Class Actions: Any Relief in Sight?

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Surge in Class Actions

- Began with 1966 Amendments to Rule 23
- Accelerated in 1990s
- To some extent, natural result of mass society
- But fueled considerably by large plaintiffs' fee awards
"The appropriate action for this Court is to affirm the district court and put an end to this Frankenstein monster posing as a class action."

The Frankenstein Monster

Class Actions are a Frankenstein monster for corporate defendants because:

1) aggregation creates claims that otherwise would not exist
   - e.g., $70 (named plaintiff damages) in *Eisen*

2) large exposure coerces settlement without regard to merits
The Bright Side

Class actions also can bring closure:

- Settlement classes can resolve massive claim volumes
- Litigation classes usually are opposed, but occasionally are supported by defendants as a closure device

But, on balance, the surge in class actions has imposed great burdens on corporate defendants
Class Actions: Nature of Claims 1995-96

Reported Judicial Decisions (n=1020)

- Securities: 19%
- Consumer: 25%
- Torts: 9%
- Employment: 15%
- Civil Rights: 14%
- Benefits, taxes, other govt: 11%
- Other: 7%

Source: RAND Institute for Civil Justice, Class Action Dilemmas (1999)
Cases Against Corporate Defendants
1995-96 Reported Decisions

Federal Cases
(n=461)

State Cases
(n=150)
Quantifying the Surge

- RAND Study:
  - "Dearth of statistical information"
  - "class action litigation has increased dramatically, imposing new costs for business and new burdens for courts"
  - "surge in damage class actions in the past several years, particularly in state courts and in the consumer area"
U.S. District Courts: Class Action Cases
1995-99

Total Cases

Source: Administrative Office of the U.S. Courts
U.S. District Courts: Class Action Cases
1995-99

Tort Actions

Source: Administrative Office of the U.S. Courts
U.S. District Courts: Class Action Cases
1995-99

Actions Under Statutes

<table>
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<th>Year</th>
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Source: Administrative Office of the U.S. Courts
U.S. District Courts: Class Action Cases
1995-99

Antitrust

Source: Administrative Office of the U.S. Courts
U.S. District Courts: Class Action Cases 1995-99

Labor Laws

Source: Administrative Office of the U.S. Courts
U.S. District Courts: Class Action Cases 1995-99

Securities, Commodities and Exchange

Source: Administrative Office of the U.S. Courts
State Court Uses/Abuses

- RAND "found evidence" of plaintiffs' forum-shopping for favorable state court venues
  - e.g., consumer class actions in Alabama
  - e.g., mass tort class actions in Louisiana
- Estimated 60 percent of class actions filed in state court
- Increased use of state courts for nationwide classes
Avenues of Relief

- Courts
- Rules Committee
- Congress
- Self-Help
Relief by Courts?

- Supreme Court already has responded (Amchem; Ortiz):
  - has confirmed restrictions on mass tort class actions
  - allows settlement classes, but
    - i) imposes strict judicial oversight,
    - ii) restricts use in mass tort context, and
    - iii) restricts use whenever litigation claim could not be certified
  - heightened emphasis on class cohesion, adequacy of representation
- Federal and state courts still reacting
- Has accelerated trend toward state court filings
- Lower federal courts starting to scrutinize fee awards and settlements more closely
- Further changes likely to be incremental rather than doctrinal
Relief by Rules Committee?

- Extensive Rule 23 amendments proposed in 1996, but only one amendment adopted:
  - Rule 23(f) – interlocutory appeals re class certification
  - Potentially good for both sides, but not heavily used yet
- Further amendments unlikely in near future, except perhaps Rule 23(e) re supervision of settlements
Relief by Congress?

• Securities Legislation Already Passed:
  • Private Securities Litigation Reform Act of 1995
    • has increased dismissals at pleading stage
    • but securities litigation has increased, not decreased
  • Securities Litigation Uniform Standards Act of 1998
    • moved most securities class action litigation to federal courts

• Pending legislation (uphill?)
  • Interstate Class Action Jurisdiction Act (would shift most class actions to federal court)
  • Asbestos Compensation Act (would prohibit asbestos class actions)

• No immediate prospects for broad Rule 23 reform
Self-Help

• Litigation Prevention
• Advance preparation for litigation and media relations
  • otherwise, plaintiffs have a potentially insurmountable headstart
  • recent increases in plaintiffs' coordination and resources
• Front-End Loading on Litigation Evaluation
  • Developing a Game Plan
  • Use of Expert Consultants
• Early Coordination with Co-Defendants
Self-Help

- Early Exploration of Settlement
- Maximizing Potential Insurance Coverage
- Winning Dismissal or Summary Judgment Motions
- Opposing or Supporting Class Certification
- Excluding Plaintiffs' Experts (Daubert, etc.)
Questions for Discussion

- What are the substantive areas in which class actions are likely to increase? decrease?
- How bad is state court for class actions? How likely is passage of the Interstate Class Action Jurisdiction Act?
- Is there any hope for federal legislative reform of federal class actions? federal or state protection against monstrous class awards?
- Do you support amending Rule 23 to authorize settlement classes more broadly than litigation classes? Why or why not? What problems have you encountered in settling class actions?
- What can be done to counteract the increasing resources and coordination of the plaintiffs' class action bar?
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