

MARCI EISENSTEIN

Leading Complex Class Action Litigation Defense

by Olivia Clarke

Marci Eisenstein describes herself as a team builder—someone who knows how to bring the best people together to accomplish a client's goals.

A partner at **Schiff Hardin LLP**, Eisenstein concentrates her practice on class action litigation defense. She has been at the firm since 1979 and has litigated more than 50 consumer-based class action challenges in federal and state courts throughout the

team where we work together, where we deliver something really terrific for the client.”

Eisenstein is co-leader of the firm's reinsurance and insurance and class action litigation groups, a member of the firm's executive committee, and a co-chair of its diversity committee.

“I love the procedure. I love the strategy,” Eisenstein says. “I often am dealing in cases where the adversary is really the other lawyer.

writing and enjoyed structuring an argument.

She and her now-husband, John Treece, went on their first date on her 20th birthday. He was a year ahead of her in school, and his decision to attend law school may have influenced her desire to also become a lawyer, she says.

Treece attended Columbia University School of Law, and she went to New York University School of Law.

“I thought it was really positive to be with someone who always understood the pressures you were under, what you were dealing with,” she says. “I think, on balance, to have somebody who has had a shared experience and helpful substantive input, and also understands the milieu of the law and the law firm, has been really helpful.”

They relocated to Chicago after Treece got a job at a law firm, and she completed her third year of law school at the University of Chicago Law School. She interviewed with Schiff Hardin and received an offer to work there during her third year.

“Schiff was a place that really attracted me,” she says. “There was a commitment to pro bono, which I found very attractive, and it was really a very diverse place.

“In those days, there was the blue-blood waspy firm, the Jewish firm, and then there were the Catholic firms, and I didn't really want to be in any of those places. Here there was really a mix of people. They came from different backgrounds. They had different political perspectives, a lot of different styles.”

When she started at the firm, one female partner worked there; while that lawyer left the firm about a year after Eisenstein started, she still inspired her.

“There were lots of young women here, and it had a great reputation and a wonderful spirit,” she says. “To be honest, I loved the art in the hallways. It was very eclectic, and to me, it reflected that there was an awareness of a bigger world out there. I was very thrilled to get an offer here. I started 30 years ago, and there is no woman lawyer who has been here longer than me.”

When she started at Schiff Hardin, she knew that being a litigator interested her.



country. She regularly represents insurers in nationwide and state class action challenges.

“To tackle these problems, you really need to be able to build a team because, in my view, no one person can do this alone,” Eisenstein says.

“We do partner and team with the local lawyers, who are very helpful and important. But we are also building a team here and identifying the right group of people and tapping into their strengths.

“I really pride myself on having the ability to identify people's strengths and build a cohesive

In other words, the other lawyer comes up with the plaintiffs, but it's their own kind of creativity and imagination that drives the case, and you need to out-manuever them.”

Getting Started

Originally from Skokie, Eisenstein, 55, never possessed a deep desire to become a lawyer. No one in her family worked as a lawyer, and she was the daughter of a doctor and a teacher. But she loved oral advocacy and

Many of her colleagues felt she received the least desirable office because it was located between the leader of the litigation practice and his lieutenant. But it turned out to be a good thing, because it gave her many opportunities to handle interesting cases, and many of the clients she worked with in her first two years remain her clients today.

She began working with some significant insurance clients. Various antitrust challenges were being made involving these clients' claims practices, so early on, she litigated the scope of certain exemptions to the applicability of the antitrust laws with regard to the insurance business.

"In the old days, plaintiffs launched antitrust attacks that were pending in federal court against insurance companies, so I got to know these companies," she says. "I got to understand how they work in the context of these challenges.

"And then, 20 or more years ago, the plaintiffs' lawyers morphed in the nature of their attacks on these companies. They essentially started challenging the same kinds of practices, but they devised different theories. ...And they decided they preferred to be in state court, and they came up with state-based claims. I knew the clients. I really understood the nature of their claims business, and the nature of the attacks on these companies started to morph, and I was just there."

When she first started practicing law, a company may have faced a few consumer-based class actions at a given time, but the number of class actions soon increased, and a client could simultaneously become part of as many as 60 of these types of cases.

"The whole thing exploded, and I was sort of there at the beginning of it," Eisenstein says. "I came to it from a federal antitrust background, but I understood the business and understood the practices under attack. And there was this whole procedural arena that opened up."

A Game of Chess

Eisenstein finds consumer-based class action work to be a complex area, which suits her fine. She loves procedure.

These cases have drawn very high-level lawyers, both in-house and outside lawyers, which means she gets to work with quality legal teams, she says. And these cases often take her to very remote areas.

"In the old days, the fight was all about the forum," she says. "So if you could figure out a way, in many cases, to remove the case to federal court, it was a whole different ball game.

"A lot of it was, 'How do I get this case into federal court?' I have the experience that whenever I was able to effectively remove a case into federal court, I would be able to quickly dispose of it. 'How do I create the arguments that are going to defeat the class action certification?' It was kind of a game of chess, and the moves the plaintiffs make would change and morph, and you had to anticipate them and out-smart them."

The cases she handles, she says, are high-stakes litigation in terms of exposure. Enormous amounts of dollars are attached to them. If there is one issue or glitch, multiply that by millions of people, then double or triple the damages, and the legal team has a massive challenge on its hands, she says.

While many cases she's handled have been meaningful, *Avery v. State Farm*, which was filed in 1997 and tried in 1999 in southern Illinois, was probably the most influential.

Eisenstein was one of the lead trial lawyers in the *Avery* trial, one of the few multi-state insurance consumer class actions ever to have gone to trial. In *Avery*, a 48-state class action composed of millions of State Farm policyholders sued to recover billions of dollars of damages they claimed to have incurred when State Farm adjusted its auto damage claims by specifying non-original equipment manufacturer parts.

In August 2005, the Illinois Supreme Court reversed the trial court judgment of more than \$1 billion and, relying largely on the trial and pre-trial record developed by Eisenstein and her team, decertified the class and directed dismissal of the case with prejudice.

"It was a total victory," she says. "This case changed the landscape in Illinois. I kind of lived through the eye of the storm and found my way to the other side, and that case became one of the poster children for the Class Action Fairness Act.

"After that judgment came out, there was an avalanche of litigation filed in southern Illinois. I became involved in litigating a lot of those cases. I suppose that was kind of a defining experience."

Eisenstein has built her practice and spread it across many different clients, says Schiff Hardin Managing Partner Ron Safer. She also plays a tremendous role in managing the firm and regularly mentors lawyers, he says.

"I think she is one of the most accomplished lawyers in the country," Safer says. "She has designed strategies for complex class actions and executes those strategies flawlessly. One thing I do as a managing partner is client

feedback interviews, and the clients consistently tell me that Marci is among the elite lawyers in the nation.

"I think she is not only one of the truly elite lawyers in the country, but she is a pleasure as a colleague. She is one of the most loyal, hard-working people that I know. She always has a positive approach."

Robert Helfand, assistant vice president and senior counsel for The Hartford, has worked with Eisenstein for about four years, but she's worked with the insurance company for many years before that.

They have handled five different class actions together, and four were dismissed with prejudice and never got to class certification, Helfand says. The fifth case was settled. That says a lot about Eisenstein's talent, he says.

"She is extremely knowledgeable and extremely thorough," he says. "The reason I like to use Marci is that I feel confident that nothing is being overlooked on the cases we entrust to her."

Eisenstein enjoys her practice and working at Schiff Hardin. The firm has been a second home to her, and she's developed many lasting relationships.

"I think I'm my own person," she says. "I try to have a lot of authenticity about what I do. I don't think I fit into a mold. I am very comfortable being who I am. I kind of love that this place not only allows that but appreciates that and fosters that."

John Treece, Eisenstein's husband and a partner at Sidley Austin LLP, says that because of her intense loyalty to her clients, his wife is incredibly attentive to their needs and to the details of each case.

"She's exceptionally strong in formulating a strategy and pursuing that strategy, and that has oftentimes resulted in the dismissal of cases that other firms may have previously handled but were unable to achieve the same results," he says. "In addition, she is unbelievably resilient, even when she litigates in defendant-hostile environments.

"She understands procedure better than just about anyone and how to use procedure to the client's advantage. She has obviously had as much or more insurance class action work than anyone in the city and has been enormously successful at it."

Schiff Hardin Partner Wally Greenough has known Eisenstein her entire career, and they remain long-time friends.

She's the type of person who can get by on five hours of sleep, maintaining not only an active practice but an active social life as well,

Greenough says. She enjoys attending traditional social activities, he says, but will also take her friends to quirky events like Talk Cinema or the Old Town School of Folk Music.

She also has an outstanding memory; that can be incredibly useful in complex litigation, but also it can be disconcerting on a personal level, because she remembers details of her friends' lives that they often forget, he says. Still, she makes a wonderful friend because she is an incredible listener.

"She shames you into doing the right things," Greenough says. "She makes sure I send flowers to my mother on Mother's Day. And she will nag you until you do it."

"She's a superb strategic thinker, one of those people who can see both the forest and the trees and figure out the best path to get through the forest in the quickest way possible," he says. "Her most remarkable skill is she's an effective manager, a team captain who remains a team player. I've seen her manage two-dozen people at a time. And she works harder than anyone else on the team."

Eisenstein has reached a point in her career where things are not as hard as they used to be.

But earlier on, juggling her roles as lawyer, mother, and wife was challenging. Her cases often took her away for several months at a time, but her children always said they felt she was always very active and present in their lives.

"There were times when you felt that something had to give in every place," she says. "Or, you'd be home and you were thinking about the job. You were physically there, but you weren't fully emotionally there. It's a demanding job. It's a consuming job. The passion of the job means that sometimes other things get compromised. Especially in those years when my children were younger, it was hard. It was very hard."

She and her husband have two daughters, 26-year-old Many and 22-year-old Brielle. Because Many was diagnosed with diabetes at age 3, Eisenstein has been active in the Juvenile Diabetes Research Foundation.

"When you have a child who has an illness, there is always a window in the back of your head where you are thinking about that," she says. "You are trying to give all you had to give and manage all the people here and also keep life going at home, which was hard. ...But it gets easier, because you get more self-assured, you get more control—not that the clients or courts give you control—but you have a little bit more judgment."

Her husband says it's been quite an accomplishment to raise two children while

both spouses work full-time as lawyers. But the couple understands each other's careers and the time commitments involved.

"Marci is fiercely committed to her family. She's got a lot of energy and an attention to detail that translates to an organized and accomplished life for her and the family," he says. "Although we do slightly different types of litigation, [our similar professions] gives us an empathy for each other and a realistic understanding of the demands made by clients and courts. That allows each of us to know when to back off when the job actually does need to take precedence over other matters."

About 10 years ago, Schiff Hardin started talking about how to organize a proactive approach to develop more diversity in the firm. Eisenstein wanted to get involved because it was something that interested her. Diversity was never a problem at the firm, but the firm was never deliberate about it, she says.

Today, the diversity committee "is not an affinity group. It is not the minority lawyers getting together or the women getting together to address their issues, because then it is not a shared goal. It is really a firm initiative.

"One thing I've also learned is, in my generation, you kind of didn't talk about differences. You were supposed to be color blind, gender neutral. All of those were politically correct ways of handling these issues. What I've learned is you really need to be at a place where you talk about the differences in an open way. I wanted this to be the place where people can really communicate openly about these issues." ■