court noted that no plaintiffs had alleged any discrimination by other plaintiffs.

In contrast, the *Wagner* court buttressed its conclusion against adequacy by noting that the named plaintiff was alleging that his own supervisor, a potential class member, had discriminated against him. Specific allegations such as these place the supervisor in the untenable position of simultaneously having to defend his specific actions while challenging the general actions of the company that employs him. They should send a warning that serious conflicts of interest are more likely to arise if the class is certified.

D. Conflicting Remedies Are Troubling

Courts should inquire whether a potential remedy would be antagonistic to the interests of some class members. Outside of a formalistic adherence to Rule 23’s requirements, it would seem that courts’ primary concerns over adequacy center around a fear that the remedy granted to the class will be antagonistic to the interests of particular class members. If class members who have potential conflicts are not aggrieved by the remedy, however, it is more difficult to be concerned with harm done to them. In *Conflict and Dissent in Class Actions: A Suggested Perspective*, Professor Garth addresses this type of concern by distinguishing “one-shot” remedies, such as injunctions prohibiting enforcement of an unconstitutional law or practice, from structural remedies, such as antidiscrimination programs. He argues that courts should be more cautious when providing one-time remedies, which some class members may be forced to accept reluctantly, than structural remedies, which by necessity involve greater ju-

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154 208 FRD at 447.
155 982 F Supp at 5.
156 836 F2d at 595.
158 Id at 526–27.
dicial participation and long-term attention to dissenters within the class.\textsuperscript{159}

The Supreme Court reasoned in \textit{East Texas Motor Freight System, Inc}\textsuperscript{160} that when putative class members disagree over the type of desired remedy, this should raise serious concerns over a potential conflict of interest.\textsuperscript{161} The Court found a “conflict between the vote by members of the class rejecting a merger of the city- and line-driver collective-bargaining units, and the demand in the plaintiffs’ complaint for just such a merger.”\textsuperscript{162} It raises clear concerns over adequacy of representation when one set of class members is agitating for relief that another set of class members opposes. In \textit{East Texas}, the Court was justifiably concerned that the class representatives could not simultaneously represent the interests of one group that wanted a merger to succeed and another that wanted the same merger to fail.\textsuperscript{163}

The court in \textit{Lott v Westinghouse Savannah River Co}\textsuperscript{164} used similar reasoning to find a lack of adequacy in a racial discrimination suit.\textsuperscript{165} Because some putative class members hoped to be placed into the same type of positions that others hoped to be removed from,\textsuperscript{166} the court found a serious conflict in the plaintiffs’ remedial desires.\textsuperscript{167} Other courts have also found that remedial disagreements create conflicts sufficient to destroy adequacy.\textsuperscript{168} Accordingly, if class members request remedies that seriously conflict with one another, courts should question whether certification is advisable.

\textsuperscript{159} Id at 527.
\textsuperscript{160} 431 US 395 (1977).
\textsuperscript{161} Id at 405.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} 200 FRD 539 (D SC 2000).
\textsuperscript{165} Id at 562.
\textsuperscript{166} Varying levels of willingness to work in radiologically sensitive areas created the discrepancy.
\textsuperscript{167} Id.
\textsuperscript{168} See, for example, \textit{Broussard v Meineke Discount Muffler Shops, Inc}, 155 F3d 331, 339 (4th Cir 1998) (“Pursuing a damage remedy that was at best irrelevant and at worst antithetical to the long-term interests of a significant segment of the putative class added insult to the injury of abandoning the only remedy in which that segment (the EDP franchisees) was interested. Plaintiffs’ strategy thus illustrates the error of allowing them to sue on behalf of ‘all’ Meineke franchisees.”).
E. Competition for Promotions Is Not Troubling

Courts should not deny adequacy because putative class members have competed with each other for promotions. Too many courts engage in the misguided logic that adequacy should be denied because class members may compete with each other for the desired remedy, a promotion. In Allen v City of Chicago, for example, the court noted that “[a]lthough the class members and the named plaintiffs allegedly were denied the position or promotion on the basis of race, conflict arises in that multiple class members would request reinstatement to the same position.” This type of argument has been used by other courts as well, but it ignores the philosophy of Title VII and is of doubtful merit. The argument seems to proceed along these lines: a named plaintiff is incapable of challenging discriminatory practices by an employer because if the suit were successful, the plaintiffs could not possibly all advance at once.

One court in a gender discrimination case strongly criticized the presumption that class members who competed with each other for promotions should consequently be prevented from occupying the same class. It noted, “[t]hat absurd proposition would of course doom almost every class action charging discrimination in promotion—a drastic rewrite of the law in this area.” Indeed, it seems strange to argue that most class members would prefer to see discriminatory practices continue instead of halting such practices and obtaining relief from the employer. Even if an individual could not advance to a better position within the company himself, ridding the company of discrimination would facilitate the upward mobility of similarly situated individuals in the future. The alternative would make discrimination much more feasible for employers “because class-discriminatory promotion would be cost-free.” It is quite cynical to suggest that if employees were forced to choose between con-

170 Id at 553.
171 See, for example, Tooley v Burger King Corp, 1995 US Dist LEXIS 4525, *8 (N D Ill) (finding significant concerns with adequacy because plaintiffs would have to compete with one another for promotions).
172 See Meiresonne v Marriott Corp, 124 FRD 619 (N D Ill 1989). See also McReynolds, 208 FRD at 447 n 31.
173 Meiresonne, 124 FRD at 625 (emphasis in original).
174 Id.
continued discrimination or an end to discrimination but no immediate personal relief, they would opt for continued discrimination.

F. Elicit Testimony

If supervisory and non-supervisory employees co-exist in a suit, courts should encourage both parties to elicit testimony from representative group members. Certainly, this principle must be balanced with concerns about delving into discovery at the certification stage, but these concerns may be overcome. Parties may present valid concerns regarding the hardships of obtaining input from concerned class members prior to discovery. If a court finds these concerns well-founded, it may create alternative solutions to the issue, such as certifying a class but then holding an additional certification hearing several months later to re-examine potential conflicts.

In assessing whether a conflict of interest exists between class members, courts frequently consider the testimony of the members whose interests may conflict. One commentator has advocated that judges take a more proactive approach, whereby the court seeks spokespeople for the various positions of the differently situated class representatives. Creative solutions such as this would allow courts to more accurately assess the possibilities for certification while avoiding a detailed analysis into the merits. If the defendants identify a substantial conflict of interest, and support their claim with testimony from supervisory employees, courts should view this as powerful evidence of a conflict. If a conflict of interest truly does exist, defendants should be able to find at least one or two putative class members who oppose the suit. In the event that defendants cannot locate individuals to elucidate the reasons for a potential conflict, courts should be more skeptical that such a conflict exists.

G. Alternatives to Decertification

If conflicts make the class infeasible as constituted, courts should strongly consider conditionally certifying the class or narrowing it rather than decertifying the class. The *Falcon* court al-

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175 See, for example, *McReynolds*, 208 FRD at 447.
176 See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 Harv L Rev 1, 21, 26-27 (1979) (reasoning that different class members will seek different relief, and judges should seek out interested parties to facilitate a more nuanced understanding of the class's desires).
cluded to the fact that courts have the ability to amend their certification decisions in light of additional information. “Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.” Indeed, Rule 23(c)(1) permits courts to alter their certification decisions following the initial certification decisions. When a court is concerned that potential conflicts of interest may arise, the court should therefore certify a class conditionally, with the understanding that if potential conflicts arise, the class will be either narrowed or decertified.

Opponents of this principle will argue that in practice, the initial certification decision is unlikely to be overturned or modified. A 1995 Federal Judicial Center study of class actions in four federal districts found that motions to decertify or reconsider a certification decision were filed in only 15 percent of the 152 certified class actions studied. Of those cases, judges modified or reversed their certification decisions on only three occasions. The fact that certification decisions are not often overturned, however, does not indicate that courts cannot alter their approaches in the future. If a court has substantial concerns about conflicts arising as a case moves forward, it can arrange an additional certification hearing six months after the conditional certification to re-evaluate the original decision. The prospect of an additional certification hearing would alter the settlement dynamics between the parties, reducing the certainty that the class would move forward.

Courts faced with a class bringing a meritorious claim but beset by conflicts between supervisors and non-supervisors should consider narrowing the class instead of refusing certification. In Morgan v United Parcel Service of America, Inc, for example, the court felt that the class representative would provide adequate representation for all center managers, but not lower-

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177 Falcon, 457 US at 160.
178 “As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.” FRCP 23(c)(1).
180 Id at 175.
181 See FRCP 23(c)(1).
182 169 FRD 349 (E D Mo 1996).
level employees. Rather than reject certification, the court narrowed the class to eliminate what it felt were overwhelming conflicts. Wherever possible, courts should take this step, rather than refusing to certify an entire class. Narrowing classes, however, should still be generally disfavored, as it is usually preferable to certify a larger class in order to accommodate all those who may have grievances. Larger classes promote judicial economy, and help ensure that subclasses are not decertified for lack of numerosity.

Whether a court decides to certify a class outright, certify it conditionally, or certify a narrower class than the proposed class, it should actively monitor the class following the initial certification decision. The liberal approach to certification recommended in this Comment could result in classes moving forward despite actual conflicts of interest unless courts are willing to re-evaluate the class composition following discovery. In Smith, the court noted its continuing obligation to monitor the class to ensure that adequacy was preserved. After finding no present conflict of interest, the court recognized that it had the “continuing authority and the ongoing obligation to adjust the class representatives to serve the interests of the class members if it becomes necessary.” This type of continued vigilance would provide defendants with an additional opportunity, post-certification, to challenge adequacy. If true conflicts do exist, discovery will likely uncover them. This approach would allow courts to presume adequacy upon a sufficient presentation of evidence, then re-evaluate the finding based on further information unearthed during discovery. The approach is consistent with the Supreme Court’s directive that courts should not inquire into the merits of the case during the certification stage. It also increases the likelihood that certification decisions will conform with Rule 23(a)(4).

CONCLUSION

When the Johnson court initiated the across-the-board approach, a concurring opinion prophetically foreshadowed difficulties for Title VII litigation. The court feared that without the across-the-board approach, “[o]ver-technical limitation of classes

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183 Id at 357.
184 Id at 358.
185 88 F Supp 2d at 678.
186 Id.
by the district courts will drain the life out of Title VII. After the Supreme Court struck down the across-the-board approach in *Falcon*, too many courts allowed this prediction to become reality. The *McReynolds* court struck a blow for Title VII, offering reasoning that other courts should use in the future to determine whether putative classes fulfill the requirements of Rule 23(a)(4) and Title VII. Hopefully, courts in the future will adopt the principles developed in this Comment, which are based largely on the *McReynolds* opinion. A liberal certification policy based on this framework would enable courts to limit racial discrimination while adhering to the procedural requirements of Rule 23. If courts adopt this policy, they would go a long way toward restoring the vitality that Title VII employment discrimination class actions may have lost.

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187 *Johnson*, 417 F2d at 1126 (Godbold concurring).
189 See, for example, *Appleton*, 168 FRD at 233.
190 208 FRD 428.