

# The Burger Court Opinion Writing Database

## *Eisen v. Carlisle & Jacquelin*

417 U.S. 156 (1974)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 22, 1974

Re: 73-203 - Eisen v. Jacquelin

Dear Lewis:

Please join me.

Regards,

*LRB*

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 22, 1974

Re: 73-203 - Eisen v. Jacquelin

Dear Lewis:

Please join me.

Regards,

WSB

Mr. Justice Powell

Copies to the Conference

Lewis, I hope this will "contain" the  
drift for government-by-class-  
action. What we need is  
vigorous action by appropriate  
regulatory agencies when these  
problems get out of line  
WSB

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

April 30, 1974

MEMORANDUM TO THE CONFERENCE:

Re: 73-203 Eisen v. Carlisle.

I will in due course be circulating a dissenting opinion  
in this case.

  
William O. Douglas

✓  
1001  
Please print me  
JH

✓ To : The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Marshall

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-203

5-6

Morton Eisen, Etc.,  
Petitioner.  
v.  
Carlisle & Jacquelin et al. } On Writ of Certiorari to the  
United States Court of  
Appeals for the Second  
Circuit.

[May —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

While I am in general agreement with the phases of this case touched on by the Court, its opinion falls in my view to reach the issue that I think should be dispositive of the litigation at this stage.

Rule 23 (c)(4) provides, "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

As Judge Oakes, speaking for himself and Judge Timbers, said below:

"The plaintiff class might, for example, be divided into much smaller subclasses . . . of odd lot buyers for particular periods, and one subclass treated as a test case, with the other subclasses held in abeyance. Individual notice at what would probably be a reasonable cost could then be given to all members of the particular small subclass who can be easily identified." 479 F. 2d, at 1023

Or a subclass might include those on monthly investment plans, or payroll deduction plans run by brokerage

Addition  
6-8

*[Handwritten signature]*

To : The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Harlan  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Souter

5th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 73-203

Circulated:

Re-circulated:

*5-8*

Morton Eisen, Etc.,  
Petitioner,  
v.  
Carlisle & Jacquelin et al. } On Writ of Certiorari to the  
United States Court of  
Appeals for the Second  
Circuit.

[May —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

While I am in general agreement with the phases of this case touched on by the Court, its opinion fails in my view to reach the issue that I think should be dispositive of the litigation at this stage.

Rule 23 (c)(4) provides, "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

As Judge Oakes, speaking for himself and Judge Timbers, said below:

"The plaintiff class might, for example, be divided into much smaller subclasses . . . of odd lot buyers for particular periods, and one subclass treated as a test case, with the other subclasses held in abeyance. Individual notice at what would probably be a reasonable cost could then be given to all members of the particular small subclass who can be easily identified." 479 F. 2d, at 1023.

Or a subclass might include those on monthly investment plans, or payroll deduction plans run by brokerage

To : The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

6th DRAFT

**SUPREME COURT OF THE UNITED STATES** Douglas, J.

No. 73-203

Circulate: \_\_\_\_\_  
Recirculated: 5-15

Morton Eisen, Etc., } On Writ of Certiorari to the  
Petitioner, } United States Court of  
v. } Appeals for the Second  
Carlisle & Jacquelin et al. } Circuit.

[May —, 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting in part.

While I am in general agreement with the phases of this case touched on by the Court, I add a few words because its opinion does not fully explore the issues which will be dispositive of this case on remand to the District Court.

Rule 23 (c)(4) provides, "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

As Judge Oakes, speaking for himself and Judge Timbers, said below:

"The plaintiff class might, for example, be divided into much smaller subclasses . . . of odd lot buyers for particular periods, and one subclass treated as a test case, with the other subclasses held in abeyance. Individual notice at what would probably be a reasonable cost could then be given to all members of the particular small subclass who can be easily identified." 479 F. 2d, at 1023.

Or a subclass might include those on monthly investment plans, or payroll deduction plans run by brokerage

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 8, 1974

RE: No. 73-203 Eisen v. Carlisle & Jacquelin

Dear Bill:

Please join me in your dissent in the  
above.

Sincerely,



Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

May 8, 1974

73-203, Eisen v. Carlisle & Jacquelin

Dear Lewis,

I am glad to join your opinion for  
the Court in this case.

Sincerely yours,

P.S.  
/

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

*File*

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 6, 1974

Re: No. 73-203 - Eisen v. Carlisle & Jacquelin

Dear Lewis:

Perhaps I do not understand the posture of this case and all of the implications of the disposition your most recent circulation suggests. But I shall risk a comment or two.

You put aside questions of manageability and fluid recovery and decide only notice-related issues, this on the basis that the District Court's orders were final only with respect to notice. This seems to say that the Court of Appeals had no jurisdiction of issues other than notice, although it sustained its own jurisdiction on the death-knell-retention theory and you do not purport to deal with that basis for jurisdiction in the Court of Appeals. See your text at page 12.

If our rejection of the death knell theory is not to be implied, then it appears that even if the Court of Appeals had jurisdiction of all issues under that approach, we nevertheless choose to decide only the notice-related issues,

leaving unresolved manageability and fluid recovery. Indeed, the vacation of the judgment of the Court of Appeals seems complete and includes that Court's disposition of the other issues, even though its jurisdiction to decide them is not cleanly disposed of here.

Unless we are to reject the death knell approach in plenary fashion and do not reach manageability and fluid recovery because neither the Court of Appeals nor this Court has jurisdiction to decide them, I wonder if there is good reason for putting those issues aside, especially since, as you now make clear, the plaintiff is not foreclosed from proposing another class as to which he is willing to pay the freight.

Perhaps we could chat about this at some convenient time.

Sincerely,



Mr. Justice Powell

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R WHITE

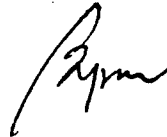
May 10, 1974

Re: No. 73-203 - Eisen v. Carlisle & Jacquelin

Dear Lewis:

Please join me.

Sincerely,

A handwritten signature in dark ink, appearing to be "Byron", written in a cursive style.

Mr. Justice Powell

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 23, 1974

Re: No. 73-203 -- Eisen v. Jacquelin

Dear Bill:

Please join me.

Sincerely,



T.M.

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

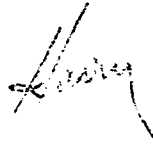
May 15, 1974

Dear Lewis:

Re: No. 73-203 - Eisen v. Carlisle  
and Jacquelin

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES <sup>Powell, J.</sup>

No. 73-203

Circulated: APR 30 1974

Recirculated: \_\_\_\_\_

Morton Eisen, Etc.,	}	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
Petitioner,		
v.		
Carlisle & Jacquelin et al.		

[May —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

On May 2, 1966, petitioner filed a class action on behalf of himself and all other odd-lot<sup>1</sup> traders on the New York Stock Exchange (the Exchange). The complaint charged respondents with violations of the anti-trust and securities laws and demanded damages for petitioner and his class. Eight years have elapsed, but there has been no trial on the merits of these claims. Both the parties and the courts are still wrestling with the complex questions surrounding petitioner's attempt to maintain his suit as a class action under Rule 23 of the Federal Rules of Civil Procedure. We granted certiorari to resolve some of these difficulties. — U. S. — (1973).

I

Petitioner brought this class action in the United States District Court for the Southern District of New York. Originally, he sued on behalf of all buyers and sellers of odd-lots on the Exchange, but subsequently the class was limited to those who traded in odd-lots

<sup>1</sup> Odd-lots are shares traded in lots of less than a hundred. Shares traded in units of a hundred or multiples thereof are round-lots.

pp 17, 18, 20 + 21

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

2nd DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

Circulated: \_\_\_\_\_

No. 73-203

Recirculated: S-4-74

Morton Eisen, Etc.,  
Petitioner,  
v.  
Carlisle & Jacquelin et al. } On Writ of Certiorari to the  
United States Court of  
Appeals for the Second  
Circuit.

[May —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

On May 2, 1966, petitioner filed a class action on behalf of himself and all other odd-lot<sup>1</sup> traders on the New York Stock Exchange (the Exchange). The complaint charged respondents with violations of the anti-trust and securities laws and demanded damages for petitioner and his class. Eight years have elapsed, but there has been no trial on the merits of these claims. Both the parties and the courts are still wrestling with the complex questions surrounding petitioner's attempt to maintain his suit as a class action under Rule 23 of the Federal Rules of Civil Procedure. We granted certiorari to resolve some of these difficulties. — U. S. — (1973).

I

Petitioner brought this class action in the United States District Court for the Southern District of New York. Originally, he sued on behalf of all buyers and sellers of odd-lots on the Exchange, but subsequently the class was limited to those who traded in odd-lots

<sup>1</sup> Odd-lots are shares traded in lots of less than a hundred. Shares traded in units of a hundred or multiples thereof are round-lots,

PP 14, 18, 20, 21

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

3rd DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 73-203

Recirculated MAY 10 1974

Morton Eisen, Etc.,  
Petitioner,  
v.  
Carlisle & Jacquelin et al. } On Writ of Certiorari to the  
United States Court of  
Appeals for the Second  
Circuit.

[May —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

On May 2, 1966, petitioner filed a class action on behalf of himself and all other odd-lot<sup>1</sup> traders on the New York Stock Exchange (the Exchange). The complaint charged respondents with violations of the anti-trust and securities laws and demanded damages for petitioner and his class. Eight years have elapsed, but there has been no trial on the merits of these claims. Both the parties and the courts are still wrestling with the complex questions surrounding petitioner's attempt to maintain his suit as a class action under Rule 23 of the Federal Rules of Civil Procedure. We granted certiorari to resolve some of these difficulties. — U. S. — (1973).

I

Petitioner brought this class action in the United States District Court for the Southern District of New York. Originally, he sued on behalf of all buyers and sellers of odd-lots on the Exchange, but subsequently the class was limited to those who traded in odd-lots

<sup>1</sup> Odd-lots are shares traded in lots of less than a hundred. Shares traded in units of a hundred or multiples thereof are round-lots,

May 29, 1974

MEMORANDUM TO THE CONFERENCE:

Holds for No. 73-203 Eisen v. Carlisle & Jacquelin

No. 73-381, Winokur, et al v. Bell Federal S & L Ass'n.

Petitioners brought a class action under SEC Rule 10(b)(5) against respondent savings and loan associations. Respondents sell certificates of deposit which are advertised to pay dividends that are equivalent to interest compounded daily. Petitioners asserted that respondents committed securities fraud since withdrawal on the last day of a quarter produces no interest at all and deposits made on the 10th day of the month collect no interest until the first of the next month. Petitioners sought to represent a class of all S & L "investors" who have been deprived of interest under the above circumstances.

The USDC (N.D. Ill.) dismissed the class action, finding that petitioners could not satisfy the requirements of Fed. Rule Civ. Proc. 23(a)(2) because there were significant questions of fact not common to all members of the proposed class. Petitioners attempted to appeal the dismissal of the class action as a final decision under 28 U.S.C. 1291. Pointing out that the claims of individual class members did not exceed \$12, petitioners argued that the district court's ruling was appealable under the "death knell" doctrine of CA 2 in Eisen I, 370 F. 2d 119 (1966), and under the "collateral

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

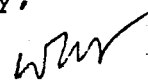
May 22, 1974

Re: No. 73-203 - Eisen v. Carlisle & Jacquelin

Dear Lewis:

Please join me in the opinion for the Court you have prepared in this case.

Sincerely,



Mr. Justice Powell

Copies to the Conference