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Why the Veto Hurts More Than You Think

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**Analysis**

Why the Veto Hurts More Than You Think

**By Susan Grover**

The Civil Rights Act of 1990 is dead. Its slayers—chief among them President George Bush—claim to have made the business world safe from dreaded employment quotas.

In fact, they have given some employers an even bigger prize: a good chance of avoiding altogether litigation to correct systemic workplace discrimination.

For minority employees challenging workplace practices under Title VII of the Civil Rights Act of 1964, consent decrees have been the primary vehicle for institutional reform. Such court-approved settlements, which generally establish affirmative-action plans, have provided the cheapest and speediest resolution to many discrimination suits.

Martin v. Wilks, 109 S. Ct. 2180, a 1989 Supreme Court decision, changed that. In that case, the Court exposed consent decrees to interminable "reverse discrimination" attacks by white employees who complain of the affirmative action called for by such decrees. The vetoed civil-rights bill included a provision to reverse that decision, restoring the status quo ante. And courts recognized an affirmative-action "doctrine," which effectively required white employees who wished to challenge a consent decree in a discrimination case to intervene in the suit in question. The doctrine encouraged parties to settle their disputes and avoided duplicative litigation.

In Wilks, the Supreme Court rejected this doctrine. Writing for the Court, Chief Justice William Rehnquist concluded that the practice of binding non-parties to the terms of a settlement was inconsistent with the scheme of the Federal Rules of Civil Procedure (FRCP), which contemplates permissive, as opposed to mandatory, intervention.

**Problematic Proffer**

Wilks proffers to employers and minority employees a different procedural device for preventing subsequent suits by white employees. But the Wilks "solution" is fraught with problems for black plaintiffs—and ultimately is no solution at all.

Wilks would have discrimination plaintiffs use FRCP 19 to bring in as parties—in other words, to "join"—the white employees in the suit that may give rise to a decree. The result of joining all white employees who may be affected by an affirmative-action plan will in almost all cases be an extremely complex and unwieldy suit at best.

But unwieldiness and complexity are the least of the hurdles. Rule 19 joinder suffers from even more severe limitations that make it a counterproductive, inadequate means of producing and protecting consent decrees.

Chief Justice Rehnquist in Wilks did not predict the outcome that Rule 19 would or should yield in these cases. He simply pointed to the rule as the only device available to plaintiffs who wish to bind white employees by a consent decree.

The problem is that Rule 19 frequently won't do the job. Some courts will construe the rule not to require joinder of white employees in the original suit, and will reject plaintiffs' efforts to invoke Rule 19. Courts have interpreted the rule to require that non-parties—like the white employees in a discrimination suit—be joined only when it is likely that the defendant-employer will be otherwise be threatened by conflicting obligations. And courts disagree on what constitutes a "conscious decision" made pursuant to the decree, then, Rule 19 may simply put the plaintiffs out of court.

Even assuming that Rule 19 can yield a manageable case which includes the white employees as parties, their joinder will have little effect if the suit is settled by a consent decree. Although joined as parties, white employees will not be bound by a consent decree between the employer and minority employees unless they accept the terms of the decree.

There is nothing the other parties can do to force the white employees, once joined, to accept the decree; they are free to reject it and may succeed in dismissing their part of the suit and bring a subsequent discrimination suit based on the conscious decisions made pursuant to the decree. To forestall these subsequent suits, the minority employees must litigate to a final, binding judgment after the majority employees have been joined. Consequently this thwarts the Title VII policy favoring settlement of discrimination cases.

President Bush's rejection of the civil rights bill is more than an attack on quotas; its effect will be to subvert entirely the use of consent decrees in employment discrimination litigation. Consent decrees promise a more efficient, more flexible resolution to employment discrimination suits than any other available remedy. They provide a means of producing and protecting consent decrees. They provide a means of producing and protecting consent decrees. Consent decrees promise to bring in the white employees under Rule 19—and they will remain wild cards who can destroy whatever settlement the parties reach.

**Spoilers at Large**

Another important component of Rule 19 has the potential to backfire on civil-rights plaintiffs. The rule requires joinder if it appears that the suit will result in a judgment prejudicial to the non-parties—"white employees"—interests. Before Wilks, white employees who would be barred from subsequent challenges to the decree could be joined under this test. Wilks, though cut off the possibility that the absent white employees will be injured—because it guarantees that they will have an opportunity to file an independent suit. Consent decrees required, and the white employees remain potential spoilers at large.

All the talk of quotas and burdens of proof has diverted attention from the traps President George Bush set—perhaps unwittingly—for discrimination victims by rejecting the civil-rights bill.

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