Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification

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Introduction

Judges have always been gatekeepers, but their gatekeeping tasks have changed a good deal over time.[1] Perhaps the most famous current "gatekeeping" function of judges involves their evaluation of proposed expert testimony. In 1993, the Supreme Court's *Daubert* decision commanded district judges to become "gatekeepers" who scrutinize the validity of scientific expert testimony,[2] and it has since extended this gatekeeping responsibility to include all kinds of expert testimony,[3] while also recognizing that courts of appeals should review district court decisions of this sort under the deferential abuse of discretion standard.[4]

Gatekeeping is often a difficult task, frequently in ways that law school and legal practice did not prepare judges to perform. On re-

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1 By "gatekeeper," I do not mean to limit my focus to judicial decisions at the outset of a lawsuit. Rather, I focus more broadly on judicial decisions regulating the litigation process, including joinder decisions (like class certification) and other decisions about what lawyers can do in the conduct of a lawsuit, such as presentation of evidence, attorney's fee awards, etc. In each of these situations, a judge ultimately must act as a gatekeeper by making a decision on whether the lawyers will be permitted to do what they want to do. Often, these decisions move far beyond the traditional task of "applying law to facts." *See, e.g.*, Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 Wm. & Mary L. Rev. 1997, 2043 (2010) (asserting that the "class certification procedure does provide a second gatekeeping point for evaluating the concerns that drive many critics to label class actions as costly or difficult").

2 *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

3 *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (applying the gatekeeping requirement to experience-based proposed testimony about the cause of a tire failure).

4 *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997) (holding that an abuse of discretion standard should be used in reviewing district court rulings on admissibility of expert opinion evidence).

mand in *Daubert*, for example, Judge Kozinski of the Ninth Circuit explained his diffidence as follows:

> Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert testimony because it was not "derived by the scientific method." Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.[5]

Gatekeeping is central to litigation aggregation, and it is thus not surprising to find that it is also central to the *Principles of the Law of Aggregate Litigation* ("*Principles*"),[6] which are the focus of this symposium. The central gatekeeping question, of course, is whether aggregation should occur and, if so, how broadly. Recently, judicial attitudes toward how to perform that gatekeeping function in class actions have shifted significantly. It has long been recognized that class certification is preeminently important.[7] Denial of class certification can be the "death knell" of the case, and a grant supposedly can create such a death threat to defendant that settlement is her only option.[8]

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5 Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1316 (9th Cir. 1995).

6 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. (2010). A catalogue of all the places where the *Principles* call for judicial gatekeeping would be too difficult, but a sampler seems worthwhile. *See, e.g.*, *id.* § 2.02(d) (the court should adopt a plan for "controlled discovery" to inform its aggregation decision); *id.* § 2.06(a) (the court must decide all questions upon which class certification depends); *id.* § 2.12(b) (the court must resolve any pertinent dispute); *id.* § 3.01 (the court may approve proposed class action settlements only if it finds them fair); *id.* § 3.02(b) (court approval required for settlement of individual claims of proposed class representatives); *id.* § 3.05(a) (the court must make findings regarding a proposed settlement); *id.* § 3.08 (the court sets fees for attorneys, including objectors' attorneys); *id.* § 3.13 (general authority of the court over attorney's fee awards).

7 *See, e.g.*, ARTHUR R. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT, AND FUTURE (1977), which explains as follows:

> In terms of the dynamics and economics of class actions, and most particularly in a Rule 23(b)(3) damage case, the lawyers believe that whether the case will be certified as a class action under Rule 23(c)(1) is the single most important issue in the case. All the lawyers' weapons and all the litigants' resources tend to be mobilized to deal with that question. Defense lawyers believe that their ability to settle the case advantageously or to convince the plaintiff to abandon the case depends on blocking certification. Conversely, plaintiffs' lawyers believe that their ability to obtain a large settlement turns on securing certification.

Id. at 12; *see also Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1423 (1976) (describing class certification as potentially a "cataclysmic, all-or-nothing event").

8 *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298–300 (7th Cir. 1995) (Pos-

Despite certification's centrality, until recently federal judges have approached their gatekeeping tasks in deciding whether to certify with one hand tied behind their backs because they have regarded the Supreme Court's 1974 *Eisen* decision[9] as forbidding consideration of anything bearing on the merits of the case at that point. Although the merits of class certification might sometimes involve issues that are as challenging as the ones Judge Kozinski described above,[10] in general, the questions posed by class certification are of the sort that judges are familiar with resolving in litigation. Thus, this limitation on certification scrutiny has been questioned almost from the time *Eisen* was decided, and it has recently been jettisoned, in part due to the 2003 amendments to Rule 23.

This is a major development.[11] Professor Mullenix, for example, has described the Third Circuit's leading decision on evaluating the merits—*In re Hydrogen Peroxide Antitrust Litigation*[12]—as potentially the most influential class certification decision since the Supreme Court's 1997 ruling invalidating a nationwide asbestos settlement class.[13] Already this trend has been denounced in the law reviews.[14]

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ner, C.J.) (arguing that class certification converted this products liability litigation from being a case involving significant exposure to being a "bet the company" case). *But see In re* Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 145 (2d Cir. 2001) (Sotomayor, J.) ("The effect of certification on parties' leverage in settlement negotiations is a fact of life for class action litigants. While the sheer size of the class in this case may enhance this effect, this alone cannot defeat an otherwise proper certification.") For a thorough critique of the view that class certification results in overkill, see Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

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

10 *See* Richard J. Arsenault & John Randall Whaley, *Will* Daubert *Challenge Your Class Certification?*, TRIAL, July 2009, at 38 (discussing scrutiny of expert opinions during class certification).

11 For another examination of this development, stressing the way in which increased scrutiny of class certification can focus on difficult issues raised by the underlying substantive law, see Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97 (2008).

12 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008). This case is discussed *infra* text accompanying notes 157–84.

13 *See* Linda Mullenix, *Class Certification*, NAT'L L.J., Jan. 26, 2009, at 9 (describing *Hydrogen Peroxide*, and referring to *Amchem Products Inc., v. Windsor*, 521 U.S. 591 (1997)).

14 *See* Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. MICH. J.L. REFORM 323 (2010); Steig D. Olson, *"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 939 (2009) (arguing that recent developments are "making class certification a more onerous and less efficient process for litigants and the court"); *see also* Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists?: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 RUTGERS L.J. (forthcoming 2011), *available at* http://ssrn.com/abstract=1542143.

This Article places this development in the context of judicial gatekeeping more generally, borrowing from Professor Molot's recent recognition that different features of judicial management of civil litigation place varying stress on the traditional judicial function.[15] Part I begins by noting the longstanding role of judges in fashioning and approving aggregation of litigation, and then Part II examines the 1966 amendment to Rule 23 and the constricted attitude toward certification that resulted from the *Eisen* decision against that background. Part III then contrasts that constricted gatekeeping role in regard to class certification with the steadily broadening gatekeeping required of judges in a variety of areas in which they are asked to perform tasks much further from traditional adjudication—including the handling of important aspects of class action practice—and Part IV finds that the recent embrace of merits scrutiny in relation to class certification is something of a "back to basics" development. Finally, Part V reflects briefly on where this development may lead.

I. Aggregation Gatekeeping

Aggregation generally describes the combination of claims within one litigation; even allowing a single plaintiff to combine claims on differing legal grounds growing out of a specific incident against a single defendant involves what is in some senses an "aggregation" decision. At one time, the common law did not allow such combination because it depended on use of separate writs. We have, of course, left that restrictive attitude far behind with modern joinder provisions such as Rule 18, which permits a plaintiff to combine all claims it has against the same defendant.[16] Similar permissiveness is integral to Rule 20, which allows plaintiffs to sue in combination, or to sue multiple defendants, whenever their claims arise out of the same transaction or occurrence, so long as the claims raise common questions.[17] It enables party aggregation far more important than the claim aggregation permitted by Rule 18.

Whether to permit aggregation involves a decision that can be made in gross or case by case. Inevitably, it depends upon a judgment combining considerations of efficiency and fairness.[18] A subsidiary

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15 Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 Yale L.J. 27, 46–58 (2003).

16 Fed. R. Civ. P. 18.

17 *See id.* 20(a).

18 *See generally* Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 Tul. L. Rev. 2245, 2250–58 (2008) (examining policy tensions presented by aggregation decisions).

question is to determine who should make the aggregation decision and when.

For conventional party joinder, the modern approach has been made in gross, and leaves the first move to the litigants; plaintiffs can band together and sue together, and can sue many defendants in a single suit. Defendants can similarly expand the cast of litigants by adding parties to counterclaims[19] or making third-party claims.[20] True, other parties can object to such maneuvers and seek a court ruling that the proposed aggregation does not conform to the prevailing rule or that it should be undone even if initially permitted by the joinder rule,[21] but that is the exception, and the onus rests to a significant extent on the objecting party to show that the other side exceeded the broad joinder permission in the rules. Gatekeeping is thus the exception and not the rule for party joinder, as it is for claim joinder.

Aggregation does not stop with joinder, however. Another important version is consolidation of separate cases. Consolidation is "[o]ne of the earliest examples of case management based on inherent authority."[22] We were assured long ago that consolidation "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another,"[23] but the likelihood there will be a consolidated complaint, lead or liaison counsel will be appointed, and a combined or "global" settlement will result makes that assurance ring somewhat hollow. On its face, Rule 42(a) seems to permit consolidation even in some instances in which initial joinder under Rule 20(a) would not be proper, because it does not require that the claims arise out of the same transaction or occurrence so long as they involve a common question.

Multidistrict consolidation may move a step further. It surely moves a step further by permitting combination for pretrial purposes of cases from throughout the federal judicial system, including "tag-along" cases filed after the initial decision to "centralize" (the Judicial Panel on Multidistrict Litigation's favored term for what it does[24]) the

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19 FED. R. CIV. P. 13(h).

20 *Id.* 14(a).

21 *See, e.g.*, *id.* 20(b) (permitting the court to separate claims even though they have been properly joined under Rule 20(a)).

22 Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1807 (1995).

23 Johnson v. Manhattan Ry. Co., 289 U.S. 479, 496–97 (1933).

24 *See* John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2227 n.12 (2008) (noting that the Panel refers to its efforts as leading to centralization of litigation).

litigation before a given judge. In at least some instances, it involves combination of cases that almost surely could not be combined under Rule 20.[25]

The point here is not to raise questions about aggressive combination of separate cases but to contrast the method for achieving aggregation with initial joinder decisions by individual litigants. These combination decisions depend upon gatekeeping by judges, who alone have the power to consolidate. At least in the instance of the Judicial Panel on Multidistrict Litigation, moreover, these decisions arguably are made by judges who are favorably inclined toward consolidation and result in assigning the cases to transferee judges who also are receptive to combined resolution.[26] Whatever the merit of those possibilities, however, there is no question that combination in these situations turns on judicial decision. That decision, in turn, is informed in large measure by litigation considerations of a sort judges have traditionally addressed, such as efficient discovery and fair combined resolution of factual and legal issues.

Class actions fit into this overall scheme, and now depend quite clearly on a judicial decision to combine. Much as lawyers can unilaterally effect a combination under Rule 20 by filing suit on behalf of multiple plaintiffs, sometimes a great many plaintiffs,[27] they cannot create a class action without the court's approval under current Rule 23—what we now call "class certification." But that term did not appear in Rule 23 until it was amended in 1998 to authorize discretionary immediate appeals from that decision,[28] and was first used by the Supreme Court in 1975.[29] Even then, it was criticized by some. In a 1977 decision, for example, Judge Schwarzer said that it is "at best semantically misleading by implying a degree of finality and authority

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25 Consider, for example, *In re* Aviation Prods. Liab. Litig., 347 F. Supp. 1401, 1402 (J.P.M.L. 1972) (combining suits involving claims about malperformance of two different makes of helicopters because they both use the same sort of engine and the cases raise issues of the "general condition and airworthiness" of this helicopter engine), and *In re* Asbestos Prods. Liab. Litig. (*No. VI*), 771 F. Supp. 415, 424, 425 (J.P.M.L. 1991) (combining over 26,000 personal injury asbestos claims from across the country). For discussions of the aggressive use of the combination power in these cases, see Marcus, *supra* note 18, at 2269, 2271–72.

26 *See* Marcus, *supra* note 18, at 2284–87.

27 *See, e.g.*, Acuna v. Brown & Root, Inc., 200 F.3d 335, 337 (5th Cir. 2000) (suit brought on behalf of more than 1000 plaintiffs against mining companies alleging personal injury from defendants' uranium mining activities).

28 *See* FED. R. CIV. P. 23(f) (authorizing an immediate appeal "from an order granting or denying class action certification").

29 *See* Sosna v. Iowa, 419 U.S. 393, 414 (1975).

which paragraph (c)(1) [of Rule 23] by its very language withholds from a determination."[30]

One might conclude that, before 1966, there was no such thing as a judicial determination whether cases were proper class actions. Certainly there are aspects of this history that seem to support that view. Thus, the original Rule 23 was taken in large measure to focus on "true" class actions, suggesting that cases simply *were* class actions without the need for any action by the court so declaring. There was no direction in the Rule for the court to make a special decision—class certification—declaring that the case actually was a class action. As Professor Bone put it in 1990, "[u]ntil the 1966 revision of Rule 23, . . . there was no routine certification procedure for the representative suit."[31]

Proceeding without gatekeeping could raise serious problems, however. In *Hansberry v. Lee*,[32] for example, the Supreme Court found that foreclosing the Hansberrys' right to live in a previously white neighborhood on the ground of an earlier class action judgment enforcing a racially restrictive covenant violated their due process rights.[33] Seemingly any moderately careful scrutiny of the propriety of treating the earlier case as a class action using the criteria of the current Rule 23 would have required the court to confront the manifest impropriety of binding all by this decree. Yet it does not appear that any such scrutiny ever occurred; rather, it seems that the statement by the plaintiff in the complaint in the earlier case that she was suing "on behalf of herself and on behalf of all other property owners" in the district sufficed by itself to lead to a binding class action judgment under Illinois law.[34] Perhaps gatekeeping was simply unknown in class actions until 1966.

This suspicion does not survive much scrutiny, however. To the contrary, the writing at the time the original version of Rule 23 was adopted in 1938 shows that it was expected that judges would scrutinize the propriety of class action treatment before entering judgment.[35] Indeed, it seems that the resolution of the question whether a

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30 Harriss v. Pan Am. World Airways, Inc., 74 F.R.D. 24, 36 n.3 (N.D. Cal. 1977).

31 Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 284 (1990).

32 Hansberry v. Lee, 311 U.S. 32 (1940).

33 *Id.* at 45.

34 *See* Jay Tidmarsh, *The Story of* Hansberry*: The Rise of the Modern Class Action*, *in* CIVIL PROCEDURE STORIES 252–53 (Kevin M. Clermont ed., 2d ed. 2008).

35 *See, e.g.*, William Wirt Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 MICH. L. REV. 878 (1932) (analyzing how courts decided if a

case was a proper class action was enmeshed in the evaluation of the merits of the case and emerged from the resolution of the merits. An early Supreme Court decision somewhat confirms that appearance. When it affirmed the binding effect of a decree in a "representative suit" in 1853, the Supreme Court emphasized that "care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried."[36] But it is not at all clear how or when the court was to make this aggregation decision. To some extent, it seems to have been dependent on the merits—or at least the nature of the merits—of the suit.[37] But arguably the Court regarded the question as somewhat separate from the merits by the time the case got to it since, after announcing that it was a proper representative suit, Justice Nelson continued: "We will now proceed to an examination of the merits of the case."[38] Nonetheless, there seems to have been no conscious attitude that aggregation decisions were distinct from merits issues or had to precede attention to the merits.

The original Rule 23 was based on this background; Charles Clark introduced it in 1938 by saying that it "is not designed to state new principles, but really to state the old equitable principle of class suits in a way that adds clarity and will make it more usable."[39] Something like class certification has been with us for a long time, although until 1966 it seemed to be closely connected to resolution of the merits and did not have to be done at any particular time.

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case should be regarded as a proper representative action); James William Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 308–14 (1938) (reporting that English chancellors and American courts before 1938 would address the question whether suits were properly maintainable as class actions); *see also Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 934–39 (1958) (describing the issues critical to making a class action decree binding).

36 Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1853).

37 Thus the Court explained its ruling upholding class treatment:

> The case in hand illustrates the propriety and fitness of the rule [regarding representative suits]. There are some fifteen hundred persons represented by the complainants, and over double that number by the defendants. It is manifest that to require all the parties to be brought upon the record, as is required in a suit at law, would amount to a denial of justice.

Id.

38 *Id.*

39 AM. BAR ASS'N, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OHIO 263 (William W. Dawson ed., 1938). At page 264, Clark cites Moore & Cohn, *supra* note 35.

II. THE 1966 COMPROMISE AND *EISEN*

The original categories of Rule 23—such as "true" class actions—did not work. In 1962, the Advisory Committee undertook to revise the Rule and ended up substituting functional certification criteria. At the same time, it was able to deal with the reality that, in the words of the Reporter, Professor Kaplan, the original Rule 23 did not "pa[y] any attention to the details of the procedural management of class actions."[40] That inattention to procedural detail may have reflected the seeming attitude that class status was simply one of the issues in a case that eventually had to be resolved, not that it required distinctive or separate attention. The revised Rule did provide some directives, although in a somewhat sketchy fashion, subsequently expanded substantially in 2003.[41]

One aspect of "procedural management" of class actions that the rulemakers wanted to address was "one-way intervention." A number of courts handling "spurious" class actions under the 1938 version of the Rule had permitted intervention by class members after a defendant's liability was determined.[42] This was "one-way" because the spurious class action was not binding on any class members who did not intervene; they could wait and see how the case came out and then decide whether to join in. In view of the general requirement at the time that collateral estoppel be mutual, one-way intervention seemed unfair. To make the binding effect bilateral, however, required a process that protected the rights of class members; the opt-out opportunity was selected as sufficient for that purpose.[43]

Making this change work required attending also to the question of decision sequence. Unless the question of class status, and the decision to opt out, were resolved before the case was decided on the merits, the decision to opt out itself might be viewed as akin to one-way intervention; indeed, it could result in one-way intervention by default should the defendant be found liable because all those who did not opt out would be included and eligible for the benefits of the suit. Rule 23(c)(1) therefore said that the court should make the determination whether the case was a proper class action "as soon as practica-

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40 Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 379 (1967).

41 *See infra* text accompanying notes 112–44 for discussion of the 2003 changes.

42 *See* John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 MISS. C. L. REV. 323, 336–39 (2005).

43 For discussion of the due process need for the opt-out right, see 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE §§ 1789–1789.1 (3d ed. 2005).

ble," in order that the court resolve this issue before deciding the merits.[44] But the Rule permitted the initial determination to be "conditional," a point emphasized in the 1966 Committee Note.[45] Thus, although courts were for the first time required to make their gatekeeping decisions about whether cases were proper class actions separately, early in the proceedings, they could hedge their bets and revisit the initial decision later.

This was the setting for *Eisen*, which was filed in the district court almost immediately after the 1966 amendments to Rule 23 became effective. Because the Supreme Court's decision has assumed such importance, it is useful to recount what led up to it in some detail. Plaintiffs asserted price-fixing claims against two "odd-lot" dealers for stock exchange trades involving trading other than in 100-share lots. For these transactions, there was an additional charge, and plaintiffs claimed that these two dealers had conspired to monopolize trading in odd lots and to overcharge for such trades. Defendants moved under Rule 23(c)(1) for a determination that it was not a proper class action.[46]

Barely three months after the amended Rule 23 went into effect, District Judge Tyler decided that *Eisen* was not a proper class action. He built on pre-1966 class action gatekeeping, reasoning that "it may be at least generally helpful to consider some of the judge-made requirements and prerequisites for maintaining a spurious class action under the old Rule in order to determine if Eisen has successfully met those specifically set forth in subparagraphs (a) and (b)(3) of the amended Rule."[47] He found that the amended Rule did not add anything new: "[A]s I read the above-cited pre-July 1, 1966, cases and others similar to them, substantially all of the specifically stated pre-

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44 *See* FED. R. CIV. P. 23(c)(1), 308 U.S. 689 (1939) (amended 1966). This sequencing imperative could be contrasted with the rule that a court may not reach the merits until it decides whether it has jurisdiction. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) (holding that the court may not address the merits of a suit before resolving disputes about its subject matter jurisdiction).

45 *See* FED. R. CIV. P. 23(c)(1) advisory committee's note, *reprinted in* 39 F.R.D. 95, 104 (1966):

> An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound.

Id.

46 Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147, 148 (S.D.N.Y. 1966).

47 *Id.* at 149.

requisites and requirements now found in amended Rule 23(a) and (b) were deemed essential for maintaining a spurious class action under old Rule 23."[48] But the requirement of notice to the class was new, and Judge Tyler found this to be "the most serious difficulty with plaintiff's claim to be able to properly protect the interests of the class" because all plaintiff proposed to do was to place advertisements in the press and provide notices to stock exchange firms.[49] Citing the tremendous size of the proposed class (then estimated to include 3.75 million people),[50] the Judge added that he was concerned that common questions did not prevail. He decided that it was not a proper class action.[51] Judge Tyler may, then, have been the first judicial gatekeeper under the amended Rule 23.

The Second Circuit, noting that it was making the first appellate interpretation of the amended Rule 23,[52] reversed by a 2–1 vote. Speaking through Judge Medina, the majority recognized that the new Rule required enhanced gatekeeping—"a court must now carefully scrutinize the adequacy of representation in all class actions."[53] In particular, due to the need to vindicate small claims insufficient to support individual litigation, Judge Medina said that "we hold that the new rule should be given a liberal rather than a restrictive interpretation."[54] Judge Tyler's dismissal of the class aspects "out of hand" therefore was wrong.[55] Moreover, the district judge's concerns about the predominance of common questions were unwarranted: "[A]t this early stage of the proceedings, we find there has been an adequate demonstration that common questions of law or fact predominate over individual questions."[56] Although the majority was uncertain how to solve the notice problem on the existing record, Judge Medina suggested that

> [i]t may be that in some situations it is better at the outset to decide that the proceedings may be prosecuted as a class action and leave for later resolution some of the debatable matters, such as the sufficiency of the representation or the

48 *Id.*

49 *Id.* at 151.

50 *Id.* at 151 n.2.

51 *Id.* at 152.

52 Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 560 (2d Cir. 1968) ("While the new concepts incorporated in the rule have not as yet been passed upon by any federal Court of Appeals, they have received somewhat less than an enthusiastic reception in the District Courts.").

53 *Id.* at 562.

54 *Id.* at 563.

55 *Id.*

56 *Id.* at 566.

> notice to be given, or the feasibility of problems of judicial administration.[57]

Thus, the majority embraced a "liberal" interpretation of the new Rule 23, favoring certification in close cases with later reconsideration if appropriate. Over the strong dissent of Chief Judge Lumbard,[58] the panel remanded to Judge Tyler and retained jurisdiction to review what he did with the case, having already declared that the predominance requirement was satisfied.

Not one to shirk his duty, Judge Tyler embarked on an odyssey of discovery and hearings to develop a solution to the problems presented in the case, an effort that years later prompted Professor Landers (who knew what was coming) to begin an important article about Rule 23 by exclaiming "Poor Judge Tyler!"[59] The District Judge initially recognized that he was "unable to conceive of a solution of this extraordinary issue upon the present record."[60] Accordingly, he directed the parties to develop and present to him the information he needed to resolve problems of manageability and notice.[61] Six months later, he announced that he had "sufficient information to make all of the required findings for the class action determination."[62] There followed twenty-one findings of fact upon which the Judge based his conclusions that plaintiff would provide adequate representation, that some sort of aggregate computation of damages to the class could be utilized (what came to be called a "fluid recovery"), and that the "expensive and stringent" notice requirements of Rule 23(c)(2) could undermine the public policy objectives of the class action device.[63]

To determine which side should bear the cost of notice, Judge Tyler decided to follow the lead of Judge Weinstein[64] and hold a preliminary hearing within sixty days on the merits to inform his decision on allocation of costs:

> This should allow sufficient time for minimum necessary discovery and at the same time prevent the proceedings from continuing longer than absolutely necessary. The hearing itself should be brief, and the parties are encouraged to submit

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57 *Id.* at 570.

58 *See id.* at 570–72 (Lumbard, C.J., dissenting).

59 Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 842 (1974).

60 Eisen v. Carlisle & Jacquelin, 50 F.R.D. 471, 472 (S.D.N.Y. 1970).

61 *See id.* at 472–73.

62 Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 256 (S.D.N.Y. 1971).

63 *Id.* at 256–69.

64 *See* Dolgow v. Anderson, 43 F.R.D. 472, 501 (E.D.N.Y. 1968).

> whatever evidence they deem relevant in the form of stipulations, affidavits or depositions to the extent that they are practicable. Actual testimony should be required only from very important witnesses.[65]

This approach seemed preferable to Judge Tyler to holding a trial and making a final decision of the merits before notice was sent.[66]

A year later, Judge Tyler ruled on the basis of his "mini-hearing," which involved "voluminous documentary evidence" but no live testimony, that the defendants should bear ninety percent of the cost of giving notice.[67] He made twenty-three findings of fact, although he specified that these findings were "only for the stated purpose of the hearing: the allocation of the cost of notice."[68] Based on the findings of fact, he reached nine conclusions of law, leading to the overall conclusion that the plaintiffs were likely to prevail under a per se antitrust rule forbidding fixing prices.[69]

Another year later, the Second Circuit reversed Judge Tyler again.[70] The panel seemed to have had second thoughts about its initial preference for a "liberal" reading of the Rule.[71] It noted that

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65 *Eisen*, 52 F.R.D. at 272.

66 *Id.* at 271 ("I have also determined that a preliminary hearing is superior to other possible procedures. One such alternative would be to allow the action to proceed to a determination on the merits before assessing the costs of notice and send notice only if plaintiff is successful."). The Judge rejected this idea because it "is at least theoretically contrary to the language of Rule 23 calling for an early determination of the class action question." *Id.*

67 Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565, 567 (S.D.N.Y. 1972).

68 *Id.* at 567. The Judge noted that plaintiffs contended that the case was ripe for summary judgment, but said that he would not "treat this case on the merits at this juncture." *Id.* at 567 n.1.

69 *Id.* at 570–73.

70 Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973).

71 For many judges, initial enthusiasm for class actions after the 1966 amendments gave way to judicial skepticism about them by the mid-1970s. The *Eisen* Second Circuit panel may have been ahead of the curve on this subject. For discussion of this development, see Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem*," 92 HARV. L. REV. 664 (1979), describing what Professor Miller called the "first phase" of judicial experience under amended Rule 23:

> Cases often were certified as class actions on the basis of rather conclusory assertions of compliance with rule 23(a) and (b). Settlements were sometimes approved without an in-depth analysis of the underlying merits of the claim, the economics of the litigation, or the feasibility of distributing the funds to class members. In addition, fee petitions were not scrutinized as carefully as experience now suggests they should have been. Enthusiasm for the class action fed upon itself, and the procedure fell victim to overuse by its champions and misuse by some who sought to exploit it for reasons external to the merits of the case. Mistakes, in most cases honest mistakes of faith, were made. By the end of the first phase, class action practice had been given a very black eye.

"[c]lass actions have sprouted and multiplied like the leaves of the green bay tree"[72] and opined that many of those decisions showed "the lack of an adequate remedy under existing laws" for situations involving millions of claimants, which the panel viewed as a problem for Congress.[73] Turning to the case before it, the panel found Judge Tyler's laborious preliminary evaluation of the merits improper:

> No provision is made in amended Rule 23 for any such mini, preliminary or other hearing on the merits. It does violence to the whole concept of summary judgment, and cannot be reconciled with the requirement in Rule 23 that "as soon as practicable after the commencement of the action" the question of class suit *vel non* be decided.[74]

Judge Tyler's reliance on a fluid recovery approach to sidestep problems of manageability was similarly improper, and, given the case's unmanageability, "a ruling should have been made forthwith dismissing the case as a class action. This dismissal could have saved several years of hard work by the judge and the lawyers and wholly unnecessary expense running into large figures."[75] Of course, poor Judge Tyler *had* dismissed the class action allegations forthwith several years before, only to be reversed for doing so by this same panel. On petition for rehearing en banc, a majority of the judges voted against rehearing in confidence that the Supreme Court would take the case.[76]

The Supreme Court did take the case, and decided it another year later—eight years after it was originally filed.[77] After detailing the case's tortured path through the lower courts, the Court held that individual notice to each identifiable class member is required in a Rule 23(b)(3) class action, no matter how small the claim, and that the mini-hearing Judge Tyler held was improper:

> We find nothing in either the language or the 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. Indeed, such

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Id. at 678.

72 *Eisen*, 479 F.2d at 1018.

73 *Id.* at 1019.

74 *Id.* at 1016.

75 *Id.* at 1017.

76 *See id.* at 1020 (Kaufman, J.) ("I vote against en banc, not because I believe this case is unimportant, but because the case is of such extraordinary consequence that I am confident the Supreme Court will take this matter under its certiorari jurisdiction.").

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

> a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such "[a]s soon as practicable after the commencement of [the] action . . . ."[78]

It added that such a preliminary determination of the merits would be unfair to the defendant "since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials."[79]

This first effort by the Supreme Court to handle the class action problem has not earned good grades. The requirement of individual notice, for example, has been regularly denounced as pointless.[80] The seeming prohibition on consideration of the merits, however, could intrude more deeply into the class certification process. Carried to its utmost, it might insulate any case against challenge on the merits until class certification could be resolved, a prospect that might understandably fill many with dread when the slog to class certification might be long and costly and the path to merits resolution relatively short and direct. Meanwhile, the commitment to mutuality in application of collateral estoppel—an important support for the effort to obtain an early decision on class certification in the first place—was largely abandoned except for "wait and see" plaintiffs.[81] Despite those developments, courts obliged to adhere to the most rigid version of *Eisen*'s

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78 *Id.* at 177–78 (alterations in original).

79 *Id.* at 178.

80 *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 27–28 (1991). Professors Macey and Miller assert:

> There is little to recommend the *Eisen* rule from the standpoint of economic analysis. The pecuniary costs of notice in large class actions can run well over half a million dollars. In addition, the costs of identifying absent class members and preparing the notice, as well as the opportunity costs to class members of interpreting the notice, can be substantial. These costs would be justifiable if they were outweighed by compensating benefits that might exist in a case with substantial individual claims. In the large-scale, small-claim class action, however, the benefits of notice appear minimal at best. It is doubtful whether notice has any social utility other than that of informing the class members of the claim. Most plaintiffs are unlikely to place any significant value on such information.

Id.

81 *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331–32 (1979) (directing that nonmutual offensive use of collateral estoppel be permitted for those who are not "wait and see"

decision sequence might forbid motions for summary judgment, or even dismiss for failure to state a claim, until after making the decision whether to certify a class.[82] And in order to maintain some sense of proportionality and hurry up the class certification process, they would often attempt to limit discovery before class certification to "class" issues, forbidding "merits" discovery.[83]

These efforts to avoid "merits" decisions could thus produce what might be called a "Clockwork orange"[84] regime, imposing significant rigidities on class action practice. *Katz v. Carte Blanche Corp.*,[85] a Third Circuit case decided shortly before the Supreme Court's *Eisen* decision, illustrates one possible dilemma. Plaintiff credit card customer filed a class action against defendant credit card issuer, claiming that it did not adequately disclose its $15 annual fee as a finance charge as required by the Truth in Lending Act.[86] Under the Act, a borrower who proves a violation may recover twice the finance charge, but not less than $100 nor more than $1000.[87] Plaintiff sued on behalf of some 700,000 cardholders, seeking an amount "substantially in excess of Carte Blanche's net worth."[88] But the Federal Reserve Board later determined that annual fees should not be regarded as finance charges subject to the disclosure requirement, and by the time the appeal was heard, even plaintiff conceded that it was "a near certainty that no liability will be imposed with respect to that claim."[89]

Nonetheless, rigidly adhering to Rule 23's commands, the district court insisted that notice had to be sent to all class members. Carte Blanche objected that giving notice would be catastrophic to it because, upon receipt of the notice, a substantial portion of its debtors

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plaintiffs unless unfair to defendant); Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 350 (1971) (authorizing defensive use of nonmutual collateral estoppel).

82 *See Developments in the Law*, *supra* note 7, at 1421 (describing post-*Eisen* lower court decisions and observing that "[t]he rationale of these recent cases, if carried to its logical extreme, would require certification to precede even motions made under rule 12(b)(6)").

83 *See, e.g.*, Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 TENN. L. REV. 1, 3 (2001) (reporting that "merits discovery in class suits usually is postponed until after certification").

84 "Clockwork orange" is an old Cockney expression alluding to a force that overcomes humans' exercise of free will through something like Pavlovian conditioning. In 1962, Anthony Burgess borrowed the phrase for the title of his dystopian novella, *A Clockwork Orange*, and in 1971 Stanley Kubrick made a movie of the novella, released under the same name.

85 Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir. 1974).

86 *Id.* at 750.

87 *Id.* at 751.

88 *Id.*

89 *Id.* at 757 n.6.

would withhold payments.[90] It added that it might even be required to file compulsory counterclaims against them.[91] The district court certified the issue for interlocutory appeal.[92]

The Third Circuit decided the case en banc, and held that the superiority requirement of Rule 23(b)(3) was not satisfied because a test-case approach was an available and superior alternative to proceeding with the class action. Although Rule 23 said that class certification must be decided "as soon as practicable," that directive meant "in the light of the relevant rule 23(b)(3) factors of predominance and superiority" and "not necessarily . . . at the outset of the lawsuit."[93] Although judgment against Katz alone would not be binding on the other proposed class members, Carte Blanche was "content to take its chances on stare decisis rather than res judicata,"[94] and the court felt that, in light of the changing views on the mutuality requirement for collateral estoppel, "a new look [should] be taken at the alternative of a test case in lieu of an early class action determination."[95] There were three dissents.[96]

As *Katz* illustrates, a variety of disagreeable consequences could follow from rigid adherence to a no-merits-evaluation-until-certification, "Clockwork orange" sequencing of decisions. Arguably, defendants could not even move to dismiss for failure to state a claim until class certification was decided and the class was given notice. Even more likely, they could be denied the opportunity to move for summary judgment since that would regularly depend on "merits" discovery. And there was abundant opportunity to dispute the dividing line between "merits" discovery and "class" discovery. As the Fifth Circuit put it in an en banc 1973 case, "[i]t is inescapable that in some cases there will be overlap between the demands of [Rule] 23(a) and

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90 *Id.* at 757.

91 *Id.* at 757–58; *see also* FED. R. CIV. P. 13(a) (requiring counterclaims arising out of the same transaction as that sued upon by plaintiff). Whether the transaction involved would really be the same is debatable, as is the question whether Rule 13(a) should apply to claims against unnamed members of a class. *See* Joan Steinman, *The Party Status of Absent Plaintiff Class Members: Vulnerability to Counterclaims*, 69 GEO. L.J. 1171 (1981) (discussing these issues).

92 *Katz*, 496 F.2d at 752.

93 *Id.* at 758.

94 *Id.* at 759.

95 *Id.* at 760.

96 *Id.* at 764 (Seitz, C.J., dissenting); *id* at 769 (Aldisert, J., dissenting); *id.* at 773 (Adams, J., dissenting). Chief Judge Seitz argued in his dissent that the majority was guilty of "judicial emasculation of Rule 23." *Id.* at 764 (Seitz, C.J., dissenting). He thought that the Supreme Court's retreat from the mutuality of estoppel "does not appear to have killed mutuality outright," and therefore saw no reason for the majority to conclude that the Rule's "as soon as practicable" directive "no longer performs a useful function." *Id.* at 766.

(b) and the question of whether [a] plaintiff can succeed on the merits."[97]

The Supreme Court's rejection of merits scrutiny as a factor in apportioning the cost of notice did not inevitably lead to unfortunate results. For example, a Fifth Circuit case the Court quoted in *Eisen* volunteered that Rule 12(b)(6) motions and Rule 56 motions could be made before certification.[98] And a contemporary survey of lawyers indicated that, in appropriate cases, liability was addressed before class certification.[99] But equally clearly, courts labored under uncertainty about whether they could open the door to merits discussion or merits discovery before granting or denying class certification.[100] The Supreme Court itself recognized in 1978 that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiffs' cause of action.'"[101] And in 1982, the Court rejected the Fifth Circuit's "across-the-board" rule permitting any plaintiff alleging employment discrimination to obtain class certification with regard to any allegedly discriminatory practices of the employer, emphasizing that the court should scrutinize the evidentiary showing that plaintiff will rely upon.[102] But the shadow of impropriety hung over aggressive precertification scrutiny of plaintiffs' claims in class actions even though the role of the court in a variety of other areas—including important class action issues—was expanding.

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97 Huff v. N.D. Cass Co. of Ala., 485 F.2d 710, 714 (5th Cir. 1973).

98 Miller v. Mackey Int'l, Inc., 452 F.2d 424, 428–29 (5th Cir. 1971) ("Purely vexatious litigation could be halted by a Rule 12 motion to dismiss or a Rule 56 motion for summary judgment.").

99 *See* Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1143 (1974) ("Scrutiny of the cases under study indicates that theory and practice differ on the question whether consideration of the merits of a case should precede or follow consideration of class certification."); *see also id.* at 1144 (reporting on a survey in which plaintiffs attorneys said they thought it essential to present a strong case on the merits to obtain certification).

100 *See, e.g.*, Wright v. Schock, 742 F.2d 541, 542 (9th Cir. 1984) (permitting defendant to move for summary judgment before class certification); Stewart v. Winter, 669 F.2d 328, 331 (5th Cir. 1982) ("[W]e think it imperative that the district court be permitted to limit pre-certification discovery to evidence that, in its sound judgment, would be 'necessary or helpful' to the certification decision." (footnote omitted)).

101 Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) (quoting Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 558 (1963)).

102 Gen. Tel. Co. v. Falcon, 457 U.S. 147, 155–60 (1982).

III. GATEKEEPING UNBOUND—NONMERITS JUDICIAL MANAGEMENT

While *Eisen* was frequently restraining judges from addressing the merits of class actions before they decided whether to certify the class, their larger gatekeeping role was expanding. Scrutiny of expert evidence was only a small part of that gatekeeping activity.

As Professor Resnik has chronicled,[103] the conception and reality of the judicial function changed in the 1960s and 1970s. Professor Chayes famously described the impact of that shift as resulting from the emergence during that time of "public law litigation"—"[t]he judge is the dominant figure in organizing and guiding the case."[104] And the most prominent versions of 1960s public law litigation—judicial decrees regarding the operation of public facilities, such as school systems and prisons—surely pushed judges beyond traditional adjudication to a quasi-administrative role in relation to the institutions under their supervision. A somewhat similar role might inevitably be waiting for judges in handling class actions of all sorts;[105] as the Supreme Court noted in 1985, "a class action resembles a quasi-administrative proceeding, conducted by a judge."[106] Reacting to such comments in 1969, Professor Kaplan, the Reporter who drafted the 1966 changes to Rule 23, commented:

> We hear talk that it all belongs not to the courts but to administrative agencies. But by hypothesis we are dealing with cases that are not handled by existing agencies, and I do not myself see any subversion of judicial process here but rather a fine opportunity for its accommodation to new challenges of the times.[107]

That "accommodation to new challenges of the times" expanded during the 1980s and 1990s to include many additional tasks. Amendments to the Federal Rules of Civil Procedure in 1983 enshrined case management in Rule 16, with scheduling orders required in most

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103 *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

104 *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

105 Indeed, the whole question of how to delineate "public law litigation" may have seemed simple in the mid-1970s, but it is open to considerable debate. *See* Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REFORM 647, 668–75 (1988) (discussing the uneasy dividing line between "public" and "private" law litigation, and suggesting that mass tort cases could be regarded as "public law litigation").

106 Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 809 (1985) (internal quotation marks omitted).

107 Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 500 (1969).

cases.[108] The Civil Justice Reform Act of 1990 put Congress's imprimatur on case management as a way to reduce the duration and cost of litigation.[109] Promotion of settlement rose to prominence among judicial tasks, and some suggested that many judges regarded it as more important than their traditional adjudicatory functions.[110] As Professor Molot has trenchantly written, however, taking on these new judicial management responsibilities went well beyond the traditional strengths of judges, and perhaps also the constitutional notion of judicial power.[111]

In managing class actions more specifically, there are at least three specific tasks regarding which the importance and nature of judicial responsibility have lately been amplified: appointing class counsel, awarding attorney's fees, and approving settlements.

Appointing class counsel. In 2003, Rule 23(g) was added, explicitly requiring that judges appoint class counsel as a part of class certification.[112] Previously, attention to the quality of counsel was a part of the determination as to whether the adequate representation requirement of Rule 23(a)(4) was satisfied.[113] But the previous treatment of this appointment power had mainly involved the approval or (very rarely) rejection of the lawyer who filed the case. On its face, the new provision looks beyond that minimal inquiry and contemplates a judicial comparison between competing applicants for the position. It is derived from the long-recognized power of courts to appoint lead or liaison counsel in consolidated cases or other multiparty situations.[114]

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108 *See* FED. R. CIV. P. 16(b) (requiring a scheduling order in all civil cases except categories exempted by local rule).

109 Civil Justice Reform Act, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. §§ 471–482 (2006)). The Senate Report that accompanied this legislation invoked the "benefits of enhanced case management," which it took to mean "that greater and earlier judicial control over civil cases yields faster rates of disposition." S. REP. NO. 101-416, at 16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6819.

110 *See* Edward Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 50 (1987) (arguing that the judicial management movement "seems to have created an attitude that a trial represents judicial failure").

111 *See* Molot, *supra* note 15, at 31–32.

112 FED. R. CIV. P. 23(g).

113 *See, e.g.*, Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239, 247 (3d Cir. 1975) (holding that Rule 23(a)(4) calls for the district judge to assess the proposed class representative by looking to whether (1) plaintiff has no interests which are antagonistic to other members of the class, and (2) plaintiff's attorney is capable of prosecuting the instant claim with some degree of expertise).

114 *See, e.g.*, MacAlister v. Guterma, 263 F.2d 65, 68–69 (2d Cir. 1958) (upholding an order appointing lead counsel in stockholders' consolidated derivative actions); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 40.22 (2004) (providing a sample order enumerating the duties of lead counsel).

Ordinarily, of course, judges do not appoint counsel for parties in civil cases; that is a choice left to the litigants. In class actions, however, judges themselves make the class members quasi-clients of class counsel by certifying the class, and this appointment power accompanies that decision. It is conceivable to allocate the power to others in some cases. The Private Securities Litigation Reform Act ("PSLRA"),[115] for example, sought to do so by directing the judge to appoint as "lead plaintiff" in securities fraud class actions the class member or group of class members with the largest losses, and then left it to the lead plaintiff to choose the lawyer.[116] As the Ninth Circuit held, "[s]o long as the plaintiff with the largest losses satisfies the [Rule 23] typicality and adequacy requirements, he is entitled to lead plaintiff status [under the PSLRA], even if the district court is convinced that some other plaintiff would do a better job."[117] And that means that the district judge may not second-guess the lead plaintiff's choice of lawyer: "[s]electing a lawyer in whom a litigant has confidence is an important client prerogative and we will not lightly infer that Congress meant to take away this prerogative from securities plaintiffs."[118]

Selecting a lawyer is an important client prerogative in a lot of other types of litigation, but there seems little chance that many others would support conferring that authority on a class member or group of them.[119] And presently there is no legal authority for the judge to defer to others' choices in a similar manner. The task of choosing between competing lawyers is a difficult one for judges, however. One creative judge decided to try auctioning off the position in

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115 Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

116 15 U.S.C. § 17u-4(a)(3) (2006).

117 *In re* Cavanaugh, 306 F.3d 726, 732 (9th Cir. 2002).

118 *Id.* at 734.

119 *See* Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 722 (2002). Professor Fisch concludes that the "empowered plaintiff" model could be expanded to other situations in which certain criteria were satisfied:

> First, the class must include members with a sufficient financial stake in the litigation. Only if the empowered lead plaintiff has a sufficient interest in the case will it incur the costs of identifying, negotiating with, and monitoring class counsel. Second, the potential lead plaintiffs must be sufficiently representative of the interests of other class members. . . . Third, the size of a class member's interest should be correlated with its sophistication and ability to handle the selection, negotiation, and monitoring processes.

Id.

securities litigation before the PSLRA was adopted,[120] but the method was not met with wide acceptance.[121]

The choice, therefore, ordinarily falls to (or on) the judge. "Few decisions by the court in complex litigation are as difficult and sensitive as the appointment of designated counsel."[122] And the stakes are unavoidably high: "[a]ppointment of class counsel is an extraordinary practice with respect to dictating and limiting the class members' control over the attorney-client relationship and thus requires a heightened level of scrutiny to ensure that the interests of the class members are adequately represented and protected."[123] As Professor Molot recognizes, this task requires a departure from the traditional role of American judges: "[i]n the class action context, . . . the judge *is* largely responsible for monitoring the attorney-client relationship."[124]

This task can require great effort and difficult evaluation of a wide variety of matters. For example, in an ERISA class action, a district judge was presented with applications from five sets of law firms, all of which seemed to be very competent and experienced.[125] Eventually the judge rejected one law firm, although its lawyers "have impressive ERISA backgrounds and have been appointed by several courts to be lead counsel in major ERISA litigation," in part because of concern about a possible conflict with the firm's role as class counsel in another ERISA class action involving an entity related to this employer.[126] To reach this conclusion, the judge had to analyze a merger agreement and evaluate the question whether the two corporate entities should be regarded as one for purposes of a possible conflict.[127] This judgment is the sort that a court can do, but even on such topics, judges may disagree. Thus, another judge subsequently appointed the same lawyers class counsel in another ERISA case, concluding that the "appearance of divided loyalty" standard used by the first judge was not a proper one.[128] But these sorts of judgments are at least the kind of thing that judges are called upon to do in resolving

120 *See, e.g.*, *In re* Oracle Sec. Litig., 131 F.R.D. 688, 689–90 (N.D. Cal. 1990); Laural L. Hooper & Marie Leary, *Auctioning the Role of Class Counsel*, 209 F.R.D. 519 (2001).

121 *See* Report, *Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. 689, 740–41 (2001) (evaluating the auction method and finding that it would work only in limited and very rare circumstances).

122 MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.224 (2004).

123 *In re* J.P. Morgan Chase Cash Balance Litig., 242 F.R.D. 265, 277 (S.D.N.Y. 2007).

124 Molot, *supra* note 15, at 47–48 (emphasis added).

125 *In re* Cardinal Health, Inc. ERISA Litig., 225 F.R.D. 552, 554 (S.D. Ohio 2005).

126 *Id.* at 556.

127 *See id.* at 557 & n.6.

128 *See* Nowak v. Ford Motor Co., 240 F.R.D. 355, 366–67 (E.D. Mich. 2006) (rejecting the

motions to disqualify and, in that sense, fall within the broad traditional role of courts in resolving disputed legal matters.

Awarding attorney's fees. During the last generation, judges have increasingly had to set attorney's fees because applying for court-awarded fees has become something of a cottage industry for the legal profession. In class actions, the task may be necessary because the suit is based on a statute that includes a fee-shifting provision, or because the common-benefit justification for paying the lawyer from the proceeds of the suit applies.[129] Either way, the judge ultimately will have to determine how much the lawyers should be paid. In litigated cases, that may be a fiercely contested point; losing defendants may focus with particular vehemence on the fee award to plaintiffs' counsel. In settled cases, defendant may have agreed not to oppose a fee application up to a certain (generous) amount. As amended in 2003, Rule 23(h) now recognizes and focuses this responsibility of the court. It requires notice to the class of the amount the attorneys are seeking and authorizes objections by class members to the fee award, as well as the possibility of a fee award to the objectors' lawyers for successfully reducing the fee.[130]

In theory, the judge is to approach this task like a private client. In reality, as a district judge objected over twenty years ago, when the fee-award question reaches the judge in a settled class action, "the court is abandoned by the adversary system and left to the plaintiff's unilateral application and the judge's own good conscience."[131] Moreover, like a private client, the judge may be overwhelmed by a huge and detailed showing of the amount of time spent by swarms of lawyers over years. At least clients usually get to absorb and evaluate this

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conclusion that the firm not appointed in *Cardinal Health*, 225 F.R.D. 552, had a conflict). The court explained:

> The *Cardinal Health* opinion also cites DR 5-105 and EC 5-14 which prohibited joint representation where there was an "appearance of divided loyalties of counsel." Having taught a course on legal ethics for many years, it was my understanding that decades ago when Ohio and nearly all states abandoned the ABA Code of Professional Responsibility and its Disciplinary Rule and adopted versions of ABA Model Rules of Professional Conduct, the new rules abandoned this "appearance of divided loyalty" standard and drafted more precise conflict guidelines. For various reasons, while recognizing the importance of the conflicts issues raised in *Cardinal Health*, that opinion does not demonstrate a sufficient factual basis to find that [the law firm] was acting inappropriately.

Id.

129 For discussion of these two fee-calculation methods, see MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 14.1–.2 (2004).

130 *See* FED. R. CIV. P. 23(h).

131 *In re* Activision Sec. Litig., 723 F. Supp. 1373, 1374 (N.D. Cal. 1989).

detailed backup on a monthly basis, but the judge gets the entire pile at the end of the litigation. The Supreme Court has directed that, at least in cases involving fee-shifting statutes, the customary measure should involve the lodestar hourly-rate approach.[132] But this approach has been likened to "converting the courts into the equivalent of public utility commissions that oversee the plaintiff's attorney,"[133] and efforts by judges to set limits in advance have been derided as trying "to determine the equivalent of the medieval just price."[134]

The alternative is, at least in class actions, yielding a "fund" for the class, to award the attorney a percentage of the fund. But when the class settlement is for coupons or something of the like, valuing this "fund" may prove quite problematic also. Even with class action settlements not involving coupons, the challenges of using a percentage approach can be great; as another district judge asked twenty years ago: "What is 30% of *up to* $70 million payable over a period of years?"[135] Often, courts "cross-check" the results of the percentage approach against the lodestar calculation, meaning that both difficult analyses must be done.[136]

Undertaking this difficult task is important. As a RAND study of class actions concluded, proper review of attorney's fees can be crucial to proper handling of class actions.[137] But judges called upon to do the job must move beyond their comfort zone in assessing the application of legal rules to evidence produced in court. Moreover, even their familiarity with the progress of the case before them may be of limited value in assessing the true value of the lawyers' out-of-court efforts.

Settlement approval. The original Rule 23 directed that class actions could not be dismissed without the approval of the court,[138] and

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132 *See, e.g.*, City of Burlington v. Dague, 505 U.S. 557, 562 (1992) (declaring that the lodestar measure is "the guiding light of our fee-shifting jurisprudence").

133 John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 725 (1986).

134 *In re* Cont'l Ill. Sec. Litig., 962 F.2d 566, 568 (7th Cir. 1992).

135 *In re* Superior Beverage/Glass Container Consol. Pretrial, 133 F.R.D. 119, 124 (N.D. Ill. 1990).

136 *See, e.g.*, *id.* at 128–33.

137 *See* DEBORAH R. HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN: EXECUTIVE SUMMARY 24 (1999), *available at* http://www.rand.org/pubs/monograph_reports/2005/MR969.1.pdf (stating that "what judges do [in class actions] is the key to determining the benefit-cost ratio," and that salutary results followed when judges "took responsibility for determining attorney's fees").

138 *See* FED. R. CIV. P. 23(c), 308 U.S. 689 (1939) (amended 1966).

the 1966 rewrite retained this feature.[139] But the "procedural management"[140] provided in the 1966 Rule was minimal beyond stating that there should be notice to the class. In 2003, Rule 23(e) was extensively rewritten, and it now provides many guidelines and directives for courts reviewing proposed class action settlements.

The detail provided by amended Rule 23(e) does not alter the reality that judges performing this task are doing a job quite different from traditional adjudication. One factor judges may consider is whether the class has a good or poor chance of success at trial; in performing this task they would be doing something like what Judge Tyler was doing in *Eisen* in forecasting the likely results of the litigation before him.[141] But unlike Judge Tyler, judges evaluating settlements would not likely have vigorous adversary presentations on which to base their decisions; it may even be that class counsel (now in sight of substantial fees) are emphasizing the weaknesses of their case.[142] And judges should be considering many other things besides likelihood of success. Objectors may "assist" the court in evaluating these matters, but objectors are themselves a dubious source of notice that something is awry with a proposed settlement. They could themselves be up to mischief, and seeking a payoff. Indeed, the risk of a sellout by objectors explains the requirement in Rule 23(e)(5) that any class member who files an objection must obtain the court's permission to withdraw it.

Even with a thorough ventilation of the issues, a judge reviewing a proposed class action settlement is called upon to reach a conclusion that goes well beyond conventional "legal" standards. There may be a temptation toward what the Supreme Court has called "appraisals of the chancellor's foot kind."[143] How much weight should be attached to immediate payment as opposed to the risk not only of a loss at trial, but also of a long wait for resolution of the inevitable appeal following a victory at trial? If the settlement involves a change in the defendant's behavior in relation to complicated and disputed matters, how readily can the judge assess the value of the changed behavior and

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139 *See* FED. R. CIV. P. 23(e).

140 *See supra* text accompanying note 40 (quoting Professor Kaplan's comment about the absence of details on the "procedural management" of class actions in the original Rule 23).

141 *See supra* text accompanying notes 59–69.

142 *See, e.g.*, Parker v. Anderson, 667 F.2d 1204, 1212 n.9 (5th Cir. 1982) (quoting a letter from class counsel to lead plaintiffs emphasizing the risks of proceeding to trial).

143 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997) (explaining further that the Court was referring to "class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness").

determine whether it should generally benefit class members or favor some over others?[144] These and other questions explain why scholars have proposed a potpourri of palliatives to deal with the difficulty of evaluating proposed settlements.[145] Others have offered judges instruction on the multiple details they should have in mind in assessing proposed settlements in specific areas on which these scholars are expert.[146] Judges are generalists; although they are expert in the law, they cannot be expected similarly to master every topic from consumer cases to employment discrimination to antitrust.[147] Ultimately, what they must do is become regulators, sensitive both to the dynamics of litigation activity and the underlying concerns of the body of law that give rise to the claims asserted.

IV. BACK TO BASICS—MERITS SCRUTINY DURING CLASS CERTIFICATION

Compared with the sorts of tasks recounted in the prior Part, making a judgment about the probable proof at trial and the persuasiveness of that proof seems well within the ordinary business of judging. On motions for preliminary injunctions, courts regularly make similar assessments early in litigation.[148] For decades, they have insisted under Rule 16 on details about the manner of proof as a part of the pretrial process. And evaluating various features of the class certification calculus—particularly whether there are common questions and whether (in Rule 23(b)(3) class actions) those questions will predominate at trial—calls for a similar assessment. As Professor Geoffrey Miller has recently put it, "[p]reliminary judgments are not alien to American litigation. On the contrary, they are ubiquitous."[149]

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144 *See, e.g.*, *In re* Prudential Ins. Co. Sales Practices Litig., 148 F.3d 283 (3d Cir. 1998) (undertaking extensive and painstaking evaluation of an elaborate settlement with a multitrack claims procedure and changes in sales practices in order to determine whether it was a good deal for class members).

145 *See* Molot, *supra* note 15, at 53–55 (reviewing various proposals).

146 *See, e.g.*, Hillary A. Sale, Judicial Gatekeepers (working paper) (on file with author) (offering many tips for judges on how to assess and probe proposed settlements in securities fraud cases).

147 Professor Gibson compares the task of judges in bankruptcy proceedings with that confronting judges evaluating class action settlements. She points out that, in the bankruptcy setting, judges "have the advantage of having specific statutory standards for the confirmation of the reorganization plan," something class action judges do not have. S. ELIZABETH GIBSON, CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS 5–6 (2000).

148 For an analysis of the judicial treatment of preliminary injunction motions, see generally John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978).

149 Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165, 203.

Under the impact of *Eisen* and due to the fear of one-way intervention and the resulting risk of unfairness to defendants, however, many courts shied away from confronting the merits in a serious way during class certification. This judicial resistance to considering the merits has excited much opposition over the years.[150] And *Eisen* continues to be cited for the proposition that the strength of the plaintiff's case on the merits cannot rightly be evaluated before class certification.[151]

But the worm has surely turned. The courts understand that Rule 12(b)(6) motions can be made before class certification is resolved. Indeed, in class actions governed by the PSLRA, that is the first order of business, and the court is not permitted to allow any discovery—merits or otherwise—until after those motions are resolved.[152] In 2001, the Seventh Circuit recognized that evidentiary inquiries are necessary to determine whether a class should be certified.[153] Shortly thereafter, the Second Circuit upheld doing something a great deal like a *Daubert* analysis of the expert theory propounded by the plaintiffs in support of class certification, but added that, if plaintiffs' expert opinion survives *Daubert* scrutiny, it is "sufficiently reliable for class certification purposes," and that challenges defendants launch at the theory accordingly do not matter at the class certification stage.[154] In

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150 *See, e.g.*, ABA Section of Litig., *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195, 206–09 (1986) (urging "precertification decision of a merits motion"); Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299, 312–14 (1980) (citing a "pervasive sentiment favoring some sort of preliminary hearing on the merits"); Bartlett H. McGuire, *The Death Knell for* Eisen*: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 368, 396–99 (1997) (stating that *Eisen* continues to be cited as authoritative in forbidding assessment of the merits, but adding that this directive is also "circumvented with increasing boldness by the lower courts," and urging adoption of a "substantial probability of success" standard for assessing plaintiffs' cases).

151 *See, e.g.*, Shook v. Bd. of Cnty. Comm'rs, 543 F.3d 597, 612 (10th Cir. 2008) ("[A] district court may not evaluate the *strength* of a cause of action at the class certification stage.").

152 *See* 15 U.S.C. § 78u-4(b)(3)(B) (2006) (staying discovery while a motion to dismiss is decided).

153 Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001) (observing that "if some of the considerations under Rule 23(b)(3) . . . overlap the merits—as they do in this case . . . —then the judge must make a preliminary inquiry into the merits").

154 *In re* Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 135 (2d Cir. 2001) (Sotomayor, J.). The court explained that, in ruling on class certification, the district judge "must ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law." *Id.* In this case, despite defendants' manifold objections to the testimony of plaintiffs' expert, "the district court's finding that [the expert's] methodology was not fatally flawed, and therefore[ ] was sufficiently reliable for class certification purposes, does not constitute an abuse of its discretion." *Id.*

2006, however, it repented that view and held that *Eisen* did not preclude analysis of the merits as needed to decide class certification. Instead, the district judge must make "findings" on a mixed issue of law and fact—whether the evidence likely to be presented at trial will satisfy the class certification standards of Rule 23.[155] Even some Justices of the Supreme Court seem to regard consideration of the merits of the suit as important to due process protections for defendants in relation to allocating cost of notice in a class action.[156]

What is likely to be the leading case, however, is the 2008 decision of the Third Circuit in *In re Hydrogen Peroxide Antitrust Litigation*,[157] authored by Chief Judge Scirica. Plaintiffs there filed a class action, riding the coattails of governmental investigations about antitrust violations in the hydrogen peroxide industry.[158] Hydrogen peroxide is sold in concentrations of 35%, 50%, and 70%, with the lower-concentration product usually sold for a lower price than the higher-concentration product. Overall, there are four different grades of hydrogen peroxide products. Plaintiffs nonetheless asserted that hydrogen peroxide products of the various grades were fungible, and made claims on behalf of a class including purchasers of any grade against

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The Seventh Circuit has recently held that failure to perform a full *Daubert* analysis of plaintiffs' expert theory before certifying a class is error:

> We hold that when an expert's report or testimony is critical to class certification, as it is here, a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants.

Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010) (citation omitted).

155 *In re* Initial Pub. Offerings Sec. Litig. (*IPO*), 471 F.3d 24, 40–41 (2d Cir. 2006). This opinion represents a remarkable confession of error by Judge Newman, the author of *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283 (2d Cir. 1999), the leading Second Circuit case for the proposition that merits scrutiny is not permitted, and then-Judge Sotomayor, who had so declared in 2001 in reliance on Judge Newman's earlier decision in *Caridad*, see *Visa Check*, 280 F.3d at 135. The court carefully chronicled the emergence of the view that scrutiny of the merits is permissible. *See IPO*, 471 F.3d at 32–42.

156 See *DTD Enterprises, Inc. v. Wells*, 130 S. Ct. 7, 7–8 (2009), in which the Court denied certiorari in a case in which defendant claimed that the state court below required it to pay the cost of notice in a class action because plaintiff could not afford to pay. Justice Kennedy, joined by the Chief Justice and Justice Sotomayor, dissented from the denial of certiorari: "To 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." *See id.* at 8 (Kennedy, J., dissenting) (emphasis added).

157 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).

158 *See id*. at 308 (describing investigations by the United States Department of Justice and the European Commission of possible antitrust violations in the hydrogen peroxide industry).

defendant producers, some of whom produce only one or two of the four grades.[159]

The class certification dispute began with an assumption that there would be evidence supporting a finding that there had been a conspiracy to fix prices, and boiled down to predominance—whether the question of "antitrust impact" could be proved by common evidence or depended on an individual showing by each purchaser that it paid inflated prices.[160] An implicit assumption was that the common questions raised by proof of conspiracy did not themselves suffice to establish predominance under Rule 23(b)(3).[161]

Antitrust impact has long been a major obstacle to class certification of Rule 23(b)(3) classes in price-fixing cases, and impact arguments often implicitly overlap with the merits of the case. As in *Hydrogen Peroxide*, defendants may challenge the conclusion that their products are interchangeable.[162] At some level, this challenge seems to strike at the notion that there could be a conspiracy to fix prices. If the products are not interchangeable, how could (indeed, why would) producers conspire to raise prices together? Thus, predominance problems may arise in relation to both the question of impact and the question of proving price fixing.[163]

A conventional solution to these problems is to invoke expert testimony, and plaintiffs in *Hydrogen Peroxide* offered the testimony of an economics Ph.D. who asserted that common proof could be used to establish impact, assuming there was a conspiracy. He claimed that

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159 *Id.* at 307–08.

160 *See id.* at 310–12 (reporting that defendants did not contest the district judge's conclusion that the requisites of Rule 23(a) were satisfied).

161 In a sense, the impact question resembles the question of reliance in securities fraud cases, where the common liability question whether defendants were guilty of inadequate or misleading statements is not regarded as sufficient to outweigh the question of reliance if that must be examined on an individual basis. The solution in securities fraud class actions has been the "fraud on the market" theory. *See* Basic, Inc. v. Levinson, 485 U.S. 224, 246–47 (1988) (adopting fraud-on-the-market theory); Donald C. Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151, 179 (asserting that "*Basic* was a boon to plaintiffs, leading to a rapid increase in the number of fraud-on-the-market suits after 1988—the number of filings had tripled by 1991, and continued to rise dramatically over the next fifteen years").

162 *See Hydrogen Peroxide*, 552 F.3d at 313.

163 *See, e.g.*, Alabama v. Blue Bird Body Co., 573 F.2d 309, 321–28 (5th Cir. 1978) (rejecting class certification of a nationwide class in relation to an alleged conspiracy to fix the price of school buses, which were made to suit the specifications of the purchasing school district); *In re* Screws Antitrust Litig., 91 F.R.D. 52, 57–58 (D. Mass. 1981) (certifying a class despite the "product diversity" of wood screws shown by defendants, on the notion that "[s]crews are not inherently diverse, and distinctions offered are likely to be 'surface distinctions' which should not deter class certification").

the various grades of hydrogen peroxide are fungible, and reasoned that because production is heavily concentrated in a small group of producers with high barriers to entry and no close substitute products, and defendants' geographic markets overlapped, there would have been lower prices absent conspiracy.[164] According to plaintiffs' expert, prices moved in tandem over time, and various producers raised list prices at the same time.[165] He also identified two "potential approaches" to estimating damages suffered by the class.[166] Defendants countered with the opinion of their own Ph.D. economist, whose views were "irreconcilable" with those of plaintiffs' expert.[167] He denied that the products were fungible on the ground that the various grades of hydrogen peroxide have differing supply characteristics and demand conditions.[168] He also asserted that the prices actually charged individual customers did not move together, pointing out that contracts for the sale of hydrogen peroxide were often individually negotiated. Some customers experienced reductions in price at a time when others were paying more.[169]

Defendants moved to exclude the opinion of plaintiffs' expert under *Daubert*, but the district court denied the motion to exclude and defendants did not challenge that decision on appeal.[170] The district judge also stated that he should not "'weigh the relative credibility'" of the competing expert views, and that it was sufficient that plaintiffs had made a threshold showing.[171] The Court of Appeals held this scrutiny inadequate, and announced two basic principles to guide the certification process that can be articulated as follows:

(1) The requirements of Rule 23 are not mere pleading rules; inquiry beyond the pleadings is required.[172] If that inquiry "overlaps" with merits issues, it must nonetheless be done; *Eisen* "is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement."[173] The need for backup and discovery is manifest; in fact, plaintiffs in *Hydrogen Peroxide* had access to consid-

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164 *See Hydrogen Peroxide*, 552 F.3d at 312–13.

165 *Id.* at 313.

166 *Id.*

167 *Id.* at 314.

168 *Id.* at 313.

169 *Id.* at 314.

170 *Id.* at 314–15 & n.13.

171 *Id.* at 322 (quoting *In re* Hydrogen Peroxide Antitrust Litig., 240 F.R.D. 163, 171 (E.D. Pa. 2007)).

172 *Id.* at 316.

173 *Id.* at 317.

erable information.[174] This approach was implicit in the 2003 amendments to Rule 23(c), which revised the timing directive from "as soon as practicable" to "an early practicable time" and removed the prior authorization for "conditional" certification.[175]

(2) The district court must make findings that each Rule 23 requirement is satisfied to support granting class certification: "Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class, the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23."[176]

The "threshold showing" attitude of the district court was therefore insufficiently demanding. The district judge had to confront the substantive points made by defendant's expert, not just conclude that the opinions of plaintiffs' expert survived a *Daubert* analysis.[177] Although a conspiracy to maintain prices could impact the entire class even though some customers benefitted from lower prices for part of the class period, the district court could reach that conclusion only "after considering all relevant evidence."[178]

V. IMPLICATIONS

Moving the class certification decision back to judging basics seems to emphasize the sorts of tasks judges do best, but it may have a number of other consequences. Whether *Hydrogen Peroxide* causes major changes in class action practice depends in large part on whether one believes the courts were regularly refraining from scrutinizing the merits until recently.[179] Because the "*Eisen* rule" has "be-

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174 *See id.* at 308 n.3 ("Defendants assert, and plaintiffs do not dispute, that they provided to plaintiffs all available sales transactions and other market data relevant to how hydrogen peroxide and persalts were bought and sold during the class period.").

175 *See id.* at 318–19. At the time these amendments were adopted, Chief Judge Scirica was chair of the Judicial Conference's Standing Committee on Rules of Practice and Procedure.

176 *Id.* at 320.

177 *Id.* at 322–24.

178 *Id.* at 325.

179 Consider Professor Silver's 2003 description:

> [A 1996 Federal Judicial Center study] conveys a picture of the law in action that diverges markedly from the law on the books. Formally, judges are supposed to decide certification motions "[a]s soon as practicable" after the start of litigation without peeking at the merits. In fact, judges usually decide dispositive motions *before* certification. They refuse to certify until they are persuaded that plaintiff's allegations have merit. Precertification rulings are common even in the Northern District of Illinois, which operates under case law disapproving the practice.

Silver, *supra* note 8, at 1395.

come a pillar of class action practice,"[180] and until recently most courts resisted even applying *Daubert* to expert opinions proffered in support of certification,[181] some significant effect is likely. One court has labeled *Hydrogen Peroxide* a "watershed decision."[182] As noted above,[183] there is no question that at least some observers see a significant shift, and dislike what they see. For others—particularly those who pine for vigorous screening for probability of success as a prerequisite to certification[184]—it is probably an attractive trend but not sufficiently aggressive. It is therefore useful to reflect on at least some of the plausible implications.

A. More Work for Lawyers and Judges

In *Eisen*, Judge Tyler hoped that his decision on remand could be made after "minimum" discovery and a "brief" hearing.[185] Class certification decisions that could be speedily made on the basis of the complaint surely involved less effort for judges and lawyers, but that is obviously not a strong argument in favor of handling certification that way. Nonetheless, choreographing the certification decision becomes more challenging the more preparation it requires. As a judge managing a huge consolidated case put it, "[o]ne of the issues at stake is always which should come first, dispositive motions or class certification."[186] Managing workload is an important feature of judicial management, and opening the door to more consideration of the merits before class certification will magnify that workload.

Whatever the original merit of trying to divide discovery between "merits" and "certification" issues, that effort will frequently fail in the future. But that does not mean that there can be no funneling of discovery to the issues that must be addressed first. To the contrary,

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180 Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51, 51 (2004).

181 *See* L. Elizabeth Chamblee, Comment, *Between "Merit Inquiry" and "Rigorous Analysis": Using* Daubert *to Navigate the Gray Areas of Federal Class Action Certification*, 31 FLA. ST. U. L. REV. 1041, 1068–74 (2004) (reporting that courts were unwilling to use *Daubert* during class certification, mainly to avoid addressing the substantive merits).

182 McDonough v. Toys "R" Us, Inc., 638 F. Supp. 2d 461, 467 (E.D. Pa. 2009).

183 *See supra* note 14 and accompanying text.

184 *E.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1331 (2002) (urging courts to evaluate the merits of plaintiffs' case before certifying in order to ensure that the settlement-inducing power of certification is not available unless it appears that plaintiffs will win); Hazard, *supra* note 83, at 3–4.

185 *See* Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 272 (S.D.N.Y. 1971).

186 *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 229 F.R.D. 35, 40 (D. Me. 2005) (refusing to entertain a summary judgment motion because the litigation schedule called for addressing class certification first).

appellate courts that insist that district judges carefully scrutinize the merits and make Rule 23 findings also emphasize that the district judges have substantial discretion in deciding how much discovery is needed to support that scrutiny.[187]

Giving judges broad discretion to control discovery does not make that task easy, however. From plaintiffs' (and perhaps defendants') perspective, it may be that something approaching full discovery is essential. Particularly when they intend to rely on expert opinions to support class certification and to prove their cases at trial, anything less may be too risky. Although the expert opinion rendered at the class certification stage is not the "final" opinion required before trial,[188] it is an important opinion about the specific issues raised in the case. Any time that an expert offers such an opinion—even with caveats about the possibility that further study could lead to a different opinion—there is a risk of impeachment at trial due to changes in the opinion unless the expert has already had access to all information that might bear on the opinion. As a consequence, something approaching full discovery may often seem essential to proper preparation of experts' opinions on class certification. Beyond that, because plaintiffs are called upon to make an evidentiary showing on issues also central to the merits—albeit on the slightly different question of predominance—they may have a legitimate need for access to full discovery regarding those "liability" issues. Courts are therefore frequently going to have to determine how much discovery to order before class certification is decided.[189]

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187 *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008) ("The trial court, well-positioned to decide which facts and legal arguments are most important to each Rule 23 requirement, possesses broad discretion to control proceedings and frame issues for consideration under Rule 23."); *IPO*, 471 F.3d 24, 41 (2d Cir. 2006) ("To avoid the risk that a Rule 23 hearing will extend into a protracted mini-trial of substantial portions of the underlying litigation, a district judge must be accorded considerable discretion to limit both discovery and the extent of the hearing on Rule 23 requirements.").

188 See, for example, *Oplchenski v. Parfums Givenchy, Inc.*, 254 F.R.D. 489, 497 n.6 (N.D. Ill. 2008), in which the court rejected plaintiffs' argument that the reports from defendants' expert should be stricken in relation to the class certification decision because the reports were not disclosed in advance. The court held that Rule 26(a)(2)(B) (regarding disclosure of expert reports) did not apply because "[t]he opinions of the experts pertain to issues to be addressed regarding class certification, not the merits of the underlying claims." *Id.*

189 See, for example, *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 258 F.R.D. 167, 176 (D.D.C. 2009), in which the court denied defendants' motion for bifurcated discovery, with the first phase limited to "class" discovery. The judge explained:

> [D]efendants have to concede that they are asking plaintiffs (and therefore the Court) to accept their formulation of the certification question and their determination of what pertains to it. But, the whole purpose of discovery is to find not only those documents that defendants wish for plaintiffs to see but all documents

Although the Supreme Court has recently expressed misgivings about the ability of district judges to control discovery,[190] this task seems manageable. Indeed, in the past, it was the defendants who were often more aggressive than plaintiffs during precertification discovery, pursuing questions about the willingness and ability of class representatives to finance suits and scaring some of them off.[191] Courts soon squelched those efforts, but more creative ones may appear. In general, defendants can do discovery about the topics relevant to class certification.[192] But courts will sometimes have to be careful about whether the discovery defendants seek actually holds promise of shedding light on whether the case should be certified. For example, in one case, defendant sought to capitalize on a falling out among the lawyers in the firm representing plaintiffs and served subpoenas on that firm and a former partner of the firm to evaluate whether the firm had the necessary resources to support class action litigation.[193] That is, of course, a relevant consideration in appointment of class counsel.[194] And in this instance, evidently, one defecting lawyer had made statements suggesting that his former firm lacked sufficient resources to prosecute class actions, and also made other accusations of wrongdoing that had received public attention and might have interfered with the firm's ability to represent the class.[195]

> that pertain to the certification issue that plaintiffs believe will advance their position. To limit plaintiffs to what defendants will give them is to, in effect, begin and end discovery with defendants' voluntary disclosures. But, unlike continental systems where discovery consists of what the parties voluntarily exchange, the American system expressly authorizes each party to independently demand relevant evidence from its opponent. While bifurcated discovery may have much to recommend it, defendants' assertions about the ease with which they can find responsive documents only apply if I limit plaintiffs to what defendants will give them. That approach in effect amends the Federal Rules of Civil Procedure to create a unique form of discovery for class actions.

Id. at 173. *See also* Kingsberry v. Chi. Title Ins. Co., 258 F.R.D. 668, 670–71 (W.D. Wash. 2009) (permitting discovery that would likely produce substantiation of consumers' class allegations).

190 *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (referring to "the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side"). Compare the views of Justice Breyer, dissenting in *Ashcroft v. Iqbal*, 126 S. Ct. 1937, 1961–62 (2009) (Breyer, J., dissenting), and affirming the utility of judicial supervision in containing overdiscovery. It is perhaps worth noting that Justice Breyer's brother is a district judge.

191 *See, e.g.*, Betty C. Bullock, Note, *Discovery of Plaintiffs' Financial Situation in Federal Class Actions: Heading 'Em Off at the Passbook*, 30 HASTINGS L.J. 449, 450 (1978).

192 *See, e.g.*, Eggleston v. Chi. Journeymen Plumbers' Local Union No. 130, 657 F.2d 890, 904 (7th Cir. 1981).

193 Stock v. Integrated Health Plan, Inc., 241 F.R.D. 618, 620–21 (S.D. Ill. 2007).

194 *See* FED. R. CIV. P. 23(g)(1) (directing the court to consider counsel's expertise and resources in evaluating counsel's adequacy).

195 *Stock*, 241 F.R.D. at 621 & n.1.

The judge quashed the subpoenas, ruling that the information sought would not assist in making the class certification decision.[196]

Defendants may also steal a march on plaintiffs and move for determination of the class certification issue before plaintiffs do. As the Ninth Circuit has recognized recently, "[n]othing in the plain language of Rule 23(c)(1)(A) either vests plaintiffs with the exclusive right to put the class certification issue before the district court or prohibits a defendant from seeking early resolution of the class certification question."[197] But just as district judges must superintend discovery to keep it within bounds for certification, they must also take care that defendants do not so accelerate the decision that plaintiffs cannot adequately prepare. Indeed, to the extent defendants object to questionable grants of certification as supporting "blackmail" with weak claims because certification is of such momentous importance, it seems more than odd for them simultaneously to contend that the decision on class certification must be accelerated to avert the possibility that the class will be certified if a fuller factual inquiry occurs.

It must be true that these shifts sometimes increase the cost plaintiffs' counsel must bear to prosecute class actions. Even the prospect of relatively untrammeled discovery about "merits" issues before certification (something that plaintiffs' counsel in general would probably applaud) also means that there will be additional discovery costs, and additional material to be sifted. And then plaintiffs' counsel will bear the burden of proving certification is justified by persuading the district judge by a preponderance of the evidence that the Rule 23 requirements are satisfied. Although many plaintiffs' counsel have substantial resources to support such litigation, those resources are not unlimited, and under the impact of the current economic difficulties, these lawyers may be more cautious than usual about committing their resources to such a demanding process.[198] But at least plaintiffs' counsel can look forward to enhanced value for their cases once the

196 *Id.* at 625.

197 Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 939–40 (9th Cir. 2009). The court noted further that "district courts throughout the nation have considered defendants' 'preemptive' motions to deny certification." *Id.* at 940.

198 For example, a recent article quoted Diane Sullivan, a defense-side lawyer at the Philadelphia firm Dechert LLP, as saying that mass tort filings are down, and added: "Sullivan also asserts that plaintiffs attorneys 'have been more willing to settle at lower dollar amounts,' although she declined to cite specific examples because of confidentiality agreements. 'They're choosing cash now over investing in prolonged litigation,' she says." Claire Zillman, *Developments: Cash-Flow Woes*, LITIG. 2009, Fall 2009, at 13. Plaintiff-side lawyers reportedly disputed these sorts of assertions. *Id.*

class action is certified; this seal of judicial approval should provide considerably more settlement clout than the prior model.[199]

Ultimately, however, the one most stressed by these developments may be the judge. Passing on class certification issues was challenging already, even though only a prima facie showing had to be made. Having to perform a *Daubert* analysis of the plaintiffs' expert opinions was an added challenge. Having to move beyond that and make "findings" including evaluating the relative persuasiveness of the plaintiffs' and defendants' experts is more challenging still, as is the prospect that such evaluations will be supported by considerably more discovery and, accordingly, expanded submissions to the court.

Altogether this effort is likely to take up more time and energy from all participants. At the same time, however, it should yield better decisions in a significant number of cases.

B. Fewer Classes Certified

The "better" certification decisions could go either way; plaintiffs who have broader discovery opportunities may develop support for certification that they would not have been able to provide under prior regimes. Put differently, there will probably be fewer false positives and fewer false negatives.[200] But it is probably also true that plaintiffs will find it harder to satisfy the current approach than it was to obtain certification under prior, more truncated versions.[201]

Certainly there are limits to the current approach's demanding attitude toward plaintiffs' showing, as illustrated by a recent Ninth

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199 Professor Cox noted the same sort of thing in relation to the effect of the PSLRA on securities class actions because it enhanced the scrutiny that occurred on a motion to dismiss:

> Though lax pleading requirements made the nuisance value of a suit much more difficult to address through pretrial motions, it must also be understood that the Reform Act's heightened pleading standard credentials suits that survive pretrial motions so that [they] will have greater settlement value than such suits had on average before the Reform Act. . . . [C]ounsel should feel more confident in the case after satisfying the new pleading requirements than the counsel who previously had to know less and plead less to withstand a challenge to the pleadings.

James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 520 (1997).

200 *See* Davis & Cramer, *supra* note 14, at 13 (using the terms "false negatives" and "false positives" to describe the *Hydrogen Peroxide* approach).

201 Consider the following reactions from a leading plaintiff lawyer:

> What had once been considered to be procedural motions are turning into a very early litigation of the merits of the claims. That's kind of a mixed bag. If the plaintiffs prevail on these issues on a less-developed record fairly early in the case, it puts defendants in a much more difficult position than they would be otherwise . . . . A decision like *Hydrogen Peroxide* can carry some mixed blessings.

Antitrust Update, CAL. LAW., Sept. 2009, at 45 (quoting Joseph R. Saveri, Esq.).

Circuit decision. Plaintiffs there filed a class action claiming that defendant employer had violated California requirements for a thirty-minute lunch break on the ground that people in a specified job status were "on duty" during lunch and therefore not "totally relieved of all duties" as required by the California statutes.[202] The district court had held that certification should be denied because it could not be assured that plaintiffs would prevail on their "on duty" theory, which defendants contested.[203] Citing *Eisen*, the appellate court held that the district judge went too far:

> Here, the district court not only "judge[d] the validity" of plaintiffs' "on duty" claims, it did so using a nearly insurmountable standard, concluding that merely because it was not *assured* that plaintiffs would prevail on their primary legal theory, that theory was not the appropriate basis for the predominance inquiry. But a court can never be *assured* that a plaintiff will prevail on a given legal theory prior to a dispositive ruling on the merits, and a full inquiry into the merits of a putative class's legal claims is precisely what both the Supreme Court and we have cautioned is not appropriate for a Rule 23 certification inquiry.[204]

It may be that this Ninth Circuit decision shows that this appellate court is resisting the new approach,[205] but the district court's aggressive insistence upon being "assured" that plaintiffs' theory would prevail at trial appears to be considerably more demanding than what *Hydrogen Peroxide* is calling for. The fact that judges are looking for more, however, almost certainly will mean that they will find plaintiffs' showings wanting more frequently than they did under more forgiving regimes. And that corresponds to such evidence as there is about the rate of certification. In the federal courts, the limited information that is available indicates that the rate of class certification is falling.[206] Whether that decline results in any significant measure from

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202 United Steel Workers Int'l Union v. ConocoPhillips Co., 593 F.3d 802, 804 (9th Cir. 2010).

203 *Id.* at 805.

204 *Id.* at 809.

205 In *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir.) (en banc), *cert. granted*, 79 U.S.L.W. 3128 (U.S. Dec. 6, 2010) (No. 10-277), the court, by a 6–5 en banc decision, affirmed class certification in a mammoth employment discrimination case, *id.* at 628, but affirmed in Part II of its opinion that it embraces demanding scrutiny of class certification, *id.* at 581.

206 *See* Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 606 (2006) (reporting approximately a one-third decline in frequency of certification of class actions terminated in 1999–2002 compared with the rate in an earlier study focusing on federal-court class

the increasing scrutiny of "merits" issues in relation to certification is difficult to determine. A contrast is provided by a recent study of certification in California state-court class actions during the period 2000–2005, which showed a substantial decline in the frequency of certification.[207]

Concluding that the *Hydrogen Peroxide* approach to class certification will reduce the frequency of certification tells us little about whether that effect is a good thing. Obviously it is unattractive to plaintiffs and pleasing to defendants, but discussion of the basic subject seems frozen in the impasse that Professor Landers observed more than thirty-five years ago:

> Proponents of [Rule 23] suggest that it is virtually the sole bulwark against "legalized theft" by large institutions from consumers, and that it is one of the most remarkable instruments of social and economic justice to have been devised by the ingenuity of man. Opponents of the rule speak of it as "legalized blackmail," as a device for the most flagrant type of claims solicitation by lawyers, and as a potential "engine of destruction" of prominent and stable businesses.[208]

Although it is inviting to conclude that those cases that fail to achieve certification under *Hydrogen Peroxide* would more likely have led to "legalized blackmail" than ferret out "legalized theft," there seems no way to prove that point.

Those who stress the "legalized blackmail" concern, however, would not likely be entirely satisfied with *Hydrogen Peroxide*'s winnowing effect. Professors Bone and Evans, for example, have offered an "ambitious proposal" that plaintiffs be required to prove a likelihood of success in order to obtain class certification, in effect introducing some scrutiny like that used by Judge Tyler in *Eisen* as a routine feature of the certification process.[209] Their premise was that otherwise the settlement-coercing power of class certification will

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actions terminated in 1992–1994); *see also* Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 789–90 (2010) (discussing the declining frequency of class certification motions).

207 ADMIN. OFFICE OF THE COURTS, CLASS CERTIFICATION IN CALIFORNIA: SECOND INTERIM REPORT FROM THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION 6 (2010) (reporting that the percentage of cases in which the class was certified decreased by more than fifty percent from 2000 to 2005). The report observes that the decreasing certification trend corresponds to what has been experienced in the federal system, and suggests that one possible explanation is that "evolving California and federal case law has narrowed the standards for a class certification." *Id.* at 10–11.

208 Landers, *supra* note 59, at 843 (citations omitted).

209 *See* Bone & Evans, *supra* note 184, at 1278–80.

come into play too often.[210] As Professor Silver has argued, on the other hand, there seems a limited basis for concluding that defendants are often so coerced.[211] It may be important to keep in mind the words of then-Judge Sotomayor: "The effect of certification on parties' leverage in settlement negotiations is a fact of life for class action litigants. While the sheer size of the class in this case may enhance this effect, this alone cannot defeat an otherwise proper certification."[212]

Perhaps consumer class actions present the most telling illustration of the blackmail concern.[213] An early example was *Ratner v. Chemical Bank New York Trust Co.*,[214] a proposed class action under the Truth in Lending Act on behalf of 130,000 Master Charge cardholders for failing to provide proper disclosure of the annual percentage rate of interest.[215] Given the statutory minimum award of $100 per "victim," this suit could have led to an award of at least $13 million for what seemed at most a small error of language. Judge Frankel concluded that this "annihilating punishment" should not be visited on defendant for such a small infraction, and found that allowing a class action would infringe defendant's substantive rights.[216] Much as this attitude may correspond with notions of inefficient overenforcement,[217] it is difficult to square with what Rule 23 says a gatekeeping judge should have in mind in determining whether to certify a class. Congress later solved the problem by adopting limits on recoveries in Truth in Lending Act class actions,[218] but the issue is much broader.[219]

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210 *See id.* at 1292–96.

211 *See* Silver, *supra* note 8, at 1399–408.

212 *In re* Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 145 (2d Cir. 2001).

213 *See also supra* text accompanying notes 85–96 (discussing Katz v. Carte Blanche, 496 F.2d 747 (3d Cir. 1974)).

214 Ratner v. Chem. Bank N.Y. Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972).

215 *Id.* at 413–14.

216 *Id.* at 416.

217 *See, e.g.*, Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 61 (1975) (arguing that class actions may invite enforcers of certain rules to pursue remedies to the point of "inefficient overenforcement").

218 *See* Act of Oct. 28, 1974, Pub. L. No. 93-495, § 408(a), 88 Stat. 1500, 1518 (codified as amended at 15 U.S.C. § 1640(a) (2006)) (setting a ceiling of $100,000 or 1% of the creditor's net worth for awards in class actions). In 1976, the maximum amount was increased to $500,000. *See* Consumer Leasing Act of 1976, Pub. L. No. 94-240, § 4(3), 90 Stat. 257, 260 (codified at 15 U.S.C. § 1640(a)). For discussion, see 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1804 (3d ed. 2005).

219 *See, e.g.*, Leysoto v. Mama Mia I., Inc., 255 F.R.D. 693, 698 (S.D. Fla. 2009) (refusing to certify a class in a suit for alleged infractions of the Fair and Accurate Credit Transactions Act due to the failure to guard against disclosure of the customer's entire credit card number in light of the "potentially annihilating" consequences of liability for the statutory minimum remedy).

Arguably, the solution would be for legislatures enacting such consumer protection measures routinely to insert provisions concerning how class actions should be handled, like the one later adopted for the Truth in Lending Act.[220] At least here, there may be a cogent argument that screening of some sort focused on the promise of the suit on the merits is in order.

This was, interestingly, the goal Judge Weinstein had in mind shortly after the 1966 amendments to Rule 23 went into effect. Presented with a proposed securities fraud class action in which he faced cross-motions regarding class certification, he worried that the notice attending class certification would itself harm defendants whether or not the action was well founded.[221] Accordingly, he did what the proponents of merits screening encourage:

> A case such as the present one should not be allowed to proceed as a class action unless the plaintiffs are able to convince the Court that there is a substantial possibility that they will prevail on the merits. Something more than the certification of good ground by an attorney is required. . . . In this case, an evidentiary hearing at which the plaintiffs will be required to make such a preliminary showing should be held before the class action motion is decided.[222]

Plaintiffs were therefore allowed considerable discovery,[223] and Judge Weinstein held a three-day evidentiary hearing.[224] At the end of this hearing, Judge Weinstein invited defendants to move for sum-

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220 For a case raising the issue whether a federal court should enforce such a limitation when presented with a request under Rule 23 to certify a class in a suit based on a state law, see Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010). For discussion, see Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in a* Shady Grove, 79 GEO. WASH. L. REV. 448 (2011).

221 *See* Dolgow v. Anderson, 43 F.R.D. 472, 501 (E.D.N.Y. 1968). As the court noted:

> [T]he notice provisions themselves may prove harmful to defendants since the attendant publicity and its official source may inflate the apparent importance of the action. So much of the stock market depends upon faith and reputation that the Court should be reluctant to lend its weight to any unnecessary publicity in connection with a pending lawsuit.

Id. (citation omitted).

222 *Id.*

223 As Judge Moore outlined in dissent from the eventual reversal in *Dolgow v. Anderson*, 438 F.2d 825 (2d Cir. 1971): "[P]laintiffs had availed themselves of discovery procedures including some twelve sets of interrogatories and had obtained from defendants over 7,600 pages of documents. In addition, they had taken the depositions of the President and a Vice-President of Monsanto [the company whose stock was involved] (some 1,500 pages)." *Id.* at 830–31 (Moore, J., dissenting).

224 As detailed by Judge Moore later, in his dissent from the Second Circuit's reversal: "Evidentiary hearings were held on December 18, 19, and 20, 1968. All materials previously

mary judgment, and, after further argument, he granted that motion and denied class certification. He was felled on appeal, however, on the ground that he should not have granted summary judgment, seemingly due to invocation of the Second Circuit's old "slightest doubt" standard for summary judgment.[225] Meanwhile, Judge Tyler had emulated Judge Weinstein in addressing the question of notice costs, leading to the Supreme Court's *Eisen* decision. *Hydrogen Peroxide* does not invite embrace of Judge Weinstein's technique.

C. "Findings" and the Seventh Amendment

The "findings" *Hydrogen Peroxide* says are necessary for class certification are of a peculiar sort, such as a finding that common questions will "predominate." On occasion, as with dueling experts, it may be necessary to choose between competing evidentiary showings to make such a finding. If the issues to be resolved to determine certification overlap with the merits that must be decided at trial, it may seem that there is a risk of intruding on the right to jury trial. At least some so argue.[226]

The Seventh Amendment argument is not persuasive. It may have been sparked by mysterious invocations of the Seventh Amendment in a 1999 Supreme Court rejection of a settlement class action, but that Supreme Court comment surely does not apply to the situation in which certification is denied, whether or not the ground for denial corresponds to an issue that would be presented at trial if absent class members filed their own suits.[227] As a starting point, then,

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submitted was [sic] made part of the record and eight witnesses were subjected to direct and cross-examination. The record before us consists of 10 volumes." *Id.* at 831.

225 *See id.* at 830 (quoting Doehler Metal Furniture Co. v. United States, 149 F.2d 130 (2d Cir. 1945), the Judge Frank opinion that introduced the "slightest doubt" standard). A year later, the Second Circuit rejected this attitude toward summary judgment. *See* Beal v. Lindsay, 468 F.2d 287, 291 (2d Cir. 1972); *see also* Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1319 (2d Cir. 1975).

226 *See* Kaufman & Wunderlich, *supra* note 14, at 357 (arguing that "this mini-trial on a motion for class certification intrudes on plaintiffs' right to trial by jury"); Olson, *supra* note 14, at 938 (arguing that, because certain issues *Hydrogen Peroxide* requires the court to resolve on class certification are issues plaintiffs must prove at trial, plaintiffs have a constitutional right to a jury decision of those issues).

227 In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Court asserted that "certification of a mandatory class followed by settlement of its action for money damages obviously implicates the Seventh Amendment jury trial rights of absent class members." *Id.* at 845–46. It is extremely difficult to determine what the Seventh Amendment problem would be. *See* Richard L. Marcus, *Benign Neglect Reconsidered*, 148 U. PA. L. REV. 2009, 2031 n.112 (2000) (puzzling over how a settlement could implicate the Seventh Amendment). In any event, at least it could be said in that case that the absent class members would, if bound by a settlement, no longer

the jury-trial rights of the absent class members cannot be imperiled by a ruling that the case is not a proper class action. And the named plaintiff is free to continue individually, jury-trial rights preserved.[228]

An equally basic point is that the Seventh Amendment does not require that the *only* way for there to be any judicial resolution of an issue that might be presented at a jury trial be by jury decision. Courts may have to resolve such issues as a pretrial matter when passing on procedural issues, such as class certification; the fact that the issue is the same does not implicate the right to jury trial.

A simple example illustrates the point. Consider the coconspirator exception to the hearsay rule as it operates in a criminal conspiracy case. To establish that a hearsay exception applies, the proponent of evidence must, by a preponderance of the evidence, show that the prerequisites for the exception have been established. Under Federal Rule of Evidence 801(d)(2)(E), those prerequisites include (1) that there was a conspiracy, (2) that defendant joined the conspiracy, (3) that the declarant also joined the conspiracy, and (4) that the statement was made during the course and in furtherance of the conspiracy. Only when the court finds that these prerequisites have been established may it admit the declarant's statement under this exception. But if the substantive charge is conspiracy, that means that the court must in effect find that defendant is guilty of conspiracy (by a preponderance of the evidence) before admitting this evidence, which the jury must evaluate, along with all the other evidence, in determining whether defendant has been proved guilty of conspiracy beyond a reasonable doubt. The judge does not, of course, tell the jury that she has already concluded that defendant is guilty, albeit

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have a right to present their cases to a jury. That concern does not arise if class certification is denied. Surely the "right" to have one's case decided by a jury does not carry with it the right to have a class in which one is a putative member certified so that a class action trial can be the vehicle for such a jury decision.

228 See, for example, *Alaska Electrical Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 228–29 (5th Cir. 2009), in which the named plaintiff argued that his showing of "loss causation" was sufficient and that a Rule 23 "finding" to the contrary at the class certification stage was tantamount to granting summary judgment even though plaintiff had enough evidence to get to the jury. The court explained that "[t]his argument fails because it conflates the issue of loss causation for purposes of establishing predominance under Rule 23 with the issue of loss causation on the merits." *Id.* at 229. But as the court pointed out, "[t]he denial of class certification does not prevent a plaintiff from proceeding individually. And 'the court's determination for class certification purposes may be revised (or wholly rejected) by the ultimate factfinder.'" *Id.* (quoting Unger v. Amedisys, Inc., 401 F.3d 316, 323 (5th Cir. 2005)); *see also* Fener v. Operating Eng'rs Constr. Indus., 579 F.3d 401, 407 (5th Cir. 2009) ("The proof needed for loss causation at the pleadings stage should not be conflated with the requirements needed at the class certification stage.").

only by a preponderance of the evidence, and defendant's right to a jury trial is preserved.

Similarly, in cases in which the judge grants class certification, then, the judge's "finding" that the prerequisites for class certification have been satisfied should not be revealed to the jury at trial and should not limit the jury's power to decide the case according to the Seventh Amendment.[229] Indeed, in this situation it is *defendant's* right to jury trial that might be at risk if the judge's pretrial resolution of overlapping issues were somehow to affect the jury's decision.

What is left, however, is a somewhat peculiar "finding." As the Second Circuit tried to explain:

> The finding that individual issues were likely to predominate did not depend on an assessment of the validity of plaintiff's claim or of the potential claims of other members of the putative class. Rather, the district court resolved an independent fact question concerning the expected forms of proof in light of the specific factual allegations contained in the amended complaint. Some overlap with the ultimate review on the merits is an acceptable collateral consequence of the "rigorous analysis" that courts must perform when determining whether Rule 23's requirements have been met, so long as it does not stem from a forbidden preliminary inquiry into the merits.[230]

How exactly to make this sort of finding may be a challenge. One district judge, presented with a report supporting class certification from the same expert plaintiffs relied upon in *Hydrogen Peroxide*,

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229 *See, e.g.*, Gariety v. Grant Thornton, LLP, 368 F.3d 356 (4th Cir. 2004). As the court explained there:

> The jury or factfinder can be given free hand to find all of the facts required to render a verdict on the merits, and if its finding on any fact differs from a finding made in connection with class action certification, the ultimate factfinder's finding on the merits will govern the judgment. A model for this process can be observed in the context of the preliminary injunction practice. Courts make factual findings in determining whether a preliminary injunction should issue, but those findings do not bind the jury adjudging the merits, and the jury's findings on the merits govern the judgment to be entered in the case.

Id. at 366. *Hydrogen Peroxide* made the same point: "Although the district court's findings for the purpose of class certification are conclusive on that topic, they do not bind the fact-finder on the merits." *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 318 (3d Cir. 2008); *see also In re* New Motor Vehicles Canadian Exp. Litig., 522 F.3d 6, 24 (1st Cir. 2008) ("The judge's consideration of merits issues at the class certification stage pertains only to that stage; the ultimate factfinder, whether judge or jury, must still reach its own determination on these issues.").

230 Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 232 (2d Cir. 2006) (citation omitted).

concluded that the situation was different because, in this case, the expert had "actually presented an econometric model that purports to show that antitrust impact is susceptible to common proof."[231] But his finding that this report sufficed seems not to make the sort of "finding" that is called for:

> Although the defense experts claim to dispute the feasibility of constructing an econometric model using proof common to the class, their reports are better characterized as disputing the results of the plaintiffs' modeling. *To resolve this dispute would be to place myself in the role of the ultimate factfinder by choosing which expert's econometric model is "correct."*[232]

This judge's reluctance to make a factfinder's choice between the competing experts arguably represents failure to scrutinize the showing in the way *Hydrogen Peroxide* commands; in that case, the court of appeals seemed to expect that the district judge would compare the views of the defense and plaintiff experts and, one would think, choose between them.[233] In that sense, it may assume that if the jury is persuaded at trial that defendant's expert is right about common proof of impact, that could imperil the entry of a judgment against the class because lack of commonality does not prove that all class members should lose, only that they should not all win. Since one goal of certifying a class action is that the outcome will bind the class, win or lose, that result might seem to defeat the purpose of the class action. Requiring the district judge to make a "finding" about which expert is right could be essential. That "finding" would not bind the jury, it is true, but it would act as an effective screen against the risk that the jury would conclude that proof of impact is not common compared with some less stringent review on class certification. But it may be that the need for such stringency overlooks another possibility. At least in the employment discrimination area, the failure of a "class claim" does not necessarily affect the possible later assertion of individual claims by class members in the losing class.[234] Similarly, in *Hy-*

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231 *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 102 n.11 (D. Conn. 2009).

232 *Id.* (emphasis added).

233 *See Hydrogen Peroxide*, 552 F.3d at 323–35.

234 *See* Cooper v. Fed. Reserve Bank, 467 U.S. 867, 880 (1984) (holding that, in a Title VII action, judgment against the class on a "class claim" of pattern or practice of discrimination does not foreclose later individual claims by class members based on a showing of actual discrimination against them).

drogen Peroxide, a finding that there was no classwide impact might not preclude individual claims based on individual impact.

But the core nature of the finding—unless it is on the "merits" of what plaintiffs must prove—will continue to perplex. For some, that perplexity results from the formulation of the predominance question.[235] The *Principles* themselves seem to respond to this concern by rephrasing the Rule 23(b)(3) standard to direct the judge to determine whether to authorize a class action by asking whether resolution of a common issue would "materially advance the resolution of multiple civil claims by addressing the core of the dispute in a manner superior to other realistic procedural alternatives, so as to generate significant judicial efficiencies."[236] Frankly, this rephrasing seems a lot like what knowledgeable judges have been trying to do under the current Rule 23(b)(3) standards, and rephrasing that effort appears unlikely to make the task easier or clearer. It also probably will not materially clarify the nature of the "findings" required.

D. Diminished Trial Court Discretion

From the beginning, it has been said that a trial court's decision whether to certify a class depends on its exercise of discretion, and courts still say so.[237] But a findings requirement, and the sort of re-

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235 See Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995 (2005):

> [The predominance requirement] requires elaborate efforts to answer a question that is not worth asking. . . . [S]imilarity among claims is an unhelpful concept when one thinks about the practical consequences of certifying a class and the procedural principles (such as finality, fidelity, and feasibility) to which class adjudication should conform. . . . The predominance concept conflates the similarity and dissimilarity inquiries into a single balancing test, thus obscuring the practical and theoretical importance of dissimilarity standing alone. . . . The ensuing weighing process is analogous to asking a starving person to balance the nutritional value of vitamins in his only potential food source against the negative effects of poison in the same food. Any sort of balancing would be pointless. A huge nutritional value would be irrelevant if the poison is fatal, and if the poison is not fatal then any amount of nutrition would justify consumption absent a superior alternative food source.

Id. at 1005.

236 PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 2.02(a)(1) (2010).

237 Thus, even while announcing a demanding standard for review of class certification motions in *IPO*, Judge Newman also observed:

> The Rule 23 requirements differ from other threshold issues in that, once a district court has ruled, the standard for appellate review is whether discretion has been exceeded (or abused). This standard of review implies that a district judge has some leeway as to Rule 23 requirements, and, unlike rulings as to jurisdiction, may be affirmed in some circumstances for ruling either that a particular Rule 23 requirement is met or is not met.

view exhibited in *Hydrogen Peroxide*, hardly seem to fit that model. Indeed, the whole notion may be unhelpful in describing the actual role of district judges and courts of appeals. Long ago, Judge Friendly emphasized the point:

> Abuse of discretion can be found far more readily on appeals from the denial or grant of class action status than where the issue is, for example, the curtailment of cross-examination or the grant or denial of a continuance. . . . While no two cases will be exactly alike, a court of appeals can no more tolerate divergence by a district judge from the principles it has developed on this subject than it would under a standard of full review—and this even though the district judge has adduced what would be plausible grounds for his ruling if the issue were arising the first time. . . . [R]eview of class action determinations for "abuse of discretion" does not differ greatly from review for error.[238]

Certainly *Hydrogen Peroxide* was providing directions for district judges to follow, not just hints for them to use in their "discretion." And the role of appellate courts undoubtedly has increased since Rule 23(f) was added in 1998, permitting immediate review of grants or denials of class certification. The very purpose of that Rule was to permit a body of appellate caselaw to develop to focus and confine the district courts' "discretion." The trend will continue.

Indeed, the whole notion of discretion under Rule 23 may need reexamination. In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[239] the Supreme Court rejected an argument that a state statute forbidding class actions for suits based on legislation creating penalties, unless the penalty statute explicitly authorized class actions, should be applied in a federal court suit seeking class certification for such claims.[240] The lower court had found that the state statute did not conflict with Rule 23 because it addressed whether a given state-law claim was "eligible" for class treatment.[241] The Court rejected this argument, finding that Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his

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IPO, 471 F.3d 24, 40 (2d Cir. 2006).

238 Abrams v. Interco, Inc., 719 F.2d 23, 28 (2d Cir. 1983). For somewhat contemporary musings by Judge Friendly about discretionary rulings, see Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982).

239 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010).

240 *Id.* at 1437–38.

241 *Id.* at 1437.

claim as a class action."[242] It emphatically rejected defendant's argument that the district court had some discretion about whether to certify a class:

> Allstate asserts that Rule 23 neither explicitly nor implicitly empowers a federal court "to certify a class in each and every case" where the Rule's criteria are met. But that is *exactly* what Rule 23 does: It says that if the prescribed preconditions are satisfied "[a] class action *may be maintained*" . . . — not "*a class action may be permitted*." Courts do not maintain actions; litigants do. The discretion suggested by Rule 23's "may" is discretion residing in the plaintiff.[243]

True, this discussion is not about whether the requirements of Rule 23 are satisfied, but it nonetheless makes the idea of discretion in application of the Rule less plausible.

E. More Frequent Settlement Class Certifications

Under amended Rule 23(e), the responsibilities borne by the court in reviewing a proposed settlement of a class action are considerable, and the judge's performance of those duties is subject to review at the behest of any objecting class member. Litigants and judges contemplating settlement of a class action will have work to do.

In one sense, *Hydrogen Peroxide* may facilitate that process. Often the question whether plaintiff counsel have had adequate access to discovery is problematical when they are telling the judge that the deal they reached is a good deal for the class. There is an obvious reason to worry about "an instance of the unscrupulous leading the blind."[244] But as the prior discovery boundary between "merits" and "class" issues breaks down,[245] there will be less occasion for worry about whether plaintiff lawyers are indeed going into the negotiations blind. To the contrary, they should have been amassing the sort of evidence that would enable them to evaluate the merits in order to present their class certification motion.

More generally, however, the additional difficulties that the class certification process erects for plaintiffs, and the prospect of probing appellate review if the class is certified, must encourage plaintiff law-

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242 *Id.*

243 *Id.* at 1438.

244 *In re* Corrugated Container Antitrust Litig., 643 F.2d 195, 211 (5th Cir. 1981).

245 *See supra* text accompanying note 83; *see also* Beach v. Healthways, Inc., 264 F.R.D. 360, 363 (M.D. Tenn. 2010) (denying defendants' motion to postpone "merits discovery" until after class certification).

yers to look more longingly at settlement. Perhaps the settlement route to certification will avoid the demanding findings of certification for litigation. The Third Circuit has recently stated that the rigors of *Hydrogen Peroxide* do not apply to review of settlement-class certification:

> Unlike in *In re Hydrogen Peroxide Antitrust Litigation*, where the certification inquiry was set against the backdrop of an impending trial, here we are not as concerned with "formulat[ing] some prediction" as to how this element of a Sherman Act violation would "play out" at trial, "for the proposal is that there be no trial," and instead our inquiry into the element of antitrust injury is solely for the purpose of ensuring that issues common to the class predominate over individual ones.[246]

For those who regard settlements as favored outcomes, this is a welcome prospect. But for those who are unnerved by asking judges to perform the tasks that they must shoulder to review settlements, rather than the more familiar job of making the "findings" required by *Hydrogen Peroxide*, it may be less welcome. Moreover, it is somewhat difficult to square this reasoning with the emphasis on predominance in *Amchem* itself, for the Supreme Court ruled there that the proposed settlement-class certification failed the predominance test.[247] But to the extent that predominance is an obstacle even in the settlement-class context, it is likely that lawyers will shift attention to non-class aggregate settlements, as Professor Sherman has recently noted.[248]

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246 *In re* Ins. Brokerage Antitrust Litig., 579 F.3d 241, 269 (3d Cir. 2009) (citations omitted).

247 In *Amchem*, the Court emphasized that the proposed settlement failed the predominance test. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 622–25 (1997). But this discussion may be off point, since it was about the "cohesiveness" of the class there, and meant to emphasize that "[n]o settlement class called to our attention is as sprawling as this one." *Id.* at 624. It may be that the function of predominance in that case was to underscore the class conflicts that mainly concerned the Court, and that a relaxed view of predominance in other cases could be justified in the settlement context where it would not suffice for a litigation class that had to show how to try the case. The Court did note as well that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Id.* at 625.

248 *See* Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2223 (2008).

CONCLUSION

In a number of ways, *Eisen* has seemed a wrong turn in class action law, particularly by scaring judges away from addressing the merits while passing on class certification. Perhaps the Court was trying only to make certification more difficult for plaintiffs to obtain,[249] but its decision had effects far beyond that for a generation. Those effects are little felt now, and will likely be felt even less in the future. Professor Molot has effectively stated the general problem that *Hydrogen Peroxide* illustrates:

> The central dilemma in contemporary civil procedure is not whether judges should cling to their traditional role or else abandon it for a completely new one, but how judges should respond to new challenges and whether judges can do so without losing sight of their core institutional competence and constitutional role.[250]

Gatekeeping about aggregation is a traditional role of judges. With class actions, it had often involved scrutinizing and evaluating the "merits" when they bore on whether aggregation should be allowed. The 1966 amendment brought new focus on the class certification decision by insisting that it be made early, and the expansion of class action activity produced by the new Rule magnified the importance of that decision. But *Eisen* seemed to deprive judges of authority to bring their traditional decisionmaking capacities to bear on that decision whenever an issue overlapped with the "merits." Restoring authority to make such judgments is easier to justify in terms of judges' core institutional competence than the expansion of judges' responsibilities to include many tasks—including tasks in managing class actions—that they must also undertake.

In terms of Professor Molot's criteria, the recent shift toward merits scrutiny at the class certification stage is a positive development. We will not soon exempt judges from performing the tasks for which their traditional roles may inadequately equip them,[251] but at

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249 *See* George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 731–32 (1980) (speculating that in *Eisen* the Court was not generally opposed to merits scrutiny, and would welcome merits scrutiny that "would protect defendants from unwarranted certification of class actions").

250 Molot, *supra* note 15, at 74.

251 A possible example is the high-profile review by Judge Rakoff (of the Southern District of New York) of a proposed settlement of an SEC action against Bank of America, which the judge reluctantly approved after first rejecting a different settlement. *See* Louise Story, *Bank's Deal with S.E.C. Is Approved*, N.Y. TIMES, Feb. 23, 2010, at B1.

least they will have more latitude to perform this task within their core institutional competence.

If that is a happy conclusion, it nonetheless comes with potential consequences that may unnerve some. The additional work that merits scrutiny portends is not itself unnerving; it should yield more thorough analysis of these important questions. The prospect that fewer classes will be certified may not be realized. But if fewer classes are certified, that result is not particularly unnerving, assuming the additional work produces more reliable certification decisions. The Seventh Amendment problem that some have raised due to the "findings" requirement seems groundless, but the nature of the finding will be perplexing whether or not there is a semantic change in the articulation of what is needed for class certification. District courts will have less latitude if courts of appeals—wielding their new power for interlocutory review of class certification decisions—become more exacting in performing that review, but that is unnerving only if one concludes that court of appeals decisions are less reliable than district court decisions. Of all the seeming consequences, then, the one that is most troubling is that there will be even more settlement-class than litigation-class certifications. Ironically, that development will require judges to do more of the sort of activity that seems less suited to their core institutional competence.[252] As Professor Resnik put it a generation ago, "[t]he history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms."[253] Perhaps the solution to the problems wrought by *Eisen* will prove this adage yet again.

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252 *See supra* text accompanying notes 138–46 (discussing judicial review of class action settlements).

253 Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 1030 (1984).