Curtailing The Impact of Class Actions on Antitrust Policy

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Eisen v. Carlisle & Jacqueline

- Supreme Court decision in1974 holding that a court may not base a determination whether or not to certify a class based on a preliminary assessment of the merits
- In Eisen's wake, class certification became progressively easier
  - Most courts ruled that, on a motion to certify a class, the plaintiffs' allegations on the merits must be accepted as true
  - Many courts went further, holding that "any doubts" had to be resolved "in favor of certifying the class"
  - On the often determinative issue of common impact, courts said they "only must find that plaintiffs have set forth a valid methodology for proving antitrust impact common to the class, not that they will prove it."
  - Second, Third, Ninth Circuits even said that challenges to the presentation of the plaintiffs' expert – often the only source of evidence supporting class certification – were limited to determining whether the expert's "proposed methods are so insubstantial as to amount to no method at all."

Impact of Eisen

- Math of Eisen in antitrust cases:
  - Violation (assumed) + damages (assumed) ÷ number of class members = average damages = common impact (through the expert's averaging) = class certification × number of class members = huge settlement
- Creation of massive potential liability for defendants, and enormous pressure to settle
  - Rational to settle a case seeking $5 billion for $500 million even if odds are 90% that plaintiffs will lose

Impact of Eisen

- Class actions have become ubiquitous
  - Follow government cases, civil and criminal
  - Follow announcements of investigations
  - Based on news clippings
  - Direct and indirect purchasers

Impact of Eisen

- Plaintiff lawyer incentives are skewed, especially in low merit cases
  - Large fee awards depend on hours expended, but there is no "client" controlling costs; action is in jockeying for positions as lead counsel, or seats on executive committee – where work is doled out
    - Financed by plaintiff law firm investments to gain significant positions
    - Competition among plaintiff firms enhances the pool of funds to spend
  - Strong incentive to make case expensive for defendants
    - Excessive discovery demands
    - Excessive document hold requirements
    - Refusals to agree on custodian and search term limitations

Impact of Eisen

- Non-class cases are less affected by misaligned litigation incentives
- Individual plaintiffs will rarely finance a case they are unlikely to win
- Rarely any incentive to make discovery expensive to induce a defendant to settle
  - Risk of “mutually assured destruction” encourages more reasonable positions in discovery
  - In some cases, the problem is reversed, with defendants outspending plaintiffs in a way designed to force the plaintiff to drop the case

Recent developments help, but . . .

- Starting with Szabo (Easterbrook) in CA7, recent decisions have cut back on some of the class certification excesses
  - Important decisions in CA2 (IPO, Heerwagen, McLaughlin); CA3 (Hydrogen Peroxide); and possibly CA9 (Dukes, en banc pending)
  - Requiring plaintiffs to prove the elements of Rule 23, no longer allowing plaintiff expert reports to carry the day without some factual and economic support
- These decisions are important but do not address the problem of low merit cases exacting exorbitant settlement amounts to avoid the cost of litigation and the threat, however small, of debilitating liability
  - They do not require that a case have substantive merit to obtain certification

Supreme Court Reaction

- Recent decisions of the Supreme Court have cut back on substantive antitrust dramatically
  - Trinko, Twombly, Billing
    - And less controversial decisions such as Leegin, linkLine, Independent Ink, Weyerhaeuser
  - Plaintiffs have not won a case since Hartford in 1993; votes often lopsided
  - Fairly open defiance of Congress – evading savings clauses in Billing and Trinko, decades of legislation in Leegin
- Overhang of class actions is easily visible
  - Trinko, Twombly, Billing were class actions
  - Open concerns about the cost of litigation and the pressure to settle cases with low merit

Supreme Court Reaction

- The Court's opinions curtail even meritorious cases and create a high risk of false negatives; they do not address the real problem of meritless class actions
  - Apart from class actions, no evidence today of excessive (or any) false positives
- Problem is exacerbated by the Court's reluctance to confront class certification issues

A better solution: overrule Eisen?

- Original reasoning no longer holds (if it ever did)
  - Court was concerned that an early merits inquiry (1) would give plaintiffs the benefit of class certification without safeguards, (2) would be unfair to defendants who would not have the benefit of discovery, (3) would be inconsistent with Rule 23 requirement of determining class certification as soon as practicable
  - None of these reasons is valid today; on the third, the text of the rule has been changed
- Class actions would still proceed, but only on demonstrating that class certification is a "superior" way to resolve the issues, i.e., that the case be shown to have some merit

Negatives

- More discovery prior to certification decision
- Already important certification decision may become outcome determinative
- District Judges with ample discretion already will have even more say in the outcome of a case

Positives

- Only cases with some merit will proceed as class actions
- Low merit cases will be discouraged ex ante
- A more equal distribution of settlement leverage, although defendants will have added incentive to settle high merit cases
  - Plaintiff lawyers will have to make greater monetary investments in document review, depositions, and experts prior to class certification
- Decreased certification may allow the Supreme Court to have less concern about false positives and focus instead on consumer welfare