"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*

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Introduction

CLASS CERTIFICATION JURISPRUDENCE is in a state of flux as a result of a trend in which federal courts of appeals are using class certification calculus to resolve genuinely disputed merits issues. Several courts have recently held that district courts can—or indeed, must—resolve bona fide disputes about the merits of the plaintiffs' claims when deciding whether certification is warranted. The Second,[1] Fourth,[2] Fifth,[3] and Seventh Circuits[4] have held this, and in a recent decision the Third Circuit took steps in this direction.[5] These decisions have the potential to dramatically change the shape and content of class certification proceedings. At a minimum, this trend is making class certification proceedings considerably more involved;

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1. *In re* Initial Pub. Offering Sec. Litig., 471 F.3d 24, 26 (2d Cir. 2006).

2. Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004).

3. Oscar Private Equity Inv. v. Allegiance Telecom., Inc., 487 F.3d 261, 265 (5th Cir. 2007).

4. Szabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir. 2001).

5. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2008). In *Hydrogen Peroxide*, the Third Circuit held that district courts could "[w]eigh conflicting expert testimony at the certification stage," but did not expressly hold that genuinely disputed issues about the merits of the case could be properly resolved at the class certification stage.

some say it is also making their outcomes fairer to corporate defendants.[6]

On its face, this embrace of genuine merits dispute resolution at the class certification stage is curious. The class certification decision was intended to come at an early stage of the litigation. Yet the federal courts of appeals noted above have essentially held that trial courts can make findings about disputed issues at the class certification stage when those very same issues could clearly *not* be resolved at the summary judgment stage—which is typically a later stage of the litigation with a fuller factual record.[7]

On closer investigation, those supporting this trend fundamentally misapprehend the proper role of the certification decision, which is to shape the litigation based on an evaluation of how the plaintiffs intend to prove their case. Providing shape to the litigation requires that courts analyze the plaintiffs' allegations and scrutinize how the plaintiffs intend to prove their case, but should not require courts to resolve disputes about the merits of the plaintiffs' allegations.[8]

Many proposed class actions in federal court—especially those seeking monetary damages—request certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure, which requires courts to find that questions of fact or law will predominate in the

6. *See, e.g.*, Ian Simmons, Alexander P. Okuliar & Nilam A. Sanghvi, *Without Presumptions: Rigorous Analysis in Class Certification Proceedings*, ANTITRUST, Summer 2007, at 66 (applauding the trend and arguing that "giving careful scrutiny to expert opinion—in particular to the methodologies proposed by plaintiffs' experts and whether they would function with common proof—will conserve judicial resources and prevent erroneous grants of certification that raise settlement pressures on defendants"); *Securities Litigation—Class Certification—Fifth Circuit Holds that Plaintiffs Must Prove Loss Causation Before Being Certified as a Class*, 121 HARV. L. REV. 890, 896 (2008) [hereinafter *Securities Litigation—Class Certification*] (arguing that the *Oscar* decision out of the Fifth Circuit is a positive development because it "limits a type of suit that is particularly susceptible to abuse by entrepreneurial plaintiffs' attorneys").

7. While a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure typically occurs at the conclusion of fact discovery, courts have generally determined that class certification briefing should occur before fact discovery is complete. *See, e.g.*, Hubbard v. Potter, No. 03-1062, 2007 WL 604949, at *2 (D.D.C. Feb. 22, 2007). The recent trend may change this, however, as the trend seems to warrant a full development of the factual record at the class certification stage.

8. We are considering here factual disputes about the merits. Courts may address purely legal disputes about the case at the certification stage. For example, if plaintiffs put forth far-fetched legal theories about how they intend to prove their case on a class-wide basis, a court could consider and reject their viability. *See, e.g.*, *Tardiff* v. Knox County, 365 F.3d 1, 4–5 (1st Cir. 2004) ("[A] *court has the power to test disputed* premises early on if and when the class action would be proper on one premise, but not another . . . .").

litigation.[9] This predominance analysis asks courts to consider the types of disputed questions likely to prevail in the litigation; it does not ask the court to resolve any of those questions.

The new circuit trend—starting with the Seventh Circuit,[10] and followed by the Second,[11] Fourth,[12] and Fifth[13]—requires that plaintiffs actually *prove* part of their affirmative case at the class stage in order to make the "predominance" showing; this is true even when key factual issues relating to the affirmative case are vigorously disputed. The problem with this trend is that, when the plaintiffs' class-wide theory is predicated on disputed facts, the plaintiffs should be able to take their case to trial and present the dispute to a fact-finder; if they do so, then questions common to the class will likely predominate in the litigation. Therefore, there is actually no need for a court to ask whether plaintiffs will succeed in the litigation on their class-wide theories in order to determine whether plaintiffs' class-wide theories will predominate during the litigation.

Securities fraud class actions are largely driving the trend, and courts have focused upon one issue in particular.[14] In a securities fraud case, plaintiffs typically argue that reliance upon the fraud can be addressed on a class-wide basis through use of a presumption that the securities were traded in an "efficient" market.[15] An efficient market is "open and developed enough that it quickly incorporates material information into the price of the security."[16] The Second, Fourth, and Fifth Circuits recently held that class certification is only appropriate if the plaintiffs can prove, *at the certification stage*, that the market in which the securities were traded was efficient.[17] Those courts determined that the trial judge could resolve this issue, even if the market's efficiency is genuinely in dispute.

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

10. *See* Szabo v. Bridgeport Machines, Inc., 249 F.3d 672 (7th Cir. 2001).

11. Oscar Private Equity Inv. v. Allegiance Telecom., Inc., 487 F.3d 261, 265 (5th Cir. 2007).

12. *See Szabo*, 249 F.3d 672.

13. *See Oscar Private Equity*, 487 F.3d at 265.

14. Indeed, some have suggested that the trend in question is really a product of increased judicial scrutiny about the fraud-on-the-market presumption in securities fraud cases, given the supposed potential for abuse in such cases. *See Securities Litigation—Class Certification*, *supra* note 6, at 895.

15. *See id.*

16. *In re* Initial Pub. Offering Sec. Litig., 227 F.R.D. 65, 106 (S.D.N.Y. 2004).

17. As is discussed *infra* Part II.B, the Second Circuit's holding is ultimately ambiguous, but this is one plausible reading.

This holding is misguided. The market's efficiency is an element of the plaintiffs' class-wide merits case. If it is in dispute, then a court could not resolve it at summary judgment, meaning the plaintiffs should be able to—indeed, plaintiffs have a constitutional right to—present it for resolution to a *jury* based on all the evidence obtained in discovery.[18] If plaintiffs can present the question of the market's efficiency to a jury, then that question common to the class will play a significant role in the litigation. If the question will play a significant role in the litigation, then the *resolution* of the question is irrelevant to the predominance analysis, and there is no reason for courts to resolve the issue to decide class certification. Although it has only recently begun to bear fruit, the effort to introduce merits scrutiny into the class certification analysis is by no means a new development. The modern form of the class mechanism was introduced in 1966.[19] Shortly thereafter, several courts and commentators advocated for making an evaluation of the merits of the plaintiffs' case part of the certification analysis.[20] These efforts were uniformly rejected.[21] Indeed, it has long been understood that the United States Supreme Court squarely foreclosed such scrutiny in its 1974 decision *Eisen v. Carlisle & Jacquelin* ("*Eisen*").[22]

Following *Eisen*, various parties have made proposals (formally and informally) to revise Rule 23 to allow for preliminary evaluation of the merits of the plaintiffs' claims, but these efforts never succeeded.[23] In 1996, a supporter of such an amendment argued that Rule 23 should be changed to "jettison *Eisen*" and require an assessment of the merits at the certification stage, and went on to say that

18. *See, e.g.*, Ross v. Bernhard, 390 U.S. 531, 541 (1970); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

19. FED. R. CIV. P. 23.

20. *See, e.g.*, 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, 376 (1997) ("Shortly after 1966, when Rule 23 was recast into its present form, some courts began to consider the merits of the cases in making their class certification decisions."); Douglas M. Towns, Note, *Merit-Based Class Action Certification: Old Wine in a New Bottle*, 78 VA. L. REV. 1001 (1992).

21. *See* McGuire, *supra* note 20, at 400 (noting that the Advisory Committee had considered, and declined to adopt, "several proposed amendments to Rule 23 that would permit preliminary assessments of the merits").

22. *Id.*

23. In 1979, for example, the Department of Justice submitted proposed federal legislation that would have expressly called for a preliminary assessment of the merits in making the class certification decision. *See id.* at 394. In 1985, the American Bar Association's Section of Litigation proposed a revision to Rule 23 that implied, but did not explicitly require, a preliminary assessment of the merits should occur at the class certification stage. *See id.*

"[i]f the rulemakers decline to act, . . . the lower courts should continue to chip away at *Eisen* until the Supreme Court overrules it."[24] None of these proposals have been adopted by Congress. But it appears that many circuit courts—wittingly or not—have taken up the invitation to "chip away" at *Eisen*. This is making class certification a more onerous and less efficient process for litigants and the court; with voluminous briefing, competing expert reports (often from multiple experts), and even extensive evidentiary hearings; the certification decision is sometimes taking the form and complexity of a mini-trial.

Why are courts supporting this move to introduce resolution of bona fide merits disputes into the certification calculus? As discussed below, it appears that the courts driving this trend, and the commentators who encourage them, are motivated less by concerns of judicial efficiency, doctrinal coherence, or deterrence goals, and more by a desire to use Rule 23 to screen what are perceived to be weak cases from strong ones. The notion that Rule 23 should involve screening cases based on merit is a product of a belief that corporate defendants need judicial shielding from the coercive effect the certification decision can have on a defendant. That coercion is seen as unfair when class claims are weak.

Under this theory, the very act of class certification can force defendants to settle weak or frivolous cases for large amounts of money. Some have even likened class certification to blackmail,[25] and this "blackmail" concern is a principal force behind the desire to "chip away" at *Eisen* and import merits scrutiny into the certification analysis. However, this purported blackmail concern is significantly overstated—to the extent it has any validity at all—and should play no role in the certification calculus. Judgments of the strength of a case at the certification stage are prone to significant errors. Lawmakers did not intend courts to use Rule 23 as a screening device; they provided other, superior, screening mechanisms instead. Merits screening via Rule 23 only makes the certification process less efficient and class certification doctrine less coherent.

This Article traces the development of this trend by several circuit courts to embrace merits scrutiny—including the resolution of genuinely disputed issues—at the class certification stage and critically ex-

24. *See id.* at 369–70.

25. Concern about the blackmail settlement is often traced to a 1972 speech by Henry Friendly, the Second Circuit jurist. *See* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1357 (2003).

amines the jurisprudential principles motivating it. Part I looks at the fundamental principles of class certification as contemplated by Rule 23, including the Supreme Court's two seminal decisions in this area, to show why it is unnecessary to resolve *any* merits issues at all to perform the certification analysis. Part II then considers, in detail, the key circuit court decisions driving the trend and identifies precisely where they have veered off track. Part III investigates the purported blackmail concern which appears to drive this trend. The Article shows that there is an insufficient empirical and normative basis to justify importing a screening device into Rule 23, particularly when doing so would make the certification process highly inefficient. The Article concludes with some observations about the future of class certification jurisprudence in light of these issues.

I. The Role of the Certification Analysis

Until recently, the signposts for the class certification analysis under Rule 23 of the Federal Rules of Civil Procedure were relatively clear. For nearly three decades, two Supreme Court decisions—*Eisen v. Carlisle & Jacquelin*[26] and *General Telephone Co. of the Southwest v. Falcon*[27]—stood as pillars of federal class action practice.[28] Since *Eisen* was decided in 1974, "preliminary inquiry into the merits" during the class certification analysis has been prohibited, and factual dispute resolutions involving the merits of the plaintiffs' claims have been precluded. In 1982, *Falcon* held that courts need not base class certification decisions solely on the nature of the plaintiffs' claims or allegations.[29] Rather, courts may "probe behind the pleadings" as part of their "rigorous analysis" of the certification motion.[30]

Rule 23, as interpreted by the Supreme Court in these two decisions,[31] envisions class certification as a tool to define the shape of the

26. 417 U.S. 156 (1974).

27. 457 U.S. 147 (1982).

28. *Eisen*, 417 U.S. at 177. Rule 23 was substantially revised into its modern form in 1966—the same year that the *Eisen* complaint was filed. Professor Geoffrey Miller has labeled the *Eisen* decision, and the rule associated with it, a "pillar of class action practice" in federal and state courts. Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51, 51 (2004). *Eisen* "pioneered judicial interpretation" of provisions of "newly-adopted Rule 23." Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 TENN. L. REV. 1, 6 (2001).

29. *Falcon*, 457 U.S. at 160.

30. *Id.* at 161.

31. The Supreme Court has addressed class action practice to a limited extent in other cases. In *Amchem Products, Inc. v. Windsor*, the Court held that courts certifying classes for settlement under Rule 23(b)(3) must still find that the proposed class meets all re-

litigation based on a court's assessment of the likely questions to arise during prosecution of the plaintiffs' claims. When the plaintiffs' allegations are insufficiently precise, or when the court desires greater clarity about the expected manner in which plaintiffs will try to prove their claims in the litigation, probing behind the pleadings may be necessary.[32] Nevertheless, as *Eisen* makes clear, it is not appropriate to resolve disputed issues about the merits of the plaintiffs' claims as part of the class certification analysis.[33]

Because the interpretation of these two seminal decisions is central to the direction of certification analysis, it is worth examining the cases in more detail.

A. *Eisen* and *Falcon*: Twin Pillars of Class Action Jurisprudence

1. *Eisen v. Carlisle & Jacquelin*

Eisen is the seminal Supreme Court case involving the interplay between the merits of the plaintiffs' claim and the class certification decision. Its procedural history is long and tortured; the case was characterized as a "'Frankenstein monster posing as a class action.'"[34] Hence, some insist that the Court's holding must be limited to its particular facts[35] when, in fact, the decision announced class certification analysis principles which generally apply and remain vital.

In 1966, the same year Rule 23 enacted the modern form of the class mechanism, plaintiff Morton Eisen filed an antitrust and securities class action in the Southern District of New York on behalf of himself and similarly situated odd-lot traders on the New York Stock Exchange (the "Exchange").[36] During the period in question, odd-lot

quirements of the Rule, except for the manageability requirement (since the case will not be tried). 521 U.S. 591, 620 (1997). *Amchem* observed that the central purpose of the class action "is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Id.* at 617 (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)). It also noted that the predominance test of Rule 23(b)(3) "is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Id.* at 625.

32. *Falcon*, 457 U.S. at 160.

33. *Eisen*, 417 U.S. at 178.

34. *Id.* at 169 (quoting Second Circuit Judge Lombard in his dissent from *Eisen v. Carlisle & Jacquelin* (*Eisen II*), 391 F.2d 555, 572 (2d Cir. 1960).

35. *See, e.g.*, Initial Pub. Offering Sec. Litig., 471 F.3d 24, 34 (2d Cir. 2006) (maintaining that *Eisen*'s prohibition of inquiring into the merits at the class certification stage has been "taken out of context").

36. An odd-lot trade is a securities trade in which fewer trading units exchange hands when compared to the "normal" amount for that particular security. *Eisen*, 417 U.S. at 159 n.1. In stock trading, an odd lot is typically an order for anything less than 100 shares. *Id.* An order for more than 100 shares is called a "round lot." *See id.*; *see also* StreetAuthority.

trading was not part of the Exchange's regular auction market but was handled exclusively by odd-lot dealers.[37] Defendants Carlisle & Jacquelin and DeCoppet & Doremus handled ninety-nine percent of the Exchange's odd-lot business.[38] Eisen claimed that these firms violated the Sherman Antitrust Act by monopolizing odd-lot trading and setting the terms of their compensation at an excessive level.[39] Eisen also charged that the Exchange had violated the Securities Exchange Act of 1934 by failing to regulate these practices.[40]

The parties and the lower courts wrestled with the class action issue for nearly eight years prior to the Supreme Court's review.[41] The Supreme Court focused on questions related to notification of the approximately six million members of the prospective class, which the district court had finally decided to certify.[42] The notice issue was sticky. Notifying all of the class members would be difficult and expensive.[43] Eisen—whose individual claim was only worth about seventy dollars—made clear that he did not intend to pay for it.[44] The district court developed a less expensive approach to provide individual notice to a subset of class members.[45] To determine who should pay for this limited notice, the district court held a hearing on the merits, which it analogized to a preliminary injunction hearing.[46] Finding that Eisen had shown a likelihood of success on the merits, the district court ordered the defendants to pay ninety percent of the notice costs.[47]

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com, "Odd Lot" Explanation, http://www.streetauthority.com/terms/o/odd-lot.asp (last visited May 1, 2009).

37. *Eisen*, 417 U.S. at 160.

38. *Id.*

39. *Id.*

40. *Id.*

41. The district court originally denied certification, finding that Eisen gave "no compelling reasons and allege[d] no facts to support the proposition that he can adequately protect the interests of possibly hundreds of thousands of members of the alleged class except to assert that both of his lawyers are well-qualified antitrust specialists." Eisen v. Carlisle & Jacquelin (*Eisen I*), 41 F.R.D. 147, 150 (S.D.N.Y. 1966). This decision was reversed nearly eighteen months later by the court of appeals, which remanded for an evidentiary hearing on a variety of issues. *See Eisen*, 417 U.S. at 162–65. Following the hearing, the district court certified the class. *See id.* at 168. This time, the court of appeals held on appeal that certification was improper and ordered the case dismissed as a class action. *See id.* at 169.

42. *Eisen*, 417 U.S. at 165.

43. *Id.*

44. *Id.* at 161.

45. *Id.* at 166–67.

46. *Id.* at 168.

47. *Id.*

The Supreme Court found that the district court's solution to the notice problem violated Rule 23.[48] First, the Court noted that Rule 23 expressly required, in actions maintained under subdivision (b)(3), that *all* class members whose names and addresses could be ascertained through reasonable effort be provided individual notice.[49] More importantly, the Court held that the district court erred by conducting a "preliminary inquiry into the merits" as part of the class certification analysis.[50] The Court observed that neither the language nor history of Rule 23 authorized a court "to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[51] The Court quoted a Fifth Circuit decision drawing a categorical distinction between determining whether class certification is appropriate and examining the strength of the plaintiffs' claims: "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."[52]

Additionally, the Court noted that conducting a preliminary inquiry into the merits could provide an unfair advantage to plaintiffs, who could gain the benefit of a ruling on their class claims, without a court decision that they were entitled even to bring class claims.[53] Besides putting the proverbial cart before the horse, the Court thought such a tentative finding for the plaintiff could potentially prejudice defendants in subsequent proceedings.[54] The Court also expressed concern that addressing merits disputes at class certification stage would not be "accompanied by the traditional rules and procedures applicable to civil trials."[55]

The crux of *Eisen*, therefore, is a categorical distinction between the class certification decision and the merits of the plaintiffs' case. Though it was operating under an unusual procedural posture, the *Eisen* Court did not limit its holding to the narrow facts before it. Instead, the Court relied on the distinction between the likelihood of a case's success on the merits and the validity of certifying the case as a class action under Rule 23, and it held that the former should not

48. *Id.* at 173.
49. *Id.* (discussing FED R. CIV. P. 23(c)(2)).
50. *Id.* at 177.
51. *Id.*
52. *Id.* at 178 (quoting Miller v. Mackey Int'l, 452 F.2d 424, 427 (5th Cir. 1971)).
53. *Id.* at 177–78.
54. *Id.* at 178.
55. *Id.*

influence the resolution of the latter.[56] Though not explicitly stated in Rule 23, this categorical distinction has guided courts since *Eisen*.[57]

2. *General Telephone Co. of the Southwest v. Falcon*

General Telephone Co. of the Southwest v. Falcon, decided eight years after *Eisen*, is the other Supreme Court case providing significant guidance about the relationship between class and merits issues in the certification analysis.[58] *Falcon* was a class action alleging racial discrimination under Title VII of the Civil Rights Act of 1964.[59] Mariano Falcon alleged that General Telephone Company of the Southwest ("General Telephone") had not promoted him because he was a Mexican-American, and sought certification of a class including both Mexican-Americans whom General Telephone had not promoted and Mexican-American job applicants whom they had not hired.

The trial court held a trial on the merits and found General Telephone to be partially liable. In so doing, it made converse findings about the named plaintiff and the class: it held that General Telephone had not discriminated against Falcon when it hired him, but had discriminated against him when it failed to promote him; meanwhile, it held that General Telephone had not discriminated against Mexican-Americans in promotion, but that it had discriminated against them in hiring.[60] On their face, these findings brought the certification decision into serious question—for one thing, the contrary findings raised questions about whether the plaintiff was typical of the class under Rule 23(a).[61]

On appeal, the Supreme Court ruled that the trial court had improperly certified the class, and rejected the Fifth Circuit's "across the board" rule, which generally permitted one individual claiming racial discrimination to sue automatically on behalf of a class of members of

56. This is a point even many of *Eisen*'s detractors acknowledge. *See, e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1265 (2002) ("The Court did not limit its holding to the unusual facts of the case, in which the plaintiffs sought and the defendants opposed the preliminary merits review. Instead, it used expansive and seemingly categorical language that has had a profound effect on class action practice ever since . . . ."); McGuire, *supra* note 20, at 377 (acknowledging that *Eisen* drew a "sharp distinction between preliminary merits rulings and class action rulings").

57. *See, e.g.*, Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 291 (2d Cir. 1999); Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975).

58. 457 U.S. 147 (1982).

59. *Id.* at 150.

60. *Id.* at 152.

61. Rule 23(a) requires, *inter alia*, that the named plaintiff's claims or defenses be "typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3).

the racial group.[62] The Court held that not all allegations of racial discrimination were *per se* proper for class treatment.[63] Rather, there must be some specific reason to believe that considering the named plaintiff's claims would also advance consideration of the proposed class's claims.[64] Focusing on the allegations in the plaintiffs' complaint, the Court found that Falcon had provided no such explanation in this case: "Respondent's complaint provided an insufficient basis for concluding . . . that the adjudication of his claim of discrimination would require the decision of any common question concerning the failure of petitioner to hire more Mexican-Americans."[65]

The Court thus held that, instead of relying purely on the nature of the claim, courts must carefully examine the specifics of the named plaintiffs' plea. Sometimes, the Court observed, whether a case is suitable for class-wide treatment can be determined from the face of the pleadings alone; sometimes the trial court will need to "probe behind the pleadings before coming to rest on the certification question."[66] In either case, a "rigorous analysis" of compliance with Rule 23, not a mere presumption, is required.[67]

Thus, *Falcon* provided lower courts instruction in class certification principles that were implicit in Rule 23, but not explicit on the face of the Rule. *Falcon* explained that the primary focus should be on the plaintiffs' allegations, but also noted that if the allegations were insufficiently precise,[68] a more searching inquiry would be required. *Falcon* expressly cautioned, however, against judging certification in hindsight—i.e., on the basis of actual findings on disputed merits is-

62. In *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (1969), the Fifth Circuit held that any victim of racial discrimination in employment may maintain an "across the board" attack on all unequal employment practices alleged to have been committed by the employer pursuant to its policy of racial discrimination. *Id.*; *see also Falcon*, 457 U.S. at 152.

63. *Falcon*, 457 U.S. at 157–58.

64. *Id.*

65. *Id.* at 158.

66. *Id.* at 160.

67. *Id.* at 161.

68. *See id.* at 158–59 ("Respondent's complaint provided an insufficient basis for concluding that the adjudication of his claim of discrimination in promotion would require the decision of any common question concerning the failure of petitioner to hire more Mexican-Americans. Without any specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent, it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner by Mexican-American employees and applicants.").

sues.[69] In other words, the mere fact that the jury's findings undercut the certification decision (by bringing into question whether the named plaintiff was "typical" of the class) did not mean that the certification decision was incorrect. In this sense, *Falcon* both supplements and comports with *Eisen.*

B. Core Principles of the Certification Calculus

1. Class Certification Is Meant to Define the Shape of the Action

The class certification decision is forward-looking. It is designed to shape the litigation's future course. It shapes the parties in the case, the theories of liability pursued, and the scope of relevant discovery. A decision declining to certify a proposed class may well end the case as a practical matter.

Accordingly, the class certification decision was intended to come at an early stage of the litigation—before discovery on any merits issue is complete.[70] This is what the framers of modern Rule 23 had in mind in 1966, when they required trial courts to make the class certification decision "as soon as practicable" after the case was commenced.[71] This was intended to "give clear definition to the action" at the outset of the case.[72] In 2003, Congress tempered this language slightly, with the certification decision now required "at an early practicable time."[73] This change was intended, in part, to make clear that courts are permitted to entertain a dispositive motion (for example, a Rule 12(b)(6) motion to dismiss) before deciding the certification issue.[74]

69. Indeed, the Court considered it obvious that Rule 23 did not permit judgment of the propriety of class certification based on actual findings about the merits of the claims. *Falcon*, 457 U.S. at 160 ("We do not, of course, judge the propriety of a class certification by hindsight.").

70. This is not to say that, given the trend toward resolving merits issues at the class stage, it would not make sense for plaintiffs in certain cases to insist that class certification come at or toward the end of discovery, so that they can present their case for class certification with the benefit of full discovery. Indeed, given the recent decisions discussed herein, this may be the only practical option as these cases seem to demand that class certification be made on a full factual record.

71. FED. R. CIV. P. 23(c)(1) note (referring to 2003 amendment, paragraph (1)).

72. FED. R. CIV. P. 23(c)(1) note (1966) (amended 2003) (referring to 1966 amendment, subdivision (c)(1)).

73. FED. R. CIV. P. 23(c)(1).

74. FED. R. CIV. P. 23(c)(1) note (referring to amendment, paragraph (1)) (observing that considerations affecting the timing of the certification decision include that "[t]he party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified").

The 2003 amendment to Rule 23(c) removes any doubt that the filing of a dispositive motion and the taking of some discovery may be proper before class certification is decided. However, the amendment also reaffirms the preferred time for deciding class certification—"early" in the case.[75] This observation should give pause to courts contemplating the wisdom of a full-scale battle on any merits issue at the certification stage.[76] Additionally, the fact that early impressions are not always reliable should counsel against courts relying on their preliminary views of the strength or weakness of the plaintiffs' claims as a factor in the class certification calculus.

2. Class Certification Is a Predictive Exercise

Class certification is a predictive exercise, particularly under Rule 23(b)(3), and one limited to predicting the likely contours of the case—not its result.[77] This elementary point is often glossed over[78] and sometimes forgotten entirely, but it is central to understanding the scope of the trial court's obligation to consider the plaintiffs' alle-

75. FED. R. CIV. P. 23(c)(1).

76. Even *Eisen*'s detractors acknowledge that *Eisen* contemplated the class certification decision occurring prior to any "time-consuming inquiry into the merits." Bone & Evans, *supra* note 56, at 1280. As noted, however, given the trend discussed herein, plaintiffs may have to insist in certain cases that class certification occur at later stages of the litigation. *See id.*

77. *See, e.g.*, *In re* Polypropylene Carpet Antitrust Litig., 178 F.R.D. 603, 618 (N.D. Ga. 1997) ("The Court examines evidence as to *how* the class proponents intend to prevail at trial, not whether the *facts* adduced by the class proponents are susceptible to challenges by class opponents.").

78. In their article arguing for a greater review of the merits at the certification stage, Bone and Evans, for example, make several observations concerning the predictive nature of class certification. Bone & Evans, *supra* note 56, at 1268. They then proceed to argue, however, that "the trial judge [s]hould review the evidence" at the certification stage in order to "consider the strength of class issues and claims." *Id.* at 1277–78. Bone and Evans acknowledge that one argument against this approach is that "an early merits review conflicts with the basic scheme of the Federal Rules because it bars class litigation before the parties have had a chance to develop the evidence fully." *Id.* at 1284. However, they dismiss this valid concern for reasons that are not particularly persuasive. First, they argue that "denial of certification is simply not the same as a final dismissal." *Id.* Of course, in many cases, it is the same as a practical matter. In any case, this is hardly a compelling reason to decide factual disputes about the merits without giving plaintiffs the benefit of the fruits of discovery. They also argue that the drafters of the class action rule "could not have meant to adopt an *absolute* principle requiring that cases always be decided on the evidence." *Id.* at 1285. But the well-established presumption that cases be decided on the merits is not a product of Rule 23 and need not be in order to apply equally well to class cases. Finally, Bone and Evans argue that "the realities of contemporary litigation militate against" a ban on an early merits review because "most class action suits settle." *Id.* It is hard to see how this supports deciding factual disputes before plaintiffs can take sufficient discovery to prove their claims.

gations at the class certification stage. The goal of the class certification inquiry is not to try the merits of plaintiffs' allegations, but to predict how trial of the merits is likely to proceed.[79] Rule 23(b)(3) asks courts to consider the type of "questions" likely to prevail, not how they will be answered.

To facilitate the court's inquiry, plaintiffs seeking class certification should outline how they expect to prove their case on a class-wide basis. Of course, plaintiffs can only provide their expectation and courts cannot entirely bind plaintiffs to their predictions.[80] Courts should permit discovery if it is necessary to give plaintiffs an opportunity to provide this explanation, defendants an opportunity to contest it, and the court an opportunity to evaluate it.[81] However, any such discovery is only relevant to class certification to the extent it assists in "identify[ing] the nature of the issues that actually will be presented at trial."[82] For this reason, the Advisory Committee's notes to the 2003 amendments observe that some courts require plaintiffs to provide a "trial plan," which "describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof."[83] Again, the class analysis should focus on the likely nature of plaintiffs' proof, not on whether it will succeed.[84]

Claims are susceptible to class-wide proof not when they can *necessarily* be proven on a class-wide basis, but when it is *possible* for them to be proven on a class-wide basis. This means that certification is generally appropriate when plaintiffs have identified a feasible class-wide theory or theories, and defendants have not demonstrated that proving such a theory or theories will be impossible.

79. *See* Miller, *supra* note 28, at 57 ("The court's job is to 'envision' the form a trial will take." (quoting Clay v. Am. Tobacco Co., 188 F.R.D. 483, 489 (S.D. Ill. 1999))). As Professor Miller observes of the predominance inquiry, "while it does look to the merits, [it] need not involve even a preliminary assessment of any substantive issue." *Id.* at 53.

80. *See* Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975) (noting that "neither the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies the Rule").

81. *See* FED. R. CIV. P. 23(c)(1) note (referring to 2003 amendment, paragraph (1)).

82. *Id.* Again, if plaintiffs are concerned that the district court is bound to follow, or will rely upon, the circuit court decisions discussed herein that call for resolution of merits issues, then plaintiffs may have to insist on expansive or full discovery before certification. Bone & Evans, *supra* note 56, at 1265.

83. FED. R. CIV. P. 23(c)(1) note (referring to 2003 amendment, paragraph (1)).

84. *See In re* Polypropylene Carpet Antitrust Litig., 178 F.R.D. 603, 618 (N.D. Ga. 1997) ("[T]he Court examines evidence as to *how* the class proponents intend to prevail at trial, not whether the *facts* adduced by the class proponents are susceptible to challenges by class opponents.").

This is not to say that *all* determinations at the class stage are predictive. Examination of the numerosity requirement of Rule 23(a),[85] for example, may require a court to resolve a dispute. If there is a wide variation between the parties' projections of the number of class members, and the defendants' estimate would not satisfy the numerosity requirement, a court may need to resolve this factual dispute before certifying a class.[86] As discussed below, some courts have considered the numerosity requirement the model for the certification calculus as a whole. But the numerosity requirement is different in kind from the predominance requirement of Rule 23(b)(3).[87] Rule 23(a) asks for a reasonably definitive assessment of the size of the class; Rule 23(b)(3) calls for a predictive assessment of the type of *questions* likely to prevail.[88]

3. Allegations Should Be Considered Plausible or Supportable During Class Certification

Many courts and commentators posit a false choice between accepting the plaintiffs' allegations as true at class certification and resolving disputed facts about the merits of the case.[89] Some courts

85. The "numerosity" requirement of Rule 23(a)(1) requires that, for a class to be certified, it must be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). Numbers in excess of forty generally satisfy the numerosity requirement. *See,* e.g., Trief v. Dun & Bradstreet Corp., 144 F.R.D. 193, 198 (S.D.N.Y. 1992).

86. Not every dispute between the parties about the size of the class needs to be resolved as part of the certification analysis. Plaintiffs are under no obligation to know the identity of every class member at the time of certification. Such a dispute would only need to be resolved in the unlikely event the defendants support an estimate of the size of the class that would bring into question whether the class is sufficiently large to be certified.

87. The predominance requirement of Rule 23(b)(3) requires the court to find that questions of law or fact common to members of the class will predominate over any questions affecting only individual class members. FED. R. CIV. P. 23(b)(3).

88. This is not to say that it would be impossible to craft a class mechanism that relied on hindsight, instead of prediction. Professor Hazard, for example, has argued that while *Eisen*'s prohibition of inquiring into the merits at the class stage is justifiable in light of Rule 23, it does "not go to the essence of the class suit," and that "[n]othing inherent in a class suit would prevent a determination of [the] merits of some of the claims before addressing the problem [with] certification." Hazard, Jr., *supra* note 28, at 9. Debates about the essential nature of a class suit aside, Professor Hazard is correct that Rule 23 establishes a procedure that does not rely on resolving the merits of the plaintiffs' claims.

89. In *Blackie v. Barrack,* for example, the Ninth Circuit stated: "The court is bound to take the substantive allegations of the complaint as true, thus necessarily making the class order speculative in the sense that the plaintiff may be altogether unable to prove his allegations." 524 F.2d 891, 901 n.17 (9th Cir. 1975). The latter part of this statement is correct: a class could be properly certified though it may later turn out that the plaintiff could not prove his allegations. But this does not mean, as the Ninth Circuit apparently thought it did, that the allegations must be taken as true. The choice, in other words, is not between accepting all allegations as true and making plaintiff prove his case.

cite *Eisen* for the proposition that they must accept the plaintiffs' allegations as true.[90] However, *Eisen*'s prohibition of conducting a preliminary inquiry into the merits of the plaintiffs' allegations does not require courts to accept all of the plaintiffs' allegations as true. If it did, it could reduce class certification to a pleading exercise. Plaintiffs would simply plead satisfaction of all certification requirements. At the same time, the fact that courts do not have to accept all allegations as true during class certification does not mean that plaintiffs need to prove their allegations.

The role of the plaintiffs' allegations at class certification is best understood as providing a plausible roadmap of how the plaintiffs will prove their claims. Courts should presume the allegations plausible, that is, supportable.[91] Consequently, when moving for class certification, the plaintiffs should not have to bear an initial burden of providing evidentiary support for the allegations. However, if there are certain allegations which, if disproved, would mean that proceeding on a class-wide basis was not feasible, then defendants may seek to defeat certification by showing that the plaintiffs cannot prove those allegations. For example, in a securities fraud case, defendants may attempt to show that the securities were not sold in an efficient market. If defendants make a sufficient showing, the plaintiffs would not need to prove the allegation is true, but would need to provide enough support to indicate that the plaintiffs should be able to take their class-wide theory to trial.

This analysis comports with *Falcon*'s instruction that it may sometimes be necessary to "probe behind the pleadings" before deciding class certification.[92] This instruction simply means that the nature of a claim and the particular factual allegations in a complaint are not always facially sufficient to allow the court to predict the likely procedure of the case. It does not mean that any allegations in the pleadings must be definitively proved. Revisiting the *Falcon* opinion provides clarity on this point. There, the Supreme Court stressed that the primary locus of scrutiny should be the "named plaintiff's plea" and that sometimes the complaint alone would be sufficient to make

90. *See, e.g.*, Koch v. Stanard, 962 F.2d 605, 607 (7th Cir. 1992); Shelter Realty Corp. v. Allied Maint. Corp., 574 F.2d 656, 661 n.15 (2d Cir. 1978).

91. A plaintiff's allegations should be considered plausible during class certification proceedings because, *inter alia*, there are other more appropriate mechanisms to deal with implausible allegations, including motions to dismiss under Rule 12(b)(6). *See, e.g.*, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 546 (2007) (dismissing an antitrust complaint for failing to make plausible allegations of conspiracy).

92. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982).

the class determination.[93] When it was not, the Court suggested this was principally a result of imprecise[94] pleadings. Moreover, the Court expressly stressed that, notwithstanding the fact it was reviewing the case after a trial, it would not make the class determination on the basis of "hindsight."[95]

4. The Plaintiffs Are the Masters of the Claims

Plaintiffs control their case and the theories employed to prove their claims.[96] If the plaintiffs wish to proceed on a class-wide basis, and prove claims using a class-wide theory, then courts should allow them to proceed on that theory unless the undisputed facts show that success is impossible. Indeed, the plaintiffs' right to take disputed liability issues to trial has a constitutional dimension. In the antitrust context, for example, plaintiffs have a constitutional right to a trial by jury of their claims and the issues necessary to resolve their claims.[97]

At the certification stage, plaintiffs have an obligation to outline how they intend to prove their claims on a class-wide basis.[98] If the plaintiffs have advanced a plausible theory for proving their case on a

93. *Id.*

94. *Id.* (quoting Johnson v. Ga. Highway Express, 417 F.2d 1122, 1125–27 (5th Cir. 1969).

95. *Id.* at 163 (Burger, C.J., concurring in part and dissenting in part).

96. *See, e.g.*, Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (noting that, under the well-pleaded complaint rule, the plaintiff is the "master of the claim"); Marcus v. AT&T Corp., 138 F.3d 46, 52 (2d Cir. 1998) (noting again that the plaintiff is the "master of the complaint").

97. As the Supreme Court has observed, "the right to trial by jury applies to treble damages suits under the antitrust laws and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1959) (citing Fleitmann v. Welsbach St. Lighting Co., 240 U.S. 27, 29 (1916)).

98. Recognizing that the party moving for certification (typically the plaintiff) has the burden of identifying the class-wide theory or theories of liability it intends to pursue readily solves what some have posed as an intractable dilemma. Professor Richard Epstein argues, for example, that the class certification decision is inherently problematic because one often cannot know the theory of the case until one knows whether it will be a class action or not.

> What is the cart and what is the horse? Normally we would like to know whether plaintiffs are similarly situated before we are called upon to decide what legal theory is relevant in their case. But now it looks as though we cannot decide whether two or more claims are dominated by common issues until we decide which theory of liability is invoked.

Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 499 (2003). But there is no Archimedean point from which "we" are "called upon" to decide the legal theory to be pursued in a class case. *Id.* at 499. This is the plaintiffs' responsibility. This does not mean, of course, that the plaintiffs' theories cannot evolve or change during the course of litigation.

class-wide basis, and defendants have provided no reason to conclude that the plaintiffs will not be able to take that theory to a jury, then class-wide issues should predominate in the litigation.[99]

5. Summary of Core Principles

These core principles—that class certification is meant to define the shape of the litigation and is a predictive exercise based on the plaintiffs' choice of class-wide theories—flow from Rule 23, as interpreted by *Eisen* and *Falcon*. They are incompatible with the resolution of disputed merits issues at the class stage. Properly understood, the class certification analysis under Rule 23 provides no occasion for resolution of any disputed merits issues.

Moreover, in light of these principles embodied in the rule, efforts to import the actual resolution of disputed merits issues into the class analysis will only sacrifice coherence and efficiency.[100] Rule 23—as *Falcon* makes plain—was not intended to have the certification decision made in hindsight.

II. Courts Drift away from Core Principles of Class Certification

A. *Szabo* Starts a Trend

In many respects, the Seventh Circuit's 2001 decision in *Szabo v. Bridgeport Machines*[101] is the key case in launching the trend toward disputed merits issues resolution at the class certification stage.

The district court certified a nationwide class of machine tool purchasers containing a "DX-32 Control Unit" manufactured by Bridgeport Machines ("Bridgeport").[102] Szabo alleged that the DX-32

99. Although the presence of defenses raising significant individualized questions may counsel against certification of a plaintiffs' class, the focus of the class inquiry is on the plaintiffs' claims and legal theory. *See* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997) (stating that the predominance inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy. . . ."); *cf.* Epstein, *supra* note 98, at 497 ("This question of predominance of common issues covers not only those issues relevant to the plaintiff's skeletal prima facie case, but to the full range of claims or defenses raised in the case.").

100. As explained herein, efforts to justify the resolution of disputed merits issues cannot be made to cohere with the predominance requirement of Rule 23(b)(3), which looks at the type of *questions* to be raised in the litigation, not the type of *answers*. And the resolution of merits issues leads to more voluminous briefing, more expert work, more hearings, and longer class certification proceedings—all which detract from the efficiency of the class action mechanism.

101. 249 F.3d 672 (7th Cir. 2001).

102. *Id.* at 673.

units were defective. He also alleged that Bridgeport (or its agents) fraudulently described the abilities and limitations of milling machines employing the DX-32 unit to hundreds of customers, including Szabo, who had purchased the machines.[103] In the Seventh Circuit's view, this theory immediately presented several obstacles to class certification. As the Seventh Circuit observed: "A nationwide class in what is fundamentally a breach-of-warranty action, coupled with a claim of fraud, poses serious problems about choice of law, the manageability of the suit, and thus the propriety of class certification."[104]

In vacating the district court's certification order, the Seventh Circuit identified numerous difficulties with certifying the proposed nationwide class. Although the breach-of-warranty claim, for example, would likely arise under Connecticut law (as provided in Bridgeport's contracts), the choice of law for the fraud or negligent misrepresentation claims could "depend on who made the representations, where, and on whose behalf."[105] The laws of numerous states thus could be involved in adjudicating the class's claims, and states differ substantially in their willingness to permit buyers of commercial products to recover in tort for defects covered by warranties.[106]

Writing for the panel, Judge Easterbrook next turned to the Seventh Circuit's view that the district court had erroneously believed it was constrained by *Eisen* to accept the truth of Szabo's factual allegations.[107] One obvious difficulty with proceeding on a class basis on the misrepresentation or fraud claims is that it is easy to suspect that the oral representations made during each sale varied to a degree. If the representations did vary, then evaluating the claim may require consideration of what was said to each individual purchaser—potentially destroying commonality. An additional complication was that finding Bridgeport liable for each alleged misrepresentation by a Bridgeport distributor would potentially require Szabo to prove that Bridgeport had authorized or ratified the oral representations made at each sale.[108]

Szabo alleged that all oral representations made by all Bridgeport distributors had, in fact, been authorized or ratified by Bridgeport itself.[109] The district court accepted the truth of this allegation for pur-

103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 676–77
108. *Id.* at 674.
109. *Id.*

poses of the certification analysis, stating that it was constrained to do so by *Eisen*.[110] This, the Seventh Circuit found, was the critical error.[111] Indeed, "[T]he proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it."[112] *Eisen* did not require a court to accept all of a complaint's allegations as true, particularly in light of *Falcon*'s instruction that courts may at times need to "probe beyond the pleadings."[113]

Beyond these observations, however, the Seventh Circuit also held that it must resolve central factual disputes relating to the merits of Szabo's case before making the class certification decision.[114] As noted, one disputed issue was whether Bridgeport had, in fact, authorized or ratified all the oral representations made by its distributors.[115] Szabo had alleged that it did; Bridgeport contended that it did not.[116] Surprisingly, the court held that "[r]esolution of this dispute is vital to any sensible decision about class certification."[117]

Thus, the Seventh Circuit held that the district court needed to *resolve* a contested, factual issue going to the merits of the class's claims before it could decide the class certification motion. Judge Easterbrook analogized the Bridgestone ratification dispute to a hypothetical factual dispute about whether a proposed class was sufficiently large to meet the "numerosity" requirement of Rule 23(a)(1).[118] If a plaintiff alleges a potential class has 10,000 members and the defendant insists it only has 10, a court plainly must resolve that factual dispute, as Judge Easterbrook wrote.[119] There is no reason why this should change if consideration of whether common issues predominate under Rule 23(b)(3) "overlap[s with] the merits."[120] In such a case, "the judge must make a preliminary inquiry into the merits."[121]

110. *Id.* at 676.
111. *Id.*
112. *Id.* at 675.
113. *Id.* at 677 (quoting General Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982)).
114. *Id.* at 674.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 676.
119. *Id.*
120. *Id.*
121. *Id.* The Seventh Circuit did not explain in what sense the district court's resolution of the ratification dispute would be "preliminary." *See id.*

It is worth observing the radical nature of *Szabo*'s holding. Consider the consequences in just the case before the court: the district court was instructed that, before it could make *any* sensible decision on class certification—i.e., one way or the other—it must *resolve* the factual dispute about whether the oral representations made at each of the hundreds of sales at issue around the country were ratified or authorized by Bridgeport.[122] Resolving this dispute would undoubtedly entail extensive discovery—discovery to which Szabo would not be entitled in an individual action. Discovery would presumably begin by identifying each sale and who made it and would likely have to involve at least some investigation of the representations made at each sale. This could require individual depositions of each distributor and potentially each purchaser, and Szabo might have to depose numerous Bridgeport personnel, including corporate designees. Presumably such depositions would be tailored to the ratification issue, but also touch upon other issues involved in the merits of the case. Szabo would also likely require document requests and interrogatories pertaining to Bridgestone's relationship with each distributor.

After discovery into the issue, the parties would undertake extensive briefing, presumably followed by an evidentiary hearing or mini-trial where witness credibility could be weighed. After all of this, the trial court might determine that Bridgestone did not in fact ratify all representations. At first glance this determination would appear to harm Szabo, but if the trial court found that Bridgestone ratified or authorized some subset of representations, then Szabo could narrow his proposed class to encompass only those purchases. In other words, Szabo would receive the benefit of class-wide discovery (and Bridgestone would bear the burden), and would gain some "preliminary" rulings on class-wide merits issues, before the class certification decision had been made. This is, of course, precisely what the *Eisen* Court stressed should not result from class certification proceedings.[123]

It is unsurprising, then, that the district court on remand did not get around to making "any sensible decision"—indeed, any decision at all—about class certification. Following remand, the district court entered a discovery plan contemplating more than six months of addi-

122. *Id.* at 674.

123. Since *Eisen*, the Advisory Committee has expressly rejected amendments to Rule 23 which would permit inquiry into the merits in order to avoid such extensive discovery and protracted proceedings. *See* McGuire, *supra* note 20, at 400 (noting the Advisory Committee's expression of concern that such amendments would necessitate "extensive discovery, protracting the certification determination and adding great expense" (internal citation and quotation marks omitted)).

tional discovery on class certification alone.[124] The district court set a date nearly a year in the future for a "bench trial" on class certification, with an estimated length of five days.[125] Before the parties made it to the bench trial, however, Bridgestone went into bankruptcy, effectively ending the case.[126] Bridgestone's legal bills on class certification discovery could not have helped matters.[127]

Szabo is significant because it set courts on a detour from core class certification principles that many are still following.[128] As noted, Judge Easterbrook authored the *Szabo* opinion for the panel, which also included Judge Richard Posner; both men are well respected jurists.[129] But although the panel may have reached a defensible result, the reasoning of the *Szabo* opinion does not withstand scrutiny. Yet other circuit courts uncritically adopted *Szabo*'s reasoning. Indeed, the decision has proven extremely influential, which appears to have been the panel's goal. As Judge Easterbrook noted, the Seventh Circuit decided to entertain the interlocutory appeal in the case to consider "important legal principles [that] have evaded attention by appellate courts."[130]

B. *IPO*: The Second Circuit Follows *Szabo*

If *Szabo* set the trend, the Second Circuit's decision in *In re Initial Public Offering Securities Litigation*[131] ("*IPO*") gives the trend its fullest articulation to date. In *IPO*, the Second Circuit applied the *Szabo* framework to an extraordinary securities fraud case. Throughout 2001, thousands of investors filed class actions against 55 underwrit-

124. Proposed Dis[co]very Plan Approved by Chief Judge William C. Lee, Szabo v. Bridgeport Machines, 199 F.R.D. 280 (N.D. Ind. 2001) (No. 1:00-cv-00200).

125. Order for PTC, Notice of Trial Setting and Order Controlling Case Chief Judge William C. Lee, *Szabo*, 199 F.R.D. 280 (N.D. Ind. 2001) (No. 1:00-cv-00200).

126. Notice by Bridgeport Machines of Filing Bankruptcy—Case Stayed Regarding, *Szabo*, 199 F.R.D. 280 (N.D. Ind. 2001) (No. 1:00-cv-00200); Order by Chief Judge William C. Lee Terminating Case for Statistical Purposes, *Szabo*, 199 F.R.D. 280 (N.D. Ind. 2001) (No. 1:00-cv-00200).

127. In *Szabo*, the Seventh Circuit failed to acknowledge the demands and delay its decision imposed on the district court and the parties. Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 674 (7th Cir. 2001). It does not appear that judicial efficiency concerns played any significant role in the court's analysis.

128. *Szabo*, 249 F.3d at 674 (7th Cir. 2001).

129. Silver, *supra* note 25, at 1360–61 (noting that Judges Easterbrook and Posner "are towering figures in American jurisprudence").

130. *Szabo*, 249 F.3d at 675 (noting also that "[a]t critical junctures the district judge cited only decisions by other district judges, most in cases later settled and thus not subject to appellate consideration").

131. *In re* Initial Pub. Offering Sec. Litig., 227 F.R.D. 65 (S.D.N.Y. 2004).

ers, 310 issuers, and hundreds of individual officers of the issuing companies, alleging that the defendants conspired to defraud the investing public in violation of federal securities laws.[132] Judge Scheindlin in the Southern District of New York consolidated the thousands of cases by issuer, resulting in 310 consolidated actions.[133] The consolidated cases alleged, in brief, that the various initial public offerings ("IPOs") underwriters required that IPO allocants purchase shares in the aftermarket, often at escalating prices, and pay undisclosed compensation.[134] In addition, the plaintiffs argued, the underwriters prepared analyst reports containing inaccurate information and recommendations because the analysts operated under a conflict of interest.[135] The investors alleged that this scheme artificially inflated the issuers' stock prices. As a result, the investors claimed they collectively lost billions of dollars.

1. The District Court Certifies the Classes

The district court decided to certify classes in six test cases.[136] The heart of the class inquiry came down, as it often does, to the predominance requirement of Rule 23(b)(3).[137] The district court's decision surveyed the certification jurisprudence landscape. It began by reviewing guidance from higher courts—which it characterized as "scant"—regarding the form of the "rigorous analysis" which, per *Falcon*, courts must conduct at the class certification stage.[138] It stated that, after the *Eisen* decision, many courts understood that they must accept the plaintiffs' allegations as true at the certification stage.[139] However, finding *Szabo* indicative of a trend, the district court stated that, "such a view—if it was ever correct—is no longer the prevailing view."[140]

What then is the prevailing view? What obligation do plaintiffs have to support their factual allegations at the certification stage? The district court concluded that plaintiffs must make "some showing."[141] Here, the court was not clear about what was to be shown—compliance with Rule 23 or support for the merits? This became somewhat

132. *Id.* at 71.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 90.
139. *Id.* at 91.
140. *Id.*
141. *Id.* at 93.

clearer in the district court's substantive discussion of the predominance inquiry, but not much.[142] The Second Circuit's decision on appeal reflected this lack of clarity.

Plaintiffs' securities fraud claims required a showing of reliance: investors can succeed on a fraud claim only if they relied on the supposedly fraudulent statements.[143] This makes it tricky to show that questions common to the class will predominate. Proving reliance conceivably can require an individual inquiry into the mental calculus of each investor.[144] Courts have recognized, however, that plaintiffs can presume reliance in securities actions under a "fraud on the market" theory.[145] This presumption is based on the premise that investors rely on the securities' market prices as an accurate measure of their inherent value.[146] But the presumption only applies if the market in which the stock was purchased was "open and developed enough that it quickly incorporates material information into the price of the security"—if, in other words, it was an "efficient" market.[147] The parties in *IPO* disputed whether the market in which the securities at issue were traded was "efficient."[148] Here then is a case in which a disputed issue appears simultaneously relevant to the class issues (showing predominance) and the merits (showing fraud).[149]

The district court found that plaintiffs had made "some showing" that the market in question was efficient, relying on three "particularly probative" facts, that the court believed, "[u]nder any conceivable test for market efficiency, [were] . . . sufficient to [satisfy] . . . plaintiffs' . . . burden": (1) all the stocks were traded on the NASDAQ National Market; (2) the stocks were traded actively at high volumes; and (3) the stocks were the subject of numerous analyst reports and media coverage.[150] This showing was sufficient, because ultimately the question of whether the markets were actually efficient is a question of fact to be

142. *Id.* at 105–22.

143. *See, e.g.*, Longman v. Food Lion, Inc., 197 F.3d 675, 682 (4th Cir. 1999).

144. *See* Gariety v. Grant Thornton, LLP, 368 F.3d 356, 362 (4th Cir. 2004) ("Because proof of reliance is generally individualized to each plaintiff allegedly defrauded, fraud . . . claims are not readily susceptible to class action treatment . . . ." (internal citation omitted)).

145. *See* Basic Inc. v. Levinson, 485 U.S. 224, 241–49 (1988) (holding that a rebuttable presumption of reliance may be applied through a fraud-on-the-market theory).

146. *Id.* at 242.

147. *IPO*, 227 F.R.D. at 106.

148. *Id.*

149. *See* Miller, *supra* note 28, at 54 (discussing overlap between merits and class issues when showing of reliance is required).

150. *IPO*, 227 F.R.D. at 107.

resolved at trial, and the facts presented provided a sufficient basis by which the jury could find for the plaintiffs on the issue.[151]

The district court took a similar approach to another tricky issue—the plaintiffs' knowledge about the challenged scheme. Securities fraud plaintiffs could only recover if they were ignorant of the fraudulent scheme.[152] The defendants alleged that "pervasive press reports" and other publications widely disclosed the scheme being challenged.[153] Plaintiffs claimed that these reports were insufficient to alert class members to the exact nature of the scheme challenged.[154] Finding that class-wide evidence best addressed this disputed issue—rather than looking at each individual plaintiff's knowledge—the district court held the knowledge question did not preclude class certification.[155]

The court thus found that plaintiffs had met their burden of showing that common questions would predominate in the litigation and certified the six test classes.[156]

2. The Second Circuit Vacates Certification

The Second Circuit disagreed and vacated the district court's decision.[157] Its expansive opinion also began by tracing the history of higher court pronouncements on the relationship between merits and class certification issues.[158] The Second Circuit was surprised to find Rule 23 adjudication standards were unsettled in its jurisdiction; it framed the key issue as "whether a definitive ruling must be made that each Rule 23 requirement has been met or whether only some showing of a requirement suffices."[159]

The Second Circuit held that district courts must find that Rule 23 requirements have actually been met and that the district court had improperly found only that "some showing" of Rule 23 compliance is sufficient for class certification purposes.[160] However, this holding misinterprets the district court. Although the district court

151. *Id.* ("Ultimately, whether the relevant markets were efficient is a question of fact to be resolved at trial.").

152. *Id.* at 109.

153. *Id.* at 109–10.

154. *Id.*

155. *Id.* at 110 (holding that the question of knowledge "presents an important class-wide common issue").

156. *Id.*

157. *In re* Initial Pub. Offering Sec. Litig., 471 F.3d 24, 45 (2d Cir. 2006).

158. *Id.* at 31–33.

159. *Id.* at 26.

160. *Id.* at 32.

was at times ambiguous, a better reading is not that the district court questioned whether Rule 23 requirements must actually be met before a class could be certified,[161] but rather the district court held that by making "some showing" that the merits of the claims could be established on a class-wide basis, the plaintiffs had made a *full showing* that the predominance requirement of Rule 23 was satisfied. The Second Circuit missed this critical distinction and thus conflated the two very different issues: "some showing" of compliance with Rule 23 versus "some showing" that the plaintiffs' could prove their claims on a class-wide basis.[162]

Like the district court, the Second Circuit traced class certification case law through *Eisen*, *Falcon*, and finally, *Szabo*. The Second Circuit found that *Szabo* got it right: lower courts have been mistaken in thinking that *Eisen* placed consideration of merits issues off limits, by taking the *Eisen* holding "out of context."[163] The Second Circuit expressly aligned itself with *Szabo* (and a Fourth Circuit case following *Szabo*[164]), suggesting that a trial judge must make a "finding on a merits issue" if the merits issue is relevant to the class certification decision.[165] It repudiated language from its prior decisions that did not comport with this approach.[166]

Yet *IPO* did not ultimately go quite as far as *Szabo*. Indeed, given its interpretation of *Eisen* and its discussion about the need to resolve factual disputes when they arise, the way in which the Second Circuit actually resolved the appeal is surprising. As observed, the district court found that common issues were likely to predominate on the reliance issue because plaintiffs had provided factual support ("some showing") for their claim that the market at issue was efficient.[167] The district court thought the existence of a genuine dispute on this issue meant that plaintiffs could take their class-wide theory of reliance to the jury. Despite the Second Circuit's approval of *Szabo*, the court did

161. This would be foolish to doubt. Rule 23(b)(3) itself unmistakably requires courts to find that common questions will predominate over individual ones before certifying a class. FED. R. CIV. P. 23(b)(3).

162. *Compare, e.g.*, *IPO*, 471 F.3d at 32 ("Judge Scheindlin ruled that the Plaintiffs were required to make only 'some showing' of compliance with . . . *Rule 23 requirements*" (emphasis added)), *with id.* at 31 (ruling that "Plaintiffs had made some showing of *market efficiency*" (emphasis added) (internal quotation marks omitted)).

163. *Id.* at 34.

164. *Id.* at 38–39 (discussing Gariety v. Grant Thornton, LLP, 368 F.3d 356 (4th Cir. 2004)).

165. *Id.* at 39.

166. *Id.* at 42.

167. *Id.* at 30.

not remand the case for *resolution* of the market efficiency dispute. Although such an instruction would have been misguided, at least it would have been consistent.

Instead, the Second Circuit found that the reliance issue doomed plaintiffs' class certification motion because "the *Plaintiffs' own allegations and evidence* demonstrate that an efficient market cannot be established in this case."[168] This was because "[i]n the first place, the market for IPO shares is not efficient."[169] Oddly, the Second Circuit did not acknowledge that the district court found a genuine dispute on this issue, or mention any of the "probative facts" that the district court believed could show the market at issue was efficient. Apparently in the appellate court's view, plaintiffs failed to show that the market was efficient because their own allegations and evidence firmly showed it was not.[170] There was, therefore, no merits issue to resolve, rendering superfluous the Second Circuit's entire discussion of the need to resolve contested issues at the class stage.

The Second Circuit's treatment of the knowledge question was similar. Instead of remanding for resolution of whether the class was knowledgeable of the challenged scheme, the Second Circuit ruled that "*Plaintiffs'* allegations, evidence, and discovery responses" demonstrate that a lack of knowledge could not be shown.[171] Again, the Second Circuit effectively found that plaintiffs had made no showing at all, and that there was no genuine dispute. It never once mentioned the *defendants'* evidence in finding that, "with respect to at least the factors of reliance and lack of knowledge of the scheme, the Plaintiffs cannot satisfy the predominance requirement for a (b)(3) class."[172]

C. The Trend Continues

In the wake of *Szabo* and *IPO*, other courts have been all too willing to abandon (or "chip away" at) *Eisen*'s teachings—typically by reading it in an extremely limited fashion—in order to embrace the resolution of disputed merits issues at the class certification stage.[173] For example in *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, the Fifth Circuit held that, in order to obtain certification, plain-

168. *Id.* (emphasis added).
169. *Id.*
170. *Id.*
171. *Id.* at 43 (emphasis added).
172. *Id.* at 45.
173. *See, e.g.*, Oscar Private Equity Inv. v. Allegiance Telecom., Inc., 487 F.3d 261, 267 (5th Cir. 2007); Gariety v. Grant Thornton, LLP, 368 F.3d 356, 365–66 (4th Cir. 2004); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2008).

tiffs in securities fraud cases must "*establish*[ ] at the class certification stage" that loss causation had actually occurred.[174] In other words, the Fifth Circuit held that the plaintiffs must demonstrate that the alleged material misstatement had "*actually moved* the market" to get their proposed class of defrauded investors certified.[175] The holding followed the Fifth Circuit's proclamation that it was a "misreading of *Eisen*" to believe that merits questions could not be addressed at the class certification stage.[176]

Loss causation is one key piece of what the plaintiff class would seek to prove at trial. Hence, a dispute on this issue would prevent summary judgment—presumably at a later stage of the litigation. It is, to say the least, strange that plaintiffs would be required to prove an element of the merits of their case in order to obtain class certification when a dispute on that same issue at summary judgment would allow the plaintiff class to present its class-wide case to a jury.[177]

D. *IPO*'s Ambiguity and *Szabo*'s Error

Closely scrutinizing *IPO* reveals a strange decision. Fundamentally, *IPO*'s doctrinal discussion and holding suffer from a disconnect. *IPO* purports to follow *Szabo*, which held that—to make any certification decision—the district court was required to inquire into and resolve a genuinely disputed factual issue going to the merits of the plaintiffs' claims.[178] However, the *IPO* court did not hold that any disputed merits issue must be decided in the case before it. Instead, it effectively found that the district court erred by thinking that any genuine dispute existed.[179] But then why the extended discussion of the need to resolve disputed issues?

IPO's crucial misstep was attempting to follow *Szabo*. Although *Szabo* may have been correctly remanded for further consideration by

174. *Oscar*, 487 F.3d at 269 (emphasis added).

175. *Id.* at 265.

176. *Id.* at 267.

177. There is reason to believe that the *Oscar* court did not think much of a plaintiff's right to take its case to trial. In defending its holding, the Fifth Circuit noted: "We cannot ignore the *in terrorem* power of certification, continuing to abide the practice of withholding until 'trial' a merit inquiry central to the certification question. . . ." *Id.* The Fifth Circuit put the quotes around "trial" there—and they seem to be disparaging—although their purpose was unexplained.

178. Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 674 (7th Cir. 2001).

179. *In re* Initial Pub. Offering Sec. Litig., 471 F.3d 24, 30 (2d Cir. 2006).

the district court, it gave the district court the wrong instruction.[180] In fact, the resolution of factual disputes about the merits of Szabo's claims was not necessary in order to make a "sensible decision" about class certification. Szabo's proposed class posed problems that would make proceeding on a class-wide basis of questionable benefit, including the ratification issue. The Seventh Circuit posited only two extreme ways of dealing with this issue—accepting Szabo's allegation that Bridgestone had ratified all misrepresentations or actually resolving the factual dispute between the parties.[181] However, neither approach was correct.

The proper approach would have been to consider the manner by which Szabo would attempt to prove his case—that is, not to focus merely on the face of the allegations, but not to assume their veracity either. As discussed above,[182] the Rule 23(b)(3) predominance inquiry is inherently predictive. It asks the court to consider the types of "questions" of law or fact that will arise during prosecution of the plaintiffs' case and judge whether these questions will be mainly common to the class or mainly focused on individual class members.[183] Courts are instructed to look at questions, not answers; they are to consider the expected forms and manner of proof, not the outcome at trial.

As part of their burden of demonstrating that common issues will prevail in the litigation, plaintiffs bear the burden of explaining the likely form the proof of their case will take. For Szabo, this posed a challenge—how would he prove that Bridgestone ratified every oral misrepresentation by every distributor without taking individual discovery about every sale? But, requiring individual discovery and proof about this issue would reduce the benefit of class certification. The district court, in other words, did not need to *resolve* the truth of Szabo's allegation that Bridgestone ratified every representation to see that significant individual issues might arise during his attempt to prove it.

The *IPO* plaintiffs explained that they intended to prove reliance by establishing that the market in which shares were traded was effi-

180. As noted, the Seventh Circuit remanded for further proceedings after stating that "[r]esolution of [the ratification] dispute is vital to any sensible decision about class certification." *Szabo*, 249 F.3d at 674.

181. *Id.*

182. *See supra* Part I.B.2 (discussing how the goal of the class certification inquiry is not to try the merits of the plaintiffs' allegations, but to predict how trial of the merits is likely to proceed).

183. FED. R. CIV. P. 23(b)(3) (referring to "questions of law or fact").

cient, thereby making them entitled to the fraud-on-the-market presumption.[184] Defendants attempted to rebut plaintiffs' reliance upon this theory by arguing that it could not possibly succeed.[185] If it would not succeed, plaintiffs could not prove their case on a class-wide basis.

The district court's solution was, if not clearly articulated, sensible and faithful to Rule 23: the court required plaintiffs to make some showing—in light of the present state of the record—that they could succeed on this class-wide theory.[186] If plaintiffs made such a showing, and defendants could not definitively rebut it, then it would dispute plaintiffs' ability to prove their case on a class-wide basis. But the very existence of this dispute would allow plaintiffs to present their class-wide case to the jury, and allowing plaintiffs to take their class-wide case to trial would mean (absent any separate problems) that common issues would predominate in the case. In other words, the existence of the *dispute* on this element of the merits itself would mean that the predominance requirement was satisfied.

The Second Circuit ultimately found there was no genuine dispute about whether the market for IPO shares was efficient.[187] But what if the Second Circuit had found that this was genuinely in dispute? It is possible some will read the *IPO* decision—not entirely without justification—to suggest that such disputes must then be resolved, presumably through a mini-trial with the judge fact-finding. Indeed, litigants quickly began citing the *IPO* decision as authority requiring trial courts to resolve a host of factual disputes going to the merits of the plaintiffs' case. But actually resolving such disputes would neither advance the Rule 23 inquiry nor be compatible with *Eisen* and *Falcon*.

If a court were to *resolve* the efficient-market inquiry, for example, it would have to allow the plaintiffs extensive—if not full—discovery into the issue.[188] Competing expert reports on the market's efficiency may then need to be resolved through a mini-trial, where the judge determines credibility. Supposing the plaintiffs were to prevail, they may have to retry this exact issue over again to a jury at trial. This is, of course, one reason why defendants and their counsel like *Szabo* and *IPO*—which not only make class certification a more daunting exercise for plaintiffs, but also arguably give defendants two shots (and

184. *IPO*, 471 F.3d at 30.

185. *Id.* at 30–31.

186. *Id.* at 42.

187. *Id.* at 42–43.

188. Limited discovery merely designed to determine whether the matter was in dispute would be insufficient to give plaintiffs a fair opportunity to prove their case under their chosen theory.

one tried to a judge instead of a jury) to defeat a class case. However—as *Eisen* observed—there are potentially problems for defendants as well with a premature inquiry into the merits at class certification.[189] If the defendants were to prevail on the efficient market question, then large institutional investors could try the case on their own—not being bound to the class certification findings. Some investors would thus get two shots—one to prove their case on a class-wide basis and one to prove their case on an individual basis.[190]

But all these steps would be pointless because the resolution of the disputed merits issue of market efficiency at the class certification stage would not advance the predominance inquiry: it is the type of questions raised by the plaintiffs' case that is significant to the predominance inquiry, not the ultimate answers to those questions. If plaintiffs have enough evidence to take their fraud-on-the-market case up to and through trial, then common questions will predominate up to and through trial.[191] The fact that plaintiffs may lose on this theory at trial would not change the fact ,that common questions had predominated in the litigation. It would only mean that the class could not recover.

Fortunately, although the decision has undoubtedly influenced other circuit courts, at least some lower courts obliged to follow *IPO* have read the decision critically.[192] In *Hnot v. Willis Group Holdings*

189. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–78 (1974).

190. The incentives of defendants and their counsel are not necessarily aligned regarding the nature and length of class certification proceedings. Defendants' counsel may benefit from more protracted proceedings because such proceedings increase the hours it takes to litigate a case. However, defendant companies may benefit from a more constrained certification analysis. In *Szabo*, for example, the Seventh Circuit could have denied the class certification without remanding for the parties to conduct lengthy discovery and a five-day bench trial on disputed issues.

191. This is why Judge Scheindlin certified the proposed class in *IPO* after finding that plaintiffs had made "some showing" of market efficiency. *In re* Initial Pub. Offering Sec. Litig., 227 F.R.D. 65, 107–08 (S.D.N.Y. 2004). Judge Scheindlin stated:

> Ultimately, whether the relevant markets were efficient is a question of fact to be resolved at trial. The present finding—that plaintiffs have made "some showing" that the focus markets were efficient—is solely for the purposes of adjudicating the pending motion for class certification, and is not binding on the finder of fact. Based on the evidence presented at trial, the finder of fact may conclude that the relevant markets were efficient, in which case all class members will benefit from a presumption of reliance. On the other hand, the finder of fact may conclude that one or more of the relevant markets was inefficient, in which case those plaintiffs who traded in such markets would be required to make individual showings of reliance.

Id.

192. This points to a potential disconnect—beyond the scope of this Article—between appellate and trial courts regarding class certification. One could surmise that *IPO*'s short-

Ltd.,[193] the defendants asked Judge Lynch of the Southern District of New York to reconsider his certification of a class in a sex discrimination case in light of *IPO*. The defendants argued that *IPO* "fundamentally change[d]" the manner in which trial courts were to evaluate the propriety of class certification and that Judge Lynch had erred under *IPO* by failing to determine which side had presented a more persuasive expert report on the discrimination issue.[194] Reading *IPO* closely, Judge Lynch noted that the Second Circuit had in fact cautioned *against* deciding the merits at the certification stage, saying such a decision should only occur if the merits issue was "coextensive with a Rule 23 determination."[195] Better still, Judge Lynch correctly explained why it was improper to decide which expert was more persuasive at the class stage: "In this case, plaintiffs and defendants disagree on whose statistical findings and observations are more credible, but this disagreement is relevant only to the merits of plaintiffs' claim—whether plaintiffs actually suffered disparate treatment—and not to whether plaintiffs have asserted common *questions* of law or fact."[196]

Judge Lynch, in other words, applied the categorical distinction first noted in *Eisen* between the merits of plaintiffs' allegations and the type of questions likely to arise during proof of them.

III. Class Certification as Blackmail

We can begin to answer the question of what is driving the trend toward resolving bona fide disputes about the merits of the plaintiffs' claims at the class certification stage by identifying a couple of things that are *not* driving it. First, concerns of judicial efficiency are not playing a role, as *Szabo* starkly illustrates. There, the Seventh Circuit remanded for extensive further discovery and effectively a mini-trial on the merits, without expressing any hesitation about the burdens that would place on the district court or the case's progress.[197] Nor have the courts' holding that district courts in securities fraud cases must determine whether the market is efficient, or whether the fraud in question moved the market, betrayed any concern with the burdens they are introducing into the certification process. In some cases, they

comings are not as fully appreciated by circuit courts, which do not have to actually make the certification decision.

193. Hnot v. Willis Group Holdings Ltd., 241 F.R.D. 204, 209 (S.D.N.Y. 2007).

194. *Id.* at 208.

195. *Id.* at 209. As this Article demonstrates, because the Rule 23 predominance inquiry looks at questions, not answers, it will never be "coextensive" with a merits issue.

196. *Id.* at 210.

197. *See* Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 674 (7th Cir. 2001).

are effectively asking a court to hold a trial on a complex issue, when that same court may have to preside over another trial on that very same issue again at a later date.[198]

Nor are concerns about the deterrent effects of class actions playing any discernible role in this development. In practice, of course, resolving merits disputes during the certification analysis can only operate to limit the number of cases that are certified. As discussed, the existence of a dispute on the merits of a class-wide theory generally means the plaintiffs satisfy the predominance requirement of Rule 23. Proceeding to resolve such a dispute will thus never help the plaintiffs make their requisite showing; it will only provide a reason to conclude that certification is not appropriate. Neither *Szabo* nor *IPO* nor any of the other cases in this trend have considered whether this restriction on certification will affect the ability of the class mechanism to deter misconduct that has the potential to cause damage to numerous entities or persons.

Nor, upon inspection, does it appear that the trend results from a narrow effort to be faithful to Rule 23 and precedent. The circuit courts in *Szabo, IPO, Oscar,* and other decisions often couch their distinguishing of *Eisen,* and their embrace of resolution of merits disputes at the class certification stage, in terms of fidelity to *Falcon*'s command that courts are to conduct a "rigorous analysis" and "probe behind the pleadings" at the certification stage.[199] However, *Szabo,* for its part, made no serious attempt to reconcile its holding with *Falcon.* Other decisions parrot the "rigorous analysis" language from *Falcon* without acknowledging that the *Falcon* Court considered it obvious that the certification decision should not be made on the basis of "hindsight."[200] But if that is obvious, why should courts resolve merits disputes in order to make the certification decision?

Instead, it appears that a professed concern with the supposedly coercive effect (akin to "blackmail") on corporate defendants of the decision to certify a class largely drives the trend. Stated generally, this blackmail concern holds that a decision to certify a class forces corporate defendants to settle rather than defend against frivolous or weak cases. Although this general statement blends several different particular claims about the coercive effect of class certification in certain

198. Oscar Private Equity Inv. v. Allegiance Telecom., Inc., 487 F.3d 261, 269 (5th Cir. 2007).

199. *See Szabo,* 249 F.3d at 677; *In re* Initial Pub. Offering Sec. Litig., 471 F.3d 24, 33 (2d Cir. 2006); *Oscar,* 487 F.3d at 268 n.36.

200. *See IPO,* 471 F.3d at 33; *Oscar,* 487 F.3d at 268 n.36 .

cases, all such claims employ what Professor Charles Silver has termed "the coercion language game."[201]

Judge Easterbrook is one of the leading judicial proponents of the blackmail justification, which he raised in *Szabo* and in two decisions coming on its heels.[202] Judge Easterbrook explained that the Seventh Circuit accepted the interlocutory appeal in *Szabo* because "class certification turns a $200,000 dispute (the amount that Szabo claims as damages) into a $200 million dispute. Such a claim puts a bet-your-company decision to Bridgeport's managers and may induce a substantial settlement even if the customers' position is weak."[203]

In another decision reversing class certification less than a year later, *West v. Prudential Securities, Inc.*,[204] Judge Easterbrook expanded upon the coercive effect theme of a certification decision, in again explaining the reason why the Seventh Circuit allowed the interlocutory appeal:

> [S]ome scholars believe that the settlements in securities cases reflect high risk of catastrophic loss, which together with imperfect alignment of managers' and investors' interests leads defendants to pay substantial sums even when the plaintiffs have weak positions. The strength of this effect has been debated, but its existence is established. The effect of a class certification in inducing settlement to curtail the risk of large awards provides a powerful reason to take an interlocutory appeal.[205]

Although Judge Easterbrook acknowledged a debate regarding the blackmail effect, he provided no support for his assertion that it is "established" that certification causes large settlements of weak cases. Two months later, Judge Easterbrook returned to this in *In re Bridgestone/Firestone Inc. Tires Products Liability Litigation*,[206] this time explaining that interlocutory appeal of the class certification had been granted because:

> the suit is unlikely to be tried. Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims.[207]

201. Silver, *supra* note 25, at 1390–91.

202. West v. Prudential Sec., Inc., 282 F.3d 935, 937 (7th Cir. 2002); *In re* Bridgestone/Firestone Inc. Tires Prods. Liab. Litig., 288 F.3d 1012, 1015–16 (7th Cir. 2002).

203. *Szabo*, 249 F.3d at 675.

204. *West*, 282 F.3d 935.

205. *Id.* at 937 (internal citations omitted).

206. 288 F.3d 1012.

207. *Id.* at 1015–16.

Only Judge Posner, Judge Easterbrook's colleague on the Seventh Circuit who also sat on the *Szabo* panel, rivals his prominence in the federal judiciary in articulating the blackmail concern. Judge Posner authored the seminal modern opinion expressing the blackmail justification in *In re Rhone-Poulenc Rorer, Inc.*,[208] a decision upon which Judge Easterbrook relies.[209] There, Judge Posner wrote:

> Suppose that 5,000 of the potential class members are not yet barred by the statute of limitations . . . . [The defendants] might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under immense pressure to settle . . . . Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action "blackmail" settlements.[210]

Although the suggestion, that class certification in weak cases is akin to blackmail, is already overblown,[211] the Fifth Circuit has taken the metaphor one step further. In *Oscar Private Equity Investments v. Allegiance Telecommunications, Inc.*, the Fifth Circuit held that the plaintiffs must show loss causation at the class certification stage because of the "*lethal* force of certifying a class of purchasers of securities enabled by the fraud-on-the-market doctrine."[212] Class certification, in other words, does not just blackmail corporations—it can destroy them.

208. 51 F.3d 1293 (7th Cir. 1995); *see also* Silver, *supra* note 25, 1369–73.

209. *See, e.g., Bridgestone/Firestone*, 288 F.3d at 1015; *see also* Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 677 (7th Cir. 2001). There are, it must be acknowledged, signs that the *Szabo* panel was motivated not just by a concern about the potentially coercive effect of class certification, but also by a more generalized hostility toward class action practice in general. The decision suggested that one reason to make the class certification proceeding considerably more onerous was to protect the "class members" and the defendants against the unchecked discretion of "plaintiff's attorneys," who could otherwise use this discretion "in ways injurious to other class members, as well as ways injurious to defendants." *Szabo*, 249 F.3d at 677. It is difficult to evaluate this concern, or even to understand it clearly, but it does suggest that *Szabo* was motivated more by skepticism about class actions in general than by the pursuit of doctrinal fidelity. Judge Easterbrook's suggestion that the discretion of plaintiffs' attorneys in seeking class certification could be "injurious" to absent class members is particularly puzzling. If a class member is practically able to bring an individual claim, if he then disagrees with the approach taken by the named plaintiff in seeking certification, he can opt out of the class and pursue his own claim. If the plaintiff is not practically able to bring his own claim, his interests are then best be served by the named plaintiff's incentive to achieve certification, which is aligned with his own.

210. *Rhone Poulenc-Rorer*, 51 F.3d at 1298 (internal citations omitted).

211. *See* Silver, *supra* note 25, at 1385–90 (discussing the "strong reasons to reject the [blackmail] analogy").

212. Oscar Private Equity Inv. v. Allegiance Telecom., Inc., 487 F.3d 261, 262 (5th Cir. 2007) (emphasis added).

Or it can make corporations very scared. The *Oscar* court also defended its decision by proclaiming, "We cannot ignore the *in terrorem* power of certification."[213] This too amplifies the inflammatory nature of the rhetoric—perhaps even more than suggesting that class certification is "lethal." *In terrorem* means "in fear," and thus the Fifth Circuit literally stated that it cannot ignore the fact that certification of a class would lead to fearful defendants. But this is hardly a legitimate concern, especially if the defendants have done something wrong. If the defendants, say, fixed prices with their competitors or defrauded investors, the fact that they might fear facing a certified class in litigation should hardly factor into the certification calculus. Of course, it is also literally nonsensical, since a corporation cannot experience fear. So it is hard to see, in principal, what the Fifth Circuit meant by saying it could not ignore the *in terrorem* power of certification. But, it is possible that the better reading is non-literal and associative, i.e., the court tapped into the language of coercion by employing a phrase associating class certification with terrorism.

It does therefore appear that courts driving this trend are concerned by the supposed blackmail effect when a class is certified. In this regard, commentators who advocate for an adjustment of the class certification procedure to accommodate a review of the merits, in order to screen out weak or frivolous cases, cheer on these jurists.[214] Courts take an overly permissive approach to class certification, these commentators argue, in particular by not closely scrutinizing the merits of the plaintiffs' case.[215] This lax approach supposedly allows certifying even frivolous class actions, placing enormous financial pressures on defendant companies, who are forced to settle the case rather than fight it.[216] Commentators argue *Eisen* was wrongly de-

213. *Id.* at 267.

214. *See, e.g.*, McGuire, *supra* note 20, at 370–71 (arguing that courts should conduct a substantive review of the merits at the certification stage because "class certification can give plaintiffs tremendous leverage in settlement negotiations, even where the claims are tenuous," and noting that class action treatment—because of the leverage it affords to plaintiffs—can create multi-party litigation where it would not otherwise exist and where, because of the weakness of the claims, it should not exist"). The Fourth Circuit in *Gariety v. Advantage Mortgage Corp. USA*, 368 F.3d 356, 365 (4th Cir. 2004), relied upon Bone and Evans's article, cited *supra* note 56.

215. *See* Bone & Evans, *supra* note 56, at 1254.

216. *Id.* ("Loose certification standards risk high costs by inviting frivolous class action suits that defendants settle rather than face potentially crippling, even bankrupting, damage awards.").

cided,[217] courts misinterpret its holding, and Congress should explicitly overrule it. [218]

The problem with relying on the blackmail analogy to justify closely scrutinizing the merits at the class stage is that it is rather flimsy. Professor Charles Silver, in particular, has demonstrated that the assorted claims voiced under the language of coercion lack both normative content and empirical support.[219] In his seminal article on the issue, Professor Silver shows that the four versions of the blackmail charge found in the scholarly literature and judicial opinions—by Judges Friendly, Posner, and Easterbrook and Professor Milton Handler—are incompatible in some respects, although their advocates do not appear to recognize this, and he argues that they do not survive scrutiny even on their own terms.[220]

The different blackmail versions are incompatible because they are based on fundamentally different concerns about the certification decision. Judge Friendly, for example, (who Judge Posner cites in *Rhone-Poulenc*) thought class certification was of concern in cases seeking monetary damages where many individual claims of small value are aggregated, because the case would expose a defendant to a large, potentially ruinous judgment, where the individual class member was likely to receive little or no benefit.[221] Judge Friendly would have solved this problem by replacing small-claim class actions with lawsuits for injunctive relief. Judge Friendly's concern is unrelated to the strength or weakness of the plaintiffs' claims.[222] Judge Posner's view, however, seems to turn largely if not entirely on the strength of the plaintiffs' claims. With strong claims, Judge Posner would apparently favor small-claim class actions because those would bring relief to otherwise unsuccessful claimants.

In Professor Silver's analysis, Judge Easterbrook—*Szabo*'s author—has the least coherent view of the blackmail concern. For exam-

217. McGuire, *supra* note 20, at 368 (arguing that *Eisen*'s prohibition of a preliminary inquiry into the merits at the class stage "is unsound as a matter of policy, inaccurate as an interpretation of Rule 23, and inconsistent with later Supreme Court statements"); Bone & Evans, *supra* note 56, at 1254 (arguing that "the *Eisen* rule [is] weakly justified").

218. *See, e.g.*, Hazard, *supra* note 28, at 4 (arguing that Congress should reverse *Eisen* and "provide for an initial judgment on the merits of class members in relation to the claims").

219. *See* Silver, *supra* note 25, at 1357.

220. *Id.* at 1360–84.

221. *Id.* at 1361–62. Notably, Judge Friendly used the facts of *Eisen* of an example of the purported inadequacies of Rule 23(b)(3) to handle numerous small-value claims. *See* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

222. *See* Silver, *supra* note 25, at 1362.

ple, in the *Bridgestone/Firestone* class action, Judge Easterbrook seemed to suggest that certification of the class would exert excessive settlement pressure on the defendants both because the action was likely never to be tried (since it was "so unwieldy"), and because the action subjected the defendants to a significant risk of a "catastrophic judgment" after trial.[223] These two notions: (1) that class certification is problematic because cases cannot be tried and thus always settle; and (2) because it can lead to a catastrophic judgment, are not only incompatible, they are flawed on their own terms. In fact, class actions—even very large ones—can and do go to trial,[224] and corporate defendants win their share.[225] Moreover, it is the extremely rare case that is frivolous or very weak and yet settles because it creates such a risk of a catastrophic judgment. Blackmail theory supporters have not provided any rigorous evidence of such cases.

The various proponents of the blackmail justification seem bound together more by their willingness to use a questionable, but highly charged, metaphor than by their sharing of any coherent and justifiable concern about the effects of collective actions. As Professor Silver observes, their versions of the blackmail justification

> make factual assertions that are questionable or unproven, such as the claim that class actions always settle or that risk aversion drives

223. *In re* Bridgestone/Firestone Inc. Tires Prods. Liab. Litig., 288 F.3d 1012, 1016 (7th Cir. 2002).

224. For example, *In re Vitamins Antitrust Litigation*, MDL No. 1285, 2003 WL 22089938 (D.D.C. Sept.4, 2003), where the plaintiffs alleged global cartel had fixed prices of bulk vitamins, was tried to a $49.5 million jury verdict (before trebling). *See* Am. Bar Ass'n, Trial Practice—Antitrust Jury Instructions, http://www.abanet.org/antitrust/at-committees/at-trial/jury-instructions/10.shtml (last visited May 25, 2009). The parties settled the matter after trial but before judgment was entered. *Id.*

225. In *In re High Pressure Laminates Antitrust Litigation*, No. 00 MDL 1368, 2006 WL 1317023, at *1 (S.D.N.Y. May 15, 2006), for example, the plaintiffs claimed that defendant Wilsonart International and three other manufacturers of high-pressure laminates conspired to fix prices in the United States. *Id.* The claims against two defendants settled for $41 million on a class-wide basis before trial, and the claims against one defendant were stayed by a bankruptcy filing, but the plaintiffs' claims against Wilsonart went to trial. After trebling, the class was seeking more than $1.3 billion in damages. In May 2006, after a two-month trial, the jury returned a verdict of no liability in favor of Wilsonart, finding that the plaintiffs had not proven that Wilsonart participated in a conspiracy. *See* Final Judgment on Jury Verdict, *In re* High Pressure Laminates Antitrust Litigation, 2006 WL 1317023 (S.D.N.Y. July 19, 2006) (No. 00 MD 1368 (CLB)).

In *High Pressure Laminates*, Wilsonart and the other defendants *stipulated* to class certification. *See* Stipulation and Order Granting Class Certification, *In re* High Pressure Laminates Antitrust Litigation, 2006 WL 1317023 (S.D.N.Y. June 17, 2006) (No. 00 MD 1368 (CLB)). Proponents of the blackmail theory cannot explain why defendants would stipulate to class certification or why they would not go to trial in a case with potentially large damages after doing so.

> the decision to settle on the defense side. All also need, but lack, a persuasive normative account of settlement pressure, without which it is impossible to show that class action defendants wrongly are coerced.[226]

In the years since Professor Silver's article, no jurist or scholar has credibly responded to his criticisms—despite the implicit challenge to those making the blackmail charge to provide both support for their factual assertions and a coherent and persuasive normative account of coercive settlement pressure.[227] Yet the blackmail charge regrettably remains an animating force, with far-reaching influence, in class action jurisprudence.[228]

There is also a more fundamental problem, apart from its empirical and normative failings, with using the blackmail concern as a basis for introducing merits scrutiny into the certification calculus. This fundamental problem is reliance on the premise that the certification calculus can and should serve as a screening mechanism.

Unless one adopts the position that there should be no class actions seeking monetary relief at all—as Judge Friendly may have favored in small-value cases—then adherents of the blackmail concern are forced to propose screening cases on their merits, with classes certified only when the class case is "strong." Indeed, reading between the lines, in the cases discussed above, the courts of appeals appear more driven to determine the case's strength rather than figuring out the question types that will predominate in the litigation.

Federal courts already have a host of screening devices at their disposal, which are properly suited to serve that function.[229] The Rule 12(b)(6) motion to dismiss, for example, tests the sufficiency of the plaintiffs' allegations.[230] Congress and courts can adjust the motion to

226. Silver, *supra* note 25, at 1357.

227. Scholarship instead continues to debunk the "blackmail myth." *See, e.g.*, Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681 (2005); *see also id.* at 703 (discussing Klay v. Humana, Inc., 382 F.3d 1241, 1272 (11th Cir. 2004)).

228. In *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 323 (3d Cir. 2008), the Third Circuit vacated class certification, expressly stating that "the potential for unwarranted settlement pressure 'is a factor we weigh in our certification calculus.'" *Id.* at 310 (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 n.8 (3d Cir. 2001)). Notably, however, the court did not explain how it would determine when settlement pressure was "unwarranted." *Id.*

229. *See, e.g.*, Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1987 n.13 (2007) (Stevens, J., dissenting) (discussing "a district court's case management arsenal"). Justice Stevens's account includes a reference to *IPO*—indicating the reach of the case's influence. *Id.*

230. FED. R. CIV. P. 12(b)(6).

dismiss when it fails effectively to screen the potentially meritorious cases from cases that plaintiffs should not file. For example, in 1995, Congress enacted the Private Securities Litigation Reform Act[231] to, among other things, raise the bar for securities fraud claims to proceed to discovery. Any other legitimate concerns about frivolous cases oppressing the nation's corporations should be addressed in a similar fashion.

Unlike 12(b)(6) there is no equivalent justification for courts to use Rule 23 as a screening device. If courts conduct the certification calculus at an "early practicable time," as Rule 23 instructs, then it will allow the defendants to rig the game by attacking the plaintiffs' class-wide theories on an incomplete discovery record.[232] On the other hand, once discovery is complete, a court should not substitute its judgment of whether a case is weak or not for the jury's. Instead, the court should entertain summary judgment motions, and allow the case to proceed to trial if there are bona fide disputes about the merits of the plaintiffs' claims.

Moreover, a court's impression of the strength of the case, particularly at its early stages, is prone to error.[233] As Professor Silver points out, for example, Judge Posner may well have overestimated the defendants' level of risk aversion in the *Rhone-Poulenc* case and underestimated the strength of the plaintiffs' claims.[234] Yet the erroneous decision not to certify a class can be detrimental. Consider the typical price-fixing case. In many such cases, without a class action, few, if any, individual claims will be of sufficient size to bring.[235] If price fixing

231. 15 U.S.C. § 78a (1995).

232. The relevant evidence in most class cases is in the hands of the defendants, not the plaintiffs. If a screening of the case on the basis of its purported merit happens early in the case under Rule 23, defendants will have an incentive to provide favorable documents and attempt to delay production of unfavorable documents until after the screening occurs.

233. As Professor Miller has observed, rules encouraging courts to consider the probability of success on the merits at the class certification stage "have no basis in the text or history of Rule 23." Miller, *supra* note 28, at 85. Continued Miller: "Because they permit or require trial courts to inquire into an issue that is not an explicit certification factor under Rule 23, they may introduce a confounding issue that results in erroneous certification decisions." *Id.*

234. *See* Silver, *supra* note 25, at 1377–78.

235. As the court explained in *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968):

> [I]t is extremely difficult to bring an antitrust action against six major steel fabricators without the financial aid made possible by the class action device. Few are the individual claimants with a sufficient interest at stake or resources to bring a suit requiring proof of a conspiracy among business corporations. Discovery expenses alone normally would be prohibitive. The court therefore deems the

has occurred, but the court fails to certify a class because the court thinks it is insufficiently strong, then not only will the members of the class go uncompensated for their injury, it will also seriously compromise deterrence goals.[236]

Some courts invoke the blackmail concern in a context suggesting they merely recognize that the class certification decision has consequences and it is important to get it right. This is innocuous and unobjectionable. The courts embracing the resolution of bona fide merits disputes during the class certification analysis, however, appear motivated by the blackmail concern to raise the certification bar, and this is misguided. Even if the blackmail concern has any validity, which is questionable, the purpose of the Rule 23 class certification procedure was not to serve as an evaluation means to screen weak cases.[237] The blackmail concern—and any similar purported concern with the supposedly coercive effect of class certification—should have no effect on the class certification analysis.

Conclusion

Recent years have witnessed a departure from basic principles of class certification by some courts, emboldened by attacks of commentators and jurists on the so-called *Eisen* rule, which prohibits inquiries into the merits at the class stage. As this Article discusses, this trend does not represent a positive evolution in class action practice. The effort to import an artificial screening mechanism into Rule 23 will not only make the class certification process less efficient, as it devolves into a series of burdensome mini-trials, but will also make the class certification doctrine less coherent, as *Szabo* and *IPO* demonstrate. This trend in the law stems, at least in part, from a mistaken belief that corporate defendants need protection from certification in weak cases because of the so-called blackmail effect.

There is, however, a genuine ambiguity in the law of class certification with which nearly every circuit is grappling: the standard plain-

> class action device to be superior to any other alternative . . . . Since avoidance of multiplicity of litigation is greatly to be favored, the class action device as invoked in this instance will serve such purpose.

Id. at 572.

236. *See id.*; *see also, e.g.*, *In re* New Motor Vehicles Can. Export Antitrust Litig., 522 F.3d 6, 8 (1st Cir. 2008) ("[A]n erroneous failure to certify a class where individual claims are small may deprive plaintiffs of the only realistic mechanism to vindicate meritorious claims.").

237. *See* discussion *supra* Part I (noting that efforts to import the actual resolution of disputed merits issues into the class analysis will only sacrifice coherence and efficiency).

tiffs must meet to satisfy Rule 23 requirements. Rule 23 does not delineate a standard, rather it establishes that a court can certify a class under Rule 23(b)(3) only after it "finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members."[238] The Rule does not specify what plaintiffs must do to support such a finding. Nor does it explain how exactly a court should measure which questions "predominate."

One possibility is to borrow from summary judgment doctrine to provide the movant's standard and burdens. However, this is problematic since the certification analysis ideally would occur before discovery is complete.[239] This would disadvantage plaintiffs, as only defendants will have access to the defendants' documents; accordingly, the plaintiffs' ability to come forward with evidence supporting all of their claims is limited. This suggests that the focus should be on the plaintiffs' intended forms of proof, and that arguments against class certification should focus on a relatively discrete set of issues that decisively affect the propriety of proceeding on a class-wide theory. This set of issues differs depending on the type of case. In the securities field, the efficient-market question is one such issue, and it is no surprise that it has dominated the important class certification decisions of the past few years. The efficient-market question, in other words, is one of the rare questions that is decisive in the sense that, if the market is not efficient, class certification will generally be inappropriate. Price fixing, discrimination, or consumer cases do not have any obvious, similarly decisive questions.

It will take some searching for courts to settle upon the appropriate showing plaintiffs must make to satisfy their Rule 23(b)(3) obligation. The district court in *IPO* suggested that plaintiffs should be required to make "some showing" that they can prove their class-wide theory. Similarly, the First Circuit has suggested that certification is appropriate if the plaintiffs make a showing that the fraud-on-the-market presumption is "reasonably applicable."[240] This is a promising for-

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

239. As noted *supra* Part I.B.1, to the extent that plaintiffs face a risk that they will have to establish elements of their claims at the class certification stage in practice, they may have to insist that class certification occurs at the end of discovery.

240. *New Motor Vehicles*, 522 F.3d at 25 (citing *In re* PolyMedica Corp. Sec. Litig., 432 F.3d 1 (1st Cir. 2005); *In re* Xcelera.com Sec. Litig., 430 F.3d 503 (1st Cir. 2005)). To be sure, portions of the *New Motor Vehicles* decision can be read as suggesting that district courts may need to resolve disputes about "basic facts" as part of their duty to conduct a "searching inquiry into whether plaintiffs will be able to prove the pivotal elements of their theory at trial. *Id.* at 26. The ultimate holding of the decision seems to make clear, however, that the proper focus is on the likely forms of proof at trial and not on how they are

mulation, since it suggests a searching inquiry of the plaintiffs' intended form of proof and the evidence adduced to date, without limiting plaintiffs to that evidence or requiring an affirmative showing of a disputed issue. What is clear, however, is that the trend started by *Szabo* and blessed by the Second Circuit in *IPO* and others, which allows or requires courts to resolve bona fide disputes about the merits of the plaintiffs' case as part of the certification analysis, does not advance the inquiry.

likely to be resolved. *See id.* at 29 ("At the class certification stage . . . the district court must still ensure that the plaintiffs' presentation of their case will be through means amenable to the class action mechanism. We are looking here not for hard factual proof, but for a more thorough explanation of *how* the pivotal evidence behind plaintiff's theory can be established. If there is no realistic means of proof, many resources will be wasted setting up a trial plaintiffs cannot win.").