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Civil Procedure--Class Action Suits: Case Notes

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I. INTRODUCTION

The recent decision in Wetzel v. Liberty Mutual Insurance Co. has raised serious questions concerning the proper application of Federal Rule of Civil Procedure 23, which deals with the maintenance of class actions, to suits seeking back pay awards under Title VII of the Civil Rights Act of 1964. In recent years, there has been a growing tendency for courts to allow Title VII class actions to be maintained under subdivision (b)(2) of the rule, which requires that injunctive or declaratory relief be appropriate with respect to the class, even in those cases where back pay is sought in addition to injunctive or declaratory relief. Since notice is not required by the rule in (b)(2) class actions, these decisions have had the effect of denying notice of the pendency of the action to the absent members of the class. Now the Third Circuit in Wetzel has extended the rationale of those cases to the point where (b)(2) actions are indistinguishable from (b)(3) actions by allowing a class action under (b)(2) when the only appropriate remedy was recovery of back pay. Such an extension is not consistent with the requirements of the rule, and

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1 508 F.2d 239 (3rd Cir. 1975), cert. denied, 421 U.S. 1011 (1975).
3 FED. R. Civ. P. 23(b) [hereinafter referred to as RULE 23(b)] provides in part:
(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . . .


5 Only discretionary notice is provided for (b)(2) actions. See note 69 infra.
the resulting lack of notice to absent class members in such cases as Wetzel may well amount to a deprivation of due process. This case-note will critically examine two major procedural holdings of Wetzel in light of the language of rule 23 and of prevailing due process precedent.

II. THE WETZEL CASE

Sandra Wetzel and Mari Ross were employed as claims representatives in the Pittsburgh office of Liberty Mutual Insurance Company. After being informed by the company that neither would be considered for advancement to the higher paying position of claims adjuster because the job was not open to women, both filed sex discrimination charges with the Equal Employment Opportunity Commission (hereinafter referred to as EEOC) in May, 1971. In August, 1971, the company reassessed its position and decided to recruit women for the position of claims adjuster. Wetzel and Ross rejected offers to be advanced to this position and, after issuance of right-to-sue letters by the EEOC, they instituted a nationwide class action against Liberty Mutual in the Western District of Pennsylvania on February 28, 1972. The suit was brought under Title VII of the Civil Rights Act of 1964 and alleged sex discrimination with respect to Liberty Mutual's hiring, promotion, wage, and pregnancy policies.

The district court determined that the class action would be maintained under rule 23(b)(2) and repeatedly denied motions by the plaintiffs themselves to have the class certified under rule 23(b)(3) as well as (b)(2), and to have notice sent to the members of the class. When the court granted summary judgment in favor of the plaintiffs on January 9, 1974, the class that had been certified by the court spanned the nation and consisted of all past, present and future employees of Liberty Mutual. No injunctive relief was ordered because the court found that Liberty Mutual had changed its policies since the commencement of the action.

On appeal, the Third Circuit substantially affirmed. It rejected Liberty Mutual's contention that the suit should have been recertified

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6 The holding regarding proper class certification is discussed under section III infra. The holding regarding notice is discussed under section IV infra.
7 See text of RULE 23(b)(3), supra note 3.
8 The only policies involved in this appeal were the hiring and promotional policies. The equal pay claim was not decided by summary judgment and the pregnancy claim was appealed to a different panel.
under (b)(3) when it became apparent that the change in company policy had obviated the need for injunctive relief. According to the court, the class retained the cohesive characteristics of a (b)(2) class even after the change in policy. Furthermore, the court held that the language of the rule did not require the suit to be recertified under (b)(3), since (b)(2) suits are not limited to the award of injunctive or declaratory relief only. According to Wetzel, all that (b)(2) requires is that the conduct of the party opposing the class be such as to make injunctive relief appropriate. If that requirement is met, the court can order other relief to the members of the class. Since injunctive relief was appropriate at the time the suit was filed, the language of the rule was held to be satisfied. The consequent change in policy did not alter either the nature of the company's policy or the nature of the class, according to Wetzel.

The Third Circuit also held that notice to the members of the class was not required by the rule or by due process of law. The court stressed that it regarded the interests of (b)(2) class members to be inherently cohesive. That being so, the court reasoned that a judgment against an individual member of a (b)(2) class would bind the remainder of the class by way of stare decisis or collateral estoppel almost as effectively as they would have been bound had that individual brought his action as a representative of the class. Therefore, the court found notice to be superfluous in (b)(2) actions, and held that it is not unfair to bind unnotified members of a (b)(2) class to an adverse judgment as long as their interests were adequately represented in the litigation.

III. THE CERTIFICATION ISSUE

A. The Distinction Between Class Actions Maintainable Under (b)(2) and (b)(3).

For a class action to be maintained under subdivision (b)(3), it is required that questions of law or fact common to the class predominate over questions affecting individual class members and that the class action device be superior to other means of litigation. Members of (b)(3) classes, therefore, may be only loosely linked to one another; there is no "pre-existing or continuing legal relationship"

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9 508 F.2d at 251.
10 Id. at 256-57.
11 See text of RULE 23(b)(3), supra note 3.
between them. In the words of Professor Moore, "[t]hey are merely fellow travelers related only by some common question of law or fact . . . ." Securities fraud class actions are typical of actions maintainable under (b)(3).

The requirements for maintenance of a suit under (b)(2) are much more strict. The court must find not only that the party opposing the class has acted or refused to act on grounds generally applicable to the class, but also that such action has made declaratory or injunctive relief appropriate with respect to the class as a whole. Generally, any class action that meets the requirements of rule 23(b)(2) will also meet the less rigid requirements of (b)(3). In (b)(2) class actions, "the class generally will be more cohesive—for example, in many instances each member will be affected as a practical matter by a judgment obtained by another member if individual actions were instituted. Similarly, it is less likely that there will be special defenses or issues relating to individual members. . . ." Typical of suits brought under (b)(2) are civil rights actions seeking to have discrimination halted via injunctive or declaratory relief.

Rule 23(c)(1) provides that the court shall decide by order "[a]s soon as practicable after the commencement of an action brought as a class action" whether it is to be so maintained. Such certification orders under (c)(1) may be altered or amended at any time before a decision on the merits, and several courts have indicated that they will use this power freely in order to make the class conform to the "actual contours of the litigation."
B. The Wetzel Approach to Certification: "(b)(2) or not (b)(2)?"

(1) The Wetzel Case Analyzed

Before Liberty Mutual changed its policies, it is clear that the requirements of (b)(2) were satisfied by the Wetzel class. Liberty Mutual had allegedly acted on grounds generally applicable to the class and, if those allegations were proven to be true, final injunctive or declaratory relief would be appropriate with respect to the class as a whole. However, as a result of Liberty Mutual's change in policy, the need for injunctive or declaratory relief was obviated and the suit's sole raison d'être was the pursuit of the back pay award. Therefore, Liberty Mutual contended that after the policy changes the suit was no longer properly maintainable under (b)(2), since that subdivision's requirement of final injunctive or declaratory relief could no longer be met, and that the district court should have amended its class determination pursuant to 23(c)(1) to recertify the class under (b)(3). Liberty Mutual placed much reliance on the Advisory Committee's comment that (b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."

(2) The Third Circuit's Analysis

The Third Circuit was unimpressed with these arguments. Under its analysis, the Wetzel class, like the classes in other Title VII suits, was "particularly fit for (b)(2) treatment" because "[t]he class . . . is cohesive as to the claims alleged in the complaint." Thus certification of the class under (b)(2) did not conflict with the Advisory Committee's comment because "a Title VII suit is essentially equitable in nature" and therefore could not be characterized as one seeking exclusively or predominantly money damages. Furthermore, the court held that the change in policy, which had obviated the need for the injunctive or declaratory relief, did not create any need for the procedural protections of (b)(3) because "[t]he basic nature of a Title VII

19 Advisory Committee, Notes on Amendments to Federal Rule 23, 39 F.R.D. 98, 102 [hereinafter referred to as Advisory Committee].
20 508 F.2d at 250.
21 Id., citing Franks v. Bowman Transp. Co., 495 F.2d 398, 406 (5th Cir.), cert. denied, 419 U.S. 1050 (1974): "[t]hus, the action and the relief authorized are essentially equitable in nature. This is true not only of traditional injunctive relief which may be granted, but also of the back pay award."
“The "cohesive characteristics of the class," which the court termed "the vital core of a (b)(2) action," were, in the opinion of the court, still intact after the change in policy.22

In addition to the class functionally remaining (b)(2), the court held that the language of the rule did not require that the class be recertified under (b)(3):

[T]he language of (b)(2) does not support the contention that (b)(2) actions are limited to final injunctive relief or declaratory judgments only. Rather, the language describes the type of conduct by the party opposing the class which is subject to equitable relief by class action under (b)(2). As recently stated in Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974),

All that need be determined is that conduct of the party opposing the class is such as makes such equitable relief appropriate. This is no limitation on the power of the court to grant other relief to the established class, especially where it is required by Title VII. . . .

Liberty Mutual's policies at the time these charges were made were such that final injunctive relief was appropriate. This satisfies the language of the rule. The nature of these policies, and the nature of the class opposing these policies, does not change merely because subsequent action by Liberty Mutual eliminates the need for final injunctive relief.24

Furthermore, the court noted that even though the district court had not ordered injunctive relief, the possibility of other Title VII affirmative action being directed by the district court still remained. Such affirmative action, according to the court, would in effect constitute the final injunctive or declaratory relief envisioned by the rule.25 Turning to past precedent, the Wetzel court cited numerous cases in which courts have allowed Title VII suits to be maintained under (b)(2) for the recovery of both injunctive relief and back pay awards.26 In addition, Arkansas Education Ass'n v. Board of Education27 was cited as precedent for the continued maintenance of a class action under (b)(2) in a Title VII action solely for back pay

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22 508 F.2d at 251.
23 id.
24 id.
25 id.
26 id. citing cases listed at note 4 supra.
27 446 F.2d 763 (8th Cir. 1971), cited in Wetzel, 508 F.2d at 251.
after the need for injunctive relief has been obviated by a change in policy.

Winding up its discussion of the certification issue, the court noted that at the time of the (c)(1) determination it was impossible to tell that injunctive relief would not be needed when the case came to the summary judgment stage. To require the court to reexamine the class at the time of the summary judgment application "would inevitably complicate a type of litigation which by its nature is complex at its best." The court therefore declined to hold that a district court must redetermine its (b)(2) class certification after a defendant's change of policy has obviated the need for injunctive relief in a situation such as in Wetzel.

C. The Wetzel "Cohesiveness" Formulation

As previously noted, the Third Circuit in Wetzel thought it necessary to discuss the characteristics of the Wetzel class before and after the change in company policy in order to see if those characteristics had changed. Presumably, if those characteristics had been found to have changed, the court would have thought it desirable to recertify the class from (b)(2) to (b)(3). Utilizing a highly circular analysis, the court found that the characteristics of the class had not changed, and it used that conclusion to reinforce its holding that the suit still complied with the language of (b)(2).

The court began its analysis by outlining the requirements for (b)(2) and (b)(3) certification and the characteristics of each class. The (b)(2) class was termed as being "by its very nature . . . cohesive," while the "common question" (b)(3) class was described as being inherently "heterogeneous." Utilizing this skeleton of the rule, the court demonstrated that the Wetzel class was cohesive before the change in policy because a common characteristic, sex, was subjected to discrimination. After the change in policy, the court found these cohesive characteristics still to be intact. Therefore, the court saw no need to provide the procedural protections afforded (b)(3) members to protect their "heterogeneous" interests.

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24 508 F.2d at 252.
25 Id.
26 Id. at 248.
27 Id. at 249.
28 Id. at 250.
29 Id. at 251.
This use of cohesiveness as an analytical aid in determining the proper certification of class actions is of dubious utility, especially when the term is used as inflexibly as it was in the *Wetzel* opinion. To the Third Circuit, the term "cohesiveness" does not admit of degree. If a class qualifies under (b)(2), it is considered inherently cohesive, while a (b)(3) class is considered inherently heterogeneous. According to this dichotomy, all (b)(2) classes would be expected to have the same amount of a quality called "cohesiveness," while all (b)(3) classes would be equally devoid of that quality. Although legal writers frequently acknowledge a tendency for (b)(2) classes to be more cohesive than (b)(3) classes, this certainly cannot be translated into any litmus paper test. Presumably, this tendency is a result of the fact that the typical (b)(2) class is interested only in injunctive relief, for in a class action where there is no claim for money damages, there are usually few if any issues relating peculiarly to individual members of the class. The interest of every (b)(2) class member in such a situation is exactly the same—the award of an injunction that would help each of them in precisely the same way. On the other hand, the typical (b)(3) class is in pursuit of money damages. In such a situation, there may be issues relating peculiarly to individual members that must be decided before liability can be predicated. Certainly there may be a difference in the amount of damages awarded, since damages are determined by particular facts pertaining to each individual in the class. But this tendency does not always hold true, a fact recognized by the Advisory Committee. It noted that members of a (b)(3) class "may have a high degree of cohesion. . . ." Therefore, the court's discussion, predicated as it was on a concept of cohesiveness and heterogeneity as being distinct as black and white, suffers from a fundamental theoretical flaw.

In applying this cohesiveness formulation to the case before it, all the court actually demonstrated was that the *Wetzel* class, which it proclaimed to be (b)(2) because of its cohesive quality, was in reality no more cohesive a class than the typical (b)(3) suit for damages. In the court's analysis, the class before the change in policy was cohesive because its members were linked together by the common characteristic of sex. However, the mere fact that the class shared a common characteristic cannot really be advanced as the reason why it is cohesive in relation to (b)(3) classes. By the same reasoning, a

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34 See text accompanying note 12 *supra*.
35 *ADVISORY COMMITTEE*, at 104.
class of odd-lot traders challenging allegedly excessive odd-lot differentials charged by brokerage firms could be considered equally cohesive. The class of odd-lot traders shares a common characteristic, namely, that they all trade in odd lots. However, such a class of odd-lot traders was found by the Second Circuit to be a (b)(3) class in *Eisen v. Carlisle & Jacquelin.* 36 If the sharing of common class characteristics is the mark of a cohesive class, the Third Circuit's theoretical framework would collapse since it is obvious that the (b)(3) *Eisen* class would be just as cohesive as the (b)(2) *Wetzel* class.

The real reason why the class in *Wetzel* was more cohesive than the class in *Eisen* is that, before the change in company policy, each of the female employees in *Wetzel* stood to gain from an injunction against that policy. It was not necessary for the court to look to individual matters in order to grant the requested relief—the injunction would help all members of the class equally. However, after the change in policy, the claim was reduced to one for money damages. In order to benefit from a decision in favor of the class after the change in policy, each employee might have to establish facts peculiar to herself to recover under the judgment. 37 The amount of the recovery for each class member would vary according to how long the employee had worked under the discriminatory conditions.

It is apparent, therefore, that it was the possibility of injunctive relief that made the class in *Wetzel* more cohesive than the class in *Eisen*, not the fact that the class in *Wetzel* was linked by a common characteristic. However, once that possibility of injunctive relief disappeared, the distinction between the interests of the workers in *Wetzel* and the traders in *Eisen* also disappeared. It follows that even if the validity of a "cohesiveness" test as an aid in determining proper class certification were to be approved, the conclusion that the class in *Wetzel* had indeed lost its cohesive quality after the change in policy by Liberty Mutual is inescapable.

D. The Pettway Approach and the Back Pay Award as Equitable Relief

Since no injunctive or declaratory relief could have been awarded at the time the summary judgment was granted, the court

\footnote{36 391 F.2d 555 (2d Cir. 1968).}

\footnote{37 For instance, it may be incumbent upon her to establish that she would have been able to qualify for that position had it been open to her or that she would have been interested in the position if it had been available.}
in *Wetzel* relied heavily on those recent decisions that have characterized the back pay award as equitable relief to support its conclusion that back pay is within the ambit of permissible relief under (b)(2). Perhaps the most crucial link in the court’s analysis was provided by *Pettway v. American Cast Iron Pipe Co.*, which conveniently paraphrased (b)(2) as saying that as long as the conduct of the party opposing the class was such as to warrant injunctive relief, there was no limit to the court’s authority to order other equitable relief. Using the *Pettway* construction of (b)(2) and the equitable characterization of the back pay award, the court in *Wetzel* found the language of rule 23 to be satisfied and neutralized Liberty Mutual’s reliance on the drafters’ prohibition of (b)(2) suits seeking predominantly “money damages.”

This characterization of the back pay award as being equitable draws its support largely from the statutory language of Title VII, which vests the court with authority to order injunctive or declaratory relief as well as to order affirmative action such as back pay, reinstatement, “or any other equitable relief.” Such language is reminiscent of the clean-up doctrine of the old courts of equity, which enabled equity courts to award money damages (which normally could be awarded only in courts of law) along with its equitable orders in order to allow the court to clean up the entire controversy at once and do complete justice between the parties.

Whatever justification may be employed, the characterization of the back pay award as being equitable in nature and therefore not money damages is in reality a mere semantic distinction that should not be accorded significance in interpreting rule 23. It has been suggested by one commentator that reliance on the relief provisions of Title VII for support of such a characterization is without theoretical foundation. Furthermore, reliance on the clean-up doctrine in

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38 See cases cited at note 4 supra.
39 494 F.2d 211 (5th Cir. 1974).
40 Id. at 257. The pertinent language from *Pettway* is:
41 [RULE 23(b)(2)] is not to be read as saying “thereby making appropriate only final injunctive relief or corresponding declaratory relief.” All that need be determined is that conduct of the party opposing the class is such as makes such equitable relief appropriate. This is no limitation on the power of the court to grant other relief to the established class, especially where it is required by Title VII . . . .
43 The relief provisions of Title VII are modeled on similar provisions of the National Labor Relations Act, 29 U.S.C. § 160(c) (1970). This is significant because the framers of the NLRA styled their relief as equitable in order to avoid Seventh Amendment jury trial problems
Wetzel would seem to be foreclosed, since there was no injunctive relief awarded in Wetzel which could have served as the equitable basis incident to which the monetary relief could be fashioned.\footnote{Id.} There is strong support for reading the rule as requiring that the predominant purpose of a class action be the pursuit of injunctive or declaratory relief in order to qualify under (b)(2).\footnote{Id.} Most commentators agree with the Advisory Committee that actions which seek to recover primarily monetary amounts are not described by (b)(2). None of them indicate that the situation would be otherwise if the monetary amounts sought could in some way be classified as being equitable. Professor Moore comments that "where it is clear that the real aim of the litigation is the ultimate money award, with a plea for injunctive relief appended as a formality or a very secondary consideration, the action should be classed within (b)(3)."\footnote{3B MOORE, \S 23.45(1).} Where injunctive relief and back pay are equally appropriate remedies in a Title VII suit, Moore suggests that the claim for what he terms "damages" be dealt with under (b)(3) separately from the injunctive aspects of the case.\footnote{Id.} Similarly, Wright and Miller regard the possibility of injunctive relief to be a requirement of (b)(2) certification. Therefore, the Pettway approach does not enjoy universal support.

E. The Extension of the Pettway Approach to Cases in which the Need for Injunctive Relief Has Been Obviated

Assuming for the purpose of discussion that the Pettway approach is proper, i.e. that the court has unlimited authority to order any equitable relief authorized by Title VII under (b)(2) if it finds the opposing party's conduct was such as to make injunctive relief appropriate, the application of that theory to this case seems without basis. In all of the cases that Wetzel relied on,\footnote{See cases cited note 4 supra.} including Pettway, the
equitable characterization of back pay were used to justify the class-wide award of back pay under (b)(2) in addition to the award of an injunction. In all those cases, the injunctive relief was a vital reason for the maintenance of the action and was not a mere appendage to a claim for money damages. The court in Pettway held merely that (b)(2) was not confined to awarding only final injunctive or declaratory relief, not that declaratory or injunctive relief was completely unnecessary to the maintenance of a (b)(2) action.\footnote{See pertinent language of Pettway, supra note 40.}

The question of whether a (b)(2) action can be maintained solely to secure a back pay award after subsequent actions of the defendant have obviated the need for injunctive or declaratory relief has been answered in the affirmative only one other time. The Eighth Circuit, in Arkansas Education Association v. Board of Education,\footnote{446 F.2d 763 (8th Cir. 1971). [hereinafter referred to as Education Ass’n].} held that a Title VII action certified under (b)(2) need not be dismissed merely because a subsequent change in policy had eliminated the necessity for future injunctive relief\footnote{Id. at 768.} and remanded the case to the district court, which had previously dismissed the suit on different grounds. This holding is at best unobjectionable only if strictly limited to its facts. To begin with, the class, which consisted of 20 black school teachers, was very small and all presumably resided within the school district in question. With such a small, localized class, it can be reasonably presumed that all class members knew of the pendency of the action and could easily monitor the proceedings. Thus the only advantage of recertification of this class under (b)(3) would be the right of the class members to elect to exclude themselves from the judgment. The class in Wetzel is hardly comparable to that in Arkansas Education Association. The Wetzel class was very large and its members were spread across the entire nation.

But perhaps the more meaningful reason for discounting the value of Arkansas Education Association as precedent is the fact that the court in that case did not expressly consider whether the class should be recertified under (b)(3) and advanced no doctrinal justification for its holding that the suit could be maintained under (b)(2). In any class action, the court has the power under rule 23(c)(1) to amend its class determination before decision on the merits, even on its own motion.\footnote{See 7A WRIGHT & MILLER, § 1785 at 128: "The court has an independent obligation..."} The court in Arkansas Education Association should have

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\textsuperscript{40} See pertinent language of Pettway, supra note 40.

\textsuperscript{41} 446 F.2d 763 (8th Cir. 1971). [hereinafter referred to as Education Ass’n].

\textsuperscript{42} Id. at 768.

\textsuperscript{43} See 7A WRIGHT & MILLER, § 1785 at 128: "The court has an independent obligation..."
discussed the possibility of doing so. However, the Eighth Circuit chose to limit its inquiry to the policy consideration of "whether the School District may be permitted to defeat the right of ATA to maintain a class action properly brought under Rule 23(a) and (b)(2), by adopting a policy for the future which does not correct past inequalities." Phrased in such a way, it certainly seems correct that a defendant's unilateral action should not totally defeat a meritorious suit. But in the Wetzel case motions were repeatedly made to have the class recertified under (b)(3) by plaintiffs, and the change in policy by Liberty Mutual was presumably made in the spirit of voluntary compliance with Title VII rather than in an effort to totally defeat the plaintiffs' right to recover. In a situation such as Wetzel where a motion is actually made to have the class recertified under (b)(3), Arkansas Education Association's cursory discussion of why the suit need not be dismissed should be viewed more as an ad hoc reaction to the equities of that case than as a reasoned analysis of why the suit need not be recertified under (b)(3).

Wetzel, therefore, is the first case to attempt to justify the extension of Pettway beyond the situation where both injunctive relief and back pay have been awarded under (b)(2) to the situation where a class action is allowed to continue under (b)(2) after the need for injunctive relief has been totally eliminated and the suit has become one exclusively for money damages. If Wetzel can be properly limited to a holding that the Wetzel class had, at the time of the initial (c)(1) determination, satisfied the injunctive relief requirements of (b)(2), and that the later change of policy did not require the initial class determination to be disturbed, the decision would not seem especially startling. However, the language of the case does not seem to limit itself to that simple conclusion, even though that holding was all that was necessary for the court to decide the issue. Instead, the court extensively discussed the framework of the rule, the characteristics of (b)(2) and (b)(3) classes, the effect of the change of policy on the Wetzel class, and the effect the change had on the nature of Liberty Mutual's conduct. All of these considerations would seem to be gratuitous if the court had meant to restrict its holding to the statement that "[i]t is at the (c)(1) hearing that the class must be shown to possess the characteristics required by (b)(2)." Looking at the opin-

\[\text{footnotes} \text{\footnote{446 F.2d at 768.}}\]

\[\text{footnotes} \text{\footnote{508 F.2d at 252.}}\]
ion as a whole, it appears what the court was really saying was that the class, even after the change in policy, could have passed muster under (b)(2). To reach this result, it was necessary to extend the Pettway rationale. However, it seems evident that Pettway cannot be extended so far without totally ignoring the language of the rule.

As noted earlier, Pettway interpreted the rule's reference to injunctive relief as merely descriptive of the nature of the conduct of the party opposing the class. As long as that conduct made appropriate final injunctive or declaratory relief, then the language of the rule was satisfied and the court had the authority to order other relief, since the rule was "not to be read as saying 'thereby making appropriate only final injunctive relief or corresponding declaratory relief.' " However, Pettway still seemed to require that some injunctive relief be appropriate in the action along with the other types of relief in order to satisfy (b)(2).

Wetzel now seems to have taken this holding one step further by eliminating the requirement that injunctive relief be sought. Recent cases in the Eastern District of Pennsylvania seem to agree that this is the proper reading of Wetzel. For example, in Rhodes v. Weinberger the court commented that under Wetzel:

That same court also interpreted Wetzel in Sommers v. Abraham Lincoln Savings & Loan Association as deciding "that a (b)(2) class was proper not only when an injunction was the principal relief sought but in all circumstances where defendant has acted on grounds generally applicable to the class and where plaintiff seeks equitable relief . . . "

It would appear, therefore, that the proper reading of the holding in Wetzel is that if the party opposing the class has at any time acted in a way which, if continued, could be the subject of an injunction

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55 494 F.2d at 257.
56 Pettway cited Education Ass'n at 257, but it is unclear whether the Fifth Circuit was adopting the holding of that case or merely looking for precedent to support its decision.
and if a class action is brought seeking equitable relief after the objectionable conduct has been discontinued, the class action would be maintainable under (b)(2) regardless of the fact that no injunctive or declaratory relief could ever be proper. If *Pettway* stretched the language of the rule somewhat, *Wetzel* has distorted it so much as to make some (b)(2) classes functionally indistinguishable from (b)(3) classes. Both subdivisions may now be used by classes linked only by common questions of law or fact to recover money damages alone, with the sole proviso being that under (b)(2) those damages must be in some sense "equitable." This construction of the rule makes the application of the procedural safeguards of (b)(3) depend upon whether the relief sought is "equitable" and seems highly irrational. However, irrational results are to be expected when courts comment on issues that are unnecessary to the case at hand.

F. The Title VII Policy Considerations in *Wetzel*

That the court construed the rule to reach such an illogical result reflects its stated desire to remove any unnecessary procedural complications that might deter the maintenance of Title VII suits. In its discussion of the necessity of notice to the class, the court proclaimed that "[s]uits brought by private employees are the cutting edge of the Title VII sword which Congress has fashioned to fight a major enemy . . . ." Since costs of notice imposed upon representative plaintiffs in Title VII class actions often discourage those suits, the court announced its reluctance to impose notice requirements upon the plaintiff in *Wetzel* unless required by the rule or by considerations of fairness. Since notice costs would automatically be imposed upon the plaintiff if the suit had to be recertified under (b)(3), it seems reasonable to infer that these same policy considerations motivated the court to extend the *Pettway* rationale to the circumstances of this case.

However, such policy considerations, regardless of how desirable they may be, are not permissible in the presence of the clear language

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5 In *Sommers*, the court held that the *Wetzel* exception to the Advisory Committee's statement that suits predominantly for money damages are not maintainable under (b)(2) was limited to "those forms of monetary relief . . . traditionally styled 'equitable.'" 66 F.R.D. at 590. In *Rhodes*, the court held that retroactive insurance benefits qualified as "equitable" and were therefore recoverable in a (b)(2) action along within an injunction. 66 F.R.D. at 604.

6 In *Wetzel*, the court held that the *Pettway* exception to the Advisory Committee's statement that suits predominantly for money damages are not maintainable under (b)(2) was limited to "those forms of monetary relief . . . traditionally styled 'equitable.'" 66 F.R.D. at 590. In *Rhodes*, the court held that retroactive insurance benefits qualified as "equitable" and were therefore recoverable in a (b)(2) action along within an injunction. 66 F.R.D. at 604.

of the rule to the contrary. If Title VII suits brought predominantly for recovery of back pay would be discouraged by being certified under (b)(3), "[t]he remedy is to change the limiting requirements of Rule 23 rather than to flout its provisions"63 by labeling a (b)(3) action as (b)(2). As stated in Paddison v. Fidelity Bank, a case effectively overruled by Wetzel:

In a nutshell, these cases have allowed the very real administrative and substantive problems raised in the determination of back pay awards to individual class members to avoid the scrutiny under the criteria of 23(b)(3) to which they would normally be subject by denominating them equitable relief in the context of a Title VII action. The motivation of these decisions is admirable—a desire for full justice—but full justice includes procedural fairness to a losing defendant as well. Style it what you will, back pay disputes raise all the traditional (b)(3) problems.64

In addition, one can only speculate as to what result the Third Circuit might have reached on the certification issue had the district court not already rendered summary judgment for the plaintiffs. The knowledge that the plaintiffs had already prevailed may have induced the Wetzel court to ignore the procedures of (b)(3) which were designed largely for their benefit. However, this is indeed a dangerous precedent for absent class members in future Title VII actions, since they will not always reap the benefits of a favorable verdict. They may instead find themselves foreclosed by a judgment in an action which they have never heard about, which was secured by counsel and representative parties in whom they have never acquiesced.65 As Judge Gobold noted in his concurring opinion in Johnson v. Georgia Highway Express, Inc., many times the courts in Title VII suits are forming overly broad classes and dispensing with any form of discretionary notice to the class on the tacit assumption that "all will be well for surely the plaintiff will win and manna will fall on all members of the class. It is not quite that easy."66

In short, these Title VII policy considerations may have unduly

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63 4 CLASS ACTION REPORTS 111 (1975).
64 60 F.R.D. 695, 698 (E.D. Pa. 1973). Paddison was declared effectively overruled by Wetzel in Rhodes, 66 F.R.D. at 604.
65 Of course, absent class members can attack the judgment collaterally if they can show that the representation was inadequate or that the lack of notice deprived them of due process. See generally Note, Collateral Attack on the Binding Effect of Class Action Judgments, 87 HARV. L. REV. 589 (1974).
66 417 F.2d 1122, 1127 (5th Cir. 1969) (special concurrence).
influenced the court's holding regarding proper class certification. Although the Third Circuit found the language of the rule to be satisfied in this case even after the change in policy by the defendant, it seems evident that the court's logic is strained in this regard. In addition, Wetzel's conclusion that the class retained the cohesive characteristics of a (b)(2) class after the policy change has been demonstrated to be highly questionable. Therefore, Wetzel's conclusion on the certification issue should be limited to the holding that a district court's initial (c)(1) determination that a class is properly maintainable under (b)(2) is not required to be disturbed on application for summary judgment merely because a defendant's subsequent change in policy has obviated the need for injunctive relief.

IV. THE NOTICE ISSUE

A. Notice in Class Actions in General

There are two provisions in rule 23 which authorize the court to order notice to members of the class. Rule 23(c)(2) mandates that the court direct notice to all reasonably identifiable members of classes maintained under (b)(3) informing them of their right to elect to exclude themselves from the judgment and of their right to appear in the action through their counsel. Rule 23(d)(2) further authorizes the court to order notice "for the protection of the members of the class or otherwise for the fair conduct of the action." Since notice

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67 Notice, as used in this case note, refers only to notice which is directed to the members of the class informing them of the pendency of the action before judgment; and is not meant to include the notice of dismissal or compromise provided for by Rule 23(e).

68 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. 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.

69 Subdivision (d)(2) provides:
(d) In the conduct of actions to which this rule applies, the 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 to come into the action: . . .
under (d)(2) is discretionary, there is no right to have notice sent to members of a (b)(2) class unless failure to do so would be so unfair as to amount to a deprivation of due process. However, the trial court may still order discretionary notice to the class for a variety of reasons specified in (d)(2).

Notice under 23(c)(2) does not directly concern the *Wetzel* case, of course, since the court determined that the suit was properly maintained under (b)(2). However, the Supreme Court's holding regarding (c)(2) notice in the landmark decision of *Eisen v. Carlisle & Jacquelin*\(^7\) may well have important consequences regarding the issue of notice to (b)(2) classes. In that case, the Court held that the language of (c)(2) requires that all members of a (b)(3) class who can be reasonably identified be notified of the action regardless of the cost to the representative plaintiff. But, more important to this discussion, the Court's analysis in reaching that conclusion strongly implies that notice to (b)(3) classes is constitutionally required.\(^11\) If such is the case, then *Eisen* may in some circumstances by extension require notice be sent to absent class members in (b)(2) actions as well as (b)(3), although the Court expressly disavowed any intent to comment on the necessity of notice in those types of actions.\(^12\)

**B. The Wetzel Approach to the Notice Issue**

The discussion in *Wetzel* of whether notice to the class was required was divided into two components: (1) whether the court should hold that notice should have been given under the circuit court's supervisory power over the district courts or (2) whether notice was mandated by the requirements of due process.

In discussing whether it should order notice in the exercise of its supervisory powers, the *Wetzel* court expressed reluctance to order notice because of the cost involved for the representative plaintiff and the consequent deterrent effect such costs might have on the maintenance of Title VII actions. It then indicated that it would hold that notice should have been given only if the rule so required or if required by fairness to the parties. After finding in short fashion that

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\(^7\) 417 U.S. 156 (1974).


the rule did not require notice to (b)(2) members, the court turned its attention to fairness. Finding the reason notice was mandatory to (b)(3) classes was to insure the effective operation of the "opt-out" mechanism, the court reasoned that notice was certainly not necessary to (b)(2) class members because the rule does not even afford them the opportunity to opt out of the judgment due to their supposedly homogenous interests. The court endorsed the comment of the Advisory Committee that "in the degree that there is cohesiveness or unity in the class . . . , the need for notice to the class will tend toward a minimum." Examining the Wetzel class for cohesiveness and unity, the court found that since the question of whether Liberty Mutual discriminated on the basis of sex was "common to all the claims of all members of the class," the claims of each class member "rest squarely on the same issue and the need for individual notice is superfluous."

The court then analyzed the issue of whether due process required notice to be sent to the members of the class. Liberty Mutual advanced the position taken by the Second Circuit in Eisen v. Carlisle & Jacquelin that "notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions." It also relied on a series of cases from three other circuits, Gregory v. Hershey and its progeny, which tended to support the view that notice was a requisite of due process in (b)(2) actions for a decision to be binding on all class members. The Wetzel court gave short shrift to the precedent advanced by Liberty Mutual, summarily discarding the Eisen statement as dictum and relegating discussion of Gregory to a footnote. Having thus disposed of the adverse precedent on this issue, the Wetzel court again discussed its notion that all (b)(2) classes are inherently cohesive. The court announced that, because of that cohesiveness, the class could, as a practical matter, be bound through the stare decisis effect of a suit involving a single class member as effectively as it would be bound through the binding effect of a class action judgment. Therefore, the Wetzel court held that "as long as the repre-

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73 508 F.2d at 254-55.
74 ADVISORY COMMITTEE, at 106, cited in Wetzel, 508 F.2d at 255.
75 508 F.2d at 255.
76 391 F.2d 555, 564-65 (2d Cir. 1968).
78 508 F.2d at 255 n.36.
79 Id. at 256.
presentation is adequate and faithful, there is no unfairness in giving res judicata effect to a judgment against all members of the class even if they have not received notice.8 Approving the due process test set forth by the Supreme Court in Hansberry v. Lee,8 i.e. whether “the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it,”8 the court held that “if there is truly adequate representation, the interests of the absent parties to a (b)(2) class are protected.”8 Therefore, notice to absent members of the class was held not to be an absolute requirement of due process, although “there may be circumstances when the court, in its discretion, believes that notice to the absent members of the class is necessary for the fair conduct of the action.”8 However, the court noted that “in most cases . . . ‘notice would add little or nothing.’”8

C. The Contours of Due Process Regarding Notice in (b)(2) Class Actions

The Wetzel holding that notice is not constitutionally required in all (b)(2) actions appears sound. The standard (b)(2) class described by the rule, when read in plain terms, may well have a high degree of cohesion. When such is the case, notice would indeed serve little function. If the representative plaintiff succeeds in the action, all the members of the class would benefit equally from the declaratory or injunctive relief envisioned by the rule and none would ever have need of notice of the judgment in his favor in order to collect its benefits. If the representative plaintiff loses, the absent members will be bound only if their interests were adequately represented. Also, as the Wetzel court noted, they would have been almost as effectively foreclosed from bringing an action based on essentially the same claims if the suit had been initiated by the plaintiff solely on his own behalf. Scholarly writing generally backs the Wetzel conclusion88 and discredits that reached by the Second Circuit in Eisen.87

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8 Id.
81 311 U.S. 32 (1940).
82 Id. at 42, quoted in Wetzel, 508 F.2d at 257.
83 508 F.2d at 257.
84 Id. at 256.
85 Id. at 257.
87 In Frost v. Weinberger, 515 F.2d 57, 65 (2d Cir. 1975), the court held that Eisen was
However, the fact that notice cannot be said to be required in every (b)(2) case does not logically lead to the conclusion that due process does not require notice in any (b)(2) action, although such was the clear implication of the court's discussion in Wetzel. The court did not even deal with the question of whether the failure to issue notice was so unfair under the circumstances in Wetzel as to amount to a deprivation of due process. It merely stated that although "circumstances" (a term the opinion did not define) might be such that it would be necessary for the district court to order notice for the fair conduct of the action, in most cases notice would add little or nothing. The opinion clearly implies that, in the absence of extremely unusual situations, all (b)(2) classes will be cohesive and therefore will need no notice as long as there is adequate representation. The decision of whether to order notice to the class in (b)(2) actions will ordinarily rest solely in the discretion of the trial judge and will not be bridled by due process concerns, at least according to Wetzel.

Such an interpretation of the requirements of due process is too narrow. Rule 23(d)(2) authorizes the court to require notice "for the protection of the members of the class or otherwise for the fair conduct of the action," which are unmistakably due process considerations. Wright and Miller comment that the discretionary authority under subdivision (d)(2) is a "power that is inherent in the court at least in situations having due process overtones," and advocate that notice should be given "whenever there is any question of the need to do so" in order to guarantee that the judgment will bind the absent class members. The Advisory Committee commented that it made discretionary notice available "to fulfill requirements of due process to which the class action procedure is of course subject." The issue of the need for notice in a particular (b)(2) action cannot properly be reduced to solely a question of policy to be resolved by each circuit, as the Third Circuit implicitly held was the case.

The Wetzel conclusion that notice will not ordinarily be required by fundamental fairness in (b)(2) class actions is based on its fallacious presumption that all (b)(2) classes are inherently cohesive. It has already been shown that the Wetzel class after the change in policy was not any more cohesive than the typical (b)(3) class. Indeed,
the court itself inadvertently reinforced that conclusion in its notice
discussion when it noted that the question of discrimination was com-
mon to the members of the class. This terminology is significant
because those are the precise words employed by the rule to describe
the composition of (b)(3) classes, also known as common question
classes. Since it is apparent that all (b)(2) classes are not inherently
cohesive, it follows that there may be a need for notice to be issued
in some (b)(2) actions. This issue must be determined on the facts of
each case. As a general guideline, the Advisory Committee suggests
that when cohesiveness or unity is high, the need for notice will tend
toward a minimum. But that guideline must not be manipulated into
a rigid rule that notice is never required in (b)(2) actions merely
because there is a tendency for (b)(2) actions to be more cohesive than
(b)(3) actions.

D. A Functional Analysis of Notice in the Class Action Context

The proper resolution of the issue of what notice is required in
a (b)(2) action is not easy; the generalized guide given by the drafters
as to cohesiveness cannot be reduced to a simple formula as the
Wetzel court attempted to do. In deciding the issue, it should always
be borne in mind that notice and an opportunity to be heard are
enshrined in Mullane v. Central Hanover Bank & Trust Co. as the
fundamental requisites of due process.90 Traditionally, each party has
been notified of his right to a day in court before having his rights
adjudicated. On the other hand, Hansberry v. Lee91 is commonly cited
for the proposition that as long as an absent party’s rights have been
adequately represented in the litigation, it is not unfair to bind him
to the final judgment regardless of lack of notice. This concept of
adequacy of representation rather than notice as being the touchstone
of due process in the class action context was not met with enthusi-
asm by the Supreme Court in Eisen, which found “little to commend
it” in (b)(3) class actions where notice is required by the rule.92 Ade-
quacy of representation, however, may still provide enough protec-
tion to absent members of the class in (b)(2) actions, an issue which
the Eisen decision explicitly declined to concern itself with.93

91 311 U.S. 32 (1940).
93 Id. at 177 n.14.
Since the rule does not give members of (b)(2) classes the opportunity to opt out of the judgment, notice to the members of a (b)(2) class obviously cannot fulfill all the functions that the mandatory (c)(2) notice does in relation to (b)(3) class members, as *Wetzel* correctly pointed out. However, it does not follow, as implied by *Wetzel*, that notice serves no function in the (b)(2) context. Notice to (b)(3) members serves functions other than affording those members the opportunity to opt out. For instance, the Advisory Committee commented that notice to (b)(3) class members was “particularly useful and advisable... to permit members of the class to object to the representation.” Therefore, the mere fact that (b)(2) members do not have the option to exclude themselves from the judgment does not render notice valueless—at least one function of notice still remains to be served, that is, guaranteeing the effectiveness of the representation.

A functional corollary to this may be regarded as the prevention of collusive suits through notifying a wide sample of the class. Judge Gobold has warned that the absence of any notice to members of (b)(2) classes raises “the possibility of whitewash of systemwide employment practices by a judicial inquiry of narrow scope in a forum far distant from numerous employees who may never have heard of the litigation, or, if they have heard, not in such manner as to impel them to grasp hold of the problem and make decisions about it.” This problem of collusion may be partially alleviated by the findings of the trial court as to the adequacy of representation; however, Judge Gobold notes that “this issue itself may be determined in the absence of 99.9% of those affected, who have no notice or service of process or right to be heard and who may feel that the plaintiff in the particular case (or his counsel, or both) is the last person they want representing them.” Finally, notice serves to protect the binding effect of a judgment rendered in favor of the party opposing the class. If a defendant’s favorable verdict could be reversed or attacked collater-

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94 *Advisory Committee*, at 106.
95 *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1127 (5th Cir. 1969) (special concurrence).
96 *Id.* This problem may be further exacerbated by the fact that absent parties who later suspect collusion may not be able to collaterally attack the issue of adequacy of representation if that was litigated in the original lawsuit. See Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 Harv. L. Rev. 589, 604: “Whenever the issue of adequacy of representation has been actually litigated, . . . a finding of adequacy by the trial court should be res judicata as to the quality of representation up to that point in the course of litigation.”
ally by absent class members every time that notice was not given to the class, not only would he be severely prejudiced by the failure to give notice, but the goals of rule 23—avoiding a multiplicity of suits involving the same subject matter and preventing situations where the estoppel is not mutual—would be seriously undermined.

Naturally, along with the positive functions of notice in the (b)(2) context there must be considered the costs of notice. Certainly, if notice costs would operate to effectively shut the doors to the courthouse on all class actions of a certain type, that fact would, weigh toward not requiring notice. However, it is a mistake to cavalierly discard notice requirements in order to achieve maximum use of the class action device without stopping to consider the effect that such actions might have on the fairness of the procedure involved.

E. Application of the Functional Guidelines to the Wetzel Class

The class members in *Wetzel* were interested solely in monetary relief after Liberty Mutual changed its policies. Moreover, the extent of their interest varied greatly. Some members of the class would have quite a large stake in this award, while those who had not worked with the company during its period of alleged discriminatory activity would have no interest whatsoever in the outcome of the litigation. There would likely be many individual questions to be answered by those eligible to claim relief in order to establish their individual qualifications. The class was nationwide and it seems clear that actual notice of the suit's pendency did not reach many members, including some of those it stood to benefit most, *e.g.* those past employees who had resigned to take jobs elsewhere with better advancement potential.

As an initial matter, it would seem desirable to notify at least those members of the class who had potential claims for back pay. The effectiveness of the representation of the class would be furthered, since all possible objections to the particular representative plaintiffs could be voiced. Liberty Mutual would be assured that a judgment rendered in its favor could not be attacked on the ground that absent class members were not given notice of the action. Even the Fifth Circuit in *Pettway* conceded that when back pay is awarded in a (b)(2) suit, there might be problems in binding absent members of the class to the judgment if notice is not given. Notice would also

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7. 494 F.2d at 257. See also Hoston v. United States Gypsum Co., 67 F.R.D. 650, 657 (E.D. La. 1975) advocating notice to assure the binding effect of judgments.
serve to diminish the effectiveness of any attempt to have the judgment vacated due to inadequacy of representation since notice to a certain extent reinforces the adequacy of representation. As Wright and Miller have noted, "notice does help the court in assuring that there is adequate representation of the class. As a result, giving some type of notice in actions under Rules 23(b)(1) or 23(b)(2) probably is the best practice in most cases."

It may also be argued that notice to at least some of the members of the class is constitutionally required. As developed earlier, this class is functionally indistinguishable from a (b)(3) class. Eisen, although specifically disclaiming any intention of commenting on notice in (b)(2) actions, strongly indicated that the notice requirement for (b)(3) classes was mandated by the Constitution as well as the rule. If such is the case, then it seems logical that notice to the class is also required in Wetzel since functionally it is a (b)(3) class. The fact that Wetzel was fortuitously certified under (b)(2) should make no difference in the constitutional analysis, particularly in view of a footnote in the recent Supreme Court decision in Sosna v. Iowa. That footnote indicates that one of the "problems associated with a rule 23(b)(3) class action" that troubled the court in Eisen, and presumably made notice constitutionally required, was the fact that monetary relief is frequently requested in (b)(3) actions. If the difficulties in awarding monetary amounts in a class action make notice constitutionally required in (b)(3) actions, those same problems in the (b)(2) context would logically require notice to (b)(2) classes as well. While this argument is not totally compelling, nevertheless, where a (b)(2) class is the functional equivalent of a (b)(3) class as in Wetzel, the prudent course of action for the court to follow to assure the maximum binding effect of the judgment is to order at least some form of notice.

V. Conclusion

Wetzel v. Liberty Mutual Insurance Co. represents both an important step toward free access to the courts for all Title VII actions

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88 See Note, 123 U. Pa. L. Rev. 1217, 1231 (1975): "The notice requirement provides an additional safeguard; its purpose is to buttress the requirement of adequate representation."
89 7A WRIGHT & MILLER § 1793 at 205.
90 See text accompanying note 37 supra.
91 419 U.S. 393, 397 n.4 (1975).
92 Id.
and dramatic step back to the pre-1966 years when the old rule 23 was creating great confusion among courts and commentators. Only time will tell which of the two results of this case is more important. Certainly the courts should do all that is within their power to implement the congressional guarantee of equal employment opportunity rights by providing effective means of redress for violations of those rights. And it is true that recent decisions of the Supreme Court, Eisen in particular, have perhaps read rule 23 too strictly with the effect that class actions now often face insurmountable obstacles.

Nevertheless, it is the duty of the court to apply the law as written. In this case the holding, if read as broadly as it seems to invite, conforms very little to what a literal reading of the rule would seem to suggest is the law. Pettway was one of the first cases to allow (b)(3) type relief to be awarded in a (b)(2) suit and Wetzel's extension of Pettway is so drastic that rule 23 no longer makes any sense from an operative standpoint. The distinction between legal and equitable claims should make no procedural difference outside of the constitutional right to a jury trial context, since modern courts have fused law and equity. However, it is exactly that distinction which presently dictates how class actions will be certified and therefore controls what procedural protections the members of the class will receive. Congress could easily provide for an appropriate procedure to be followed for the award of class-wide back pay by simply amending the relief provisions of Title VII. If that does not occur, it seems likely that sometime in the near future the Supreme Court will be forced to deal with the ramifications of Wetzel's de facto amendment to rule 23 and spell out more clearly the due process rights of plaintiffs and defendants in the class action area.

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