Missouri Organization of Defense Lawyers

P.O. Box 1072 ♦ Jefferson City, MO 65102
Phone: (573) 636-6100 ♦ Website: www.modllaw.com

Fall, 2005

President's Report

By Dean Franklin, MODL President

MODL has a strong commitment to the Missouri Non-Partisan court plan which helps to maintain the independence of our judiciary, through the appointment of fair, qualified and independent judges. The judicial Commissions at the state and county levels help to insure the unbiased selection of judges by providing a broad range of candidates from which vacancies can be filled. The Appellate Judicial Commission is entrusted with the duty of providing appointments for vacancies that arise in the Missouri Supreme Court and the Courts of Appeal. The Commission provides the governor with three diverse candidates from which the governor can select the individual best suited for a given vacancy.

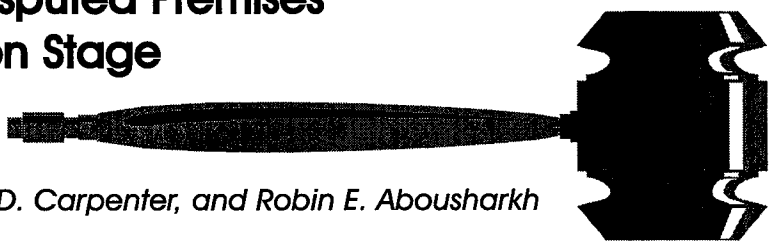
The Commission is comprised of one member of the Missouri Supreme Court, one lawyer and one layperson from each of the three Courts of Appeal districts in Missouri. The members of the Supreme Court select the Supreme Court member of the Commission. The members of the Missouri Bar who reside within each of the three districts elect the lawyers and the Governor appoints the laypeople. The Commission is only able to act through a majority concurrence of the members. The members are limited to serving a single six year term and the terms of the members are staggered such that one member of the Commission is replaced each year. They do not receive compensation, aside from travel expenses that are incurred while fulfilling their duties. The members may not hold an official position in a political party or a public office, with the exception of the Supreme Court justice.

This November, MODL is supporting two candidates in the Appellate Judicial Commission Eastern District election: Frank Gundlach, from Armstrong Teasdale and Nicholas Lamb, a fellow partner at Thompson Coburn. MODL is also supporting Debbie Champion in the St. Louis County Judicial Commission election and Dan Herrington in the 16th Circuit Judicial Commission election. Currently, there are no MODL endorsed candidates in the St. Louis City Judicial Commission election. Although, the decision to vote for any particular candidate is a matter of your personal choice, I ask that you keep in mind the aims of this organization: to constantly bring about changes which will lead to fair and impartial laws, by supporting those who will work hard to sustain the independence and quality of government. Specifically, judicial Commissions have a profound impact on the independence of our state judiciary as well as our practice of law and the lives of our clients. If we give the utmost consideration to all issues at hand when voting for a given candidate and support those who will best handle the responsibilities of a particular office, we are helping to fulfill the purpose of our organization.

MODL Past Presidents Honored at Annual Meeting

← *MODL honored past presidents at the 20th Annual Meeting. President's pictured (left to right) Susan Ford Robertson, Clark H. Cole, Lisa A. Weixelman, Robert A. Wulff, Gerard T. Noce, Michael A. Dallmeyer, Jeffrey O. Parshall, Lawrence B. Grebel, Randa Rawlins, Robert A. Babcock, Joseph J. Roper, Wendell E. Koerner, Jr. and Paul L. Wickens. Not pictured Duane E. Schreimann, John H. Quinn III, Stephen E. Scheve, W. James Foland, and Raymond E. Whitaker. Deceased Presidents – John L. Oliver, Jr., and Ben Ely, Jr.*

Eighth Circuit Joins Growing Number Of Circuit Courts In Rejecting The So-Called *Eisen* Rule, And Requiring District Courts To Test Disputed Premises At The Class Certification Stage



By James P. Muehlberger, Andrew D. Carpenter, and Robin E. Abousharkh

I. INTRODUCTION

As class counsel and courts are aware, an issue that frequently arises in the class certification calculus is the tension between a court's duty to conduct a rigorous analysis[1] as to whether the plaintiff has satisfied plaintiff's burden to demonstrate that the requirements of *Fed.R.Civ.P. 23* (or its state law counterparts) are satisfied, and the so-called *Eisen*[2] rule, which plaintiffs argue mandates that the court must accept as true the allegations in plaintiff's Complaint for purposes of a class certification analysis. Over the last few years, several federal circuit courts have rejected the proposition that *Eisen* requires a court to analyze a proposed class based upon the bare allegations in the pleadings. Recently, in a well-reasoned decision, the Eighth Circuit joined this growing trend and provided needed clarification as to class certification standards. *Blades v. Monsanto Company, 400 F.3d 562 (8th Cir. 2005)*,

This article will first describe the origin of the *Eisen* rule before addressing later Supreme Court decisions clarifying *Eisen*. Then, recent federal court decisions which recognize the limits of *Eisen* will then be analyzed, including the *Blades* decision and its teachings as to class certification standards within the Eighth Circuit.

A. The *Eisen* Rule

Thirty years ago, the United States Supreme Court in *Eisen v. Carisle & Jacqueline, 417 U.S. 156 (1974)*, issued the following statement:

> [N]othing in either the language or history of Rule 23 . . . 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.

Id. at 177. From this single sentence of *dicta*, many plaintiffs' counsel, and even some courts, have accepted the proposition that courts must assume for purposes of class certification analysis that whatever allegations and averments plaintiffs make are true, without any analysis of whether there is actually any factual support for such allegations and averments.

By the very context in which the Supreme Court made the above statement demonstrate its limits. *Eisen* presented the question of whether, under Federal Rule of Civil Procedure 23, the district court should have required the defendant rather than the plaintiffs to bear the full cost of providing class notice to approximately 2.25 million potential class members. The district court held that the defendant should bear 90% of the cost because plaintiff was more likely to prevail on his claims. *Id. at 177*. In other words, the district court shifted the cost of notice to the defendant based on its assessment of the strength of the merits of the case.

Read in its proper context, the *dicta* in *Eisen* merely states the obvious: it is improper to shift the entire burden of notice payment from one party to another based on the court's preliminary evaluation of which party will ultimately prevail on the merits of the claim. *Id. at 178*. Later Supreme Court cases clarified *Eisen's dicta*.

B. Later Supreme Court Decisions Clarify *Eisen*

Subsequent Supreme Court decisions have made it clear that *Eisen* does not stand for the proposition plaintiffs' counsel often advance. *Eisen* does not construct a wall between merits analysis and class certification analysis. In *Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)*, the United States Supreme Court held that:

> Evaluation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims. The typicality of the representatives' claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact are obvious examples. The more complex determinations required in *Rule 23(b)(3)* class actions entail even greater entanglement with the merits. . . .

437 U.S. at 469.

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1 See *General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982)*.

2 See *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974)*.

Four years later in *General Tel. Co. of Southwest v. Falcon, 457 U.S. 147 (1982)*, the United States Supreme Court further clarified the relation between plaintiff's proof and class certification analysis in the context of *Fed. R. Civ. P. 23(a)*'s adequacy requirement:

> Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. . . . [A]ctual, not presumed conformance with *Rule 23(a)* remains . . . indispensable . . . [A] Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of *Rule 23(a)* have been satisfied.

457 U.S. at 160. Subsequent cases have confirmed that the Supreme Court's reasoning applies with equal force to class certification questions concerning other aspects of Rule 23 as well.

C. The Seventh Circuit Rejects the *Eisen* Rule

In *Szabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir. 2001)*, the Seventh Circuit rejected the proposition that *Eisen* requires a court to certify a class based solely on the bare allegations in the pleadings. *Id. at 675-76*. In this fraud and breach-of-warranty action, the district court refused to consider the defendant's uncontroverted evidence that the elements for class certification were not met. *Id. at 674*.

The Seventh Circuit vacated the order certifying the class, based on its consideration of evidence that illustrated nagging issues of choice of law, commonality, and manageability. *Id. at 677*. The Seventh Circuit reasoned that, unlike *Rule 12(b)(6)* motions, a court ruling upon a motion for class certification need not accept the allegations in the complaint as true. *Id. at 675-76*. The court said that in contrast to a *12(b)(6)* motion, which strictly tests the legal sufficiency of a pleading, a motion for class certification tests both the legal and factual sufficiency of a claim. *Id.* The order certifying a class or denying certification becomes the court's last word on the issue. *Id.* Thus, the court should consider whatever facts are relevant to the issue of class certification. *Id.*

The court then analogized class certification with determinations of venue, *forum non conveniens*, and amount in controversy for diversity jurisdiction. *Id. at 676*. Courts routinely look to the merits of a case to resolve disputed issues of jurisdiction and venue before allowing a case to proceed. *Id. at 676-77*. The court said because these other *12(b)* motions are not governed by the *12(b)(6)* requirement that the court accept the plaintiff's pleadings at face value, there is no reason to extend such a requirement to class certification. *Id. at 677*. Additionally, the court reasoned that *Eisen*, *Falcon*, and the 1966 amendments to Rule 23 dictate that a district court must probe beyond the pleadings in order to determine whether the plaintiffs are able to satisfy the Rule 23 certification requirements. *Szabo, 249 F.3d at 677*.

In *Szabo*, the Seventh Circuit interpreted *General Telephone* to hold that similarity of claims must be demonstrated rather than assumed. *Szabo, 249 F.3d at 677*. The court reasoned further that accepting the allegations in the pleadings as true places unfair power in the hands of plaintiffs' attorneys. *Id.* If courts were to blindly accept such allegations, plaintiffs' attorneys could use the pleadings in ways injurious to some members of the class or the defendants. *Id.* Therefore, the court held, defendants as well as absent class members are entitled to an independent judicial review of plaintiffs' allegations. *Id.*

D. The Majority of Circuits Now Recognize the Limits of *Eisen*

Szabo's rejection of the *Eisen* rule is repeatedly followed in district court decisions within the Seventh Circuit. *See* Linda Mullenix, *Inroads on Eisen, NAT'L Law J., Sept. 22, 2003 at 13*. Moreover, the First, Third and Fourth Circuit Court of Appeals and the United States Court of Federal Claims have adopted *Szabo's* approach to class certification. *Id.*

The Third Circuit adopted *Szabo* outright, reasoning that in light of the Supreme Court's apparent rejection of *Eisen*, and the Seventh Circuit's arguments in *Szabo*, it had the discretion to conduct preliminary inquiry into the merits to determine whether the alleged claims would be properly resolved in a class action. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 (3d Cir. 2001)*. The United States Court of Federal Claims shortly thereafter issued *Christopher Village, LP v. U.S., 50 Fed. Cl. 635, 643 (Fed. Fl. 2001)* denying class certification on grounds that the plaintiffs did not present evidence beyond the pleadings sufficient to refute the government's evidence.

In *Tardiff v. Knox County, 365 F.3d 1 (1st Cir. 2004)*, the First Circuit concluded that when faced with the issue of accepting the complaint's factual allegations as true or attempting to resolve disputed contentions during the class certification process, the court should opt for the latter. The court noted that it is sometimes taken for granted that the complaint's allegations are necessarily controlling; but class action machinery is expensive and in our view the court has the power to test disputed premises early on if and when the class action would be proper on one premise but not another. *Id. at 4* (noting the split between the Second and Tenth Circuits [discouraging any preliminary inquiry] and the Third and Seventh Circuits [allowing such an inquiry]).

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Then in *Gariety v. Grant Thornton LLP, 368 F.3d 356 (4th Cir. 2004)*, the Fourth Circuit held that the district court erred when it refused to look beyond the plaintiff's complaint before deciding that common questions of law or fact predominated over individual issues in a securities fraud case. The court explained that the district court's reliance on mere assertions did not fulfill the requirement that the district court take a close look at relevant matters, conduct a rigorous analysis, and make findings in determining whether the plaintiffs had demonstrated that the requirements of *Rule 23(b)(3)* have been satisfied. *Id. at 359*.

In addition to courts that have explicitly adopted *Szabo*, the Fifth, Ninth and Eleventh Circuits seem to have indicated that it is appropriate to consider evidence outside the plaintiffs' pleadings to determine whether the requirements of Rule 23 are met. *See Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996)* (holding going beyond the pleadings is necessary, as the court must understand the claims, defenses, relevant facts and applicable substantive law in order to make a meaningful determination of the certification issues); *Hanon v. Dataproducts Corp., 976 F.2d 497, 509 (9th Cir. 1992)* (where the court held that we are at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case" [quotations and citations omitted]); *Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1234 (11th Cir. 2000)* (that followed the same logic of the preceding case).

Until recently the Eighth Circuit hadn't addressed this issue. Then, it affirmed a district court decision denying class certification after whole heartedly adopting *Szabo's* approach to class certification. *See Blades v. Monsanto Co., 218 F.R.D. 644, 647-48 (E.D. Mo. 2003); aff'd 400 F.3d 562 (8th Cir. 2005)*. In *Blades*, the district court denied class certification for a group of corn and soybean farmers who alleged seed companies had engaged in a price-fixing conspiracy in violation of the Sherman Anti-Trust Act. In denying class certification, the district court relied on *Falcon* for the proposition that a court must conduct a rigorous analysis to ensure that the Rule 23 requirements are met. *Id. at 647*. The district court also relied on another district court case, *Sanft v. Winnebago*, in its decision to adopt *Szabo*. *Sanft v. Winnebago, Indust., Inc., 214 F.R.D. 514, (N.D. Iowa 2003); Blades 218 F.R.D. at 647*. In *Winnebago*, the court summarily dismissed the line of cases that maintain a court must accept the allegations in the pleadings as true. *Winnebago, 214 F.R.D. at 519, n.3* (collecting cases).

On appeal, the Eighth Circuit stated that in order to determine whether common questions predominate over individual questions, a court must look behind the pleadings. *Blades, 400 F.3d at 566-67*. The court cautioned, however, that this inquiry must be limited so as to only allow for a determination as to whether the nature of the evidence will be common as to all class members or whether the proposed class members will need to present individual evidence given the factual setting and the general allegations. *Id.* But, the court did acknowledge that in making this preliminary inquiry, some merit issues may come into play. *Id. at 567*. ("The preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case").

Today, it appears that only the Second, Sixth, and Tenth Circuits hold that the allegations in plaintiffs' complaint are controlling at the class certification stage. *See Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291-93 (2d Cir. 1999); Reeb v. Ohio Dep't. of Rehab and Corr., 2003 WL 22734623 (6th Cir. 2003); J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999)*. But even though these Circuits have taken the view that the plaintiffs' complaint is controlling, several state supreme courts within these Circuits have held that a court can look outside the pleadings to determine class certification. *See, e.g., Collins v. Anthem Health Plans,*

Inc., 266 Conn. 12, 25; 836 A.2d 1124, 1134 (Conn. 2003) where the court relying on the *Falcon* decision stated, "sometimes, it may be necessary for the court to probe behind the pleadings before coming to rest on the certification questions"; *Warner v. Waste Mgmt., 36 Ohio St. 3d. 91, 99 n. 9; 521 N.E. 2d. 1091, 1098 (Ohio 1988)* holding that it is rare that the pleadings will be so clear as to allow for a court to find by a preponderance of the evidence that certification is or is not proper; *Dragon v. Vanguard Industries, Inc., 277 Kan. 776, 781, 83; 89 P.3d 908 (Kan. 2004)* where the court rejected plaintiffs' contention that the court should make the class certification decision based solely upon the basis of the allegations contained in the pleadings. So, even though the Second and Sixth Circuits may still adhere to the misconstrued *Eisen* rule, many of the state courts within these circuits have joined the majority of federal and state court decisions, which hold that a court may look beyond the pleadings to determine whether class certification is appropriate.

E. Conclusion

Blades v. Monsanto Co., put a well-deserved end to the so-called *Eisen* rule in the Eighth Circuit. In doing so, the Eighth Circuit joined the growing trend of courts recognizing the impossibility of making sensible class certification decisions without looking to the underlying facts that relate to the class certification analysis.