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Toward Judicial Realism: The Evolution of Rule 23

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The Rule 23[2] analysis is currently undergoing what can only be described as a seismic jurisprudential shift. A series of recent cases and recent amendments to Rule 23 auger a much more difficult road to certification for class representatives. Although it was always clear that class plaintiffs had to convince the trial court that the requirements of Rule 23 were met, there was little guidance on the proper standard of proof. Eschewing a formulaic rubber-stamping of plaintiffs claims to meeting the Rule 23 requirements, courts now are likely to delve into merits evidence, as necessary, and to apply a preponderance of the evidence test to all of the Rule 23 factors. Only plaintiffs who put forth evidence that "more likely than not" establishes each fact necessary to meet the requirements of Rule 23 will have their class certified. This articulation of the how trial judges should apply Rule 23 and the weight and degree of inquiry into Rule 23 factors seems consistent with the purpose of the class action mechanism: it provides a way in which to adjudicate claims that have a certain degree of sameness and commonality. To the extent those factors are not present, the class action mechanism should not be used.

As a practitioner, it is difficult to conceive that judges would not feel it necessary to understand the substantive legal issues for both plaintiff and defendant and how they

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[2] Rule 23 identifies four "prerequisites":

- *numerosity*-making j*oinder* of all members impracticable (a requirement that is typically not the subject of dispute);
- the existence of *common questions* of law *or* fact (a minimal test);
- *typicality* of claims and defenses that are being (or would be) put forward by the proposed representative; and
- *adequacy*; *viz.,* will the proposed representative be able to fairly and adequately represent the class.

The rule then posits the existence of three "types" of class actions:

- Where prosecution of separate claims would lead to inconsistent or varying results that would establish incompatible standards of conduct for the opposing litigant(s) or where adjudication of individual claims would be dispositive of the claims of unrepresented parties or would substantially impair their interests;
- Where injunctive or declaratory relief is sought against an opposing litigant or litigants that refuses to act on grounds that are generally applicable to the class, warranting injunctive or declaratory relief for the class as a whole; *or*
- Where common questions of fact or law predominate *and* the class action approach can be seen as "superior" to other available methods of fair and efficient adjudication.

This last category is the one into which most class actions (and almost all those seeking recovery of damages) fall.

would be played out in a trial in order to assess whether a class action can proceed. Evidence of the variations among individual class representatives seems particularly relevant in determining class certification in antitrust cases. In particular, assessing whether impact can be proved with common evidence or is more individualized is often the keystone of an opposition to class certification in a conspiracy case. Thus it seems obvious that there must be some assessment of whether these types of issues will really impair class-wide determination.

Until recently, however, courts seemed hostile to substantive or "merits-based" inquiries. This resistance arose out of the 1966 revisions to Rule 23. Those revisions appeared to direct federal trial courts to decide class certification questions at the very start of a case, and to do so in a procedural context, Because class decisions were made early-on in the life of case and because the rule set the analysis as one of procedure, courts were suspicious of any arguments that were seen as an effort to force consideration of substantive merits at an early stage. In order to give effect to the requirement for early resolution, courts adopted local rules requiring class certification motions to be filed within a specified period, as short as 90 days after case filing. This was the era of bifurcated class- and merits- based discovery. Discovery aimed at lawyer arguments illustrating significant individual issues was often precluded. Arguments against class certification that were entwined with evaluation of the merits of the case were doomed to be ignored.

Although *Eisen v. Carlisle & Jacqueline*,[3] is cited as the foundation of precedents that limit consideration of the merits in certification, even before *Eisen*, U.S. courts had pointed to the 1966 language of Rule 23 to create a structure that exalted form over substance. Relying on the language in the 1966 version of the rule that mandated a class action determination "as soon as practicable after the commencement of the action," courts reasoned that the threshold issue "is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."[4] Despite the fact that only a few years after *Eisen*, the Supreme Court pointed out in *Coopers & Lybrand v. Livesay*,[5] that the class determination generally involves considerations that are "enmeshed in the factual and legal issues comprising" the plaintiffs case, the result was to suggest that class certification could (and should) proceed even in the face of a defective complaint, to emphasize that inquiry beyond the face of the pleadings was improper, and to preclude early motions for summary judgment in the belief that any form of hearing addressing the merits does violence to the whole concept of summary judgment and cannot be reconciled with the "as soon as practicable" requirement.

[3] 417 U.S. 156, 177 (1974) (there is nothing in the language or history of Rule 23 that gives a court the authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether a class action can be maintained.)

[4] *Miller v. Mackey International, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971).

[5] 437 U.S. 463, 469 (1978)

In short, the Supreme Court's opinion in *Eisen*, had the effect of suspending debate on the issue for an extended period. Until now.

The pendulum is now swinging back toward recognition, at least on the federal level, that proposed class actions must be analyzed and scrutinized in great detail.[6] A new level of judicial understanding seems to have been obtained. Interestingly, the Supreme Court precedent supporting a careful examination of class action allegations is a generation old, written less than a decade after *Eisen*. Perhaps as a result of 30 years of experience adjudicating class actions under the *Eisen* standard, the reasoning in *General Telephone of the Southwest v. Falcon*[7] resonates with many trial court judges and a substantial number of the federal appellate judiciary who recognize that class action certification is a complex process and that erroneous certification can lead to outcomes that undermine respect for law.[8]

In G*eneral Telephone*, the Court took pains to emphasize that class action litigation is an exception to the usual rule and to chastise the lower court's reliance on irrelevant similarities between the named plaintiff and potential class members, and an over-arching allegation of "subjectivity" in making certification decisions obfuscating the acknowledged fact that proposed class claims, and the position of various potential class members, were markedly different. The decision recognizes that class determinations generally involve considerations enmeshed in the factual and legal issues, making it necessary for the court to probe behind the pleadings, and in particular, to engage in "a rigorous analysis"[9] before determining that a class action should be certified.

Current case law provides further support for arguing that a court cannot reduce a class action plaintiff's burden to that of making "some showing" that Rule 23 requirements are met and thereby avoid having to consider competing claims of experts that common issues will not predominate. But rather, this recent line of cases requires trial judges to instead assess evidence at the class certification stage and resolve all disputed issues regarding the threshold prerequisites.

The Third Circuit's decision earlier this year, *In re Hydrogen Peroxide Antitrust Litigation,* puts both history and current precedent in sharp focus. The relevant principles are stated one after the other,[10] with supporting authority:

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[6] *See In re Hydgrogen Peroxide Antitrust Litig.*, 552 F.3d 05 (3d Cir. 2009); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008).

[7] 457 U.S. 147 (1982)

[8] *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (Without regard to the merits, certification has a decisive effect on litigation and may force a defendant to settle rather than incur the costs of defense or risk potentially ruinous liability. These considerations must be a factor to be weighed in the certification calculus.) 259 F.3d 154, 167-68 (3rd Cir. 2001)

[9] *Id.* at 161.

[10] 552 F.3d at 316-320.

- The rule requires more than a threshold showing; it calls for findings. Relying on a threshold standard is not "rigorous analysis."
- The trial court cannot indulge in the hypothesis that "well-pleaded" allegations are to be accepted as "true" without critical analysis.
- The trial court is required to make findings that are germane to class certification even if they overlap with issues on the merits. The rule does not require the trial judge to put on blinders.
- The trial court must formulate some prediction as to how specific issues will play out in a trial in order to determine whether individual issues do or do not predominate; if essential proof must be individual, class certification is unsuitable.
- Proof of "injury" (or in antitrust terms, "fact" of damage), must be distinguished from calculation of damages. The former is an element of liability and if it cannot be established through common proof, common issues do not predominate.
- The fact that the first step in proof of liability (e.g., "conspiracy") is common and is seen as a significant reason for litigation does not mean that it is the predominant issue or that liability can be established with class-wide proof.
- The court must resolve all factual and legal disputes relevant to class certification even if those determinations overlap with the merits of the case or involve choosing between competing expert testimony that, in a plenary trial, would be the province of the jury.

The principles articulated in *Hydrogen Peroxide* are both clear and well-founded. One wonders what has taken so long, and why there is still adherence to the *Eisen* way. Although some state court litigation is pointing in the same direction as the *Hydrogen Peroxide* principles, the status of the rule in one of the largest and most litigious jurisdictions, the Ninth Circuit, is still in doubt.[11]

One consistent theme appears throughout the preceding pages. Class actions should not be sanctioned or rejected on the basis of conclusions that flow from the pleader's pen. Analysis demands engagement by court and counsel, based on realistic understandings of specific details of a dispute.

[11] *See Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177n.2 (9th Cir. 2007)(on rehearing). On February 13, 2009, the Court of Appeals granted a petition for *en banc* review by the full 9th Circuit. *See also, McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008) (class action brought by smokers who claimed to be deceived into believing that "light" cigarettes were healthier; reversed by interlocutory appeal based on the appellate court's conclusion that the degree of individual reliance on alleged misrepresentations varied and that damages as well as other issues would require individual proof).