A Class Action Trend Tests Limit Of Courts' Equity Powers

By **Jay Tambe, Louis Chaiten and Sarah Welch** (September 30, 2024)

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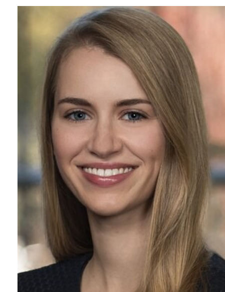
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A troubling trend has developed in federal class action litigation as some plaintiffs counsel and judges attempt to push injunctive relief classes under Rule 23(b)(2) of the Federal Rules of Civil Procedure beyond the rule's traditional limits.

Rule 23(b)(2) allows certification of a mandatory, non-opt-out injunctive relief class when, among other requirements, "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

Litigants and courts are increasingly testing the limits of federal courts' equitable powers under Rule 23(b)(2).

To take one example, in Hardwick v. 3M Co., a putative class sought an injunction to create and fund a science panel that would study the effects of PFAS on human health, as well as potential medical monitoring depending on the science panel's findings.[1]

The U.S. District Court for the Southern District of Ohio certified the class in 2022, ignoring the lack of historical precedent for the equitable relief sought.[2] But the U.S. Court of Appeals for the Sixth Circuit granted review of the class certification decision, and last year **vacated and remanded** with instructions to dismiss the case on standing grounds.[3]

In its decision granting review, the Sixth Circuit explained it was "somewhat difficult to see why the district court would have authority to award the remedy that plaintiffs seek," because there was no reason to think that any historical precedent supported that sort of injunction.[4]

Similar requests for ambitious and novel forms of relief include, for example, Goodluck v. Biden, where the U.S. Court of Appeals for the District of Columbia Circuit earlier this year **held** that a district court lacked authority to order the federal government "to reserve, process, and issue visas on terms devised by the courts" because that remedy was "irreconcilable" with traditional equity practice;[5] and Digital Media Solutions LLC v. South University of Ohio LLC, where the Sixth Circuit last year held that "historical principles of equity" did not permit courts to issue an injunction protecting "the non-receivership assets of non-receivership parties."[6]

Along similar lines, the U.S. District Court for the Eastern District of New York recently suggested that it is considering an injunction that could amount to a similarly expansive and unprecedented exercise of federal courts' equitable powers — one that could have profound implications not just for the particular industry involved in the case but for class action and antitrust litigation more generally.

In the long-running multidistrict litigation over Visa and Mastercard merchant fees, known as In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, Chief Judge Margo K. Brodie of the U.S. District Court for the Eastern District of New York has **indicated** the view that she can determine and set fair interchange fees if the merchants prevail.[7]

Just as the district judge in Hardwick lacked authority to order the creation and funding of a science panel, it is difficult to see how Judge Brodie would have the power to issue an injunction setting rates in the Interchange Fee antitrust litigation.

Federal courts' equitable powers are limited by history. In the key decision regarding the equitable powers of federal courts, Grupo Mexicano de Desarollo SA v. Alliance Bond Fund Inc., the U.S. Supreme Court in 1999 held that federal courts issuing equitable relief under Rule 65 of the Federal Rules of Civil Procedure are limited to forms of relief that were "traditionally accorded by courts of equity."[8]

This is because the federal courts' jurisdiction over equitable actions traces back to the Judiciary Act of 1789, and the authority granted by the Judiciary Act was the authority that existed at the time — "the jurisdiction in equity exercised by the High Court of Chancery at the time of the adoption of the Constitution and the enactment of the original Judiciary Act."[9]

In other words, federal courts are bound by the principles governing English chancery courts at the time of the U.S. Constitution's adoption, and they can issue only the kinds of injunctions embraced by that tradition.[10]

So, for example, in Grupo Mexicano, the Supreme Court held that, in a lawsuit seeking money damages, a federal court could not use Rule 65 to issue a preliminary injunction barring a defendant from transferring assets in which no lien or equitable interest was claimed.[11] The court considered the closest analogy offered to traditional equity practice, known as a "creditor's bill."[12] But that relief could be obtained "only by a creditor who had already obtained a judgment establishing the debt."[13]

For further support, the court relied on precedents from federal courts acknowledging that the requested relief was inconsistent with historical equity practice.[14] The court also observed that "the English Court of Chancery, from which the First Congress borrowed in conferring equitable powers on the federal courts, did not provide an injunctive remedy" like the one requested "until 1975."[15] For all those reasons, Rule 65 barred federal courts from expanding on that practice.[16]

Ultimately, the court concluded in Grupo Mexicano that changes to the scope of the federal courts' equity powers must come from Congress, not the courts.[17] So the first question when encountering a novel equitable remedy is what authority could support it.

If the only authority is one of the Federal Rules of Civil Procedure, including Rule 65 and Rule 23(b)(2), the answer is straightforward. Grupo Mexicano has already established that Rule 65 does not expand the federal courts' authority to issue equitable relief. And Rule 23(b)(2) has no language suggesting that it attempts to do so, either — nor could it, because the Rules Enabling Act forbids rules that "abridge, enlarge or modify any substantive right."[18] That language bars rules that purport to alter "the available remedies" in litigation.[19]

Return to the Interchange Fees litigation for an example of how that analysis plays out. The possible

authorities for a rate-setting injunction are Rule 65, Rule 23(b)(2) and the Clayton Act's authorization for injunctive relief in antitrust cases.[20]

As already explained, Rule 65 and Rule 23(b)(2) cannot support novel equitable relief. And the Clayton Act does not purport to confer authority to grant any novel equitable relief. Instead, it invokes the traditional scope of equity by authorizing injunctions "under the same conditions and principles as injunctive relief … is granted by courts of equity, under the rules governing such proceedings."[21] So it appears that no rule or statute permits a break with traditional equity practice in the antitrust context of the Interchange Fees litigation.

Unless Congress has authorized courts to depart from traditional equitable remedies, the next step is to determine whether the form of relief in question is a traditional equitable remedy. Equity is "flexible," according to the Grupo Mexicano ruling, but that does not mean that courts enjoy unbounded discretion to issue new remedies.[22] Courts can and must look to the forms of relief traditionally awarded in equity actions, as well as to principles of equity more generally.

And courts should be especially cautious about granting a new form of relief for an old problem. For example, in Grupo Mexicano, the dissent argued that equitable remedies available to creditors must be allowed to evolve to account for the "increasing complexities of modern business relations," but the majority rejected that argument because "there is absolutely nothing new about debtors' trying to avoid paying their debts," even through "sophisticated strategies."[23]

Take the possible rate-setting injunction in the Interchange Fees litigation again. Federal courts have reviewed rates set by agencies to determine whether they are lawful.[24] In particular, courts closely reviewed rates set for railroads and utilities in a robust line of cases during the Lochner era, so named for the 1905 Supreme Court decision in Lochner v. New York.[25] But even in those cases, federal courts have long disclaimed power to modify or set rates themselves.[26]

The antitrust context involves the same principles; in fact, courts are especially unwilling to set rates in the antitrust context.[27] Antitrust laws traditionally regulate practices, not prices. As then-U.S. Circuit Judge Stephen Breyer summarized in the U.S. Court of Appeals for the First Circuit's 1990 decision in Town of Concord v. Boston Edison Co., "antitrust courts normally avoid direct price administration."[28]

According to "Antitrust Law: An Analysis of Antitrust Principles and Their Application" by Phillip Areeda and Herbert Hovenkamp, antitrust courts "correctly regard as uncongenial and foreign to the Sherman Act the burden of" supervising businesses' "pricing decisions."[29]

More broadly, principles of equity can determine whether a remedy accords with historical equity practice.

Attempting to transform what is really a Rule 23(b)(3) damages class into a Rule 23(b)(2) class, perhaps because of a perception that the bar is lower for certifying a Rule 23(b)(2) class than a Rule 23(b)(3) class and because of the possibility of preventing opt-outs from Rule 23(b)(2) classes, can end up hamstringing the relief available. It is a "basic doctrine of equity jurisprudence that courts of equity should not act … when the moving party has an adequate remedy at law," according to the Supreme Court's 1992 Morales v. TWA decision.[30]

In other words, a court would exceed traditional equity practice if it grants an injunction to a Rule 23(b)(2) class when a damages remedy is available.

When it comes to equitable relief, creativity is no virtue. Courts and parties alike should be cautious about attempts to obtain or issue unprecedented injunctions.

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Disclosure: Jones Day represented two of the defendants in Hardwick v. 3M Co.

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[1] Hardwick v. 3M Co., 589 F. Supp. 3d 832 (S.D. Ohio 2022).

[2] Id.

[3] Hardwick v. 3M Co., 87 F.4th 315, 321 (6th Cir. 2023); In re 3M Co., 2022 WL 4149090 (6th Cir. Sept. 9, 2022).

[4] Id. at *5 n.3

[5] Goodluck v. Biden, 104 F.4th 920 (D.C. Cir. 2024).

[6] Digital Media Solutions LLC v. South University of Ohio LLC, 59 F.4th 772 (6th Cir. 2023).

[7] MDL 1720. Doc. 9342 at 59-60; Doc. 9344 at 13.

[8] Grupo Mexicano de Desarollo S.A. v. Alliance Bond Fund Inc., 527 U.S. 308, 319-20 (1999).

[9] Id. at 318 (quoting A. Dobie, Handbook of Federal Jurisdiction and Procedure 660 (1928)); see Atlas Life Ins. Co. v. W.I. Southern Inc., 306 U.S. 563, 568 (1939).

[10] Id.

[11] Id. at 310, 333.

[12] Grupo Mexicano, 527 U.S. at 319.

[13] Id.

[14] Id. at 324-27.

[15] Id. at 327.

[16] Id.

[17] Id. at 322, 329.

[18] 28 U.S.C. §2072(b).

[19] Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins. Co., 559 U.S. 393, 394 (2010).

[20] See 15 U.S.C. §26.

[21] Id.

[22] Grupo Mexicano, 527 U.S. at 322.

[23] Id. at 322 (alteration accepted); id. at 337 (Ginsburg, J., dissenting).

[24] See, e.g., Smyth v. Ames, 169 U.S. 466, 546 (1898) ("When a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation are, as an entirety, so unjust as to destroy the value of its property, ... its duty is to take into consideration the interest both of the public and of the owner of the property.").

[25] See generally, e.g., Stephen A. Siegel, Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation, 70 Va. L. Rev. 187 (1984). "The era is named for Lochner v. New York, 198 U.S. 45 (1905), in which the United States Supreme Court, over strong dissent, voided maximum employment hours legislation for bakeries as violating the due process clause of the fourteenth amendment."

[26] See Keller v. Potomac Elec. Power Co., 261 U.S. 428, 440-44 (1923); Armstrong v. Exceptional Child Center Inc., 575 U.S. 320, 334-35 (2015); Arsberry v. Illinois, 244 F.3d 558, 562 (7th Cir. 2001) (remarking on the "historical antipathy to rate setting by courts").

[27] Court enforcement of a settlement in which the parties agree on a maximum rate or rate freeze is a different fact pattern and a distinct kind of remedy from direct judicial ratesetting. See, e.g., Sullivan v. DB Invs. Inc., 667 F.3d 273, 312 (3d Cir. 2011) ("[A] district court's certification of a settlement simply recognizes the parties' deliberate decision to bind themselves according to mutually agreed-upon terms without engaging in any substantive adjudication of the underlying causes of action.").

[28] Town of Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990).

[29] Phillip E. Areeda, Herbert Hovenkamp, "Antitrust Law: An Analysis of Antitrust Principles and Their Application" §720(b).

[30] Morales v. TWA, 504 U.S. 374, 381 (1992) (quoting O'Shea v. Littleton, 414 U.S. 488 (1974)).