FROM THE

EDITOR

The Federalist Society publishes *Class Action Watch* to apprise both our membership and the public at large of recent trends and cases in class action litigation that merit attention. We hope you find this and future issues thought-provoking and informative. Comments and criticisms about this publication are most welcome. Please e-mail: info@fed-soc.org.

DTD v. Wells: Historical Curiosity or Important Protection Against "Judicial Blackmail"?

by Vano I. Haroutunian & Avraham Z. Cutler

Initially, Justice Kennedy's separate opinion in *DTD Enterprises v. Wells*,[1] which argued that in a class action a defendant cannot be forced to pay notice costs based solely on plaintiff's poverty, was chiefly noted for being the first opinion joined by Supreme Court Justice Sonia Sotomayor.[2] Commentators noted the case as a possible preview of Justice Sotomayor's views, in particular how sympathetic she was to the rights of class action defendants.[3] Putting aside its use as a crystal ball for Justice Sotomayor's views, *DTD* has the potential to be a significant opinion in its own right, and businesses that currently believe they are forced to choose between financing lawsuits against themselves or giving into "judicial blackmail" and settling unmeritorious lawsuits think the decision may help solve these problems.[4]

I. The Facts of *DTD v. Wells*

DTD Enterprises, Inc. is a commercial dating-referral service that pairs its customers by analyzing detailed information the customers provide about themselves.[5] Janice Wells was a customer who signed up for DTD's basic dating service and signed a contract to finance the payments. DTD sued Wells after she stopped making her monthly payments. Wells answered by bringing a class action against DTD and moving to consolidate the two suits.

Wells' class action claimed that DTD's contract and financing agreement violated New Jersey Consumer Protection rules. The New Jersey Superior Court certified one of Wells' two requested classes and ordered DTD to bear all the costs of class notification. The Superior Court, in the course of oral argument, explained that its order was based on its assumption that DTD could afford to pay and Wells could not. DTD argued that this was an improper basis for requiring it to finance Wells' suit.

II. The Pre-*Eisen* Case Law

In 1966, the Supreme Court adopted new Federal Rules of Civil Procedure, including rules governing class action lawsuits. Rule 23 required that notice be given to all potential plaintiffs in class action suits involving common questions of fact or law.[6] Rule 23 did not state who was required to pay for the notice, and courts were conflicted as to who should pay, with one court going so far as to suggest the court itself should pay the notice costs.[7]

In determining whether a defendant could be compelled to pay notice costs, several courts raised a concern that defendants should not be required to pay for unmeritorious lawsuits.[8] Therefore, many courts developed multi-factor tests which required a court to consider a series of factors, including the merits, the plaintiff's ability to pay, the type of relationship between plaintiffs, and whether the defendant is better off defending the action as a class action instead of as separate individual suits prior to shifting costs to defendants.[9]

One case, *Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie*,[10] explicitly held that these factors needed to be considered in order to avoid a violation of the defendant's due process rights under the U.S. Constitution. No other court addressed *Cusick's* contention, and the issue soon became moot due to the Supreme Court's 1974 decision in *Eisen v. Carlisle & Jacquelin*.[11]

III. *Eisen* Takes the Issue out of the Federal Courts

Eisen "filed a class action on behalf of himself and all other odd-lot traders on the New York Stock Exchange . . . charg[ing] respondents with violations of the antitrust and securities laws."[12] Eisen's suit raised several novel issues regarding class action lawsuits, making repeated

appearances in the Second Circuit Court of Appeals.[13] Eventually, several issues reached the Supreme Court, including the question of whether the district court was right to allocate 90% of the notice costs to the defendants based on a finding that the plaintiff was likely to win on the merits.[14] The Supreme Court held that Federal Rule of Civil Procedure 23, which required notice, does not provide a judge with discretion to choose who must pay the notice costs. In the absence of authority under Rule 23, the Court found that the "usual rule . . . that a plaintiff must initially bear the cost of notice to the class" was controlling.[15]

Eisen ended discussion of who should bear the costs of notice in federal cases. Although the Court left open previously existing exceptions to the "plaintiff pays" rule and explicitly declined to decide how notice costs should be decided in such cases, no subsequent case has raised the issue of what is constitutionally required before making a defendant pay notice costs.[16]

IV. Post-*Eisen* Cases

In the wake of *Eisen*, several states changed their rules of civil procedure to provide judges with the authority to force defendants to pay notice costs.[17] One such state, California, soon confronted the issue of whether a defendant could be compelled to pay notice costs. In *Civil Service Employees Insurance Co. v. Superior Court of San Francisco*, the California Supreme Court split 4-3 over the issue of whether a defendant may be required to pay notice costs, thereby forcing him to finance the plaintiff's suit.[18]

The majority opinion held that courts may require a defendant to pay notice costs because "the adoption of efficient class action procedures unquestionably rationally relates to the vindication of a wide range of legitimate public purposes."[19] The court analogized the rule allowing the court to allocate the costs to defendants to other rules regarding costs, such as the rule that defendants are required to pay some discovery costs to benefit plaintiffs.[20]

The dissent disagreed, stating that "[t]he trial court's order requiring defendant to pay costs of notice to plaintiff constitutes a permanent deprivation of property without a final or even tentative adjudication of liability. As such the order constitutes a denial of due process."[21] The

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District Court Dismisses Claims in Nationwide Text Messaging Class Action

by Seth Cooper

Text messaging is a booming advanced wireless service. This service for using cellular telephones to send and receive short messages was first introduced by AT&T in 2002 but was quickly launched by other wireless providers. Monthly text messages have soared from 4.7 billion during December 2005, to 9.8 billion during December 2006, all the way up to 48.1 billion in December 2008.[1] In 2008 alone, some one trillion text messages were sent and received.[2] This business has been the target of class-action litigation. But owing to a failure to allege facts sufficient to state a claim of unlawful conspiracy, a recent federal trial court ruling put the brakes on a nationwide class-action antitrust suit alleging collusive per-message price-fixing by all major wireless carriers.

Consumers typically purchase text messaging services either on a per-message basis or through a bundled plan. Bundled plans can include either set allotments of text messages or unlimited amounts. Moreover, since 2005, wireless carriers' "prices for other wireless services, such as voice calling and data transmission, decreased."[3] Nonetheless, per-message prices for text messaging have become the target of congressional inquiry and a Department of Justice investigation that recently concluded without any action being taken. But per-message prices are also the subject of a sweeping class action lawsuit: *In Re Text Messaging Antitrust Litigation*.[4]

Over a dozen separate lawsuits against the four national wireless carriers—AT&T, Sprint, T-Mobile, and Verizon—were transferred to the U.S. District Court for the Northern District of Illinois by the Judicial Panel on Multidistrict Litigation.[5] Plaintiffs' attorneys filed suit on behalf of "all those who purchased text messaging services on a fee-per-message basis from defendants or their predecessors, subsidiaries, or affiliates from January 1, 2005 to the present."[6] At issue in the district court's December 2009 ruling was the defendants' Rule 12(b)(6) motion to dismiss the plaintiffs' claims that all four national wireless carriers violated Section 1 of the Sherman Act.[7] Horizontal price-fixing is per se illegal under antitrust law. Plaintiffs' alleged that the defendants colluded to fix prices for per-message text messaging services.

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dissent pointed out that based on the plaintiff's affidavit it was likely that the plaintiff would not be able to repay the defendant for notice costs in the event the defendant prevailed in the lawsuit.[22]

The second due process argument discussed by the majority was whether the defendants' procedural due process rights were violated by being forced to pay notice costs prior to an adjudication on the merits. The court held, similarly to *Cusick*, that the formulas used by the pre-*Eisen* federal courts to assess notice costs constituted sufficient process and that in the absence of a record the court was required to assume that these factors had been considered.[23]

A second important, if ambiguous, post-*Eisen* case is the West Virginia Supreme Court's decision in *McFoy v. Amerigas, Inc*.[24] The court in *McFoy* first addressed a series of factors it believed should be considered before requiring a plaintiff to pay notice costs. Then, it separately stated:

> However, before a court *can* require a defendant to finance the plaintiffs' case in advance of judgment, it *must* appear with reasonable certainty that the ends of justice are served and that no irremediable damage will be visited on the defendant. The likelihood of a judgment for the plaintiff *must* be great enough that the weight in terms of overall equity of going forward out of the defendant's pocket overwhelms the burden to the defendant of those costs.[25]

The court in *McFoy*, as did Justice Clark dissenting in *Civil Service*, also voiced its concern that the plaintiff would be unable to repay any costs in the event that the defendant prevailed in the underlying lawsuit.[26]

Although *McFoy* does not explicitly state that these prerequisites are constitutionally required, when viewed against the backdrop of the earlier discussion of the proper interpretation of West Virginia law, it is clear that the court was addressing a source above and beyond the West Virginia notice statute. Similarly, the mandatory language used in the above-quoted portion of the opinion contrasts sharply with the language used in describing the proper application of West Virginia law.

Other than these two cases, courts have rarely addressed the issues of when a defendant can be assessed the notice costs. One reason for the lack of cases on this issue despite its frequent occurrence is that, as happened in *DTD*, preliminary decisions by trial level courts tend not to be published and, contrary to the federal rule discussed in *Eisen*, many states do not allow a notice costs determination to be challenged as a matter of right.[27]

V. The Supreme Court's Separate Opinion in *DTD*

DTD, after being ordered by the New Jersey Superior Court to pay notice costs based on the judge's presumption that it must be wealthier than the individual plaintiff, filed a request for leave to appeal the lower court's ruling on several constitutional grounds. New Jersey's superior court, appellate division, and supreme court refused to hear DTD's arguments, and DTD petitioned the U.S. Supreme Court for certiorari on the issue of whether it could be required to pay notice costs it was likely to be unable to recover without a prior determination on the merits.

The Supreme Court denied DTD's petition. However, Justice Kennedy wrote separately, joined by Chief Justice Roberts and Justice Sotomayor. The separate opinion stated that although they agreed with the decision to deny the petition for technical reasons, "[t]o the extent that New Jersey law allows a trial court to impose the onerous costs of class notification on a defendant simply because of the relative wealth of the defendant and without any consideration of the underlying merits of the suit, a serious due process question is raised."[28] Justice Kennedy further stated that "there is considerable force to the argument that a hearing in which the trial court does not consider the underlying merits of the class-action suit is not consistent with due process because it is not sufficient, or appropriate, to protect the property interest at stake."

VI. After *DTD*

It seems likely that, in the wake of *DTD*, lower court judges will feel compelled to consider the merits of an action before notice costs. Such consideration could help New Jersey and California, two states currently considered to be favorable to plaintiffs in class action lawsuits.[29] Class action defense lawyers are likely to push this issue because forcing a plaintiff to pay for notice costs reduces the incentive for plaintiffs to bring unmeritorious suits.

However, such progress may be difficult to track because the decisions are unlikely to be published. It is

therefore likely that if a published opinion adopting or rejecting *DTD* is made public, it will be an appellate court decision and will serve as a poor gauge for measuring the impact of *DTD* in trial courts.

Even if courts adopt *DTD* as the proper interpretation of the Due Process Clause, several important issues remain in setting the minimum constitutional standard for requiring a defendant to pay notice costs. One important issue is what type of hearing will be sufficient to provide for notice costs. The Supreme Court, in *Eisen*, voiced the concern that "in the absence of established safeguards, [a preliminary hearing to determine who should pay the notice costs] may color the subsequent proceedings and place an unfair burden on the defendant."[30] Judge Clark's dissent in *Civil Service* quoted this concern and held it was a reason to completely bar defendants from being tasked with paying the notice costs.

In contrast, *McFoy* argued that *Eisen's* concerns were limited to the specific type of hearing with which it was dealing.[31] Similarly, New York and the District of Columbia explicitly require such hearings prior to forcing a defendant to pay notice costs.[32]

It is hard to see a basis for distinguishing a preliminary hearing for an injunction and one for notice costs. Therefore, it seems likely that courts will agree with *McFoy*'s interpretation of *Eisen* and use preliminary hearings. Potentially, these courts can overcome *Eisen*'s concerns by setting a higher standard before requiring a defendant pay for notice. Alternatively, a court could reject evidence that would be inadmissible at a regular trial, thereby alleviating *Eisen*'s concern.

A second question with which courts will have to grapple is how the plaintiff's wealth (or lack thereof) and ability to repay the notice costs fit into the picture. As *Berland* pointed out, the purpose of shifting costs is to allow plaintiffs who can't afford the notice costs to proceed with meritorious suits.[33] On the other hand, as discussed above, several courts have held that the plaintiff's inability to repay the cost of notice if it loses weighs in defendants' favor on the constitutional issue.[34] The Supreme Court suggested it holds this view as well.[35]

Another potential outcome is that the class of federal suits in which defendants can be required to pay notice costs may change.[36] Potentially, this issue may be visible earlier than the issue of *DTD*'s applicability to state lawsuits due to the greater reporting of federal district court decisions and because the collateral order doctrine would allow such a determination to be challenged as a matter of right.[37]

VII. Final Thoughts

Although at the moment *DTD* is merely a historical footnote, many businesses believe that it may become a major component in what they see as the fight to protect them from unmeritorious class action lawsuits and judicial blackmail. The identity of the three justices who signed Justice Kennedy's opinion, representing the right, center, and left of the Supreme Court, suggests that these concerns reflect a consensus on the Court and are not merely the view of "right-wing" business interests. Therefore, it is likely that the issue of whether defendants can be forced to finance a suit against themselves will remain important in the coming years and that lawyers across the U.S. will use *DTD* to protect their clients' interests against unmeritorious suits.

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Endnotes

1 558 U.S. __, 130 S. Ct. 7, 175 L. Ed. 2d 300 (2009).

2 *See, e.g.,* Posting of Lyle Denniston to SCOTUSblog, http://www.scotusblog.com/court-to-hear-new-enron-case/#more-11672 (Oct. 13, 2009, 10:11 ET).

3 *See, e.g.,* Posting of Jonathan H. Adler to The Volokh Conspiracy, http://volokh.com/2009/10/14/is-justice-sotomayor-concerned-about-the-cost-of-class-actions/ (Oct. 14, 2009, 9:15 ET).

4 *See, e.g.,* Klay v. Humana Inc., 382 F.3d 1241, 1274-1275 (11th Cir. 2004) (citing to several cases that raise the concern that class action certification creates pressure on defendants to settle unmeritorious lawsuits and referring to this as judicial blackmail).

5 The facts are based on the record and the petitioner's statement of facts. All the underlying documents are available from the authors and may be retrieved by e-mailing them at acutler@ballonstoll.com.

6 Fed. R. Civ. P. 23(c)(2).

7 *Compare* Sch. Dist. of Phila. v. Harper & Row Publishers, Inc., 267 F. Supp. 1001 (E.D. Pa. 1967) (requiring the court to send out notice), *with* Katz v. Carte Blanche Corp., 53 F.R.D. 539 (W.D. Pa. 1971) (holding that the default rule is plaintiff pays for notice), *and* Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969) (applying a multi-factor test).

8 *E.g., Berland*, 48 F.R.D. at 131-132.

9 *Id.*; Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022 (E.D. Pa. 1970).

10 317 F. Supp. 1022 (E.D. Pa. 1970).

11 417 U.S. 156, 169-72 (1974).

12 *Id.* at 159.

13 *See generally* 370 F.2d 119 (2d Cir. 1966); 391 F.2d 555 (2d Cir. 1968); 479 F.2d 1005 (2d Cir. 1973).

14 The district court decision can be found at 54 F.R.D. 565, 573 (S.D.N.Y. 1972).

15 *Eisen*, 417 U.S. at 177-179.

16 *See id.*

17 *See, e.g.,* Philip Stephen Fuoco & Robert F. Williams, *Class Actions In New Jersey State Courts*, 24 Rutgers L.J. 737, 767 (1993) (discussing New Jersey R. 4:32-2).

18 22 Cal. 3d 362 (1978).

19 *Id.* at 377.

20 *Id.* at 378.

21 *Id.* at 382 (Clark, J., dissenting).

22 *Id.* at 382-383.

23 *Id.* at 379-381 (majority opinion).

24 170 W. Va. 526, 535 (1982).

25 *Id.* at 534 (emphasis added).

26 *Id.*

27 *See, e.g.,* State v. Nemes, 405 N.J. Super. 102 (N.J. Super. Ct. App. Div. 2008) (contrasting the federal collateral order doctrine with New Jersey's rules, which require permission from a court to appeal a collateral order).

28 DTD v. Wells, 558 U.S. __, 130 S. Ct. 7, 175 L. Ed. 2d 300 (2009).

29 *See, e.g.,* Laura M. Franze, M. Brett Burns & Roland M. Juarez, *Sleepless in California*, Financier Worldwide Mag. (Financier Worldwide/Hunton & Williams), Sept. 2009, *available at* http://www.hunton.com/files/tbl_s47Details/FileUpload265/2718/Financier_Worldwide_Sleepless_in_California_9.09.pdf(discussing California's pro-plaintiff stance); New Jersey Consumer Class Actions, http://www.reedsmith.com/practice_areas_&_industry_groups.cfm?widCall1=customWidgets.content_view_1&cit_id=10664&cta_tax_id=12095 ("Recent pro-consumer decisions in New Jersey courts threaten to make the state a national magnet for consumer class actions.").

30 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974).

31 *McFoy*, 170 W. Va. at n.4.

32 N.Y. CPLR 904(d), D.C. Civ. Rule 23(c)(2).

33 Berland v. Mack, 48 F.R.D. 121, 131 (S.D.N.Y. 1969); *see also McFoy*, 170 W. Va. at n.15.

34 *See* Cusick v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 317 F. Supp. 1022 (E.D. Pa. 1970); Civil Serv. Employees Ins. Co. v. Superior Court of S.F., 22 Cal. 3d 362 (1978) (Clark, J., dissenting).

35 "Where a court has concluded that a plaintiff lacks the means to pay for class certification, the defendant has little hope of recovering its expenditures later if the suit proves meritless; therefore, the court's order requiring the defendant to pay for the notification 'finally destroy[s] a property interest.'" DTD v. Wells, 558 U.S. __, 130 S. Ct. 7, 175 L. Ed. 2d 300 (2009) (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 433-34 (1982)).

36 *See, e.g.,* Oppenheimer Fund v. Sanders, 437 U.S. 340 (1978) (giving the lower courts discretion to make the defendant bear certain costs of notice).

Mississippi Supreme Court to Rule on Constitutionality of Non-Economic Damage Caps

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The reforms made in these three areas—venue, joinder, and damages—had a significant impact. In 2004, Mississippi was dropped from ATRA's Judicial Hellhole's report and has not returned.[7] A 2008 story in the *Wall Street Journal* documented the reform's other effects, including a ninety percent reduction in the number of medical malpractice claims, a thirty to forty-five percent reduction in the cost of medical malpractice insurance, billions of dollars in new business investment, and thousands of new jobs.[8]

Case History

Double Quick involves one leg of these tort reforms. The reform at issue in this case is the $1,000,000 limit on non-economic damages in civil cases. Non-economic damages are cash awards paid to tort victims to compensate them for things like pain, suffering, loss of companionship, and other harms that are difficult to quantify monetarily. Because damages of this type are so subjective, the amount awarded can vary greatly, even in very similar cases. This lack of predictability can lead to extremely large jury awards, and, given the uncertainty of outcome, additional pressure to settle.

This case arises from a shooting that took place outside a Double Quick convenience store.[9] Mr. Lymas was injured and sued Double Quick for not doing enough to prevent the shooting. A jury awarded Mr. Lymas approximately $700,000 in compensatory damages and an additional $3,500,000 in non-economic damages.[10] The judge later reduced the non-economic damages to $1,000,000 in accordance with the state's non-economic damage cap.[11]

Double Quick appealed the ruling on liability to the Mississippi Supreme Court, and Mr. Lymas cross-appealed the reduction of his award.[12] If the court upholds the ruling