Putting Proponents to Their Proof: Evidentiary Rules at Class Certification

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ABSTRACT

One of the most often cited precepts at class certification hearings—when courts hold such hearings—is that the rules of evidence do not apply. Since 1966, virtually every federal and state judge has fallen back on this trope to wave off objections to materials offered by counsel during class certification hearings. Class certification hearings, then, often resemble some sort of Kabuki theatre, where, upon an offer of proof, the opposing party rises to object to the materials on evidentiary grounds, only to be rebuffed by the judge's invocation of the "no rules of evidence apply" mantra.

In light of the evolving rigorous analysis standard for class certification and the increased use of evidentiary hearings, courts ought to recognize that rules of evidence should be applied at class certification hearings. Under current practice, we have evidentiary hearings without reference to the rules of evidence. Although compelling arguments may be marshaled against imposing such a requirement, imposing evidentiary rules at class certification is the logical extension of importing the Daubert *gatekeeping function into the certification process. The trend over two decades has been to make the class certification process a more serious affair, against the backdrop of the consequences of the class certification decision, which usually impels defendants to settle the case rather than to continue litigation. Imposing evidentiary rules at class certification will enhance professional responsibility on class certification motions. Additionally, imposing evidentiary rules, on balance, most likely will not increase expense or delay because litigants already undertake precertification discovery. Evidentiary standards at class certification simply will require class action attorneys to clean up their acts. In addition, requiring evidentiary rules will enhance judicial functions and responsibilities by inducing judges to make deliberative decisions in the shadow of possible appellate reversal for reliance on inadmissible materials. In the end, a class certification framework that imports evidentiary rules into the certification process will enhance the sense of justice and fairness in class certification decisions.*

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INTRODUCTION

As is well known, one of the most often cited precepts at class certification hearings—when courts hold such hearings—is that the rules of evidence do not apply. Since 1966, virtually every federal and state judge has fallen back on this trope to wave off objections to materials offered by counsel during class certification hearings. Class certification hearings, then, often resemble some sort of Kabuki theatre, where, upon an offer of proof, the opposing party rises to object to the materials on evidentiary grounds, only to be rebuffed by the judge's invocation of the "no rules of evidence apply" mantra. At class certification hearings, judges equally subject both proponents supporting and adversaries opposing certification to the "no rules of evidence" rule. As a consequence, parties have added large quantities of inadmissible materials into class certification records, and no one knows the extent to which judges rely on or are persuaded by such materials in their class certification decisions.

In the past two decades, federal courts increasingly have tightened the requirements for class certification based on the Supreme

Court's admonition that judges conduct a "rigorous analysis" prior to determining whether a proposed class action can be maintained under Rule 23.[1] In a series of cases from the Second,[2] Third,[3] Fifth,[4] Sixth,[5] and Seventh Circuits,[6] federal judges have redefined and given content to what actions a judge must take in conducting such a rigorous analysis. The earlier era of drive-by class certifications or certifications based on the pleadings alone is in the past.[7] In addition, many courts now conduct "evidentiary" hearings (of varying duration) prior to a judicial ruling on the certification issue.[8] With the increased use

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1 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011); *see also* Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160 (1982) (finding that the district court erred by failing to carefully evaluate certain class certification issues).

2 *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 40–42 (2d Cir. 2006).

3 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320–22 (3d Cir. 2008).

4 Castano v. Am. Tobacco Co., 84 F.3d 734, 740–42 (5th Cir. 1996).

5 *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1082 (6th Cir. 1996).

6 Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 677–78 (7th Cir. 2001); *In re* Rhone-Poulenc Inc., 51 F.3d 1293, 1307–08 (7th Cir. 1995).

7 *See* State v. Homeside Lending, Inc., 826 A.2d 997, 1020 (Vt. 2003); Mitchell v. H & R Block, Inc., 783 So. 2d 812, 818 (Ala. 2000) (characterizing Alabama as the poster child for "drive-by" class certifications); *see also* Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1715 (2000) (describing the tendency of several state courts to certify anything that comes through the doors); Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 501 (2000) (describing the drive-by certification problem in several state courts).

8 *See, e.g.*, Jaffree v. Wallace, 705 F.2d 1526, 1536 (11th Cir. 1983) (finding that a hearing is required before a court can deny certification on grounds that the class representative is inadequate), *aff'd*, 472 U.S. 38 (1985); Int'l Woodworkers of Am. v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1268 (4th Cir. 1981) ("Where . . . the written record leaves serious questions as to the propriety of class certification, an evidentiary hearing is essential." (citing Camper v. Calumet Petrochemicals, Inc., 584 F.2d 70, 72 (5th Cir. 1978))); Shepard v. Beaird-Poulan, Inc., 617 F.2d 87, 89 (5th Cir. 1980) (finding that a court should ordinarily conduct an evidentiary hearing), *remanded on reh'g*, 638 F.2d 909 (5th Cir. 1981); Marcera v. Chinlund, 565 F.2d 253, 255 (2d Cir. 1977) (holding that courts should order an evidentiary hearing if a party requests). *But see* Franks v. Kroger Co., 649 F.2d 1216, 1223 (6th Cir. 1981) (finding that district courts should forego evidentiary hearings unless exceptional circumstances necessitate them), *aff'd on reh'g*, 670 F.2d 71 (6th Cir. 1982); Edwards v. Publishers Circulation Fulfillment, Inc., 268 F.R.D. 181, 185 n.11 (S.D.N.Y. 2010) (finding that Rule 23 does not require an evidentiary hearing on class certification); Ellis v. Costco Wholesale Corp., 240 F.R.D. 627, 635 (N.D. Cal. 2007) (finding that an evidentiary hearing on class certification is not required), *aff'd in part, vacated in part*, 657 F.3d 970 (9th Cir. 2011); Mehl v. Canadian Pac. Ry., 227 F.R.D. 505, 509 (D.N.D. 2005) (declining to conduct evidentiary hearing).

Generally, a district court doesn't abuse its discretion by failing to hold an evidentiary hearing before deciding class certification "unless the parties can show that the hearing, if held, would have affected their rights substantially." Grayson v. K Mart Corp., 79 F.3d 1086, 1099 (11th Cir. 1996); *see, e.g.*, *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006) (describing judicial discretion to determine extent of hearing); Hipp v. Liberty Nat'l Life Ins.

of class certification hearings, many courts also have imported *Daubert*[9] hearings as part of the gatekeeping function to assure the reliability of expert witness testimony offered in support of or opposition to class certification.[10] In addition, many appellate courts require that trial judges, in issuing their class certification orders, report their findings of fact and conclusions of law based on the class certification record.[11]

Co., 252 F.3d 1208, 1219 n.8 (11th Cir. 2001); Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 624 (5th Cir. 1999); Bradford v. Sears, Roebuck & Co., 673 F.2d 792, 795–96 (5th Cir. 1982) ("[A] district court is not obliged to conduct an evidentiary hearing. However, when a serious question of commonality, or any other essential element, is raised, a hearing usually is necessary."); Marcera v. Chinlund, 565 F.2d 253, 255 (2d Cir. 1977) (finding that hearings are discretionary); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.21 (2004) [hereinafter MANUAL FOR COMPLEX LITIGATION] ("A hearing under Federal Rule of Civil Procedure 23(c) is a routine part of the certification decision.").

9 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

10 Am. Honda Motor Co., Inc. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010); West v. Prudential Sec., Inc., 282 F.3d 935, 938 (7th Cir. 2002); *see also In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 315 n.13 (3d Cir. 2008); Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1179–80 (9th Cir. 2007) (withdrawing and superseding prior opinion which held that full *Daubert* examination should not be conducted at class certification stage), *aff'd in part, remanded in part on reh'g en banc*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011); *In re Initial Pub. Offerings*, 471 F.3d at 42. *See generally* Zachary W. Biesanz & Thomas H. Burt, *Everything That Requires Discovery Must Converge: A Counterintuitive Solution to a Class Action Paradox*, 47 U.S.F. L. REV. 55 (2012); Cynthia H. Cwik, Amanda Pushinsky & Justin T. Smith, Daubert *Scrutiny of Expert Evidence in Class Certification Proceedings*, PRAC. PERSP.: PROD. LIAB. & TORT LITIG. (Jones Day), Spring 2011, at 16; John Kuppens, Jay Thompson & Jase Glenn, *Another Bite at the* Daubert *Apple: The Use of Experts at the Class Certification Stage*, 33 CLASS ACTION REP. 599 (2012); Heather P. Scribner, *Rigorous Analysis of the Class Certification Expert: The Roles of* Daubert *and the Defendant's Proof*, 28 REV. LITIG. 71 (2008); 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 (2004); Meredith M. Price, Comment, *The Proper Application of* Daubert *to Expert Testimony in Class Certification*, 16 LEWIS & CLARK L. REV. 1349 (2012).

11 *See, e.g.*, FLA. R. CIV. P. 1.220 (2014). This rule governs class certification in Florida courts and is modeled after Federal Rule of Civil Procedure 23. Rule 1.220(d)(1) contains an additional requirement not present in Rule 23: that a trial court's order on class certification must "separately state the findings of fact and conclusions of law upon which the determination is based." *Id.* Perhaps it is because of this additional requirement that Florida courts, unlike federal courts, almost invariably require evidentiary hearings on the issue of class certification. *See, e.g.*, Rollins, Inc. v. Butland, 951 So. 2d 860, 868 (Fla. Dist. Ct. App. 2006) (explaining that "a trial court will generally be required to conduct an evidentiary hearing to determine whether to certify a class"). Although there are no such requirements in Rule 23, virtually all federal courts issuing class certification orders do so by enumerating the court's findings of fact and conclusions of law, and several federal courts have indicated that a district court ruling on a motion for class certification should set forth findings of fact and conclusions of law. *See In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 794–95 (3d Cir. 1995); Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985); St. Paul Fire & Marine Ins. Co. v. Del Webb Cmtys., Inc., No. 2:12-CV-00674-KJD, 2013 WL 1181904, at *2 (D. Nev. Mar. 19, 2013) (restating the court's certification order that was based on findings of fact and conclusions

In light of the evolving rigorous analysis standard for class certification and the increased use of evidentiary hearings, courts ought to recognize that rules of evidence should be applied at class certification hearings. Under current practice, we have evidentiary hearings without reference to the rules of evidence. Although compelling arguments, discussed below, may be marshaled against mandating such a requirement,[12] imposing evidentiary rules at class certification is the logical extension of importing the *Daubert* gatekeeping function into the certification process.[13] The trend over two decades has been to make the class certification process a more serious affair,[14] against the backdrop of the consequences of the class certification decision.

Importing evidentiary rules into the class certification proceeding will enhance professional responsibility on class certification motions.[15] It will improve the integrity of the record upon which a judge makes the class certification decision.[16] Additionally, mandating evidentiary rules, on balance, most likely will not increase expense or delay because litigants already undertake precertification discovery.[17] Evidentiary standards at class certification simply will require class action attorneys to clean up their acts and more carefully cull the materials offered in support of or opposition to class certification.[18] Moreover, requiring judges to evaluate class certification motions based on a true and reliable evidentiary record will enhance the judicial function, inducing judges to make deliberative decisions in the shadow of possible appellate reversal for erroneous reliance on inadmissible materials.[19]

The judicial system can easily accomplish a shift from a regime that ignores the rules of evidence to one that take the rules into account. The most robust way to accomplish this objective would be to amend Rule 23 to specify that courts must hold an evidentiary hearing on class certification requirements, and that this hearing must be based on admissible evidence. The current Rule 23 does not contain

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of law); Yeager's Fuel, Inc. v. Pa. Power & Light Co., 162 F.R.D. 471, 475–76 (E.D. Pa. 1995) (noting that a district court's ruling on class certification must set forth findings of fact and conclusions of law).

12 *See infra* Part III.

13 *See infra* Part II.D.

14 *See infra* Part I.A.2.

15 *See infra* Part II.C.

16 *See infra* Part II.C.

17 *See infra* Part III.B.

18 *See infra* Part II.C.

19 *See infra* Part II.C.

either requirement.[20] The Rule 56 summary judgment standard provides a simple model and language for importing an evidentiary standard into the class action rule.[21] An alternative but less desirable approach would be to have courts abandon the "no rules of evidence" mantra and instead create a common law doctrine that evidentiary rules do apply at class certification to evidence adduced in support of or opposition to class certification.[22] In the end, a class certification framework that imports evidentiary rules into the certification process will enhance the actual and perceived justice and fairness in class certification decisions.

I. THE EVIDENTIARY PROBLEM AT CLASS CERTIFICATION

A. *The Evolution of Class Certification Proceedings from 1966 to the Present*

1. *The Era of Lax Certification Requirements*

The modern era of class action litigation effectively began with the 1966 amendment of Rule 23. In the nearly five decades since the rule's amendment, one may trace a jurisprudential arc that illustrates intensified attention to the purpose of class litigation, the consequences of granting or denying class certification, the ascendency of the settlement class, and questions of due process and access to justice. The history of class certification also moves from relative inattention to class certification procedures to heightened scrutiny for the threshold requirements for maintaining a class.[23]

The 1966 amendments to Rule 23 made no specific mention of class certification. Instead, couched in the passive voice, Rule 23(c) merely indicated that a court was to determine "[a]s soon as practicable" whether a class "is to be so maintained."[24] Beyond this cryptic statement, Rule 23 said nothing about the procedures or standards by which a court was to determine whether a class could be maintained. Implicit in this command, however, was the understanding that a proposed class action needed to satisfy the threshold explicit require-

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20 *See* FED. R. CIV. P. 23.

21 FED. R. CIV. P. 56(c)(2); *see infra* Part IV.C (proposing amendment of Rule 23 to require a certification hearing and an evidentiary standard parallel to the Rule 56(c) summary judgment standard).

22 *See infra* Part IV.A.

23 *See infra* Part I.A.2.

24 FED. R. CIV. P. 23(c)(1) (1982). This language has been changed by later amendments. *See* FED. R. CIV. P. 23(c)(1)(A) ("At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.").

ments in Rule 23(a) and (b).[25] In addition, over time, other implicit requirements accreted to the class certification process relating to a proper class definition[26] and the satisfaction of Article III justiciability issues, such as standing and the case or controversy requirement.[27]

Rule 23 is interesting for the array of matters it fails to illuminate regarding class certification. First, the rule does not set forth a specific time when proponents must seek certification or when a court must issue a certification decision. In 2003, Rule 23(c) was amended to change the former vague timing language to the equally opaque current standard: "at an early practicable time."[28] Second, Rule 23 nowhere requires a court to conduct a class certification hearing, even though Rule 23(e) was amended in 2003 to specifically require a hearing for a court's assessment of the fairness and adequacy of a class settlement.[29] Thus, although the Rule 23(e) hearing requirement is a laudable rule amendment, requiring a back-end hearing to ensure fairness and adequacy makes little sense when Rule 23 has no parallel front-end hearing to ensure the same.[30]

Third, Rule 23 does not indicate what burdens of proof—if any—the parties to class litigation bear in order for a court to grant or deny class certification.[31] Instead, the articulation of burdens of proof at class certification has been left to doctrinal development as a matter of common law.[32] Fourth, Rule 23 does not indicate what sort of record the parties need to create to enable the court to make a determination with respect to a class certification motion.[33] The rule also does not indicate what constitutes a record on class certification for possible appellate review. Fifth, although some courts choose to do so, the

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25 *See* 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1759 (3d ed. 2005).

26 *See id.*

27 *See* 7AA WRIGHT ET AL., *supra* note 25, § 1785.1.

28 FED. R. CIV. P. 23(c)(1)(A).

29 FED. R. CIV. P. 23(e)(1)(C).

30 The Rule 23(e) requirement for a back-end fairness hearing is akin to closing the barn door after the horse is out. Courts in their supervisory and fiduciary capacity should ensure adequacy at the front end, rather than ratifying adequacy at the back end. *See* Linda S. Mullenix, *Taking Adequacy Seriously: The Inadequate Assessment of Adequacy in Litigation and Settlement Classes*, 57 VAND. L. REV. 1687, 1733 (2004). Rule 23(c) should simply be amended to require a class certification hearing, which many courts now require, but which is largely discretionary with the presiding judge. *See infra* Part IV.C.

31 *See* FED. R. CIV. P. 23.

32 *See, e.g.*, *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1079, 1086 (6th Cir. 1996) (reaffirming that plaintiffs carry the burden of proof on satisfying Rule 23 requirements and it is improper for court to shift burden of proof in opposition to defendants to defeat class certification).

33 *See* FED. R. CIV. P. 23.

rule even now does not specify that a judge must make findings of fact and conclusions of law on the class certification motion.[34] Sixth, Rule 23, unlike Rule 56 dealing with summary judgment, does not set forth any evidentiary rules or standards governing the materials offered in support of or opposition to class certification, or to govern judicial determination of a class certification motion.[35]

In light of Rule 23's considerable omissions, as well as its lack of guidance regarding class certification procedures, many federal and state judges over the past five decades have entertained class certification motions on an ad hoc basis.[36] Moreover, because many appellate courts have routinely ratified trial judges' class certification rulings under an abuse of discretion standard, appellate deference to trial judges has largely insulated them from appellate reversal and contributed to lax certification proceedings.[37]

2. *The Sea Change to Heightened Class Certification Requirements*

Against this background, though, one may trace an arc starting with the seeming casual nonchalance to class certification and culminating with the current era of heightened scrutiny and ratcheted requirements. Thus, throughout the 1980s and 1990s, any number of courts willingly certified class actions based on the plaintiffs' pleadings alone, without supporting evidence and in absence of any judicial hearings.[38] In the most extreme form, several state courts notoriously engaged in the so-called practice of "drive-by" certifications where a plaintiff's filing of a class complaint in the clerk's office merited almost immediate, rubber-stamped class certification.[39] In addition, many courts reflexively defaulted to a "presumption" favoring class certification, which suggested that if a court entertained any doubts about the suitability of a proposed class action, the court should presumptively favor the class and err on the side of certification.[40]

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34 *See supra* note 11.

35 *Compare* FED. R. CIV. P. 23, *with* FED. R. CIV. P. 56(c)(1)(A) (declaring that parties must support assertions with "particular parts of materials in the record").

36 *See supra* note 11.

37 *See infra* note 135 and accompanying text.

38 *See supra* note 7.

39 *See supra* note 7.

40 *See, e.g.*, Law v. NCAA, 167 F.R.D. 178, 181 (D. Kan. 1996) (asserting that district courts should construe Rule 23 liberally and resolve all doubts in favor of class certification); *In re* Carbon Dioxide Antitrust Litig., 149 F.R.D. 229, 232 (M.D. Fla. 1993) (stating that courts should resolve any doubts in favor of class certification).

In the past two decades, however, as courts and commentators increasingly have focused attention on class action abuse, legislatures and courts have responded with initiatives to ensure integrity in the class action arena. Many state and federal courts have rejected the notion that a court can certify a class action on the pleadings alone.[41] Indeed, the Supreme Court eventually declared that Rule 23 does not set forth a mere pleading standard, but requires something more.[42] Although not mandating a class certification hearing in all cases, the Federal Judicial Center, in the *Manual for Complex Litigation*,[43] suggested that a hearing on the class certification decision might be necessary or appropriate in many cases.[44]

Significantly, all federal circuits have now endorsed the "rigorous analysis" standard to be applied in judicial assessments of class certification motions.[45] Although different federal courts have ascribed varying meanings to what constitutes the requisite "rigorous analysis" inquiry, the trend across these cases has been to provide some content and meaning to this requirement. The emerging consensus has focused on the concept that a rigorous analysis requires the presiding judge to "probe behind the pleadings" and evaluate whether the underlying claims, defenses, and applicable law are capable of proof on a classwide basis.[46] In this view, the rigorous analysis standard does not

41 *See supra* note 11.

42 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

43 MANUAL FOR COMPLEX LITIGATION, *supra* note 8.

44 *Id.* § 21.21.

45 Mazza v. Am. Honda Motor Co., 666 F.3d 581, 588 (9th Cir. 2012); Damasco v. Clearwire Corp., 662 F.3d 891, 896 (7th Cir. 2011); Pipefitters Local 636 Ins. Fund v. Blue Cross Blue Shield of Mich., 654 F.3d 618, 629 (6th Cir. 2011); *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 611 (8th Cir. 2011), *cert. dismissed sub nom.* Zurn Pex, Inc. v. Cox, 133 S. Ct. 1752 (2013); Madison v. Chalmette Refining, L.L.C., 637 F.3d 551, 554 (5th Cir. 2011); Sacred Heart Health Sys. v. Humana Military Healthcare Servs., 601 F.3d 1159, 1169 (11th Cir. 2010); DG *ex rel.* Stricklin v. Devaughn, 594 F.3d 1188, 1194 (10th Cir. 2010); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 309 (3d Cir. 2008); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 29 (2d Cir. 2006); Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 318 (4th Cir. 2006); Love v. Johanns, 439 F.3d 723, 730 (D.C. Cir. 2006); Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003). *See generally* Ian Simmons, Alexander P. Okuliar & Nilam A. Sanghvi, *Without Presumptions: Rigorous Analysis in Class Certification Proceedings*, ANTITRUST, Summer 2007, at 61; J. Britton Whitbeck, *Identity Crisis: Class Certification, Aggregate Proof, and How Rule 23 May Be Self-Defeating the Policy for Which It Was Established*, 32 PACE L. REV. 488 (2012); Sarah Rajski, Comment, In re Hydrogen Peroxide*: Reinforcing Rigorous Analysis for Class Action Certification*, 34 SEATTLE U. L. REV. 577 (2011).

46 *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551 (internal quotation marks omitted). *See generally* Stephen J. Newman, *Use of Expert Testimony at the Class Certification Stage After* Wal-Mart v. Dukes, CLASS ACTION WATCH (The Federalist Soc'y for Law & Pub. Policy Studies, Washington, D.C.), June 2012, at 2; Julie Slater, Comment, *Reaping the Benefits of Class Certification: How and When Should "Significant Proof" Be Required Post-*Dukes*?*, 2011 BYU L. REV. 1259.

violate the so-called *Eisen* rule,[47] and because the inquiry focuses on satisfying threshold class certification requirements, it does not impermissibly evaluate the underlying merits of the claims in dispute.

The judicial development of the rigorous analysis standard reached an apogee in Chief Judge Anthony Scirica's decision in *In re Hydrogen Peroxide Antitrust Litigation*,[48] where he determined that it would be useful to provide some content to the oft recited but nonetheless vaguely defined rigorous analysis standard.[49] In the most thoroughgoing analysis of the rigorous analysis requirement, Judge Scirica clarified three key aspects of certification procedure that heighten judicial obligations.[50]

First, a district court must make findings that all Rule 23 requirements are met and may not certify a class action based merely upon a "threshold showing" by the party seeking certification.[51] Second, a district court must resolve all factual or legal disputes relevant to certification, even if that determination overlaps with merits questions intertwined with the underlying claims.[52] Third and finally, a district court must consider all conflicting expert testimony, whether offered by a party seeking class certification or a party opposing it.[53]

The court announced that in the underlying antitrust class certification proceedings, the district court had erred in applying too lenient

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47 *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–78 (1974) ("We find nothing in . . . 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."); *see also* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432 (2013) ("Repeatedly, we have emphasized that it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. Such an analysis will frequently entail overlap with the merits of the plaintiff's underlying claim." (internal quotation marks and citations omitted)); Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1195 (2013) ("Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."); *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2552 ("The necessity of touching aspects of the merits in order to resolve preliminary matters . . . is a familiar feature of litigation."); *Hydrogen Peroxide*, 552 F.3d at 317 ("As we explained in *Newton*, *Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement. Other courts of appeals have agreed." (citation omitted)). *See generally* Seth H. Yeager, Note, In re New Motor Vehicles Canadian Export Antitrust Litigation*: Examining the Requisite Levels of Inquiry into the Merits of a Case at the Class Certification Stage*, 34 DEL. J. CORP. L. 563 (2009).

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

49 *Id.* at 307.

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

a standard of proof with respect to Rule 23 requirements and that courts may no longer accept a mere threshold showing by plaintiffs.[54] Judge Scirica, anticipating the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*,[55] declared that Rule 23 class certification requirements are not mere pleading requirements.[56] Courts may delve beyond the pleadings to determine if class certification requirements are met and must make findings that each Rule 23 requirement is satisfied.[57]

For the first time, the court set forth an evidentiary standard for proof for materials offered at class certification. The standard, the court held, was that 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."[58]

The court indicated that a judge must apply the rigorous analysis standard in evaluating the parties' proffered evidence, as well as their arguments in support of or opposition to the class certification motion. Importantly, a party's mere assurance that it intends or plans to meet certification requirements in the future is insufficient.[59] In addition, a court must resolve disputed issues raised at class certification:

> Under these Rule 23 standards, a district court exercising proper discretion in deciding whether to certify a class will

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54 *See id.* at 320.

55 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

56 *Hydrogen Peroxide*, 552 F.3d at 316.

57 *Id.* at 320.

58 *Id.* Federal courts are split concerning how stringently to apply the rules of evidence at class certification proceedings. *Compare* Lewis v. First Am. Title Ins. Co., 265 F.R.D. 536, 552–53 (D. Idaho 2010) (noting circuit split and deciding that for class certification purposes the court would not strictly apply rules of evidence), Serrano v. Cintas Corp., Nos. 04-40132, 06-12311, 2009 WL 910702, at *3 (E.D. Mich. Mar. 31, 2009) (declining to strike declarations in connection with motion to certify and finding it appropriate to consider all evidence at class certification stage, while deferring admissibility challenges), *aff'd sub nom.* Davis v. Cintas Corp., 717 F.3d 476 (6th Cir. 2013), *and* Levitt v. PricewaterhouseCoopers, LLP, No. 04 Civ. 5179(RO), 2007 WL 2106309, at *1 (S.D.N.Y. July 19, 2007) (denying motion to strike declarations and affidavits for lack of personal knowledge and noting that Rule 56 evidentiary standard applies only to summary judgment motions), *with In re* Salomon Analyst Metromedia Litig., 544 F.3d 474, 486 n.9 (2d Cir. 2008) (holding that plaintiffs had to make prima facie showing of securities fraud element by admissible evidence and implicitly accepting admissibility requirement), *abrogated on other grounds by* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184 (2013), *and* Lujan v. Cabana Mgmt., Inc., 284 F.R.D. 50, 64 (E.D.N.Y 2012) (opining that the Second Circuit would require class certification declarations to be admissible, based on personal knowledge, and not subject to hearsay exception).

59 *Hydrogen Peroxide*, 552 F.3d at 318.

> resolve factual disputes by a preponderance of the evidence and make findings that each Rule 23 requirement is met or is not met, having considered all relevant evidence and arguments presented by the parties.[60]

Furthermore, Judge Scirica opined that a court may not decline to resolve relevant certification disputes because there may be an overlap between the certification requirement and an underlying merits issue, and that this inquiry does not violate the *Eisen* rule.[61] Hence, a court's rigorous analysis may include a preliminary inquiry into the merits. A court may consider the substantive elements of the case to envision how an actual trial would be presented.[62] Although stopping short of requiring a trial plan, Judge Scirica's suggestion of the usefulness of a trial plan paralleled state court developments requiring a trial plan as part of the class certification process.[63] Similarly, the *Manual for Complex Litigation* also incorporated several provisions supporting the utility of a trial plan in support of a request for class certification.[64]

In *Hydrogen Peroxide*, the Third Circuit also addressed the developing jurisprudence on the use of expert witness testimony at class certification hearings.[65] As parties began to offer expert witness testimony during class certification proceedings, most often with reference to proving the triability of classwide damages, courts began to entertain *Daubert* challenges to proffers of expert witness testimony at the class certification stage.[66] In *Hydrogen Peroxide*, the court declared that expert opinion testimony requires rigorous analysis and should not be uncritically accepted as establishing a Rule 23 requirement

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60 *Id.* at 320.

61 *Id.* at 307.

62 *Id.* at 319 (noting 2003 Advisory Committee note to Rule 23 amendments as approving the utility of a trial plan to focus attention on a rigorous evaluation of the likely shape of a trial on the issues).

63 *See, e.g.*, BMG Direct Mktg., Inc. v. Peake, 178 S.W.3d 763, 778 (Tex. 2005) ("[A] trial plan is required in every class-certification order to allow reviewing courts to assure that *all* requirements for certification under Rule 42 have been satisfied." (internal quotation marks omitted)); State Farm Mut. Auto. Ins. Co. v. Lopez, 156 S.W.3d 550, 556 (Tex. 2004).

64 MANUAL FOR COMPLEX LITIGATION, *supra* note 8, § 21.21 ("If the parties have submitted a trial plan to aid the judge in determining whether certification standards are met, the certification hearing provides an opportunity to examine the plan and its feasibility."); *see also id.* § 22.318 (discussing trial plans).

65 *Hydrogen Peroxide*, 552 F.3d at 323.

66 *See* Linda S. Mullenix, *Certification Burdens*, NAT'L L.J., July 3, 2000, at A14 (noting early use of *Daubert* hearings during class certification proceedings); *see also* MANUAL FOR COMPLEX LITIGATION, *supra* note 8, § 22.87 (describing the use of *Daubert* hearings to resolve issues relating to proffers of scientific evidence).

merely because the court holds that the testimony should not be excluded.[67] Thus, weighing conflicting expert testimony may be integral to a rigorous analysis of Rule 23. The court held that the district court erroneously gave weight only to the plaintiff's antitrust expert's testimony that classwide impact could plausibly be demonstrated by two possible methodologies, while not crediting conflicting defense expert testimony that those methodologies were incorrect and unworkable.[68]

Judge Scirica drew authority for the court's conclusions from amendments to Rule 23 that became effective in 2003.[69] In that year, Rule 23(c)(1)(A) was amended to change the timing of class certification—to encourage discovery into certification requirements and to avoid premature certification decisions.[70] The Advisory Committee's note to the 2003 amendments introduced the concept of a trial plan to focus judicial attention on a rigorous analysis of a likely trial on the merits.[71] The 2003 amendments eliminated conditional class certification; the Standing Committee advised that conditional class certification was deleted to avoid the suggestion that certification could be granted on a tentative basis even in circumstances in which it was unclear that the Rule 23 requirements were satisfied.[72]

The Third Circuit also addressed various formulaic standards that the court indicated would no longer suffice to permit class certification.[73] Generally, the court repudiated any mechanical language that might signify that the plaintiff's burden at class certification was lenient.[74] The court indicated that it was incorrect that "a plaintiff need only demonstrate an intention to try the case in a manner that satisfies the predominance requirement."[75] Consequently, courts misapply Rule 23 if they find a plaintiff need only make a "threshold showing" of certification requirements.[76] Emphatically, the court instructed:

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67 *Hydrogen Peroxide*, 552 F.3d at 323.

68 *Id.* at 322–25.

69 *Id.* at 318.

70 *Id.* at 318–19.

71 *Id.* at 319.

72 *Id.* ("Additionally, the 2003 amendments eliminated the language that had appeared in Rule 23(c)(1) providing that a class certification 'may be conditional.' . . . The Standing Committee on Rules of Practice and Procedure advised: 'The provision for conditional class certification is deleted to avoid the unintended suggestion, which some courts have adopted, that class certification may be granted on a tentative basis, even if it is unclear that the rule requirements are satisfied.'" (footnote and citation omitted)).

73 *Id.* at 321.

74 *Id.*

75 *Id.* (internal quotation marks omitted).

76 *Id.*

> A "threshold showing" could signify, incorrectly, that the burden on the party seeking certification is a lenient one (such as a prima facie showing or a burden of production) or that the party seeking certification receives deference or a presumption in its favor. So defined, "threshold showing" is an inadequate and improper standard.[77]

The court also addressed the general practice of judicial default to class-favoring presumptions when evaluating a class certification decision. In antitrust class actions, the Third Circuit repudiated the notion that courts in horizontal price-fixing conspiracy cases, when in doubt, may apply a presumption favoring class certification.[78] The court concluded that such presumptions "invite error."[79]

Moreover, the court rejected the notion that certification-favoring presumptions can relieve district courts of their obligation to conduct a rigorous analysis in any type of class action: "Although the trial court has discretion to grant or deny class certification, the court should not suppress 'doubt' as to whether a Rule 23 requirement is met—no matter the area of substantive law."[80]

Finally, the court addressed the Supreme Court's famous suggestion in *Amchem Products, Inc. v. Windsor*[81] that Rule 23(b)(3)'s requirement of "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."[82] Acknowledging this, the court instead contended that "it does not follow that a court should relax its certification analysis, or presume a requirement for certification is met, merely because a plaintiff's claims fall within one of those substantive categories."[83]

The Third Circuit's thorough discussion of the rigorous analysis requirement paralleled other doctrinal and scholarly developments embracing a more robust class certification process. Several courts, most famously the Seventh Circuit,[84] have endorsed expanded use of *Daubert* hearings during class certification proceedings. The Supreme Court in its *Wal-Mart* decision indirectly signaled that *Daubert* hearings might be both an appropriate and necessary part of a court's rig-

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77 *Id.*

78 *See id.*

79 *Id.*

80 *Id.*

81 Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

82 *Hydrogen Peroxide*, 552 F.3d at 321–22 (alteration in original) (internal quotation marks omitted).

83 *Id.* at 322.

84 *See* cases cited *supra* note 10.

orous analysis,[85] leaving open questions relating to evidentiary standards at class certification. Furthermore, in the Court's 2013 decision in *Comcast Corp. v. Behrend*,[86] Justice Scalia directly attacked the lower courts' refusals in that case to consider a defendant's challenge to the plaintiffs' expert damage testimony. The lower courts had concluded that "an attac[k] on the merits of the methodology [had] no place in the class certification inquiry."[87] Without clarifying what evidentiary standards apply at class certification, Justice Scalia deflected the proper inquiry onto the Rule 23(b)(3) predominance inquiry.[88] Justice Scalia concluded that "[b]y refusing to entertain arguments against [the plaintiffs'] damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry."[89]

In the evolving arena of class certification proceedings, several courts concluded that, in issuing class certification orders, judges should be required to set forth their findings of fact and conclusions of law, based on the record adduced during the proceedings.[90] In other words, judges could no longer simply issue one-sentence orders granting or denying class certification, but had to indicate the reasons for their decisions and how the proposed class action satisfied the requirements of Rule 23. In this regard, a judge's mere conclusory restatement of the Rule 23 requirements would not suffice to provide an appellate court with a basis for review of the lower court's certification decision.

Finally, in tandem with the doctrinal development of the rigorous analysis standard, the scope, meaning, and application of the *Eisen* rule became enmeshed in a heated scholarly and judicial debate.[91] As

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85 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553–54 (2011) ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . . ." (internal citation omitted)).

86 Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).

87 *Id.* at 1431 (alterations in original) (internal quotation marks omitted).

88 *Id.* at 1432.

89 *Id.* at 1432–33.

90 *See supra* note 11; *see also* MANUAL FOR COMPLEX LITIGATION, *supra* note 8, § 21.21 ("After the hearing, the court should enter findings of fact and conclusions of law addressing each of the applicable criteria of Rule 23.").

91 *See generally* 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 (1996); Joseph A. Osefchen & Philip Stephen Fuoco, *New Jersey Parts Company with the Federal Courts on Whether to Consider Merits Issues on Class Certification*, 43 RUTGERS L.J. 59 (2011); Patricia Groot, Note, *Fraud on the Market Gets a Minitrial:* Eisen *Through* In Re IPO, 58 DUKE L.J. 1143 (2009).

judicial decisions skewed towards more heightened attention to class certification proceedings, several prominent procedure scholars urged enhanced merits review at class certification,[92] along with a proposed Rule 23 amendment to add a factor to the rule that would permit judges to make some kind of preliminary assessment of whether—on balance—pursuing a class action was a preferable means of resolving a dispute.[93]

In sum, by the early twenty-first century, courts had moved a long way from the earlier sustained era of lax class certification proceedings. Presumptions favoring class certification had fallen into disrepute. Class actions could no longer be certified on the pleadings, and the rigorous analysis standard—variously defined—was embraced by all federal courts. Class certification hearings became common, including the use of expert witness testimony subject to *Daubert* challenges. The proponents and opponents of class certification needed to produce a record for the court, consisting of documentary or testimonial evidence on class certification requirements. Judges needed to make class certification decisions on a record adduced at the certification proceedings and needed to set forth the reasons why a proposed class satisfied or did not satisfy Rule 23 requirements. The era of easy plaintiff-favoring class certification effectively came to an end.

B. Consequences of the "No Rules of Evidence Apply" Regime

The legal landscape of class certification proceedings has changed considerably in the past two decades, with the dominant trend towards assuring greater reliability in class certification decisions. This trend, emphasizing heightened attention to the actual requirements of Rule 23, is grounded in rationales of fundamental fairness to plaintiffs, defendants, and absent class members. The evolving class certification jurisprudence, then, evinces a judicial recognition of the serious consequences of a court's decision to certify, or to deny certification to, a proposed class action.

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92 *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1254–55 (2002); Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 TENN. L. REV. 1, 3–4 (2001); Richard Marcus, *Brave New World: Scrutinizing the Merits During Class Certification*, 12 Class Action Litig. Rep. (BNA) No. 17, at 848, 851–52 (Sept. 9, 2011); Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 GEO. WASH. L. REV. 324, 372–73 (2011); Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51, 51–52 (2004).

93 *See* Proposed Rules: Amendments to Federal Rules, 167 F.R.D. 523, 559 (1996) (proposed Rule 23(b)(3)(F)); *see also* Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 621 (1997) (commenting on the proposed new Rule 23(b)(3)(F) factor, commonly called the "'it just ain't worth it' factor").

Against the backdrop of judicial pronouncements of increasingly specific standards and requirements that courts should use to evaluate class certification, the absence of any evidentiary protocols for class certification proceedings remains an unusual anomaly.[94] Although not all courts have embraced a rule requiring a hearing, most courts do conduct some sort of evidentiary inquiry on a class certification motion.[95] That hearing may take the form of pure legal argument or a multiday, in-court proceeding with witness testimony and documentary evidence. But, whatever the format, the proponents and opponents to class certification now produce a record for the court's assessment of actual conformity to the Rule 23 requirements.

Nonetheless, the concept that judges conduct an evidentiary hearing on Rule 23 requirements, or render a decision on the evidentiary record, carries little meaning when the rules of evidence do not apply to the materials offered either in support of or opposition to a motion for class certification. Although parties on both sides of the docket may lodge evidentiary objections to materials offered as part of the class certification process, these objections simply are unavailing under the "no rules of evidence apply" mantra that has prevailed throughout decades of class certification proceedings. The continuance of the "no rules of evidence apply" model makes no sense in a changed class certification arena which seeks to ensure greater reliability in a court's certification decision.

What, then, are the problems engendered by the "no rules of evidence apply" regime at class certification? In order for a court to grant certification—applying some variation of the rigorous analysis standard—courts repeatedly have indicated that the presiding judge must evaluate whether a proposed class action satisfies the *actual* requirements of Rule 23. These include the threshold Rule 23(a) re-

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94 *See, e.g.*, 8 EMPLOYMENT COORDINATOR EMPLOYMENT PRACTICES § 99:52, *available at* Westlaw EMPC-EMP ("Certification hearings under Fed. R. Civ. P. 23 are preliminary proceedings that need not strictly conform to the Rules of Evidence applicable in civil trials. Therefore, evidence submitted by a plaintiff and unchallenged as to reliability could be used in a certification determination, despite the fact that it was not introduced in conformity with the procedures specified in the Federal Rules of Evidence."); *see also* 6A STACY L. DAVIS ET AL., FEDERAL PROCEDURE LAWYERS EDITION: CLASS ACTIONS § 12:281 (2012) ("In addition, evidence need not be admissible at trial in order to be submitted for the purposes of a class certification inquiry, and thus the court need not address the ultimate admissibility of the parties' proffered exhibits, documents, and testimony at this stage, and may consider them where necessary for resolution of the certification issue." (footnotes omitted)). *But see* 8 EMPLOYMENT COORDINATOR EMPLOYMENT PRACTICES, *supra*, § 99:52 (suggesting that class certification procedures be modified to subject them to the Federal Rules of Evidence).

95 *See supra* note 8.

quirements of numerosity, commonality, typicality, and adequacy of representation.[96] In addition, the proponents must demonstrate that the proposed class may be maintained under one of the provisions of Rule 23(b).[97] If the plaintiff seeks certification of a Rule 23(b)(3) damages class action, then the plaintiff additionally must satisfy the court that issues of law or fact predominate over individual issues and that proceeding as a class action is superior to other means of resolving the dispute.[98]

Without any evidentiary standards, both proponents and opponents of class certification are capable of creating an evidentiary record consisting of hearsay or otherwise objectionable, inadmissible materials. What problem, then, is presented by a class certification record that is populated with large amounts of otherwise inadmissible, irrelevant, redundant, repetitive, prejudicial, injurious, or unacceptable materials and testimony? There are two fundamental problems: (1) overweighting the record with irrelevant or redundant materials that are not really probative of the Rule 23 requirements, and (2) creating a merits-based record on the underlying claims for the purpose of convincing the court that the alleged defendant is a bad actor, and that therefore the court ought to grant certification to punish the malefactor.

With regard to overweighting class certification records, Rule 23's commonality and typicality requirements and the Rule 23(b)(3) predominance requirement offer the most fertile grounds for adding otherwise inadmissible evidence to the record.[99] This allows litigants to inundate a court with a bulbous "evidentiary record" purportedly demonstrating satisfaction of these Rule 23 requirements.[100] Judges are human and very busy. In the absence of any rigorous sifting of the evidence based on applicable legal standards, the danger is that many overburdened judges simply default to the position that the sheer volume of proof offered by parties serves as an expedient surrogate—a quick shorthand—for actual conformity with Rule 23.[101] In essence, many judges simply may conclude that the production of a big record—the more voluminous, the more probative—equates with satis-

96 FED. R. CIV. P. 23(a)(1)–(4).

97 FED. R. CIV. P. 23(b)(1)–(3).

98 FED. R. CIV. P. 23(b)(3).

99 *See id.*

100 *See id.*

101 *See supra* note 7.

faction of the commonality, typicality, predominance, or other Rule 23 requirements.[102]

The problem of bloated class certification evidentiary records that trial judges have not vetted by ordinary evidentiary rules is compounded by the ratification and approval of such practices by reviewing courts. It is not uncommon at the district court level or on appellate review of a class certification decision for courts to note that the trial court's decision was based on voluminous documentary evidence.[103] These appellate pronouncements, in turn, encourage class action lawyers and the judges considering such motions to attempt to insulate their decisions by bolstering the court's order by referencing massive class certification records. The simple concept is that if the class proponents offer into the record dozens of black looseleaf binders of documents, there must be Rule 23 commonality, typicality, or predominance of common questions (and other class certification requirements) to be found within the vast documentary evidence. Indeed, in some jurisdictions the court's class certification order need not be supported by any particular evidence in the record, so long as the court reasonably could find support *anywhere* in that record for a class certification decision.[104]

The deferential respect accorded a lower court's appreciation of the class certification evidentiary record—however voluminous—simply begs the question of the quality and the nature of that record. In an era that now requires the production of some kind of record on the Rule 23 requirements, the problem of bloated class certification records is not imaginary. In order to convince judges of the overwhelming scope of class allegations, attorneys have creatively exploited modern technology to generate thousands of pages of documents that may (or may not) support an assertion of common questions and typicality across class claims.[105] Moreover, the need to demonstrate commonality and predominance of common questions is

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102 *See supra* note 7.

103 *See, e.g.*, Kifafi v. Hilton Hotels Ret. Plan, 701 F.3d 718, 733 (D.C. Cir. 2012) (stating that certification motion was decided by court facing voluminous record); Bennett v. Nucor Corp., 656 F.3d 802, 816 (8th Cir. 2011) (same); Campbell v. First Am. Title Ins. Co., 269 F.R.D. 68, 71 n.1 (D. Me. 2010) (granting class certification in reliance on voluminous record); Cooper v. S. Co., 205 F.R.D. 596, 598 (N.D. Ga. 2001) (denying class certification in reliance on voluminous record).

104 *See* Becton Dickinson & Co. v. Usrey, 57 S.W.3d 488, 492–93 (Tex. App. 2001); Rainbow Group, Ltd. v. Johnson, 990 S.W.2d 351, 356–57 (Tex. App. 1999).

105 *See, e.g.*, Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1245 (11th Cir. 2008) (noting that "Family Dollar produced voluminous payroll records, store manuals, emails, and other communications").

particularly salient across the entire range of products liability, consumer protection, and economic loss class actions, among many others.[106]

The trend towards creating voluminous class certification records is now exacerbated in the digital age. With easy access to online materials, litigants can generate thousands of pages of largely hearsay materials offered in support of demonstrating satisfaction of the Rule 23(a) commonality requirement and the Rule 23(b)(3) predominance requirement.[107] Given the Supreme Court's recent emphasis on meaningful judicial scrutiny of the commonality and predominance requirements,[108] the problem of a lack of evidentiary rules ensuring reliability of the record for these Rule 23 requirements deserves more attention and a reform of the prevailing jurisprudence.

The second problem encouraged by the lack of evidentiary rules at class certification is that this practice enables class action proponents to engage in a kind of smoke-and-mirrors performance during class certification proceedings. In so doing, litigants can subtly divert the judge's attention from Rule 23 considerations and instead focus on the overall nature of the defendant's alleged bad conduct.[109] Thus, advocates seeking class certification have an incentive on the motion for class certification to present the court with a compelling narrative of the evil nature of the alleged wrongdoer, in order to convince the court that the defendant has done something wrong on a very large and extensive scale.

Ironically, as class action plaintiffs aggressively resist any introduction of a preview of the merits of the underlying claims in the litigation, the preferred strategy of plaintiffs' attorneys during class certification proceedings is often to present the presiding judge with a litany of the defendant's alleged bad conduct on the underlying legal claims—past, present, and future.[110] In essence, although class attor-

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106 *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012).

107 *See, e.g.*, *id.* at 32–34 & n.9 (discussing the large amount of evidence submitted by the parties but declining to express an opinion on whether the evidence would withstand a renewed motion for summary judgment).

108 Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432–33 (2013); Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1191, 1194–95 (2013); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550–54 (2011).

109 *Cf.* Bone & Evans, *supra* note 92, at 1269 (noting that without merits inquiry, parties may "inject frivolous issues" to support argument for or against class certification, such as plaintiffs alleging numerous common questions).

110 *See id.* at 1265, 1269 (noting that situations in which plaintiffs seek preliminary merits review are unusual, and that without such an inquiry parties have "wide latitude to inject frivolous issues" in support of class certification).

neys eschew a preview of the merits at class certification, they are perfectly willing to engage in a merits-based attack on the defendant's conduct in an effort to broadly suggest to the presiding judge that where there is smoke, there must be fire, and therefore to err on the side of class certification.

The tendency to deploy a class certification motion as the staging ground for telling a narrative about the evil corporate defendant invites the very abuse of recordmaking that suggests some reform of this process is long overdue. The "bad narrative" strategy permits materials to be introduced into the record that essentially preview the plaintiff's arguments on the merits of the claims, which may include information that is prejudicial, harassing, factually incorrect, and inappropriate in a court's assessment of actual conformity to the requirements of Rule 23.

Moreover, the entirely lax approach to constituting the evidentiary record at class certification also invites a perverse escalation of mounting piles of unhelpful evidence on both sides of the class certification docket. Defense attorneys are equally at fault in this and can engage in the very same record-creating behaviors as their litigation counterparts. Thus, defense attorneys seeking to stave off or defeat class certification are not immune to the temptation to responsively pad the evidentiary record with their own material, in order to counter the plaintiffs' attempts to support the Rule 23 requirements.

Once the plaintiffs' attorneys have infused the record with merits-based evidence to paint the defendant in a negative light, defense attorneys have little choice but to respond in kind. Hence, the lack of any evidentiary discipline during class certification proceedings has inspired its own litigation—a thermonuclear tit-for-tat escalation of record creating, no matter how irrelevant, inadmissible, or prejudicial the materials. The unstated assumption on both sides of the class certification process is that relative weight carries the day on the class certification motion.

C. *An Illustration of the Need for Rules of Evidence at Class Certification*

An illustration illuminates the problem with the lack of evidentiary rules as applied to class certification materials and the consequences for the class certification decision. In this hypothetical example, plaintiffs sue a computer manufacturer in a nationwide class action for an alleged product defect based on an economic loss and other legal theories. Among many claims asserted in the class com-

plaint, the plaintiffs also allege breach of express and implied warranties. The complaint seeks relief on behalf of citizens of many states during differing time periods involving various computer models. The various computer models were sold through different commercial retail vendors at different times and through different sales representatives who were not working on a predesigned sales script. The boxed computers came with different warranty booklets and instruction manuals. In addition, any number of consumers bought computers through online websites in different parts of the country at different times, with no human interaction during the sales transaction.

At a multiday class certification hearing in support of the Rule 23(a) commonality and Rule 23(b)(3) predominance requirements, over the strenuous, repeated objections of defense attorneys, the plaintiffs' attorneys introduced thousands of webpages downloaded from the internet relating to several of the defendant's computers. The attorneys introduced into the record numerous printouts of disgruntled conversations in chat rooms, as well as screen shots of other complaint websites relating to the manufacturer's computers. The defense attorneys objected on the grounds of lack of authentication, hearsay, and other evidentiary rules. The defense attorneys pointed out that the webpages produced in support of Rule 23(a) commonality and Rule 23(b)(3) predominance actually differed from region to region throughout the country and had periodically been changed in various times periods, although the webpages offered in the record did not reflect these differences.

In response to the defense's evidentiary objections, the court invoked the "no rules of evidence apply" to class certification proceedings mantra and declined to rule on the evidentiary objections. Consequently, the plaintiffs produced multiple enormous looseleaf binders of downloaded webpages as the record in support of Rule 23(a) commonality and Rule 23(b)(3) predominance, although the materials adduced in support of these requirements most likely would not have passed evidentiary muster. The court certified the class action, and the defendant manufacturer, rather than engage in lengthy further litigation, eventually settled the class action.

It is fair to ask whether, in absence of this record, the court would have certified the proposed class action anyway. Although we cannot know the answer to this question, it is equally fair to ask whether a court should be evaluating actual conformity with Rule 23 requirements based on a record of dubious evidence. We cannot know to what extent, if any, the presiding judge was swayed by the introduc-

tion of hearsay evidence such as the disgruntled chat room conversations and consumer websites, which the plaintiffs deployed to illustrate bad defendant conduct.

It seems that the simple answer to this question must be no. This example illustrates the ways in which inadmissible evidence can inappropriately sway a judge's decision about class certification. After all, evidence that is hearsay, irrelevant, and inadmissible is precisely that—material that may be unreliable and untrustworthy. Litigants, absent class members, and the judicial system all deserve a better foundation upon which to make significant litigation decisions. Finally, there is now an inherent tension with developing a requirement for a *Daubert* gatekeeping function during class certification proceedings.[111] With this significant camel's head already in the tent, why limit judicial evidentiary scrutiny to expert witness proffers only? This makes no sense.

II. Arguments in Favor of Requiring Evidentiary Rules at Class Certification

The common sense notion that the rules of evidence ought to apply to class certification proceedings seems so compelling as to confound the notion that this has not been the reigning standard since 1966. Moreover, it seems incredible that anyone would oppose a simple reform intended to improve process and ensure the integrity of judicial decisionmaking, especially in the class action arena.

Many fairly self-evident, nonprofound arguments support the idea that the rules of evidence should apply at class certification and that the time has come to give due appreciation to these contentions and to do something. Naturally, not all class action practitioners will welcome such a change, and one may expect that segments of the practicing bar will aggressively resist such a proposal. This is not a case, though, of "if it ain't broke, don't fix it." The fundamental issue is that there *is* something broken about the class certification process. To give critics of this proposal their due, this Article addresses varied objections and suggests reasons why those objections ought not to impede implementation of a better class certification regime.

111 *See supra* note 10 and accompanying text.

A. *The Important Consequences of Class Certification Justify Rigorous Review Based on the Rules of Evidence*

The overheated rhetoric that typically infuses class action proceedings is perpetrated equally by both sides of the docket. Plaintiffs' lawyers characterize themselves as champions of sympathetic victims seeking justice from faceless corporations that have perpetrated egregious wrongs. On the other hand, corporate defendants sued in class litigation and their fellow-traveler amici are perfectly capable of ratcheting up catastrophic bombast to communicate that class action litigation is itself an abomination—that class litigation entails a dreaded *in terrorem* effect on corporations, inducing settlement blackmail, and that the laissez-faire economic theory demands defeat of class litigation. This is to say nothing of the argument about the overarching problem of corporate America being besieged by frivolous lawsuits.

A significant impediment to any debate over sensible class action reform is that the core arguments most often are advanced by advocates zealously representing the interests of their clients, as the attorneys must and should. Such hyperbolic advocacy tends to dumb down any reasonable conversation about class action reform, relegating actors to two extreme, warring camps firing shots from entrenched rhetorical positions. As a starting point for reform, such excessive posturing is incapable of countenancing sensible discussion.

In this fixed tactical universe, the plaintiff and defense bars have diametrically opposed, and fairly intransigent, views about class certification. For plaintiffs, the failure to achieve class certification sounds the death knell for the ability of class members to achieve justice and fairness as a consequence of defendants' bad actions. This paradigmatic injustice is exemplified by small-claims consumers with negative-value lawsuits whose claims have become the poster child for class action advocates.[112] At the other extreme, defense attorneys contend that a class certification order effectively ends any sensible litigation. At that point, rather than endure class discovery, trial, and concomitant transaction costs, most defendants simply capitulate to settlement blackmail.[113] While each side of the docket is capable of conceptualizing the dire consequences of a class certification decision

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112 *See generally* Linda S. Mullenix, *Complex Litigation: Negative Value Suits*, NAT'L L.J., Mar. 22, 2004, at 11, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2278312##.

113 *See* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1378 (2000) (explaining that blackmail settlements occur when "the class counsel is able to threaten the defendant with a costly and risky trial").

for its clients, neither side seems capable of conceding that there is any merit to the opponent's view.

The truth, of course, is somewhere in the middle—which ought to be the starting point for reasonable discussion over what occurs at class certification, the stakes involved, and sensible means for ensuring a just outcome for all involved. All actors involved in class certification proceedings ought to accept, as an initial proposition, that class litigation is unlike ordinary bipolar litigation, and that the stakes involved consequently are more significant than in ordinary litigation.[114] Defendants should recognize and concede that a denial of class certification in some types of cases may indeed leave many plaintiffs without effective representation. As a counterpoint, class action lawyers ought to recognize that a grant of class certification may indeed have significant negative consequences for a corporate defendant, even apart from the underlying merits of the litigation. The stubborn refusal of either side to concede these simple realities stands as an impediment to improving process for all.

Common ground, then, is for all class action practitioners to take ownership of the reality that the class certification process is *the* major, significant litigation event in class litigation, with serious, outcome-determinative effects for everyone. *It is the main event.*[115] Class certification, then, is not some way station on the path to justice, and it is not some stupid hoop-jumping trick. It is not merely another provisional proceeding sandwiched among the judge's other daily routine proceedings. A class certification determination no longer presents the judge with multiple opportunities for subsequent revision or amendment of the court's decision. Gone are the days of conditional class certifications.[116] Court-issued decertification orders are extremely rare.[117] In short, there are not a lot of do-overs in the class certification realm.

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114 *See, e.g.*, Parker v. Time Warner Entm't Co., 239 F.R.D. 318, 341 (E.D.N.Y. 2007) (noting that in high-stakes complex class action litigation, defendants may face "devastating judgments" and "catastrophic damages awards").

115 *See* Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001) ("By contrast, an order certifying a class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and, if the case is settled, there could not be such an examination even if the judge viewed the certification as provisional).").

116 *Id.*; *see supra* note 47; *see also* 7AA WRIGHT ET AL., *supra* note 25, § 1785.4 (explaining the deletion of the provision for conditional or provisional class certification as part of the 2003 Rule 23 amendments).

117 *See supra* note 115.

Once the serious consequences of class certification are embraced, it follows that all actors involved should be required to produce and secure as reliable a record as necessary to ensure that a court has appropriate information upon which to make a serious class certification decision. The imposition of evidentiary standards on the production of such a record comports with the significance, importance, and consequences of this judicial determination. Precisely because the stakes are so high for both sides of the docket, justice and fairness compel a rule requiring that any judicial evaluation be made on a sound and reliable record. The imposition of basic evidentiary standards, then, provides a set of guidelines for securing the integrity of such a record.

B. The Imposition of Evidentiary Rules Is Congruent with Proposals for a Review of the Merits at Class Certification

In addition to the desirability of securing a sound evidentiary record for judicial assessment of a class certification motion, the concept that evidentiary rules should apply at class certification is congruent with recent academic proposals that courts should have an opportunity to make an assessment of the underlying merits of proposed class claims.[118] The impetus and rationales underlying these proposals are varied,[119] but they share a core insight that there are certain proposed class actions that, on balance, may not be worth pursuing for various merits-based reasons. The attempt to introduce a so-called controversial "just ain't worth it" factor into class certification analysis in the 1990s failed,[120] because, among other reasons, it was seen as an impermissible affront to the *Eisen* rule; but these proposals may be enjoying renewed interest.

The suggestion that courts ought to be allowed in some fashion to preview the merits of proposed class action claims rests on various corollary propositions. In this understanding of class action jurisprudence, litigants have no right or entitlement to proceed as a class action. Instead, Rule 23 is merely a procedural rule that affords a procedural means for aggregating individual cases. Furthermore, even if class proponents are able to satisfy all the Rule 23 requirements, a court legitimately may decline to certify a class action be-

118 *See supra* note 92.

119 *See supra* note 92.

120 *See supra* note 93.

cause there is no automatic right to class status upon satisfaction of Rule 23 prerequisites.[121]

Once one accepts that there is no established legal right to proceed as a class action and that a judge may decline to certify a class even if all the Rule 23 requirements are met, the question shifts to what other considerations a court may take into account in making such a determination. Scholars have proposed nuanced suggestions—grounded in common sense, law and economics, and other analytical constructs—to extend to judges an evaluative role of the merits of the underlying claims. Implicit in all these proposals is the conclusion that, applying whatever merits-based analytical model a court might adopt, it is legitimate for a judge to consider the underlying merits of the proposed class claims as part of the court's class certification decision.

It is beyond the scope of this Article to evaluate—let alone take a position on—the debate surrounding whether Rule 23 should be further amended to permit judges to make merits-based assessments of proposed class litigation. On the other hand, were the Advisory Committee to incorporate such a proposal in Rule 23 or its Advisory Committee notes, then the salience of the evidentiary record on merits-based arguments is directly implicated. While it is important that the Rule 23 certification prerequisites be established with reliable supporting evidence, the need for reliable evidentiary material relating to merits-based claims seems equally (if not more) compelling.

If courts were permitted to conduct merits-based evaluations at class certification, the need to proceed with extreme care in creating a reliable evidentiary record on merits-based issues would seem paramount. If a court would deny the admissibility of evidence and disregard that evidence on the merits of class claims at summary judgment or trial, there is simply no reason not to impose this fundamental precept with regard to those same materials offered as part of the class certification process. Once merits-based assessments become included as within the legitimate purview of the class certification process, evidentiary rules should be in place to ensure the fairness and reliability of any merits-based proffers and consequent judicial assessment.

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121 *See* FED. R. CIV. P. 23 (listing the prerequisites of a class action and stating that the court must determine *whether* to certify the action as a class action but not requiring courts to automatically certify a class).

C. *The Imposition of Evidentiary Rules Heightens Attorneys' Responsibilities in Proffering a Good Record in Support of or Opposition to Class Certification and Heightens the Role and Sensibility of Judges*

It seems self-evident that recordmaking in class certification proceedings ought to be made on proper and material evidence, rather than on hearsay or otherwise inadmissible or excludable matter. Yet, as suggested above, many class certification records are populated with just such material.[122] And, as explained above, the current regime of class certification proceedings and appellate review creates perverse incentives among all parties to escalate voluminous submissions to the court in the interest of documenting a disproportionate record in support of or opposition to class certification.[123]

Attorneys on either side of the docket should not be faulted for doing their jobs at class certification under current standards, but no attorney has any incentive to alter the current regime of mutually ensured evidentiary escalation. In light of this reality, a simple rule imposing evidentiary standards on class certification materials would not only greatly help to ensure the reliability of the record, but would also have the salutary effect of reigning in inappropriate and burdensome litigation conduct all around. As long as "no rules of evidence" apply to class certification proceedings, every attorney has an incentive (if not a duty) to lard the class certification record with as much material as possible in support of or opposition to the class certification motion. A universally applicable rule on evidence would induce attorneys to cease the practice of record-loading and to thoughtfully consider exactly what record the court actually needs to have available in order for it to make its Rule 23 assessment.

Moreover, the existence of such a regime, implemented by judicial rulings on evidentiary challenges, would induce attorneys to carefully and thoughtfully assemble their class certification materials. Attorneys would operate in the shadow of actual evidentiary rulings during class certifications, rather than in the current free-form universe of anything goes, without consequence.

In addition, the replacement of an evidentiary regime for a "no rules of evidence apply" regime would have the beneficial effect of enhancing the judicial role in securing a reliable record on which the court makes its class certification decision. In the absence of a re-

122 *See supra* notes 99–104 and accompanying text.

123 *See supra* Part I.B.

quirement that class certification materials meet evidentiary standards, it is all too easy for busy judges to simply and reflexively greenlight any and all materials offered during class certification proceedings. In response to routine evidentiary challenges to materials offered into the record, the current, standard judicial refrain seems to consist of the same rote recitation: "This is a class certification proceeding, so I am going to let everything into the record."

Imposing rules of evidence on class certification decisions would restore the judge's role in calling balls and strikes regarding evidentiary objections to documentary or testamentary materials offered at class certification. Such judicial determinations can only enhance the reliability of the record, and would likely limit it to the essential materials upon which judges may make findings of fact and conclusions of law relating to the court's certification decision. Such a regime would not impose an undue burden on judges for whom evidentiary determinations are routine and familiar.

D. *The Imposition of Evidentiary Rules Is Congruent with Jurisdictions That Require* Daubert *Hearings for Expert Witness Testimony*

While federal and state courts have not yet universally embraced the role for *Daubert* hearings during class certification proceedings, several significant federal courts have nonetheless concluded that this threshold judicial gatekeeping function plays an important part in supporting a sound class certification decision.[124] The class certification jurisprudence, it might be fair to suggest, is trending towards the use of *Daubert* hearings to secure reliable expert testimony either in support of or opposition to class certification.

The deployment of *Daubert* hearings as part of class certification proceedings constitutes a judicial application of evidentiary rules to assess the class certification decision. Currently, *Daubert* hearings typically are used to permit a court to evaluate competing claims as to the ability of the class plaintiffs to prove damages on a classwide basis, as must be demonstrated for proponents to secure certification of a Rule 23(b)(3) damages class action.[125] Courts' assessments of competing expert testimony using *Daubert* standards have become more commonplace, as judges have come to understand that uncritical

124 *See supra* note 10.

125 *See supra* note 10; *see also* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1433–35 (2013).

acceptance of a plaintiff's expert testimony can too easily result in certification of a proffered class.[126]

In this regard, the judicial recognition and use of *Daubert* hearings represents the camel's head in the tent for the use of evidentiary standards at class certification. Having accepted the use of some evidentiary standards at the class certification stage, it seems illogical not to apply the other rules of evidence to the vast body of materials offered in support of or opposition to other class certification requirements.

The Federal Rules of Evidence apply to all proceedings.[127] Neither the evidence rules nor the drafters' commentary distinguishes among types of proceedings.[128] There is no justification in the evidence rules for characterizing class certification proceedings as some sort of preliminary proceeding to which the rules of evidence need not apply. Although the evidence rules except a small number of special situations from their purview, virtually all the exceptions apply in the criminal context.[129] Significantly, class certification hearings are not among the excepted types of proceedings to which the rules of evidence need not apply. In addition, Federal Rule of Evidence 102 states: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."[130]

Moreover, it is no longer accurate—however true it might have been in the past—that class certification hearings are preliminary or conditional in the sense that a judge is going to go back and reconsider his or her class certification order. In 2003, the Advisory Committee on Civil Rules excised the Rule 23 provision permitting conditional

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126 *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2008) ("It follows that opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason.").

127 FED. R. EVID. 101 ("These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101. . . . In these rules: (1) 'civil case' means a civil action or proceeding; . . . (4) 'record' includes a memorandum, report, or data compilation . . . .").

128 *Id.*

129 FED. R. EVID. 1101(d) (stating that the rules of evidence do not apply to a court's determination on a preliminary question of fact governing admissibility; grand jury proceedings; and miscellaneous proceedings such as extradition or rendition, issuing an arrest warrant, preliminary examination in a criminal case, sentencing, granting or revoking probation or supervised release, and considering whether to release on bail or otherwise).

130 FED. R. EVID. 102.

class certification.[131] Although a judge subsequently may revise a class certification order, this practice has become extremely rare.[132] Hence, in current class action litigation, the class certification hearing is the most important, significant, and outcome-determinative event,[133] and consequently a serious judicial proceeding to which formal rules of evidence ought to apply.

E. The Imposition of an Evidentiary Rule Requirement Provides a Basis for Appeal for Abuse of Discretion if a Judicial Officer Makes a Certification Decision on an Improper Record

Imposing an evidentiary regime for class certification materials will improve the quality and nature of the class certification record upon which a judge must determine whether to grant or deny class action status. As indicated above, as part of the trend towards ensuring sound class certifications decisions, many authorities now indicate that judges should make findings of fact and conclusions of law on the record with regard to satisfaction of the Rule 23 requirements.[134]

Appellate courts generally apply an abuse of discretion standard of review to a trial judge's class certification order[135] and accord great deference to a trial judge's determination. On the other hand, a judge's class certification order must comport with the Rule 23 requirements, and in many courts the failure to apply Rule 23 legal standards provides a basis for appellate de novo review of a court's class certification decision.[136]

Against this appellate backdrop, the production of a sound, reliable class certification record assumes great importance. Some courts, however, focus on the amount of evidence offered rather than its true quality.[137] However, under prevailing jurisprudence in some jurisdictions, an appellate court will not overturn a trial judge's class certification decision if there is *any* support for the court's decision, *anywhere* in the record.[138] This highly fluid standard, coupled with voluminous class certification records bolstered by thousands of pages of evidence of often dubious quality, essentially insulates many class certification

131 *See supra* notes 72, 116.

132 *See supra* note 116 and accompanying text.

133 *See supra* note 115.

134 *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 8, § 21.21; *see also supra* note 11.

135 *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 312 (3d Cir. 2008).

136 *See* Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432–35 (2013) (finding district and appellate courts did not apply the test correctly).

137 *See infra* note 139.

138 *See supra* note 104.

orders from appellate reversal. Moreover, if the appellate standard is simply that the judge find "any support in the record" for the class certification decision, then this slack criterion encourages attorneys to bulk the certification record to shield the trial judge's determination and impress the appellate court. As indicated above, many Rule 23 appellate decisions that ratify class certification orders refer to the lower court's consideration of multiple days of testimony and thousands of pages of records.[139]

Importing evidentiary standards into class certification proceedings, then, would import appellate standards for review of erroneous judicial evidentiary decisions. Thus, judges would have to rule in the shadow of more meaningful appellate scrutiny of the court's basis for its decision and would no longer be able to reflexively rely on the fact that the court's order was insulated if supported somewhere in a huge record. In turn, attorneys also would function in the same shadow of potential appellate review of the class certification record. The fact that the court's class certification decision would need to be supported by sound evidentiary materials would encourage attorneys to produce a more streamlined, evidence-based record.

III. ARGUMENTS AGAINST IMPOSING EVIDENTIARY RULES AT CLASS CERTIFICATION

The proposal to introduce rules of evidence into the class certification process no doubt will inspire spirited opposition from class action practitioners, most likely from plaintiffs who carry the burden of proof on Rule 23 requirements. Because both sides of the docket currently partake in and benefit from the no-evidence regime, however, defense attorneys have little incentive to endorse such a proposal until the rules ensure mutual application. Having said that, class action proponents are most likely to issue a predictable litany of arguments they routinely invoke in opposition to any refinements of class action jurisprudence. While not discounting the seriousness of such chal-

139 *See, e.g.*, Campbell v. First Am. Title Ins. Co., 269 F.R.D. 68, 71 n.1 (D. Me. 2010) (relying on a voluminous record to grant class certification); *In re* Intel Corp. Microprocessor Antitrust Litig., No. 05-485-JFF, 2010 WL 8591815, at *9 (D. Del. July 28, 2010) (referencing a three-day hearing with competing expert witness testimony and additional submissions post-hearing); *In re* Welding Fume Prods. Liab. Litig., 245 F.R.D. 279, 289 & n.6 (N.D. Ohio 2007) (referencing a two-day hearing supported by substantial evidentiary record); Georgine v. Amchem Prods., Inc., 157 F.R.D. 246, 260 (E.D. Pa. 1994) (referencing an eighteen-day class settlement hearing spread over five weeks, including twenty-nine witnesses and numerous supporting exhibits), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

lenges, this stock catalogue of complaints often has a hyperbolic quality that overstates objections and impairs dispassionate debate.

This Part assesses five contentions in opposition to a requirement that rules of evidence apply to class certification proceedings. Although the arguments merit conversation and debate, this Part concludes that the arguments fail to carry sufficient weight to undermine a jurisprudential shift to an evidence-based class certification procedure.

A. *An Evidentiary Requirement Will Convert the Certification Hearing into a "Trial Before Trial"*

Over the past two decades, as courts have trended towards enhanced procedures for class certification motions, opponents commonly have objected that the introduction of heightened standards effectively converts a class certification motion into a minitrial before trial.[140] As a corollary, opponents have suggested that any new form of class certification requirement relating to the production of a class certification record violates the *Eisen* rule as an impermissible review of the merits during class certification.[141] At the extreme, proposals that courts ought to be able to preview the merits of the underlying class claims as part of the certification exercise most clearly raise the protest that the class certification process will actually become the trial before trial.

Nothing could be further from the truth, however, as borne out by the gradual evolution of class certification standards over the past twenty years. The move from the era of drive-by certifications to certification on a record certainly did not convert class certification hearings into trials on the merits. The requirement, imposed in some courts, that a judge make findings of fact and conclusions of law based on a record[142] has not turned class certification proceedings into trials on the merits. Even the introduction of *Daubert* hearings relating to expert witness testimony[143] has not changed class certification hearings into trials on the merits.

The reason is simple: judges understand that the appropriate inquiry at class certification is whether the proposed action satisfies the

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140 *See, e.g.*, 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, 329 (2010).

141 *See* 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, 955 (2009).

142 *See supra* note 11.

143 *See supra* note 10 and accompanying text.

requirements of Rule 23 and nothing more. Judges are very good at separating class certification wheat from chaff and understand that "probing behind the pleadings"[144] entails limitations, which include not trying the underlying merits of the claims during the class certification exercise.

Hence, there is simply no reason to believe that an evidence-based class certification procedure would turn into a trial-before-trial production. Instead, the application of evidence rules would serve to further encourage attorneys to refine the materials that constitute the certification record and supply the presiding judge with an additional tool by which to create a meaningful record on the only issue at stake during class certification: whether the proponents are able to satisfy the Rule 23 requirements.

B. An Evidentiary Requirement Will Increase the Time and Money Expended in Precertification Discovery

Similar to the objection that enhanced class certification standards convert such proceedings into merits trials before trial, class action proponents commonly lament that newly imposed standards increase cost, increase the amount of time expended, and encourage delay.[145] From this efficiency and fairness perspective, heightened class certification requirements thus impose unfair and disproportionate burdens on class plaintiffs, to the benefit of defendants.

It cannot be denied that the move from conclusory certification on the pleadings did impose new burdens on the parties to create a class certification record. In an era that now basically requires the production of such a record, though, it is difficult to fathom how the introduction of an evidence-based regime would increase cost or the amount of time expended, or encourage delay. Currently, the problem with the creation of a class certification record is not underproduction of materials, but rather the opposite: the overproduction of irrelevant, inadmissible, or otherwise objectionable materials to pad the record for certification and appeal.

Attorneys already are conducting extensive discovery relating to class certification issues and, in some contested instances, using the class certification process to delve into merits issues as well.[146] The introduction of an evidentiary regime would improve the record at no

144 *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

145 *See* Olson, *supra* note 141, at 955 (arguing that resolving factual disputes before class certification would entail "extensive discovery," "extensive briefing," and a "mini-trial").

146 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 317 (3d Cir. 2008).

additional cost or delay—attorneys merely would be required to apply some measured evidentiary standards to their offer to the court. Hence, attorneys on both sides of the docket equally would engage in a process of selective winnowing, rather than expansive and expensive padding.

C. *Evidentiary Requirements Will Further Heighten Class Certification Standards and Thereby Deny Access to Justice for Plaintiffs*

A third common refrain from opponents to any change to the class certification process embraces the very broad theme that every such incremental change effectively denies access to justice for class action plaintiffs.[147] No doubt, this chorus will again be raised in objection to the concept of applying rules of evidence to class certification proceedings.

It is worth observing that class action advocates have posited the access-to-justice objection to virtually all evolving class action jurisprudence, such as the commonality requirement that was the focus of the Court's *Wal-Mart* decision.[148] The extreme version of this argument typically posits that any doctrinal developments incorporating enhanced class certification procedures spell the death knell of class litigation.[149]

The denial-of-access-to-justice arguments are overbroad and simply not supported by empirical evidence. Far from being killed off, class litigation actually is alive and well in federal and state courts.[150] Notwithstanding the universal acceptance of the rigorous analysis

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147 *See* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 448 (2013).

148 *See, e.g.*, Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 80 (2011) (arguing that recent cases limit litigant access to justice using the language of individual rights and that "the constitutional concept of courts as a basic public service provided by government is under siege"); *see also* Suzette M. Malveaux, *How Goliath Won: The Future Implications of* Dukes v. Wal-Mart, 106 Nw. U. L. REV. COLLOQUY 34, 37 (2011), *available at* http://www.law.northwestern.edu/lawreview/colloquy/2011/18/LRColl2011n18Malveaux.pdf (explaining that when individuals with small claims refrain from challenging large corporations, this "effectively immuniz[es] companies from complying with the law," and stating that "[t]he *Dukes* class certification standard jeopardizes potentially meritorious challenges to systemic discrimination" and "compromises employees' access to justice").

149 *See* Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 Nw. U. L. REV. 511, 516 (2013) (discussing repeated instances of predictions of the death knell for class action litigation in response to doctrinal developments over a near seventy-year period).

150 *See id.* at 532.

standard for class certification, the need for a production of a certification record, the requirement of judicial findings of fact and conclusions of law, and the introduction of *Daubert* hearings, litigants continue to file class litigation.[151] Empirical evidence does not show that plaintiffs are being denied class certification at a higher rate than in the past.[152]

The denial-of-access-to-justice argument is precisely the sort of "sky is falling" hyperbole that undermines a thoughtful, common sense discussion of improving the class action process. In reality, as courts have worked towards refining class certification procedures to ensure a just result, attorneys on both sides of the docket have adjusted their practices to conform to evolving standards and rules. What the past twenty years teaches is that the class certification process has become better, not worse, and has improved the quality of lawyering and judicial decisionmaking as it pertains to class action litigation.

Either class proponents can support a request for class certification based on satisfying the Rule 23 requirements or they cannot. Requiring that the materials offered in support of these requirements meet basic evidentiary standards entails no additional burdens and presents no barrier to entry to the courthouse. It is difficult to believe that a plaintiff's attorney is going to decline to pursue a meritorious class action because he or she will have to support that request with a sound evidentiary foundation. On the contrary, the lawyer who would lard a record with irrelevant information, in the hopes of convincing a judge that something in there ought to be certified, is suspect. The introduction of an evidentiary regime would have the salutary effect of improving process and would not effectuate a denial of access to justice for class plaintiffs.

D. Rules of Evidence Need Not Apply at Class Certification Hearings Because These Hearings Are Bench Trials and the Motion Is Not Before a Jury

Another conceivable objection to the imposition of evidentiary rules during class certification is predicated on the theory that such proceedings are actually bench trials, and, in absence of a jury, the rules of evidence need not apply. Because a class certification hearing

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151 *See id.*

152 *See* Thomas E. Willging & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003–2007*, 80 U. CIN. L. REV. 315, 342 (2011) (discussing possibility for speculation but lack of clear proof of a decline in class litigation).

is similar to a bench trial, there is no fear of undue prejudice that might result from an uninformed jury deliberation of inadmissible evidence. The corollary is that judges are excellent sifters of proffered materials in support and opposition, are capable of giving due weight to whatever is produced in the record, and, therefore, technical evidence rules need not apply.[153]

The application of the Federal Rules of Evidence does not generally distinguish between bench and jury trials. The evidence rules are intended to apply to all judicial proceedings,[154] which is exactly what a class certification hearing is. There is no exception in the evidence rules for class certification proceedings, even though this strange practice has accreted to class certification hearings since 1966.[155]

Nonetheless, in many respects, full-blown class certification proceedings are conducted in a fashion similar to trials—with opening statements by counsel, fact and expert witness testimony, production of documentary evidence, direct and cross examination, and closing arguments.[156] What is singularly peculiar about this process is the archaic invocation of the "no rules of evidence apply" rule. The system merely assumes that the presiding judge, *sub silentio*, is conducting some appropriate evidentiary sifting of materials that will ensure a sound basis for decisionmaking.

To express concern over the recordmaking process is not to communicate a distrust of judges or the judicial process. What we do know is that most judges are busy, overburdened, and diligent in their jobs.[157] In fact, though, we simply cannot know how any judge filters the materials, documents, and testimony piled on at class certification

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153 Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 188 (2006) ("And in the absence of such experimental empirical conclusions, we assume that judges are less prone than juries to the cognitive and decision-making failures we worry about in jurors, possibly because judges are smarter, possibly because they are better educated, possibly because of their greater experience in hearing testimony and finding facts, and almost certainly because of their legal training and legal role-internalization." (footnote omitted)).

154 *See* FED. R. EVID. 1101.

155 *See id.*

156 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 3:13 (10th ed. 2013) ("A common practice among courts, particularly in complex litigation, is to require the parties, prior to the evidentiary hearing, to submit written statements summarizing the anticipated direct testimony of any expert witness who will appear at the hearing. The hearing will proceed much like a trial, with witness testimony on direct examination, followed by cross-examination and redirect examination." (footnote omitted)).

157 *See generally* ALICIA BANNON, BRENNAN CTR. FOR JUSTICE, FEDERAL JUDICIAL VACANCIES: THE TRIAL COURTS (2013), *available at* www.brennancenter.org/sites/default/files/publications/Judicial%20Vacancies%20Report%20Final.pdf.

hearings, nor can we know the nature and extent to which a judge reviews multiple black binders of thousands of pages of material. Nor can we ever really know what parts of the record, if any, the judge relies on in making the class certification decision.

The existence of an evidentiary regime as applied to the creation of a class certification record would focus everyone's attention on the core matter at hand: those matters of sound evidentiary proof in support of or opposition to class certification. In serving a prophylactic function, attorneys would present only such materials that passed evidentiary muster. When objections are made to offers of proof, judges ought to make deliberative rulings on what can and should go into the evidentiary record on Rule 23 requirements. In turn, the production of such a record will better provide parties and appellate courts the precise record upon which a judge's certification order relied.

E. The Imposition of Evidentiary Rules at Class Certification Will Increase the Opportunities for Appellate Review, Further Lengthening Class Certification Battles

Finally, another possible objection to the introduction of an evidentiary regime during class certification proceedings is that this will increase opportunities for appellate review, with the negative consequence of lengthening class action litigation. It is somewhat difficult to assess the weight of this prospective problem, but it is correct that a door would be opened to another basis for appeal from class certification orders related to the consideration of erroneous evidentiary materials in the record.

In 1997, the Advisory Committee on Civil Rules added a new subdivision to Rule 23, Rule 23(f), to provide a means for discretionary appeal of class certification decisions.[158] Such appeals are discretionary, and the federal circuits variously have defined the standards for granting or denying appellate review.[159] However, because one cannot raise multiple objections to a class certification order seriatim, one may anticipate that arguments based on erroneous evidentiary rulings would be part of an omnibus petition for review. In other words, the imposition of an evidentiary regime to the class certification process would provide another basis for appeal, but not necessarily prolong a process that currently allows for such review.

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158 FED. R. CIV. P. 23(f).

159 *See generally* 7B WRIGHT ET AL., *supra* note 25, § 1802.2 (citing cases and standards among the federal circuits).

The purpose of importing evidentiary standards into class certification proceedings is to ensure that the court makes a reasoned decision on Rule 23 requirements based on materials that the judge can point to as the basis for the decision. The parties and an appellate court have a right to know that the judge's certification decision was grounded on sound and reliable evidence in the record, and not simply on a mass of undifferentiated materials somewhere in which a court could conceivably find a class action. To require anything less runs afoul of the so-called "ferret" rule, in which judges are not required to act like ferrets rummaging through a voluminous record to discover some nugget of evidence in support of a ruling.[160] Neither the parties nor an appellate court should have to root around a voluminous class certification record to find the acorns that constitute satisfaction of the Rule 23 requirements.

IV. Possible Ways to Implement Evidentiary Standards at Class Certification Proceedings

No doubt, any number of class action practitioners will resist any change to class certification proceedings that would involve application of the formal rules of evidence. In addition to the objections outlined above, many may contend that this suggestion comes under the conventional wisdom that "if it ain't broke, don't fix it." This Article, however, is based on the premise that the class certification system is deficient and needs reform. Thus, counterarguments to maintain the status quo precept that "no rules of evidence apply" and to allow anything and everything into the record are untenable in an era of increasingly close scrutiny of class certification motions.

There are at least three means by which courts might accomplish a shift from the current "no rules of evidence apply" regime to one in which evidence rules do apply. Each of these proposals is assessed for its strengths and weaknesses in accomplishing the goal of an improved class certification process.

A. Allow the Doctrinal Development of an Evidentiary Regime

The current "no rules of evidence apply" regime is not embodied in any Federal Rule of Civil Procedure or statute. Instead, it simply developed as a matter of doctrinal explication, largely without any supporting authority or rhyme or reason. Nonetheless, the precept is

160 *See* Morales v. A.C. Orssleff's EFTF, 246 F.3d 32, 33 (1st Cir. 2001) (encouraging the adoption of antiferretting rules that require parties opposing summary judgment on factual grounds to "identify factual issues buttressed by record citations").

now deeply embedded in class action procedure.[161] Thus, in the same fashion that the "no rules of evidence apply" regime came into existence, this prevailing precept could be abandoned through judicial articulation setting out a counter-rule requiring that class certification materials be subject to the Federal Rules of Evidence.

Doctrinal development of a new evidentiary standard is the least efficient means to accomplish the overall goal of improving class certification proceedings. Such doctrinal development invites inconsistent decisionmaking and a lack of uniformity across the federal courts, which in turn invites other undesirable litigation conduct, such as forum shopping for favorable courthouses operating under the "no rules of evidence apply" regime. In addition, allowing for doctrinal development takes time, increases confusion, and encourages years of appellate challenges before judicial acceptance of a new regime.

B. *Revise the* Manual for Complex Litigation *to Include a "Best Practices" Recommendation That Judges Apply Rules of Evidence to Class Certification Materials*

The primary judicial handbook for judicial case management of complex litigation, published by the Federal Judicial Center, is the *Manual for Complex Litigation*, now in its fourth edition.[162] Federal judges routinely look to the *Manual* for guidance on best practices in supervising and managing complex litigation, including class action litigation.[163] The *Manual for Complex Litigation* currently is silent concerning what evidentiary standards apply at class certification.[164] Hence, a second way in which an evidentiary regime could be introduced into class action proceedings would be to revise the next edition of the *Manual* to include a specific direction that courts apply evidentiary rules to materials offered in support of or opposition to class certification motions.

Revising the *Manual* to include such a specific evidentiary requirement has the virtue of providing federal judges with an authoritative source upon which to rely in determining how to properly evaluate class certification motions. In addition, this recommendation has the virtue of providing counsel on both sides of the docket with an authoritative basis for making evidentiary challenges to offers of proof

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161 *See supra* note 94.

162 *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 8.

163 *See* 15 WRIGHT ET AL., *supra* note 25, § 3868 (noting use of the *Manual* by judges).

164 *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 8, § 21.21 (noting only that an evidentiary hearing may be necessary).

during class certification proceedings. On the other hand, importing a new evidentiary regime through revision of the *Manual for Complex Litigation* is a weak surrogate for a more robust rule. To the extent that attorneys or jurists view the *Manual* as a compilation of "best practices" rather than binding rules, this invites attorneys to challenge and judges potentially to ignore the *Manual.*

C. *Amend Rule 23 to Require a Certification Hearing and an Evidentiary Standard Parallel to Rule 56(c) for Summary Judgment*

The best possible means to shift from a "no rules of evidence apply" regime to one where the rules of evidence apply is simply to amend Rule 23 to clearly set forth this rule. A lucid statement of the rule would provide an immediate, robust basis for change in class action procedure. To this end, Rule 23 could be improved by three very simple amendments. Rule 23(c)(1), dealing with class certification orders, should be amended to add the following new provisions.

The first amendment would add a provision requiring a hearing on a class certification motion. In 2003, the Advisory Committee on Civil Rules added a provision to Rule 23(e)(2) requiring a hearing if a class action settlement would bind class members.[165] Nonetheless, the Advisory Committee made no parallel change requiring a hearing at the front end of class proceedings. As indicated at the outset of this Article, imposing the Rule 23(e)(2) requirement for a hearing at the back end of class litigation without providing for a hearing at the front end of class proceedings seems backwards.[166] If there are problems with a proposed class action, especially adequacy of representation issues, then the time to identify such issues is at the outset of the litigation, rather than after the parties have agreed to a settlement and pressures have set in to simply approve the deal.[167]

The second amendment to Rule 23(c)(1) would add a provision that parallels the language of Rule 56(c)(2), which sets forth an evidentiary standard for summary judgment materials.[168] Evidence rules apply to materials offered into the summary judgment record, and Rule 56 provides a means for plaintiffs and defendants to raise evidentiary challenges to summary judgment materials offered in support of

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165 FED. R. CIV. P. 23(e)(2) ("If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.").

166 *See supra* note 30 and accompanying text.

167 *See* Mullenix, *supra* note 30, at 1733 (arguing that courts must assess adequacy at the beginning of litigation in order to protect absent class members).

168 FED. R. CIV. P. 56(c)(2).

or opposition to a summary judgment motion.[169] Rule 56(c)(2) simply states: "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."[170] Other linguistic formulations providing for application of the evidence rules to class certification materials are possible, of course.

A third recommendation, coupled with the requirement for an evidentiary hearing, would be to add language to the rule specifically requiring a judge to issue the class certification order based on findings of fact and conclusions of law. Although almost all federal courts routinely do this, there is no specific requirement in Rule 23. In this regard, some state class action rules are in the vanguard of Federal Rule 23 in specifically requiring this of the judge issuing a class certification order.[171]

Amending Rule 23 to specify that judges must state their findings of fact and conclusions of law would ensure that parties will have a good basis upon which to craft an appeal, and likewise would provide appellate courts with a basis for review of the court's order. Language similar to that incorporated into the Florida class action rule provides a model for such an amendment. The Florida rule provides that a trial court's order on class certification must "separately state the findings of fact and conclusions of law upon which the determination is based."[172]

Finally, in tandem with such Rule 23(c)(1) amendments, the Advisory Committee on Civil Rules could provide an Advisory Committee note commenting on the rule amendments and the underlying rationales for implementing an evidentiary regime during class certification proceedings.

CONCLUSION

The trend over the past two decades of class action practice has been to make class certification a more serious affair, against the backdrop of an increasing appreciation of the consequences of the class certification decision for both sides of the docket. It is fair to

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169 *See* FED. R. CIV. P. 56(c)(1) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.").

170 FED. R. CIV. P. 56(c)(2).

171 *See supra* note 11.

172 FLA. R. CIV. P. 1.220(d)(1); *see also supra* note 11.

suggest that we are now a long way from the era of drive-by certifications and have moved towards a system that applies heightened scrutiny to class certification proceedings.

The remaining anomaly in the class certification arena has been the persistent "no rules of evidence apply" trope with reference to the production of the class certification record upon which the court's order rests. In light of the doctrinal elaboration of the ways in which courts must implement a rigorous analysis of Rule 23 requirements, it makes little sense to persist in the rote recitation of an outdated precept, based on scant authority other than sheer repetition. Indeed, at least some federal courts[173] and other authorities[174] have now turned attention to the question of whether and to what extent evidentiary rules ought to apply to class certification proceedings, concluding that better practice counsels this rule.

Importing evidentiary rules into the class certification process will enhance professional responsibility and lawyering on class certification motions. Importing evidentiary rules at class certification will likely not increase cost, time, or delay in class certification proceedings because litigants already shoulder these burdens in precertification discovery. Requiring admissible evidence will instead enhance attorney performance in producing a reliable record on class certification requirements.

In addition, importing evidentiary rules at class certification will enhance the judicial role in managing and supervising class litigation.

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173 *See, e.g.*, Lujan v. Cabana Mgmt., Inc., 284 F.R.D. 50, 64 (E.D.N.Y. 2012) (opining that "the Second Circuit would require . . . declarations be admissible (i.e., based on personal knowledge and either non-hearsay or information subject to hearsay exceptions)"); *see also* Colin Miller, *Class Act: Eastern District of New York Finds Rule Against Hearsay Applies at Class Certification Stage*, EVIDENCEPROF BLOG (Sept. 8, 2012), http://lawprofessors.typepad.com/evidenceprof/2012/09/rules-of-evidence-class-certification-lujan-v-cabana-management-inc-fsupp2d-2012-wl-3062017edny2012.html (discussing the *Lujan* decision and concluding that there may be inferential support in Federal Rule of Evidence 802 applying at the class certification stage); *Must Evidence Submitted at Class Certification Stage be Admissible into Evidence (Rule 56 Standard)? Circuit Split*, JOSEPH HAGE AARONSON LLC COMPLEX LITIG. BLOG, http://www.jha.com/us/blog/?blogID=2162 (last visited Mar. 25, 2014) (discussing split among circuit courts concerning whether rules of evidence should apply to class certification materials).

174 *See* 8 EMPLOYMENT COORDINATOR EMPLOYMENT PRACTICES, *supra* note 94, § 99:52 ("Given the fact that the same evidence may be central to a determination on the merits as well as to satisfaction of certification requirements under Fed. R. Civ. P. 23, and the fact that the Federal Rules of Evidence attempt to codify procedures which insure the reliability of information used in court proceedings, parties should not advocate or oppose class action certification based only on evidence that can't eventually be submitted at trial in conformity with those rules. Certifying a class will be of little value to plaintiffs who are unable to prevail on the merits, and unreliable evidence for or against certification, even if admitted, will not be persuasive in influencing the court." (citation omitted)).

It will provide judges with a concrete rule on which to make evidentiary judgments in a deliberative manner in the shadow of possible appeal for reliance on inadmissible materials. Finally, importing evidentiary rules into class certification proceedings will improve justice and fairness in class certification decisions.