

Judicial Fact Finding Increasing in Class Action Certification Hearings

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Class action certification under the Federal Rules of Civil Procedure (“FRCP”) only permit a class action if, among other things, “there are questions of law or fact common to the class.” (FRCP 23)

This means that trial judges in US District courts are often called upon to determine whether common questions of law or fact exist.

But examining these issues often means that judges are not only determining whether common questions exist for class certification purposes, but also determining important factual matters that should be resolved on the merits as part of a jury trial.

The 1974 US Supreme Court decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) set what seemed to be a bright line regarding inappropriate overlap when it noted the following:

We find nothing in either the language or history of Rule 23 that 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.

But later cases have extended the boundaries, causing one commentator to recently note that “[t]he long-term effect has been to elevate a pre-trial procedure intended to help judges approximate the boundaries of a class action into a premature trial on the merits held in the absence of a jury.”

Defense counsel often use class certification to defeat the maintenance of a class action under the divide and conquer strategy, even if it means facing multiple lawsuits. If maintenance of a class action can be defeated, while simultaneously disposing of factual issues that could prove troublesome at trial, all the better.

But the US Supreme Court on November 5, 2012 heard oral argument in two cases related to fact finding during class certification which might bring greater clarity as to where the line must be drawn.

One of the cases, *Amgen v. Connecticut Retirement Plans and Trust Funds*, No. 11-1085 [Transcript of Oral Argument [here](#)], asks whether plaintiffs in certain securities fraud cases “must prove materiality before they can proceed with a class action, and whether the defendants are permitted to present evidence rebutting a fraud-on-the-market theory at the class certification stage.” [[The Federalist Society](#)]

The trend of using class certification as a means of effectively resolving factual issues on the merits, as well as any limits imposed on this practice by the Supreme Court in its pending cases, will have an undeniable impact on class action litigation moving forward, and could spill over into consideration of other pre-trial issues in non-class action litigation as well.

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