How Defendants Can Use Class Certification to Their Advantage

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An Article discussing recent developments in federal law that may potentially benefit class action defendants.

The class action device was created initially as a way to efficiently resolve a large number of claims by individuals who suffered similar injuries or losses caused by the same defendant. However, class actions have sometimes been abused by plaintiffs' lawyers to pressure companies who want to avoid the time, expense and bad publicity associated with litigation into settling otherwise meritless lawsuits.

In the federal judicial system, a lawsuit does not become a class action until (and unless) the court enters an order under Rule 23 of the Federal Rules of Civil Procedure (FRCP) certifying it as such. The class certification stage is perhaps the most important phase of the lawsuit. If a plaintiff succeeds in persuading the court to certify the case as a class action, the defendant will be under enormous pressure to settle rather than proceed to trial and face the prospect of a multi-million-dollar jury verdict. However, recent developments in the law may make it easier for defendants to get class actions dismissed at the certification stage. Specifically, courts now:

- May consider, at the class certification stage, merits-related issues in addition to certification-related issues.
- Have more flexibility in deciding when to issue an order certifying (or not certifying) the case as a class action.
- May hold plaintiffs to a higher standard of proof in demonstrating that the case should be certified as a class action.

These new developments are discussed below.

CONSIDERATION OF MERITS-RELATED ISSUES

THE EISEN APPROACH

The issue of whether courts may consider merits-related issues in deciding whether or not to certify a case as a class action has its roots in *Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974)*. In *Eisen*, the Supreme Court rejected the argument that defendants should pay the cost of notifying potential class members of the lawsuit simply because the plaintiffs were likely to prevail on the merits at trial. In so holding, the Court observed that there was "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."

Many federal courts took *Eisen* to mean that they could not engage in a merits-related inquiry at the certification stage even if that inquiry was necessary to help them decide whether the case should be certified as a class action. This approach tended to allow dubious class actions to proceed past the certification stage as long as plaintiffs' counsel could show that the weaknesses in their class certification arguments were also somehow wrapped up in the merits of the case.

Take for example the situation where a plaintiff brings a class action under FRCP 23(b)(3) to recover damages against a product manufacturer for negligently failing to warn of its product's hidden dangers. To certify the case as a class action under FRCP 23(b)(3), the plaintiff must show that common class-wide issues will predominate over individual issues at trial. But suppose the defendant possesses several surveys showing that its product's dangers were actually commonly known to the public. The surveys are clearly relevant to whether class certification is

appropriate under FRCP 23(b)(3), because the surveys tend to show that individual issues will predominate over common class-wide issues at trial (that is, whether each individual class member knew about the product's supposed "hidden" dangers). However, the surveys are also relevant to the merits of the case because a product manufacturer usually has no duty to warn of a commonly known defect and, in any event, its failure to warn could not have been the proximate cause of plaintiffs' injuries if they already knew about the danger. Under the old *Eisen* approach, the court might be forced to ignore this survey evidence altogether because it relates directly to the merits of the case. This, in turn, could result in the case being certified as a class action, even though its legal and factual foundations may be somewhat shaky.

A RETREAT FROM EISEN

In recent years, most federal circuit courts have rejected the view that *Eisen* prohibits courts from considering merits-related issues at the class certification stage, at least where the merits and certification issues overlap. In fact, some courts even require merits-related inquiries if those inquiries are necessary to fully explore whether the plaintiff has satisfied Rule 23's criteria for class certification. For example:

- **First Circuit**. *Stuebler v. Xcelera.com, 430 F.3d 503, 512 (1st Cir. 2005)* (court may engage in a "case-specific analysis" that goes "well beyond the pleadings").
- **Second Circuit**. *In re Initial Public Offerings Sec. Litig. (In re IPO), 471 F.3d 24, 33 (2d Cir. 2006)* ("careful examination of *Eisen* reveals that there is no basis for thinking that a specific Rule 23 requirement need not be fully established just because it concerns, or even overlaps with, an aspect of the merits").
- **Third Circuit**. *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 317 (3d Cir. 2008)* ("*Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement[.]").
- **Fourth Circuit**. *Gariety v. Grant Thornton LLP, 368 F.3d 356, 366 (4th Cir. 2004)* (whether plaintiff has met all of Rule 23's requirements must be considered even if the certification issues "overlap with issues on the merits").
- **Fifth Circuit**. *Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 268 (5th Cir. 2007)* ("*Eisen* did not drain Rule 23 of all rigor. A district court still must give full and independent weight to each Rule 23 requirement, regardless of whether that requirement overlaps with the merits.").
- **Seventh Circuit**. *Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2002)* (when certification issues overlap with the merits of plaintiff's claims, "a preliminary inquiry into the merits" is warranted).
- **Ninth Circuit**. *Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 590 (9th Cir. 2010) (en banc)* (the "district court must sometimes resolve factual issues related to the merits to properly satisfy itself that Rule 23's requirements are met"), cert granted, *Wal-Mart Stores, Inc. v. Dukes, 79 USLW 3342, 79 USLW 3128, 79 USLW 3339 (2010)*).
- **Tenth Circuit**. *Shook v. Bd. of County Comm'rs, 543 F.3d 597, 612 (10th Cir. 2008)* ("There is not an impermeable wall between the substance of a cause of action and the decision to certify the class[.]").
- **Eleventh Circuit**. *Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1266 (11th Cir. 2009)* ("the trial court can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied").

To satisfy themselves that Rule 23's requirements are met, courts are now more likely to examine all of the evidence bearing on certification, including evidence submitted by the defendants. If that examination leads to factual disputes, courts may need to resolve those disputes before deciding whether to certify the class (see *In re IPO, 471 F.3d 24, 42 (2d Cir. 2006)*).

FLEXIBLE TIMING

Under the pre-2003 version of FRCP 23, federal courts were required to decide whether or not to certify a case as a class action "as soon as practicable after commencement of the action." Some courts interpreted this to mean that the class certification issue had to be decided before the parties engaged in discovery relating to the merits of the underlying suit. However, Rule 23 was amended in 2003 to require courts to enter class certification orders "at an early practicable time" (*FRCP 23(a)(1)*). This new language was designed to give courts more flexibility in deciding when to make class certification decisions (*FRCP 23 (2003 advisory committee's notes)*). As a practical matter, the change to Rule 23 allows courts to delay ruling on the class certification issue until after merits-related discovery has taken place.

HIGHER STANDARD OF PROOF

The trend toward tightening class certification standards by evaluating overlapping merits issues has also included a shift in the standard of proof that a plaintiff must meet at the certification stage to move the class action lawsuit forward. Historically, federal courts required plaintiffs to make only "some showing" that Rule 23's requirements had been met before granting class certification. However, several circuit courts now require plaintiffs to prove that they have met Rule 23's requirements by "a preponderance of the evidence" (*see Myers v. Hertz Corp., 624 F.3d 537, 547 (2d Cir. 2010); In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008); Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 269 (5th Cir. 2007)*).

USING THESE DEVELOPMENTS TO DEFENDANTS' ADVANTAGE

Companies named as class action defendants should keep these recent developments in mind when mapping out their defense strategies. For example, when putting together a defense budget, companies should allot for merits-related discovery (and any

related motions practice) early in the case, especially where plaintiffs' underlying claims are weak and those weaknesses can be dispositive of the certification issue. Although this extra layer of discovery can be expensive, it will be worth the price if it results in early termination of the class claims.

Likewise, trial counsel should aggressively push for merits-related discovery at the outset, and be prepared to explain to the court at the initial scheduling conference how this discovery will affect the class certification analysis. Trial counsel may also need to inform the court that there is no pressing need to rule on the class certification issue right away, and that under the 2003 FRCP amendments, the parties should be given time to fully develop all the facts necessary to aid the court in its determination.

The new higher standard of proof may also be extremely helpful to class action defendants in opposing plaintiffs' certification efforts, at least in those circuits that have adopted the "preponderance of the evidence" standard. For example, to the extent similar class actions have been certified in the past under the older "some showing" standard, defendants obviously can argue that those older cases need not be followed due to differences in plaintiffs' standard of proof. Conversely, if certification was denied in a similar case under the "some showing" standard, defendants can argue that the same result should almost certainly follow under a "preponderance of the evidence" standard.

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