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Symposium
Rule 23: Class Actions at the Crossroads

INTRODUCTION ..... *Joel Seligman & Lindsey Hunter* 407

In order to broaden the context in which consideration of class actions and the proposed amendments to Rule 23 occur, this Introduction discusses the Rule's development from inception to the recently proposed amendments concluding with a brief description of the conference schedule. From the Rule's original adoption, encouraging the use of class actions through textually sophisticated analysis, through the 1966 revision, substituting functional tests with more conceptually realistic guidelines, the recently proposed amendments will both enhance the effectiveness of Rule 23 while at the same time effect a retrenchment of the Rule's aggregation capabilities.

Articles & Comments

AN ENFORCEMENT OFFICIAL'S REFLECTIONS ON ANTITRUST CLASS ACTIONS ..... *Stephen Calkins* 413

Class actions, once central to antitrust practice, declined sharply in importance after 1981, but may now be enjoying a renaissance. The

importance of such actions for deterrence, however, has declined because government antitrust sanctions have increased substantially. When examining an antitrust class action, therefore, courts should carefully assess whether and how the action promotes supplemental deterrence, compensation, or identification of wrongdoing. Concerns about the potential costs of antitrust class actions can be allayed by the courts' continued ability to consider the antitrust merits at relatively early stages and by the empirical fact that such actions (and especially the successful ones) concentrate on the accepted core of antitrust.

Comment:

CLASS ACTIONS AT THE CLOVERLEAF..... *John Leubsdorf* 453

New legislation imposing varied changes on class actions in different fields of law manifests the decline of a single transsubstantive federal civil procedure. It reflects Congress' substantive concerns, but also suspicion of plaintiffs' lawyers and judges: the private law enforcement that was to supplement a distrusted government is now itself distrusted by some. Mass tort settlement class actions merit such distrust, at least when defended by predictions that asbestos or other suits will otherwise proliferate without bound.

Articles:

THE CONSTITUTIONAL LIMITS OF JUDICIAL RULEMAKING: THE ILLEGITIMACY OF MASS-TORT SETTLEMENTS NEGOTIATED UNDER FEDERAL RULE 23..... *Paul D. Carrington & Derek P. Apanovitch* 461

Many lower federal courts have in the last decade and a half made creative use of the class action to resolve mass tort disputes. The authors contend that the resolution of mass torts under Rule 23 is not legitimate; that any amendment to that rule legitimizing the resolution of mass torts as class actions would exceed rulemaking power of the Supreme Court under the Rules Enabling Act; and that any revision of the Rules Enabling Act to authorize such rulemaking might well be unconstitutional.

MAKING SECURITIES FRAUD CLASS ACTIONS VIRTUOUS..... *James D. Cox* 497

There has been a great deal of debate over the virtue of securities class actions. In this Article, Professor Cox examines whether the commentators and empiricists have addressed the right questions in their battles over whether reform of the securities class action is a menace. Since so much of the debate centers on whether class actions serve either a compensatory or deterrent function, this Article examines available data and concludes that securities class actions are largely compensatory. Moreover, Professor Cox argues that entity liability, rather than solely individual liability, is consistent with the deterrence of securities violations. The procedural changes introduced by the Private Securities Litigation Reform Act of 1995 are explained as filling the void created by the courts failing to aggressively discharge their supervisory role in class action litigation. Against the the background of his analysis

of the Reform Act's provisions, Professor Cox suggests who is the guardian of the securities class action's virtue.

Comment:

THE MERITS MATTER MOST AND OBSERVATIONS ON A CHANGING LANDSCAPE UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995 ..... *Sherrie R. Savett* 525

This Comment represents a practitioner's view that the strength of a securities class claim determines the size of a recovery assuming a viable funding source. The author also presents observations about the changes, both procedural and substantive, emerging from the Private Securities Litigation Reform Act of 1995. The author contends that the race to the courthouse has ceased, the federal interpretations of *scienter* have not dramatically changed from pre-Act cases, the Reform Act produces great delays and institutional investors are now emerging as plaintiffs.

Article:

CLASS ACTION REFORM: LESSONS FROM SECURITIES LITIGATION ..... *Jill E. Fisch* 533

In this Article, Professor Fisch analyzes the application of the reforms to private securities fraud litigation adopted by the Private Securities Reform Act of 1995, focusing in particular on the lead plaintiff provision. The Article describes the factors motivating the reforms, particularly the observation that securities fraud litigation is lawyer driven. The Article evaluates the likelihood that the legislative changes will result in greater institutional investor involvement in securities fraud litigation and the capacity of that involvement to influence the perceived problems with the litigation process.

Professor Fisch then demonstrates how the experience of securities litigation reform can provide greater insight into the recent proposals to reform class action litigation more generally through proposed amendments to Federal Rules of Civil Procedure 23. She cautions reformers to consider more carefully both the purposes of the class action vehicle and the possibility that efforts to increase client involvement in the class action format may increase collusive behavior. Finally, the Article suggests that developments in mass tort cases may, in turn, offer lessons for securities litigation.

Comment:

COMMENT: THE IMPACT TO DATE OF THE LEAD PLAINTIFF PROVISIONS OF THE PRIVATE SECURITIES LITIGATION REFORM ACT ..... *Elliott J. Weiss* 561

Professor Weiss argues that, while it is far too early to draw many conclusions concerning the impact of the lead plaintiff provisions of the Private Securities Litigation Reform Act, several promising developments should be noted. The notice provision has made it far easier for

institutional and other investors to learn of the pendency of class actions in which they have an interest. Institutional investors have begun to act as lead plaintiffs. The results they achieve and the costs they incur should influence strongly the willingness of other institutional investors to volunteer to serve as lead plaintiffs.

Article:

CIVIL RIGHTS CLASS ACTIONS:
PROCEDURAL MEANS OF OBTAINING
SUBSTANCE ..... *Jack Greenberg* 575

This Article traces the use of the class action in prisoners' rights, school desegregation, and employment discrimination cases. The author argues that, despite current criticisms of the class action device, it remains a viable and important avenue for relief for plaintiffs in these contexts.

Comment:

STATUTORY FEE SHIFTING IN CIVIL RIGHTS
CLASS ACTIONS: INCENTIVE OR
LIABILITY? ..... *Stanley M. Grossman* 587

This Comment discusses Congress' recent restrictions on the ability of federally funded legal organizations to bring class actions to adjudicate civil rights grievances. It concludes that as a result of these restrictions, there is a great need for the private class actions plaintiffs' bar to bring class actions to redress civil rights violations. Upon examination of civil rights fee shifting statutes, this author concludes that courts must provide for attorneys' fees comparable to those earned in antitrust, securities and other class actions where fees are awarded based on the recovery of a common fund for the class.

Articles:

THE DEFENSIVE USE OF FEDERAL CLASS
ACTIONS IN MASS TORTS ..... *Francis E. McGovern* 595

There is an unusual confluence of opinion from the political right and left in opposition to federal settlement class actions in mass torts. Exploring various theories to explain this phenomenon may assist our understanding of the challenges facing appellate courts as they confront a host of class action issues driven by trial judges' attempts to resolve their mass tort backlog.

THE CONSTITUTIONALITY OF THE
PROPOSED RULE 23 CLASS ACTION
AMENDMENTS ..... *Linda S. Mullenix* 615

In her Article, Professor Mullenix sets forth the basis for the various constitutional challenges to the proposed Rule 23 amendments grounded in the Rules Enabling Act, Article III of the Constitution, and due process. She concludes that the proposed Rule 23(b)(3) subfactor (F) legitimately may be vulnerable to constitutional attack, but that the Rule 23(b)(4) settlement class proposal is constitutionally defensible.

THE NEW SECURITIES CLASS ACTION: FEDERAL OBSTACLES, STATE DETOURS ..... *Richard H. Walker, David M. Levine & Adam C. Pritchard* 641

The Private Securities Litigation Reform Act of 1995 intended to transform securities class actions by putting investors in charge and protecting defendants from abusive lawsuits. This Article surveys developments under the Reform Act. The Act's heightened pleading standard and discovery stay pose real obstacles to securities class actions, but the lead plaintiff provision has not yet displaced plaintiffs' lawyers from their dominant role. Finally, the Article discusses the migration of securities class actions to state court.

THE PAST AND FUTURE OF DEFENDANT AND SETTLEMENT CLASSES IN COLLECTIVE LITIGATION ..... *Stephen C. Yeazell* 687

Historically group litigation has served defendants as much as plaintiffs. Only in the last few decades has the class action operated primarily to empower plaintiffs. The settlement class represents defendants' invocation of the class action against plaintiff. To that extent, the settlement class resembles the defendant class. If one could free it from the justified concerns about lawyer-client conflicts, the settlement class might serve both ajudicatory efficiency and procedural thought.

Comments:

FEDERAL RULE 23—THE EARLY YEARS ..... *John G. Harkins, Jr.* 705

The 1938 version of Federal Rule 23 was patterned on Equity Rule 38, which in turn reflected the centuries-old practice of allowing certain "representative" parties to prosecute or defend some types of claims on behalf of themselves and others. Intended by its draftsmen to be procedural only and not to affect substantive rights, the Rule created what came to be known as the "true," "hybrid" and "spurious" classes. The Rule was interpreted to allow so-called "one-way intervention," one of the principal targets of change in the 1966 amendments.

A DISTANT MIRROR: THE BILL OF PEACE IN EARLY AMERICAN MASS TORTS AND ITS IMPLICATIONS FOR MODERN CLASS ACTIONS ..... *Thomas D. Rowe, Jr.* 711

This Comment examines several late 19th and early 20th century American cases on the "bill of peace," an equitable device that could be used in response to multiplicity of suits against a single defendant, and considers their implications for modern class actions. The bill of peace was used, albeit sparingly, to consolidate actions in some mass-tort litigation. The history both provides precedent for mass-tort defendants initiating joinder of numerous claims against them, and illustrates reasons for caution in the use of aggressive approaches to aggregation.

REMARKS TO THE INSTITUTE FOR LAW AND ECONOMIC POLICY ..... *Paul V. Niemeyer* 719

Describing mass torts as a recent phenomenon that was not contemplated by Federal Rule of Civil Procedure 23, Judge Niemeyer, in an address to the Institute, explores the limitations of Rule 23. As chair of the Civil Rules Advisory Committee, which is working on Rule 23, Judge Niemeyer describes recently proposed changes to Rule 23. He concludes his remarks with the observation that rulemaking cannot solve Rule 23's shortcomings in addressing mass torts, and he proposes, for congressional enactment, the idea of a product bankruptcy which would provide for a petition for "Product Disassociation."

Notes

KIDDIE SEX HARASSMENT: HOW TITLE IX COULD LEVEL THE PLAYING FIELD WITHOUT LEVELING THE PLAYGROUND ..... *Jehan A. Abdel-Gawad* 727

This Note traces the litigation arising from the growing problem of peer sexual harassment in elementary and high schools. The author argues that courts should recognize that Title IX provides students with a right to sue for hostile environment sexual harassment and a remedy for redress in accordance with Title VI and Title VII of the Civil Rights Act of 1964.

RE-EXAMINING THE ATTORNEY GENERAL'S GUIDELINES FOR FBI INVESTIGATIONS OF DOMESTIC GROUPS ..... *David M. Park* 769

Shortly after the Oklahoma City bombing, the FBI announced it would interpret its guidelines concerning domestic investigations more broadly. This announcement created great concern among civil libertarians, who feared a more expansive interpretation would unnecessarily encroach upon constitutionally-protected freedoms. This Note suggests several modifications to the FBI guidelines in an attempt to reach a compromise between the FBI and civil libertarian positions.