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## Certification: A Practical Device for Early Screening of Spurious Antitrust Litigation

W. Cole Durham, Jr.\* and Jonathan A. Dibble\*\*

Cognizant of the growing need to provide responsible guidance in the discovery process to prevent abuses in complex cases, federal district courts in two pending antitrust cases<sup>1</sup> have employed an innovative certification procedure to help focus issues and assure that discovery does not impose wasteful costs on the parties.<sup>2</sup> Briefly stated, the procedure stays discovery in appropriate cases<sup>3</sup> until the party asserting the claim files a certificate specifying a factual basis for concluding first, that the claim is brought in good faith, and second, that there is sufficient likelihood discovery will be fruitful.<sup>4</sup> Because of certain tensions such a procedure creates with regard to the general philosophy of liberal discovery and notice pleading pervading the Federal Rules of Civil Procedure,<sup>5</sup> it is bound to be controversial if applied more widely. However, while nowhere near as extensive in its ramifications as the key proposals for discovery reform currently being advanced by the American Bar Association and the Judicial Conference of the United States,<sup>6</sup> discovery certification remains an

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1. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (D. Utah, filed Mar. 23, 1977); *Portland Retail Druggists Ass'n v. Abbott Laboratories*, No. 71-543 (D. Ore., filed Aug. 6, 1971).

2. For convenience, and because this procedure requires certification as a precondition for obtaining normal discovery, it will be useful to refer to this device as "discovery certification."

3. See notes 203-10 and accompanying text *infra*.

4. For a more detailed description of the procedure, see notes 51-61 and accompanying text *infra*.

5. See notes 138-79 and accompanying text *infra*.

6. In the aftermath of the Pound Conference held two years ago, see generally 70 F.R.D. 79 (1976), the ABA Section of Litigation has presented a series of proposals which would narrow the scope of discovery under Rule 26(b)(1) from the "subject matter" to the "issues" involved in an action and would make a number of minor modifications in the rules which would reduce discovery expense in certain circumstances. See SPECIAL COMMITTEE FOR THE STUDY OF DISCOVERY ABUSE, SECTION OF LITIGATION OF THE AMERICAN BAR ASS'N, REPORT (2d printing and rev. 1977); Lundquist & Schechter, *The New Relevancy: An End to Trial by Ordeal*, 64 A.B.A.J. 59, 59-60 (1978); Lamm, *Department of Justice Endorses Discovery Rule Changes Proposed by Section*, LITIGATION NEWS, April 1978, at 1. Following up on this proposal, the Committee on Rules of Practice and Procedure of

attractive procedural device because of its flexibility and utility in curbing abuses at the very outset of the discovery process.

Although it is still too early to evaluate the discovery certification device comprehensively, the procedure clearly warrants careful examination. Accordingly, after identifying some of the potential abuses which create the need for such a procedure,<sup>7</sup> this Article will analyze the possible bases for a certification order within the Federal Rules<sup>8</sup> and within the inherent power of district courts.<sup>9</sup> Next, we will examine limitations on the availability of certification in view of the liberal pleading and discovery notions of the Federal Rules.<sup>10</sup> Finally, the sanctions available to assure effective implementation of a certification procedure will be explored.<sup>11</sup> While the certification device might ultimately prove to be useful in managing many types of complex litigation, our analysis will focus primarily on its use in the antitrust area since that is the area in which the device first evolved and in which its possible applications are most apparent.

### I. THE PROBLEM SETTING

Forty years of experience under the Federal Rules of Civil Procedure have established beyond peradventure the value of discovery as a potent tool for advancing the interests of justice in the vast majority of cases. In recent years, however, various abuses of the discovery procedures have attracted increasing attention and concern. Chief Justice Burger echoed a mounting refrain in his keynote address at the Pound Conference in 1976 when he stated:

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the Judicial Conference has circulated a preliminary draft of proposed amendments to the Federal Rules of Civil Procedure dated March 1978. While this draft varies from the ABA proposal in some respects, most notably in not explicitly limiting the scope of discovery to "issues," it endorses the suggestion of eliminating the phrase from Rule 26(b)(1) which suggests that parties may discover anything relevant to the "subject matter involved in the pending action." It also follows the recommendation of establishing a discovery conference, available as a matter of right in appropriate cases, to facilitate more efficient and better focused discovery. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 6-11 (March 1978) [hereinafter cited as 1978 PROPOSED AMENDMENTS], reprinted in 77 F.R.D. 613 (1978). While it is still too early to predict the impact the proposed changes would have—assuming they are adopted in some form—they would no doubt be considerably more far reaching in their effects than the certification procedure outlined in this Article.

7. See notes 12-30 and accompanying text *infra*.

8. See notes 62-179 and accompanying text *infra*.

9. See notes 180-202 and accompanying text *infra*.

10. See notes 203-10 and accompanying text *infra*. Also see notes 137-79 and accompanying text *infra*.

11. See notes 211-34 and accompanying text *infra*.

Increasingly in the past 20 years, responsible lawyers have pointed to abuses of the pretrial processes in civil cases. The complaint is that misuse of pretrial procedures means that "the case must be tried twice." The responsibility for correcting this lies with lawyers and judges, for the cure is in our hands.<sup>12</sup>

The problem of abuse has become particularly acute in the antitrust area where cases typically involve numerous parties, complex issues, and voluminous discovery. The seriousness of the problem is underscored by the realization that pretrial is increasingly becoming the determinative phase of antitrust litigation.<sup>13</sup> Discovery is almost always burdensome and in the larger cases can be truly staggering. A typical case may necessitate hundreds of depositions and may involve thousands, if not millions, of documents.<sup>14</sup> Wily attorneys have developed techniques for propounding literally thousands of questions by using a few carefully subdivided and cross-referenced interrogatories.<sup>15</sup> Expanded use of the class action device in the antitrust area over the past decade<sup>16</sup> has further multiplied potential discovery burdens.<sup>17</sup> The

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12. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 95-96 (1976).

13. See Withrow & Larm, *The "Big" Antitrust Case: 25 Years of Sisyphian Labor*, 62 CORNELL L. REV. 1, 5, 7-9 (1976).

14. See, e.g., Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 203 (1976). One of the major computer industry cases, *Honeywell, Inc. v. Sperry Rand Corp.*, 1974-1 Trade Cas. (CCH) ¶ 74,874 (D. Minn. 1973), involved over 30,000 marked exhibits, some 71 live and 80 canned witnesses, and over 20,000 pages of transcript at trial alone. See Withrow & Larm, *supra* note 13, at 37. Presumably, the quantities of information involved at the discovery stage were even more staggering.

The use of computers in large antitrust cases for storage of information and documents is becoming increasingly common. See Arthur, *The Computer and the Practice of Law: Litigation Support*, 63 A.B.A.J. 1737, 1737-40 (1977). This adds another dimension to discovery costs. A recent LEXIS sales brochure indicates that the first-year cost of converting 8,000 letters averaging one page apiece into computer readable form and making them available for research in LEXIS (*i.e.*, the cost of keystroking, loading, and storage) is \$15,600. Storage costs in subsequent years would be approximately 18 cents per page. MEAD DATA CENTRAL, *COMPUTER ASSISTANCE IN LITIGATION: A LAWYER'S GUIDE 9* (undated). In a large case this could easily run into hundreds of thousands of dollars, not including the cost of computer time once the information is stored. Of course, the decision to computerize a document depository would reflect a business judgment that computerization would ultimately be less expensive than some other form of document management, but the expense is nonetheless very high.

15. See McElroy, *Federal Pre-Trial Procedure in an Antitrust Suit*, 31 Sw. L.J. 649, 682 (1977).

16. See Withrow & Larm, *supra* note 13, at 4.

17. Other examples of discovery abuse include demands for nationwide discovery in local or regional cases, requests for documents and interrogatories which cover excessive time periods, inquiries which range too widely into the business and records of subsidiaries and divisions, and other types of dragnet demands. Byrnes, *Discovery: Its Uses and Abuses—The Defendants' Perspective*, 44 ANTITRUST L.J. 14, 24-25 (1975); McElroy, *supra* note 15, at 682. See also Blecher, *Is the Class Action Rule Doing the Job? (Plaintiff's*

growing tendency to use discovery as a bludgeon has elicited cries of "legalized blackmail."<sup>18</sup> The gargantuan economic costs of discovery are further compounded by less tangible injuries in the form of invasion of privacy and psychological disruption of an ongoing economic enterprise.<sup>19</sup> In view of the exploding volume of information involved in the discovery phase of large cases, Judge Renfrew has aptly characterized the procedural transformation wrought by the federal rules as a shift from "trial by ambush" to "trial by avalanche."<sup>20</sup>

One of the most deeply troubling perversions of the discovery process involves using the threat of expensive discovery costs to extort substantial settlements from innocent defendants.<sup>21</sup> The Supreme Court adverted to this problem in *Blue Chips Stamps v. Manor Drug Stores*.<sup>22</sup> After noting that extensive and liberal discovery of evidence relevant to determining the merits of a claim is to be encouraged, the Court observed:

[T]o the extent that [discovery] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.<sup>23</sup>

The threat of expensive discovery is particularly acute for the small company swept into the large antitrust case as a codefendant. Facing the risk of joint and several liability that may vastly exceed the total worth of the enterprise, as well as a minimum of several thousand dollars in litigation expenses during the early discovery phase alone, a small company may be driven to settle no matter how sincere its belief that it is innocent.<sup>24</sup> An unscrupulous plaintiff can take advantage of this situation by joining a large number of defendants, settling with the "smaller fish" for a sum which is substantial but less than the projected costs of

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*Viewpoint*), 55 F.R.D. 365, 365-68 (1972); Malina, *The Search for the Pot of Gold*, 41 ANTITRUST L.J. 301, 320 (1972); Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 378, 389-91 (1972).

18. Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

19. See, e.g., Kirkham, *supra* note 14, at 203.

20. Renfrew, *Panel Discussion: Discovery in Civil Antitrust Suits*, 44 ANTITRUST L.J. 57, 59 (1975).

21. See Byrnes, *supra* note 17, at 25.

22. 421 U.S. 723 (1975).

23. *Id.* at 741.

24. Kirkham, *supra* note 14, at 207.

defending the action through the early discovery phase, thus building a "war chest" to go after larger targets.

In order to more clearly delineate the dimensions of this problem, it will be useful to identify a number of potential sources of expense in early antitrust discovery. The figures in the table on the following page are based on conservative estimates and assumptions extrapolated from actual experience with a number of actual cases.

Despite conscientious efforts to achieve an elusive Aristotelian balance between being analytically thorough and maintaining a minimal cost for the client, the defense of a complex action will precipitate substantial costs even in the very early phases of litigation. An antitrust case, because of the combined exposure to large prayers, treble damages, attorneys' fees, injunctive relief, related subsequent actions, and, in some instances, possible criminal sanctions, usually requires a team of two to three attorneys. If the action is brought in an area removed from the larger metropolitan cities, two law firms will probably be retained: the antitrust specialists and the litigating firm admitted before the bar of the forum state.

The accompanying table gives a breakdown of the approximate attorneys hours involved in the early stages of an antitrust case, assuming the involvement of two law firms for the defendant.

TABLE — *Estimated Attorney Hours  
in Initial Stages of Litigation per Defendant*

	Partner Hours	Associate Hours
Review of complaint and file	2	6
Initial discussions with client's executives	2	2
Law firm strategy mapping	3	3
Industry and company background discussion with lawyers and employees	4	16
Analysis of possible motions to dismiss; further consultation with client; legal research	4	16
Preparation and filing of answer to complaint	2	6
Preparation and filing of counter-claim	4	8
Drafting of first set of interrogatories; <sup>25</sup> request for production of documents	3	15
Conversations, conferences, correspondence between opposing counsel for discovery scheduling, stipulations, extensions of time, etc.	4	8
Preparation of answers to plaintiff's interrogatories; review of answers with client's employees; review and production of defendant's documents for plaintiff's inspection; inspection of plaintiff's documents	8	45
Analysis of possible further motions to dismiss or for summary judgment; legal research	4	12
Data gathering by means of interview, affidavit, or deposition <sup>26</sup>	30	40
Compelling complete discovery—communications with plaintiff's counsel, Rule 37 motion, legal research <sup>27</sup>	6	10
Preparation, filing, and implementing of protective orders for sensitive competitive information	4	8
Total attorney time	80	195

25. Defendants' first set of interrogatories are often aimed at ferreting out the "facts" upon which the allegations in the complaint are based.

26. Hours given include the time expended in preparing for and taking the deposition of one person for one day, assuming that a partner from each law firm spends eight hours at the deposition and seven hours in witness preparation, and that associates from both firms are involved in culling documents, outlining the areas of examination, and otherwise laying the groundwork for the deposition.

Since a complex case would probably require many depositions over many days, actual expense in this category could be much greater. Depositions would also include

Assuming conservatively<sup>28</sup> that counsel, with a reputation of competence to deal with complex litigation, can be retained at an hourly rate of \$50 per hour for an associate's time and \$75 per hour for a partner's or senior litigator's time, attorney billings alone would amount to \$6,000 for partners' hours and \$9,750 for associates' hours. In addition, the client must pay paralegal costs for examining and culling documents often stored in massive numbers in warehouses. Duplicating costs, long distance telephone bills, and travel expenses also increase the burden. These expenses could easily exceed \$5,000 within the first several weeks. Thus, a defendant in a complex, multiparty case might expect to spend well over \$20,000 during the initial stages of litigation,<sup>29</sup> and this figure would increase dramatically as more depositions were taken.

This estimate of expenses does not include the defendant's own internal costs, such as time spent by in-house counsel and other employees in connection with the lawsuit. In addition, many costs associated with the defense of complex litigation are not easily quantified. Diversion or preoccupation of key company executives and other employees may take a significant toll in terms of both time and morale. Another unquantifiable cost is the possible adverse impact of the suit on the firm's public relations.

The above expenses represent the initial costs incurred prior to the stage where unmeritorious pleadings can be disposed of by a motion for summary judgment. Although the stated expenses are in a sense arbitrary in that they are not based on a large

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court reporter costs which typically involves a minimum of \$25 per first hour and \$10 per hour thereafter, \$1.75 per page for the original and one copy, and \$0.25 per page for each extra copy.

27. Some of these expenses may be reversed if the judge awards costs; often, however, the court only compels discovery.

28. An idea of just how conservative our figures are can be obtained by comparing the fees recently awarded in the sugar industry antitrust litigation. *See generally In re Sugar Industry Antitrust Litigation*, Master File No. MDL-201 (N.D. Cal., May 10, 1978) (opinion and order regarding attorneys fees). The fees awarded the various attorneys ranged from \$40 to \$175 per hour, with most of the fees awarded to the more experienced attorneys ranging between \$100 and \$125 per hour and fees for associates averaging about \$65 per hour.

29. On the other hand, if a complaint seeks temporary or preliminary injunctive relief, initial discovery costs escalate dramatically because a tremendous amount of evidence in affidavits and live testimony must be discovered, digested, and related to the finder of fact in a relatively short period of time. And, these costs must still be multiplied by the number of defendants to give an idea of the total defense costs involved. It may well be that the defendants can, through a joint defense committee, avoid the duplication of some of these costs and thereby reduce the burden on each defendant. If the complaint involves antitrust allegations, however, each defendant must cautiously avoid any appearance of concerted action.



sample of empirical data, they reflect averages drawn from actual cases and have been conservatively reduced. And, for purposes of this Article, it is irrelevant whether the figures accurately reflect the actual expenditures in any one case or group of cases. Their principal purpose is purely to illustrate the potential discovery costs defendants may incur in complex litigation. Once a defendant focuses on the costs associated with participation in a lawsuit, any lesser amount can serve as a starting point for early settlement discussions.

By thoroughly invoking the process of discovery, the plaintiff can possibly find enough evidence to establish a jury issue, and in any event can immediately boost the amount of a "nuisance value" settlement from the defendants. By pulling everyone in an industry into a complex lawsuit dragnet-style and then selling peace for a price below the costs of defending the lawsuit, the plaintiff can often secure early settlements, thereby augmenting its "war chest"<sup>30</sup> while simultaneously narrowing the number of parties and reducing its prosecution costs. In this setting, the pragmatic business man is faced with the dilemma of either investing in a fight to protect his honor or capitulating to save litigation expenses. Confronted with such a choice, companies may well decide to pay a nuisance value settlement rather than face an irate board of directors later if the legal expenses escalate or the lawsuit is lost.

A system which tolerates such extortionlike pressures is unjust to innocent defendants in unmeritorious actions and may be unfair to plaintiffs and contrary to the public interest in some meritorious suits. If a real culprit escapes a lawsuit by slipping through the net while the confused fisherman sorts the smelt from the salmon, society as a whole suffers. Requiring the plaintiffs to meet an initial threshold burden through discovery certification might prevent such injustices and help litigants and the courts focus on the real issues and parties in interest.

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30. A quick rule of thumb would place such settlements anywhere below the early costs of defending the lawsuit, as suggested by the following diagram:

$$\begin{array}{ccccc} \text{Minimum settlement acceptable} & & \text{"War chest"} & & \text{Early costs of} \\ \text{to plaintiff} & < & \text{settlements} & < & \text{discovery} \end{array}$$

The minimum settlement acceptable for plaintiff would normally approximate his expenses per defendant or the plaintiff might set an arbitrary minimum so as to "save face."

A minimum value settlement of \$5,000 from 20 of the 28 defendants in *Mountain View* would give plaintiffs a \$100,000 "war chest."

## II. THE DISCOVERY CERTIFICATION PROCEDURE

As indicated at the outset, we are aware of only two cases in which a discovery certification procedure has been invoked—*Portland Retail Druggists Association v. Abbott Laboratories*,<sup>31</sup> and *Mountain View Pharmacy v. Abbott Laboratories*.<sup>32</sup> Both cases involve nebulous antitrust claims brought against several major pharmaceutical companies, and the complaint in the *Mountain View* case was apparently modeled on the amended complaint in *Portland Retail Druggists*.<sup>33</sup> Before proceeding to a brief description of the manner in which a certification procedure would operate and an analysis of the potential value of this device in alleviating the problems discussed in the previous Section, it will be useful to describe these two cases in some detail.

### A. The Case Law Background

The complaint originally filed in *Portland Retail Druggists* asserted five separate causes of action. The first four were Robinson-Patman Act claims and the fifth alleged a conspiracy claim under section 1 of the Sherman Act. The first certification order was issued on January 12, 1972, and required the plaintiffs to provide "a certificate showing that they currently have information from which the Court can conclude that it is reasonably probable that discovery on the merits will produce evidence sufficient to establish each cause of action."<sup>34</sup> A certificate to this end was subsequently filed. Thereafter, the case was assigned to a second judge who dismissed two of the causes of action<sup>35</sup> and allowed discovery to go forward on the claim involving discriminatory sales to nonprofit institutions.<sup>36</sup> After final resolution of that portion of the case by the United States Supreme Court,<sup>37</sup>

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31. No. 71-543 (D. Ore., filed Aug. 6, 1971).

32. No. C-77-0094 (D. Utah, filed Mar. 23, 1977).

33. The original complaint in *Mountain View* was in many respects a verbatim copy of the amended complaint in *Portland Retail Druggists*.

34. *Portland Retail Druggists Ass'n v. Abbott Laboratories*, No. 71-543 (D. Ore., Jan. 12, 1972) (first certification order), quoted in Memorandum in Support of the Motion of Eli Lilly & Co. for Certification Procedure at 2, *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (D. Utah, filed Mar. 23, 1977) [hereinafter cited as *Eli Lilly Memorandum*].

35. These causes of action alleged Robinson-Patman violations on sales to various governmental agencies. See *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 4 n.2 (1976).

36. This is the claim which was ultimately disposed of in *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976).

37. *Id.*

the district court ordered the filing of a new certificate addressed to the remaining causes of action.<sup>38</sup> The plaintiffs subsequently filed a certificate that was found to be inadequate.<sup>39</sup> On June 30, 1975, the plaintiffs filed their third certificate. By a letter order dated July 18, 1975, the court held that this certificate was still inadequate as to the Sherman Act claim.<sup>40</sup> On December 27, 1977, the court severed the conspiracy cause of action and stayed all discovery of it. Discovery on the remaining claims was allowed to proceed by a bench ruling of March 24, 1978.<sup>41</sup>

Viewed from the plaintiffs' perspective, the use of the certification procedure in *Portland Retail Druggists* has delayed discovery on the Sherman Act claim for over five years. On the other hand, the certification procedure has apparently helped the Oregon federal court manage discovery in a massive case and identify issues that could be severed and resolved. At the same time, the procedure has protected defendants from burdensome discovery on a claim with regard to which plaintiffs have been unable to certify a satisfactory factual basis despite having had three distinct chances to do so.

*Mountain View*, filed March 30, 1977 by thirteen Utah pharmacies, also involves multiple Robinson-Patman Act claims and an alleged violation of section 1 of the Sherman Act. In all respects the allegations, which refer to all twenty-eight defendants en masse, are conclusory and unspecific. The complaint alleges that the defendants engaged in unlawful price discrimination<sup>42</sup> by

38. *Portland Retail Druggists Ass'n v. Abbott Laboratories*, No. 71-543 (D. Ore., Oct. 10, 1973) (second certification order), cited in Eli Lilly Memorandum, *supra* note 34, at 3.

39. *Id.* (Feb. 19, 1974) (order staying discovery pending submission of an adequate certificate as ordered on Oct. 10, 1973), cited in Eli Lilly Memorandum, *supra* note 34, at 3.

40. This letter order stated, *inter alia*,

I have examined, or re-examined, all the certificates filed by plaintiff, including that of June 30, 1975. Some of the materials therein are obviously irrelevant: this lawsuit does not and will not concern itself with *all* the practices of the drug industry, however good or evil they may be. Some of these materials may be informative, though not of course, necessarily admissible or legally probative, on the topic of price discrimination. But none even hints that discovery would unearth evidence of Sherman Act violations alleged in the Fifth Cause.

*Id.* (letter order of July 18, 1975) (emphasis in original), quoted in Eli Lilly Memorandum, *supra* note 34, at 3-4.

41. Memorandum in Support of Response of Portland Defendants to Motion to Transfer for Consolidated or Coordinated Pretrial Proceedings Pursuant to Section 1407 of Title 28, U.S.C. at 2, *In re Pharmaceutical Antitrust Litigation*, M.D.L. Docket No. 346 (J.P.M.D.L., filed Apr. 24, 1978). The stay continued in effect as of May 4, 1978. *Id.*

42. See 15 U.S.C. § 13 (1976).

granting lower prices and more favorable treatment to various categories of pharmaceutical purchasers other than plaintiffs. Although the Robinson-Patman Act is directed against discriminatory sales from a particular seller to specific purchasers the complaint fails to allege any such discriminatory transactions. The complaint also does not identify the products purportedly involved. The broad conclusory allegations that all defendants violated the Sherman Act appear to be the only basis upon which separate Robinson-Patman Act claims against the separate defendants could be combined in a single action.<sup>42.1</sup>

After a flurry of motions,<sup>43</sup> the court dismissed certain claims relating to transactions exempt from the Robinson-Patman Act,<sup>44</sup> stayed all discovery pending a further order of the court, and granted plaintiffs three weeks in which to file a motion for leave to amend the complaint.<sup>45</sup> The plaintiffs filed such a motion attaching, as ordered, a draft of an amended complaint. Arguing that the amended complaint contained no more substance than did the original, counsel for Abbott Laboratories suggested a procedure that would require the plaintiffs to submit a sworn statement or certificate setting forth "all facts known to plaintiffs which are sufficient to establish a reasonable likelihood that discovery in the action will provide evidentiary facts relevant to and probative of" various allegations in the complaint.<sup>46</sup>

On January 16, 1978, the court granted the defense motion for certification and made a bench ruling to that effect which was clarified in a letter to all counsel two days later. The written

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42.1. For a discussion of the problems in bringing such multiple claims, see Note, *Class Actions Under the Robinson-Patman Act: Gold Strike May Be Only Iron Pyrite*, 25 *Stan. L. Rev.* 764 (1973).

43. While some defendants answered the complaint, others filed various motions to dismiss and motions for summary judgment. One group of defendants filed a motion to dismiss or, in the alternative, a motion to require plaintiffs to "separately state their claims," purportedly pursuant to Federal Rule of Civil Procedure 10(b). Memorandum of Points and Authority in Support of Defendant Smith, Kline & French Laboratories Motion for Summary Judgment, Motion to Dismiss and Motion to Separately State. Several defendants sought an order to delay first wave discovery until the motions were decided. Others argued that defendants should be allowed to conduct "transaction discovery" to obtain more specific details about the plaintiffs' allegations after which appropriate motions could be filed. Memorandum of Certain Defendants Concerning Pretrial Scheduling.

44. Sales to hospitals and other nonprofit organizations "for their own use" are specifically exempted from the Robinson-Patman Act. 15 U.S.C. § 13c (1976). See also *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976). Sales to any governmental entity have been interpreted as exempt from the Act. 38 Op. Att'y Gen. 539 (1936).

45. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (D. Utah, Sept. 6, 1977) (order reflecting rulings of Aug. 15, 1977 scheduling conference).

46. Letter from W. Robert Wright to Judge Aldon J. Anderson (Sept. 12, 1977) (filed with the clerk of the court Sept. 13, 1977).

order, entered January 28, required plaintiffs to file "sworn statements setting forth all facts presently known to them, if any, which support their belief that they possess meritorious claims under the Sherman and Robinson-Patman Acts."<sup>47</sup> The authorization for this procedure emanated, according to the letter to counsel, from the court's "inherent power and . . . compelling duty to actively manage cases of the magnitude of the present action."<sup>48</sup> Apparently searching for a specific basis in the Federal Rules of Civil Procedure for the certificate requirement, the court seemed to rely on its power to attach conditions to a grant of leave to amend under Rule 15. Consistent with its opinion "that the entire focus of the action at this stage should be upon plaintiffs substantiating the proposed amended complaint," the court ordered all pending defense motions "to be held in abeyance until the ordered certification procedure has run its course and all questions and motions relevant thereto are resolved."<sup>49</sup> The plaintiffs filed a certificate and its sufficiency has been challenged by the defendants.<sup>50</sup>

### B. *The Basic Structural Features of a Discovery Certification Procedure*

At this point, a brief description of the general contours of the procedure emerging from the foregoing discussion of *Portland Retail Druggists* and *Mountain View* will be useful. The certification procedure could be invoked at any time after the filing of the initial pleadings, either upon motion by a party against whom the action was directed or sua sponte by the judge to whom the case was assigned. For the certification procedure to be maximally effective, it is vital that the judge act on the motion requesting certification as promptly as possible. Normally he would be able to assess whether certification was appropriate merely by reading the complaint and determining whether the risk of discovery abuse was sufficiently great to warrant certification. In some cases, the judge may not be in a position to act promptly or may

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47. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (D. Utah, Jan. 28, 1978) (certification order). The variations in the language of the certificate requirements are set out in notes 53-55 and accompanying text *infra*.

48. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (D. Utah, Jan. 18, 1978) (judge's letter to all counsel).

49. *Id.*

50. The *Mountain View* plaintiffs have moved for transfer of the Utah action to Oregon for consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 (1970). *In re Pharmaceutical Antitrust Litigation*, M.D.L. Docket No. 346 (J.P.M.D.L., filed Apr. 24, 1978).

wish to hear both sides before ruling on the certification motion. In such cases, the judge may wish to stay discovery pending his ruling on the certification request in order to minimize the risk of discovery abuse during the (hopefully brief) intervening period. Assuming the judge decided to require certification, an order would be issued that would set a reasonable deadline for filing a certificate and that ideally would specify the type of information to be included in the certificate. The court could also determine in its discretion whether counsel should be required to set forth the facts in a sworn statement, or simply be bound by the standard sanctions of Rule 11.<sup>51</sup>

In general, a certificate should be deemed adequate when, in view of the circumstances of the case and the nature of the claim, the plaintiff has adduced sufficient information to establish that his claim is made in good faith and that there are reasonable grounds to believe discovery will yield information relevant to an identifiable claim. This standard may be met affirmatively by including such information in the certificate, or negatively by showing that, despite good faith efforts, it has been impossible to obtain information of the type or degree of particularity specified in the certification order and that there is some reason to believe the information is so exclusively within the control of the defendant that only discovery would disclose its existence or nonexistence. Of course, the arguments advanced to meet the standard negatively would include all those made against certification in the first place. Normally, then, in order to establish the adequacy of the certificate in this manner, it would be necessary for a plaintiff to bring to the court's attention some consideration that was not raised in the initial arguments against granting a certification request.

In light of the nature of the certification standard just posited, the *Portland Retail Druggists* order may have demanded too much by requiring the plaintiff to include information indicating that there was a "reasonable probability" that "discovery on the merits [would] produce evidence sufficient to establish each cause of action."<sup>52</sup> A plaintiff could conceivably have sufficient information to show a reasonable probability that discovery would be fruitful even though additional evidence from other sources would then be necessary to *establish* some or all of the claims. A certification order which required the plaintiff essen-

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51. See notes 100-01 and accompanying text *infra*.

52. *Portland Retail Druggists Ass'n v. Abbott Laboratories*, No. 71-543 (D. Ore., Jan. 12, 1972) (first certification order), *quoted in* Eli Lilly Memorandum, *supra* note 34, at 2.

tially to prove his case before allowing discovery would clearly demand too much.

A similar problem arises with respect to the *Mountain View* court's order requiring plaintiffs to disclose "all facts presently known to them . . . which support their belief that they possess meritorious claims."<sup>53</sup> While a defendant ought to be able to ascertain whether the plaintiff is capable of making a minimal threshold showing that he has good grounds for his complaint, this does not imply that he has a right to learn *all* that the plaintiff knows before discovery begins.<sup>54</sup> These examples emphasize the fact that great care should be given to properly limiting the scope of the certification request if certification is to become a legitimate discovery management device.

The approach suggested by the *Mountain View* court's letter to counsel is arguably preferable in that it merely asked plaintiffs to "[set] forth the [as opposed to "all"] facts known to them, if any, which support their belief that they possess meritorious claims."<sup>55</sup> While not as clear as the standard proposed at the outset of this Subsection, this certification order has the advantage of clearly focusing the attention of the parties and the court on whether the plaintiff has a good faith basis for bringing the action rather than on the quantum of evidence already in the plaintiff's possession. The principle drawback of the *Mountain View* order is that it leaves the plaintiff with considerable uncertainty as to the precise standard the court will use to determine the sufficiency of the certificate. This difficulty could have been reduced if the court had detailed more fully the type of information that would be adequate to withstand a sufficiency challenge and permit discovery to proceed normally. For example, the court might have required the plaintiff to provide particulars regarding the factual basis for thinking discovery would show that the defendant was somehow connected with harm suffered by the plaintiff.

Since the purpose of certification is merely to protect a defendant from unjustifiable discovery costs, and not to cut off a plaintiff's claim, a plaintiff who has filed a certificate subsequently deemed inadequate should be given a reasonable num-

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53. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (D. Utah, Jan. 28, 1978) (certification order).

54. See notes 205-08 and accompanying text *infra*.

55. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (D. Utah, Jan. 18, 1978) (judge's letter to all counsel). The bench ruling had ordered plaintiffs to "provide facts through affidavit showing the factual basis upon which the claims made have been alleged." Transcript of the Proceedings at 46 (Jan. 16, 1978).

ber of opportunities for revision. Resulting delays would generally protect rather than prejudice the defendant, and appropriate adjustments could be made in exceptional cases. If, after repeated attempts, a plaintiff has been unable to meet the minimal informational demands of a certificate order, the underlying claim may properly be dismissed. Such a dismissal should be overturned only if abuse of discretion is found.

The workability of discovery certification, as with other procedural mechanisms, depends to a large extent on the availability of appropriate sanctions. The possibility that an unwarranted certification motion might be filed could be deterred by allowing a court in its discretion to tax the defendant with the plaintiff's costs occasioned by the motion. The range of sanctions for plaintiff noncompliance with certification requirements is necessarily more complex and will be dealt with in detail later.<sup>56</sup>

In addition to sanctions for the abuse of or noncompliance with discovery certification, certain variations on the procedure could be developed. In some cases, it may be that the interests of justice and expeditious management of discovery will be better served if a party is presented with the alternative of either certifying or being allowed to engage in limited discovery upon the condition of paying the direct and indirect costs of such discovery to the defendant (or of posting bond for such costs in the event that the allegations turn out to be unfounded).<sup>57</sup> Such an alternative order would have the advantage of allowing discovery to go forward where the plaintiff was sufficiently convinced of the validity of his claim to bear the initial risk of discovery, while at the same time insulating the defendant from the costs of potentially abusive discovery. The fact that a plaintiff would assume this type of financial burden is obviously a very strong indicator that the plaintiff's claim is genuine, and it is difficult to imagine circumstances in which a plaintiff willing to bear the risk of loss on discovery costs should not be allowed to proceed.<sup>58</sup> Once a plain-

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56. See notes 211-34 and accompanying text *infra*.

57. There would, of course, be difficulties in quantifying the less tangible costs of gathering such information. But courts continually deal with such valuation problems, and there is no reason to think that the cost to a defendant of a plaintiff's discovery would be inherently unquantifiable.

58. Of course, if a plaintiff thought discovery costs were greater than possible discovery benefits, it would be reasonable to utilize the certification device to bar the plaintiff from proceeding with discovery indefinitely, since it is difficult to see why the defendant should incur costs that the plaintiff himself would be unwilling to pay. A possible exception to this generalization arises where the cost to the plaintiff of finding certain information is much greater than the cost to the defendant. Certain price information, for example, might be easily accessible to the defendant, but might be difficult and costly for a



tiff gleans sufficient information to file an adequate certificate pursuant to an alternative order of this type, discovery would be allowed to go forward on a normal basis and, if the plaintiff ultimately prevailed on the merits, his expenses in financing initial discovery costs could be recouped to the extent that such costs are normally taxed to the losing party.

It should be noted that a discovery certificate is not merely a kind of particularized pleading. If it were, issuance of a certification order would imply that the pleading against which the order was directed was legally insufficient. But there is no reason to think that such would be the case. A judge requiring certification might well consider the initial pleadings sufficient to toll a statute of limitations or withstand an immediate motion to dismiss. In contrast to an amended pleading, a discovery certificate does not supplant a prior pleading; it merely adds to the store of information available for identification and ultimate resolution of disputed issues without affecting the validity of the original complaint or counterclaim. In this regard, it resembles discovery more closely than pleading. Certification may best be thought of as a hybrid procedure intermediate between pleading and full-blown discovery, but conceptually distinct from both.

A certification procedure with the features just described can serve a number of purposes. First, and perhaps most important, it is a means whereby certain forms of discovery abuses can be constrained if not eliminated. The tactic of filing an action and then settling for an amount below the defense startup costs would be emasculated in cases where there is no reasonable basis for the claim. The procedure may also be of assistance to the trial judge in supervising the course of discovery. As in the *Portland Retail Druggists* case, it may well be that certification will result in a

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plaintiff to find if it were simply allowed to fish through a sea of documents. A parallel problem arises in the context of administering Federal Rule 33(c), which allows a party to answer interrogatories simply by specifying the records from which the answer may be derived and allowing the party serving the interrogatories to inspect them. This procedure is theoretically available only when "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served." FED. R. CIV. P. 33(c). The difficulty, of course, is assessing when the burdens are sufficiently similar on the opposing parties to allow this shifting of discovery costs. See 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2178, at 570-71 (1970) [hereinafter cited as WRIGHT & MILLER]. Presumably, a court exercising its discretion in the certification context could evaluate relative production burdens and tailor an alternative certification order accordingly. One must also remember that, generally, a plaintiff who knows enough to specify why eliciting particular information will be much more costly for himself than for the opposing party probably has sufficient information to comply with a certification order.

determination by a judge that discovery should go forward on certain aspects of a plaintiff's claim, but be postponed as to other more nebulous claims. This gives the plaintiff additional time to formulate the factual basis for a claim in more questionable areas while allowing discovery to proceed where there is good ground to think it will be fruitful.

Perhaps the most significant practical problem with the certification procedure derives from the fact that it is as yet essentially an untested device. There is no way at this point to determine with any precision how effective it is at actually eliminating the costs which create the leverage for extortionlike settlements.<sup>59</sup> In fairness, it must be recognized that many of the costs associated with early discovery will continue to accrue whether or not certification is invoked. While some of the larger expenses, such as deposition costs, preparation of answers to the plaintiff's interrogatories, and costs deriving from discovery disputes would obviously be eliminated pending submission of an adequate certificate, others, such as those for filing responsive pleadings and analyzing possible bases for dismissal or summary judgment, would probably continue.<sup>60</sup> Particularly in cases as large as those in which certification would likely be invoked, parties and counsel are unlikely to hold off planning defense strategy pending compliance with a certification order.

The continuation of these expenses, however, does not necessarily impugn the certification procedure's workability. The ongoing costs may reflect concerns either that the plaintiff does have a viable claim or that the judicial system may fail to detect a groundless one. These costs therefore are attributable not to a defect in the certification procedure but to the defendant's own uncertainty as to the strength of its position or to risks inherent in the judicial process. The certification procedure would operate to hold such "insurance" expenses at an unburdensome level, and particularly where a defendant is confident that a complaint is

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59. In the *Mountain View* case, for example, a number of stipulated dismissals have been entered since the entry of the certification order in January. See, e.g., *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (D. Utah, Mar. 9, 1978) (order dismissing defendant Squibb); *id.* (May 18, 1978) (order dismissing defendant Hoechst-Roussel Pharmaceuticals, Inc.). Of course, it is difficult to know whether such dismissals reflect nuisance value settlements or legitimate settlements based upon realistic assessment of the merits. To the extent they reflect the latter, their existence is no indictment of the practicality of certification, since it was never intended to impede settlement on the merits. Indeed, its purpose is to promote that end by insuring that settlements do not occur simply because of the burdens associated with the defense of unfounded claims.

60. See table at p. 304, *supra*.

groundless, will act as a good insulator against *unjustifiable* expense.

Moreover, even if certification does not entirely eliminate costs extrinsic to the risk of loss on the merits, it certainly alters the atmosphere in which settlement negotiations would occur. The defendant's cost of continued involvement in the action is reduced at least temporarily because the risk of incurring substantial discovery costs is largely eliminated. In addition, if a court imposes sanctions for a plaintiff's failure to comply with a certification order, the defendant may ultimately be able to recoup all its costs incurred in defending the action.<sup>61</sup> Thus, while there may be some defendants who feel the only way to "stop the meter" and avoid the costs flowing from involvement in an anti-trust action is to enter into a nuisance value settlement, the certification device still has considerable utility. Finally, recognition of a certification procedure would give the judge an identifiable tool to restrain early discovery abuse and would eliminate the problem of his constantly having second thoughts about which of the numerous potential bases for the exercise of his discretion is specifically being called into play.

### III. FOUNDATIONS OF JUDICIAL AUTHORITY TO INVOKE THE DISCOVERY CERTIFICATION PROCEDURE

The fact that the certification device may constitute a useful technique for constraining certain forms of discovery abuse does not, of course, insure that the procedure is authorized. In fact, one of the major problems with which the *Portland Retail Druggists* and *Mountain View* courts wrestled was precisely whether they had the power to stay discovery pending submission of an adequate certificate. This Section will analyze the various possible bases for such power within the Federal Rules of Civil Procedure, and within the inherent power of a court insofar as it bears on this issue.<sup>62</sup> To the extent that this analysis identifies limits on, as well as grounds for, judicial power to require certification, it necessarily prefigures the discussion of limitations on the scope of the procedure in Section IV.<sup>63</sup>

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61. See notes 223-34 and accompanying text *infra*.

62. See notes 180-202 and accompanying text *infra*.

63. See notes 203-10 and accompanying text *infra*.

A. *Specific Bases in the Federal Rules*

1. *Rule 15*

The judge in the *Mountain View* case apparently felt most comfortable in basing his decision to require certification on his discretionary power to attach conditions to the grant of leave to file an amended complaint.<sup>64</sup> Rule 15 provides that, except for one amendment which is allowed as a matter of course prior to the filing of a responsive pleading, "a party may amend his pleading *only by leave of court* or by written consent of the adverse party . . . ."<sup>65</sup> Similarly, the "court may, upon reasonable notice and upon such terms as are just, permit [a party] to serve a supplemental pleading . . . ."<sup>66</sup> Since it is well settled that in appropriate circumstances a court may deny leave to amend outright,<sup>67</sup> may impose suitable conditions upon the grant of leave to amend,<sup>68</sup> or may even require a party to amend a pleading that fails to adequately state a claim in order to avoid dismissal,<sup>69</sup> there would appear to be no obstacle to requiring certification as a condition for amending or supplementing pleadings, so long as this results in no infraction of the liberal amendment policies of Rule 15. As a practical matter, since the great majority of complicated cases are based upon amended or supplemental pleadings by the time they reach trial, Rule 15 would be available as a basis for certification in a wide range of cases.

Of course, one of the key premises of Rule 15 is that "leave shall be freely given when justice so requires."<sup>70</sup> While the deter-

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64. See *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (D. Utah, Jan. 18, 1978) (judge's letter to all counsel).

65. FED. R. CIV. P. 15(a) (emphasis added).

66. FED. R. CIV. P. 15(d).

67. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971) (denial justified in light of substantial prejudice to opposing party); *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) (first amended complaint had already failed to allege sufficient facts to support a "bare bones" antitrust conspiracy claim); *Miller v. Steinbach*, 43 F.R.D. 275, 277 (S.D.N.Y. 1967) (denial where allegations were identical to counts of original complaint which had already been dismissed and stricken).

68. See, e.g., *Firchau v. Diamond Nat'l Corp.*, 345 F.2d 269, 275 (9th Cir. 1965); *Hayes v. Parkview-Gem of Hawaii, Inc.*, 71 F.R.D. 436, 442 (D. Hawaii 1976); *Prandini v. National Tea Co.*, 62 F.R.D. 503, 506 (W.D. Pa. 1974); *Sherrell v. Mitchell Aero, Inc.*, 340 F. Supp. 219, 222 (E.D. Wis. 1971); *Thermal Dynamics Corp. v. Union Carbide Corp.*, 42 F.R.D. 607, 609 (D.N.H. 1967); *Chamberlin v. United Eng'rs & Constructors, Inc.*, 194 F. Supp. 647, 651 (E.D. Pa. 1961); 3 MOORE'S FEDERAL PRACTICE ¶ 15.08, at 935 (2d ed. 1974) [hereinafter cited as MOORE]; 6 WRIGHT & MILLER, *supra* note 58, § 1486, at 423-24 (1971).

69. 6 WRIGHT & MILLER, *supra* note 58, § 1473, at 376 (1971); see *Benner v. Philadelphia Musical Soc'y Local 77*, 32 F.R.D. 197, 199 (E.D. Pa. 1963).

70. FED. R. CIV. P. 15(a).

mination of whether leave to amend should be granted rests with the discretion of the trial court,<sup>71</sup> the liberal amendment policy articulated by the rule demands that there be some justification for denial of leave. Generally, this takes the form of a showing that the opposing party would be prejudiced in some manner if leave were granted.<sup>72</sup> As the Supreme Court has suggested in discussing the liberality with which amendments should be permitted:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as *undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.*—the leave sought should, as the rules require, be “freely given.”<sup>73</sup>

The Court's catalog of the situations in which leave might be denied has close affinities with the factors that would justify a judge in requiring certification.<sup>74</sup> The central purpose of the certification procedure is to help eliminate abuses in the early phases of discovery which may reflect bad faith, bludgeon tactics, or failure to possess or adequately articulate a claim, and which could prejudice an opposing party by causing inconvenience and possibly, in the event of a nuisance value settlement, preclude a determination on the merits. Conditioning leave to amend on the submission of an adequate certificate would thus appear to be well within the limits of a court's discretion under Rule 15, particularly since a certification order is considerably less drastic than denying leave to amend.

A few cases have suggested that “a district court will not use its power under Rule 15(a) to require amendments for the sole purpose of obtaining evidentiary details that would be available through the discovery process.”<sup>75</sup> Superficially, such holdings appear to run counter to the philosophy behind the certification procedure. The cases involved, however, are clearly distinguishable from the situations in which the certification procedure

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71. The trial court's exercise of discretion is not subject to appellate review except for abuses of discretion. *Ziegler v. Akin*, 261 F.2d 88, 90 (10th Cir. 1958).

72. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971).

73. *Foman v. Davis*, 371 U.S. 178, 182 (1962) (emphasis added).

74. See notes 208-09 and accompanying text *infra*.

75. 6 WRIGHT & MILLER, *supra* note 58, § 1473, at 377 (1971) (footnote omitted).

would be appropriate. One such case, *Mahon v. Bennett*,<sup>76</sup> was a simple two-party breach of contract action where the defendant sought specific details about the contract. Where a case is thus lacking in complexity and the issues are sufficiently well defined that discovery may proceed in an orderly manner, the parties may properly be directed to seek such information through discovery. The use of either Rule 15(a) or discovery certification in such a setting would be equally inappropriate. In another case, *Galdi v. Jones*,<sup>77</sup> the Second Circuit overturned a default judgment entered upon failure of the plaintiff to comply with an order requiring very detailed particularization of the facts undergirding his claim. The court's decision was predicated on the availability of discovery. The facts in this case were more analogous in complexity to those in a case appropriate for certification, but the nature of the particularization required differed appreciably from that which would be proper in a discovery certificate. The certifying party is not required to show the facts which substantiate a claim, but rather the facts that provide some basis for believing discovery might yield evidentiary facts. As in *Mahon*, the fact that the parties in *Galdi* were correctly relegated to discovery procedures rather than granted a remedy rooted in Rule 15(a) does not imply that a Rule 15(a) based certification procedure is never appropriate.

## 2. Rule 16

Under Rule 16 the court in its discretion may direct counsel to appear at a pretrial conference to consider, in addition to specifically enumerated issues, "[s]uch other matters as may aid in the disposition of the action."<sup>78</sup> This provision has been interpreted as a source of broad discretion for the trial court;<sup>79</sup> therefore, the court is free to choose from a wide variety of mechanisms to clarify the issues and avoid unnecessary costs. In those instances where the discovery process threatens to become a source of overwhelming expense to parties brought into the action on the basis of sweeping, unspecific allegations, certification would appear to be a legitimate and useful device that could be wielded by a court in connection with a pretrial conference under the auspices of Rule 16.

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76. 6 F.R.D. 213 (W.D. Mo. 1946).

77. 141 F.2d 984 (2d Cir. 1944).

78. FED. R. CIV. P. 16.

79. 3 MOORE, *supra* note 68, ¶ 16.16 (2d ed. 1974).

The purposes of the pretrial conference have been explained by Professor Moore:

One of the prime purposes of the Federal Rules is to expedite the disposition of cases and lessen the cost of litigation. This is indicated in Rule 1. . . . The pre-trial conference under Rule 16 plays an important part in achieving this purpose. The rule establishes legal machinery whereby the court, as well as the parties, may participate in . . . the sifting of issues and evidence in actions pending before it, with the view of simplifying, shortening and possibly avoiding a trial. The chief purposes . . . are to define and simplify the issues . . . .<sup>80</sup>

Rule 16 has been seen as promoting goals very similar to those of the discovery rules,<sup>81</sup> but the objectives are not identical nor are the procedures interchangeable.<sup>82</sup> In fact, Professors Wright and Miller note that "as a result of the simplified pleading allowed under Rule 8 and the broad, frequently unstructured, discovery permitted by Rules 26 through 37, greater reliance must be placed on the pretrial hearing as the vehicle for informing the parties of precisely what is in controversy."<sup>83</sup>

Many courts have held that the pretrial conference should be conducted at the conclusion of discovery<sup>84</sup> and commentators have agreed that this is the normal practice.<sup>85</sup> In complex and protracted cases, however, pretrial conferences have been recognized as valuable tools in guiding and structuring the discovery process itself.<sup>86</sup> Indeed, the *Manual for Complex Litigation*,<sup>87</sup>

80. *Id.* ¶ 16.02, at 1105-06 (footnotes omitted).

81. See *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

82. 6 WRIGHT & MILLER, *supra* note 58, § 1528, at 615 (1971).

83. *Id.* § 1522, at 567-68 (footnote omitted).

84. See, e.g., *Commercial Ins. Co. v. Smith*, 417 F.2d 1330, 1334 (10th Cir. 1969).

85. 3 MOORE, *supra* note 68, ¶¶ 16.08, 16.16, at 1126 (2d ed. 1974) ("normally"); 6 WRIGHT & MILLER, *supra* note 58, § 1524, at 580 (1971). Wright and Miller note that three jurisdictions (Alaska, Connecticut, and Nebraska) have local rules requiring completion of discovery before pretrial. *Id.* at 580 n.50.

86. 3 MOORE, *supra* note 68, ¶ 16.08 (2d ed. 1974). See also *Leumi Financial Corp. v. Hartford Accident & Indem. Co.*, 295 F. Supp. 539, 542-43 (S.D.N.Y. 1969).

Wright and Miller note that "preliminary utilization of pretrial conferences would enable the court to define the issues and eliminate unnecessary discovery . . ." 6 WRIGHT & MILLER, *supra* note 58, § 1530, at 625 (1971) (emphasis added) (footnote omitted). In complicated cases, to be effective for these ends the pretrial narrowing of issues must precede discovery. See *Life Music, Inc. v. Broadcast Music, Inc.*, 31 F.R.D. 3, 5 (S.D.N.Y. 1962). Where the pleadings make only generalized, conclusory allegations, the impetus for very early conferences is even greater. Certification at the pretrial conference stage would help to determine whether discovery is appropriate at all by evaluating whether the plaintiff has a good faith basis for bringing the claim.

87. MANUAL FOR COMPLEX LITIGATION (rev. ed. 1977). The title was changed from *Manual for Complex and Multidistrict Litigation* to clarify that the *Manual* is recom-

which would typically be applicable in cases amenable to certification, specifically provides for the use of four pretrial conferences<sup>88</sup> as a means of controlling complex actions. The *Manual* suggests that the first such conference, known as the preliminary or scheduling conference, take place before any discovery proceedings commence to permit the court to discuss with counsel the basic issues and attempt to determine what pretrial procedures may be necessary.<sup>89</sup> As a rule, the preliminary conference will include discussion of the possibility of an early settlement<sup>90</sup> and notification to the parties that preclusion orders will issue for noncompliance with pretrial orders.<sup>91</sup>

With its recognition that flexibility is a key to discovery management, and that pretrial conferences may be modified as the judge sees fit in light of the circumstances of a particular case,<sup>92</sup> the *Manual* provides additional support for the propriety of discovery certification. The decision to issue a certification order can be viewed simply as a manifestation of the kind of flexible guidance recommended by the *Manual*. Moreover, certification can be used to complement the procedures the *Manual* outlines. But,

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mended in all civil and criminal actions and not exclusively for multidistrict litigation. *Id.* at xx.

The *Manual* defines complex litigation as "one case or two or more related cases which present unusual problems and which require extraordinary treatment, including but not limited to the cases designated as 'protracted' and 'big.'" *Id.* § 0.10, at 4. Complex or multidistrict litigation is defined by Wright and Miller as litigation "involving 'either large numbers of plaintiffs, suing in many district courts on essentially the same facts, or many complex and interrelated issues which require the evaluation of large quantities of data.'" 6 WRIGHT & MILLER, *supra* note 58, § 1530, at 626-27 (1971) (citing Comment, *Observations on the Manual for Complex and Multidistrict Litigation*, 68 MICH. L. REV. 303, 303 (1969)).

88. Each conference is structured in greater detail than is outlined in Rule 16. See MANUAL FOR COMPLEX LITIGATION §§ 0.40, 1.00, 2.00, 3.00 & 4.00 (rev. ed. 1977).

89. See *id.* § 1.10. At the first conference, timetables are set for the first wave of discovery, which is designed to disclose the names and location of witnesses whose written interrogatories or depositions may be sought and the existence, location, and custodian of documents and other physical evidence. *Id.* §§ 0.10, 1.50. Consolidation and joinder matters are also discussed. *Id.* § 1.60.

90. *Id.* § 1.21.

91. *Id.* § 1.11.

92. The *Manual* recognizes that "[a]ll of the suggested procedures are not suitable for every complex case; nor are they necessarily the best that can be devised. Judges and lawyers, therefore, are encouraged to improve them and to adapt them to the particular case being processed . . ." *Id.* at 4. "It is not intended, however, to recommend an inflexible program of holding only four principal pretrial conferences. The suggestions made herein are subject always to the discretion of each judge to deviate and *innovate* where necessary or desirable." *Id.* § 0.40, at 12 (emphasis added).

"[F]lexibility in applying the directives for pretrials is the key to effective and sensible Court administration of [Rule 16]." Pollack, *Pretrial Conferences*, 50 F.R.D. 451, 465 (1970).



since the first conference does not usually take place until at least a month or two after the action is filed, it may not come soon enough to deal with the types of problems certification is designed to handle. The filing of a certification motion, however, may alert the judge to the need for an expedited pretrial schedule and may help structure the first conference.

While the *Manual* generally tends to buttress the notion of certification,<sup>93</sup> there is one particular in which it appears to detract from it. The current *Manual's* introduction notes that some procedures suggested in its precursor, the *Handbook of Recommended Procedures for the Trial of Protracted Cases*,<sup>94</sup> are no longer encouraged. One of these is specified as the "unsound practice of staying of discovery until the issues are formed."<sup>95</sup> Although this language could be construed as an indictment of the certification procedure, its actual concern is quite different. The *Manual's* objection is directed against a wooden insistence that issues be framed before discovery can proceed. Certification is less demanding and more flexible. While it does prompt some measure of issue crystallization, its primary concern is with the imposition of unjustifiable discovery costs on an innocent party rather than with neat organization of the issues. The standards of compliance are minimal and the procedure can be tailored to stay discovery on all or merely some aspects of a case until sufficient foundational data is supplied by the plaintiff. In contrast to the problem identified by the *Manual*, it does not insist on full elaboration of issues as a prerequisite to discovery.

Use of the certification procedure to permit better court management of the discovery process through pretrial conferences may find even stronger support in the Federal Rules if the proposed amendment to add subsection (f) to Rule 26 is adopted. That amendment would allow any party to request a "discovery conference" as a matter of right at "any time after commencement of an action," provided "that counsel . . . has made a reasonable effort with opposing counsel to reach agreement on the matters set forth in the request."<sup>96</sup> The committee proposing the amendment contemplates that the discovery conference would be confined to "the exceptional case" where "early intervention by

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93. The *Manual* specifically notes that by following its suggestions a judge may "prevent abuse of discovery in complex cases by any and all parties." *MANUAL FOR COMPLEX LITIGATION* § 0.60 (rev. ed. 1977).

94. 25 F.R.D. 351 (1960).

95. *MANUAL FOR COMPLEX LITIGATION* 3 n.3 (rev. ed. 1977).

96. 1978 PROPOSED AMENDMENTS, *supra* note 6, at 7-8, 11.

the court appears preferable to a series of motions to compel or to limit discovery."<sup>97</sup> A district judge in a complex case might usefully require a plaintiff who has filed a nebulous complaint to submit a discovery certificate at an initial discovery conference to ascertain whether there is good ground for imposing the burdens of discovery.<sup>98</sup> In some cases, of course, it may be more fruitful simply to hold the conference without insisting on the formality of discovery certification. In larger cases, however, certification may prove to be a useful device to help answer threshold questions about the need for discovery in general and as to particular claims.

Some might object to the use of the pretrial conference under the present rules as a device for early control of discovery on the ground that the pretrial conference is intended to narrow the issues by encouraging agreement among the parties themselves. As expressed by the Reporter to the Supreme Court's Advisory Committee on Rules of Civil Procedure, "the proper function of pre-trial is not to club [one party] . . . into submission," but rather the emphasis is upon agreement of the parties.<sup>99</sup> The certification procedure, however, is not a means of coercion but rather a means of ascertaining that there exists a basis for subjecting a defendant to discovery and its attendant costs. This lack of coercive effect is emphasized by the very minimal factual showing required of the plaintiff. Any plaintiff who has a valid basis for believing discovery will produce necessary information would be permitted to proceed.

Although no one has yet sought discovery certification on the basis of Rule 16, there appears to be no reason why the power to convene pretrial conferences could not be interpreted as implicitly authorizing the use of certification during the initial stages of a case for the purpose of pretrial scrutiny of loosely drawn, sprawling complaints which name any number of peripheral defendants and involve complex issues of a magnitude that would inflict substantial discovery costs on the parties and the courts.

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97. *Id.* at 11.

98. *Cf. Von Poppenheim v. Portland Boxing & Wrestling Comm'n*, 442 F.2d 1047 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972) (action dismissed pursuant to Rule 41(b) because of repeated failure of plaintiff to provide court with statement of particulars from which basis for Sherman Act claim could be inferred).

99. Clark, *To an Understanding Use of Pre-Trial*, 29 F.R.D. 454, 456 (1961). *See also* J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976) (nothing in Rule 16 gives trial court power to force stipulation of facts). *Cf. Life Music, Inc. v. Edelstein*, 309 F.2d 242, 243 (2d Cir. 1962) (the court may tentatively define issues basically agreed upon by attorneys despite lack of formal assent); Renfrew, *supra* note 20, at 60 (if attorneys do not find ways to limit discovery burdens, the judiciary will).

Such a procedure would seem to be consonant with the policy of the rule and in line with the breadth of discretion which the rule confers on trial judges.

### 3. Rule 11

The propriety of a discovery certification procedure is also supported in some measure by Rule 11, which deals with the signing of pleadings. The rule states that "[t]he signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."<sup>100</sup> The rule further provides that a pleading signed with the intent to defeat the purpose of the rule may be stricken as sham and false, and in the event that the violation was willful, the attorney filing the pleading may be subjected to appropriate disciplinary action.<sup>101</sup>

Because the rule does away with the requirement of verified pleadings "[e]xcept when otherwise specifically provided by rule or statute,"<sup>102</sup> the argument might be raised that Rule 11 cuts against the legitimacy of a certification procedure, at least to the extent that certification is equivalent to verification that the complaint was filed in good faith. However, the elimination of the verification requirement was merely designed to do away with "the all too barren formality of an oath to pleadings;"<sup>103</sup> it was certainly not intended to relieve counsel of their obligation of good faith and avoidance of delay.<sup>104</sup>

Rule 11 sanctions have been invoked to deal with abuses very much like those the certification procedure is designed to handle. In *Kinee v. Abraham Lincoln Federal Savings & Loan Association*,<sup>105</sup> a group of mortgage borrowers filed actions against

100. FED. R. CIV. P. 11.

101. *Id.*

102. *Id.* Verification is specifically required by Rule 23.1 (derivative actions brought by a shareholder); Rule 27(a) (petition for the perpetuation of testimony before commencement of an action); Rule 65(b) (ex parte request for a temporary restraining order); and Rule 66 (proceedings for the appointment of the receiver impliedly require verification since verification was a standard feature of prior practice referred to by the rule). Among the major federal statutes requiring verification are the following: 8 U.S.C. § 1445(a) (1976) (petition for naturalization); 11 U.S.C. § 41(c) (1976) (petitions for voluntary and involuntary bankruptcies); 28 U.S.C. § 1446 (1970) (removal of actions from state court); 28 U.S.C. § 1734(b) (1970) (replacement of lost or destroyed court records); 28 U.S.C. § 1915 (1970) (proceedings in forma pauperis); 28 U.S.C. § 1924 (1970) (verification of bill of costs); and 28 U.S.C. § 2242 (1970) (application for writ of habeas corpus).

103. Clark, *Simplified Pleading*, 2 F.R.D. 456, 463 (1942).

104. *See id.*

105. 365 F. Supp. 975 (E.D. Pa. 1973).

some 177 mortgage-lending institutions. They alleged, *inter alia*, that the defendant institutions had conspired to eliminate interest on escrow accounts employed to collect tax and utility fees, and thereby reduce competition in the market for borrowers. The plaintiffs' attorneys had simply gone through the Philadelphia phone book and sued every individual or lending institution listed that might possibly use such accounts.<sup>106</sup> More than one-fourth of these defendants were subsequently dismissed from the case because they did not even practice the escrow method of collecting such fees. Through their dragnet approach the plaintiffs' attorneys imposed indiscriminate inconvenience, expense, and possible anxiety upon a large number of innocent parties, in effect imposing upon them the costs of winnowing out the groundless claims.

The *Kinee* court noted that when the plaintiffs' attorneys signed their pleading, they had no reasonable basis to believe that the allegations therein were true as to each defendant. At best, they were aware that within the aggregate mass of defendants sued some defendants were possibly guilty of the alleged violations. The court held that this was an abuse of process and a violation of Rule 11.<sup>107</sup> Since the pleadings asserted potentially good claims against the defendants remaining in the action, the court held that it would be inappropriate to apply the sanction of striking the pleading as a sham. Instead, the court notified the attorneys for the dismissed defendants that they could file a bill of costs for their clients' expenses to be taxed to the plaintiffs' attorneys.<sup>108</sup>

While differing in some respects from discovery certification, the procedure applied in *Kinee* is certainly suggestive of the legitimacy of the certification technique. *Kinee* recognized the problem of potential pretrial abuses whereby plaintiffs unfairly impose the costs of gathering information on innocent defendants without exerting any effort to determine whether there is good ground for the claim asserted. In dealing with this abuse, the court imposed a sanction that was not specifically provided for under the rules, but one that was well tailored to rectify the unfairness of imposing fact-gathering costs on innocent parties.

The authority of a court to strike a pleading signed in violation of Rule 11 or to impose alternative sanctions is well estab-

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106. *Id.* at 982.

107. *Id.* at 982-83.

108. *Id.* at 983.

lished,<sup>109</sup> although these measures are seldom invoked.<sup>110</sup> Pleadings have been stricken in an action where it was clear that the named plaintiff was essentially recruited by the attorney and knew little or nothing of the nature of the claim.<sup>111</sup> This suggests the significance of a plaintiff's informational basis for his allegations, albeit from a slightly different angle. Another court, after noting a litigant's obligation under Rule 11 to certify that there is good ground for a claim, has stressed the significance of particularization of issues to the management of protracted litigation.<sup>112</sup> Thus, to the extent certification is a means whereby a court can determine during early stages of litigation whether a pleading is merely a sham properly dismissible under Rule 11, certification in appropriate cases would appear to be a reasonable exercise of a court's authority to monitor the good faith of the parties and decide whether there are good grounds<sup>113</sup> for particular allegations in a complaint.

#### 4. Rule 26

In many ways, the certification procedure is closely analogous to Rule 26(c) which provides that "for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" in the discovery process.<sup>114</sup> A similar provision was originally part of Rule 30(b), but was made applicable to all discovery as part of the 1970 amendments. In addition to creating Rule 26(c), the changes included a clarification explicitly granting the court power to protect parties and witnesses against "undue burden or expense."<sup>115</sup> The rule enumerates eight types of orders that the court might choose in appropriate circumstances, including an order "that the discovery may be had only on specified terms and conditions."<sup>116</sup> Moreover, this list is not exhaustive. It certainly does not preclude the court from using

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109. See, e.g., *Freeman v. Kirby*, 27 F.R.D. 395 (S.D.N.Y. 1961); *Risinger, Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34-37 (1976).

110. *Risinger*, *supra* note 109, at 34-37.

111. *Freeman v. Kirby*, 27 F.R.D. 395, 397-99 (S.D.N.Y. 1961).

112. *Peter Kiewit Sons' Co. v. Summit Constr. Co.*, 422 F.2d 242, 271 (8th Cir. 1969) (dictum).

113. For an excellent discussion of what constitutes "good grounds" under Rule 11, see *Risinger*, *supra* note 109, at 52-61.

114. FED. R. CIV. P. 26(c).

115. Advisory Comm. Note, 48 F.R.D. 505 (1970).

116. FED. R. CIV. P. 26(c)(2).

mechanisms such as certification to the extent that they promote the policy behind the rule. Rule 26(c) thus reinforces the notion that the trial court has complete control over the discovery process and has very broad discretion to impose such restrictions or conditions as it deems necessary for the management of a particular case.<sup>117</sup>

The courts, in exercising this discretion, have been particularly conscious of the need to impose limitations on discovery in complex litigation, "where the possibility of abuse is always present."<sup>118</sup> The discovery rules require that a judge strike a balance between permitting a full inquiry through liberal discovery and protecting against its possible "harmful side effects."<sup>119</sup> In determining what is unduly burdensome the court must take into account the individual circumstances of the action before it. "[E]ven very slight inconvenience may be unreasonable if there is no occasion for the inquiry and it cannot benefit the party making it."<sup>120</sup> Certification could serve a particularly valuable role in identifying those situations in which a claim is so lacking in foundation that it would be unreasonable to allow discovery to go forward at all.

Certification can thus be viewed as an extension of the remedies available to a court under Rule 26(c). But, while certification is designed to fulfill the same basic purposes as Rule 26(c) remedies, it is intended to be exercised primarily in cases sufficiently complex to create a significant risk of discovery abuse and at a stage in the proceedings earlier than that at which Rule 26(c) normally comes into play. Certification differs from Rule 26(c) remedies in other significant respects. In contrast to certification, Rule 26(c) is structured to allow challenges only after unduly burdensome discovery has been sought by an opposing party. The courts have reinforced this arrangement,<sup>121</sup> noting that the parties

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117. 8 WRIGHT & MILLER, *supra* note 58, § 2036, at 267-68 (1970). See also *Paramount Film Distrib. Corp. v. Civic Center Theatre, Inc.*, 333 F.2d 358, 362 (10th Cir. 1964).

118. *Dolgow v. Anderson*, 53 F.R.D. 661, 664 (E.D.N.Y. 1971). See also *United States v. R.J. Reynolds Tobacco Co.*, 268 F. Supp. 769, 774 (D.N.J. 1966). But see *Waldron v. Cities Serv. Co.*, 361 F.2d 671, 673 (2d Cir. 1966), *aff'd sub nom.* *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253 (1968) (discovery proceeded over a period of nine years before the court decided that plaintiff had had "more than ample opportunities" to find evidence of his claim filed on a "hunch or suspicion").

119. 4 MOORE, *supra* note 68, ¶ 26.67, at 26-487 (2d ed. 1976).

120. 8 WRIGHT & MILLER, *supra* note 58, § 2036, at 270 (1970) (footnote omitted). See also *Waldron v. British Petroleum Co.*, 4 Fed. R. Serv. 2d 487, 488 (S.D.N.Y. 1961); *United Air Lines, Inc. v. United States*, 26 F.R.D. 213, 219 n.9 (D. Del. 1960) ("discovery has limits and . . . these limits grow more formidable as the showing of need decreases").

121. *Neonex Int'l Ltd. v. Norris Grain Co.*, 338 F. Supp. 845, 854 (S.D.N.Y. 1972).

should proceed on their own and seek court intervention "only where bad faith, annoyance, embarrassment, oppression or the like are the purpose of the examination, or other special circumstances occur."<sup>122</sup> This structural difference between certification and Rule 26(c) has particular significance with regard to the problem of equalizing the startup burdens of plaintiffs and defendants in complex antitrust litigation. Whereas the burden of showing that a discovery request is unreasonable under Rule 26 lies with the party against whom discovery is sought,<sup>123</sup> the burden of establishing the requisite threshold information for certification lies with the party seeking discovery. Finally, Rule 26(c) has simply not been applied in a manner that would allow its remedies to serve as functional equivalents for certification.<sup>124</sup> Even Rule 26(c)(2), which parallels the certification notion most closely in that it allows a court to limit the "terms and conditions" upon which discovery may be granted, has generally been applied merely to impose conditions related to the convenience of the parties in terms of time and place,<sup>125</sup> and has not been used to establish threshold informational requirements as a prerequisite for further discovery.

In summary, Rule 26(c) provides authority by analogy for certification, but the two remedies are distinct enough that Rule 26(c) could probably not be made to serve as an adequate substitute for certification in those unusually complex and nebulous cases where certification would be most salutary. Of course, once an adequate certificate is filed with the court in response to a certification order, discovery would proceed along its normal course and the panoply of sanctions and remedies established by the Federal Rules would come into play.

#### *B. Rule 83 and the Decisionmaking Power of the Court*

One of the clearest sources of authority for a discovery certification rule is found in Rule 83, which provides:

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing

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122. *Laverett v. Continental Briar Pipe Co.*, 25 F. Supp. 80, 82 (E.D.N.Y. 1938).

123. FED. R. CIV. P. 26(c).

124. As a practical matter, Rule 26(c) is infrequently used. See 1978 PROPOSED AMENDMENTS, *supra* note 6, at 35.

125. See 4 MOORE, *supra* note 68, ¶ 26.70 (2d ed. 1976); 8 WRIGHT & MILLER, *supra* note 58, § 2038 (1970). The concern with time and place convenience extends to those conditions which impose expense reimbursement requirements. See 4 MOORE, *supra* note 68, ¶ 26.77 (2d ed. 1976).

its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.<sup>126</sup>

The rule establishes two independent powers that courts may invoke to fill procedural gaps within the federal system. These two powers have been appropriately characterized as a rulemaking power and a decisionmaking power.<sup>127</sup>

The drafters of the Federal Rules were very conscious of the fact that they were creating two distinct powers under Rule 83. They anticipated that the rulemaking power would be used rather infrequently, and that it would be applied primarily to fill deliberate gaps left in the civil rules to accommodate recognized local needs.<sup>128</sup> It was not expected that rulemaking would be applied to sensitive issues of nationwide import.<sup>129</sup> In contrast to the limited role envisioned for the rulemaking power, the drafters expected much greater reliance to be placed on the decisionmaking power.<sup>130</sup> Unlike the language creating the rulemaking power, which was derived from various pre-1938 statutes,<sup>131</sup> the language establishing the decisionmaking power was new with the federal rules.<sup>132</sup> Significantly, the drafters regarded it as one of the most important additions in the new rules.<sup>133</sup> They were apparently

126. FED. R. CIV. P. 83.

127. Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1252 (1967) [hereinafter cited as *Local Federal Rules*].

128. 12 WRIGHT & MILLER, *supra* note 58, § 3152, at 218 (1973); *Local Federal Rules*, *supra* note 127, at 1253.

129. 12 WRIGHT & MILLER, *supra* note 58, § 3152, at 220 (1973).

130. *Local Federal Rules*, *supra* note 127, at 1253.

131. The language of the first sentence of Rule 83 traces its ancestry ultimately to the Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83. See *Local Federal Rules*, *supra* note 127, at 1253 & n.9. It was closely modeled upon two earlier grants of rulemaking power—a predecessor of the current 28 U.S.C. § 2071 (1970) and Equity Rule 79, 226 U.S. 673 (1912). See *Local Federal Rules*, *supra* note 127, at 1253-54 & nn.10-11.

132. *Local Federal Rules*, *supra* note 127, at 1254.

133. Commenting on this new power, a member of the Advisory Committee stated that this provision is

“one of the most important and salutary in the entire set of rules. It closes all gaps in the rules. It puts an end to the whole of the Conformity Act, and it permits judges to decide the unusual or minor procedural problems that arise in any system of jurisprudence in the light of the circumstances that surround them and of the justice of the case without the complications and injustice that must attend attempts to forecast the situations and to regulate them in advance either by general or by local rule.”

12 WRIGHT & MILLER, *supra* note 58, § 3155, at 242-43 (1973) (quoting Proceedings, Wash-



impressed by the potential for procedural flexibility afforded by this rule's allowance of case-by-case handling of unique or unforeseen problems. Within the overall system of uniformity contemplated by the new Federal Rules, Rule 83 was to serve the vital function of allocating to the good sense and sound discretion of district judges the responsibility of dealing with those situations which prospective rules could not adequately handle. Therefore, the decisionmaking power was theoretically supposed to play a much more significant role than the making of local rules. In practice, the tendency has been somewhat the opposite.<sup>134</sup> District courts have adopted a plethora of local rules,<sup>135</sup> whereas the decisionmaking power remains little known and little used.<sup>136</sup>

The discovery certification procedure can very easily be conceived of as a procedural mechanism properly deriving from a court's decisionmaking power under Rule 83. It is not a procedure which should be invoked as a matter of course, even in identifiable situations such as the large antitrust case. Rather, it is a device which is available when circumstances warrant reducing or eliminating the risk of discovery abuse. Thus, it is necessarily a creature of judicial discretion and one which must be invoked on a case-by-case basis.<sup>137</sup> The question therefore becomes whether the limitations circumscribing the scope of Rule 83 prevent the rule from serving as the basis for the discovery certification device.

Before proceeding to a discussion of this question, a methodological point must be made. Because most of the case law and scholarly analysis which has examined the scope of Rule 83 focuses on the rulemaking power, analysis of the boundaries of the decisionmaking power must necessarily rely upon analogies

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ington Institute on the Federal Rules 129 (1938) (statement of Edgar Tolman)). He further noted that overuse of the rulemaking power would tend to impair the usefulness of the final sentence of Rule 83. *Id.* This statement does not indicate how "unusual or minor" procedural problems must be before they qualify as fit subjects for the exercise of decisionmaking power, and therefore the statement does not shed much light on the scope of Rule 83. However, it does underscore the significance that the drafters attached to this provision.

134. 12 WRIGHT & MILLER, *supra* note 58, § 3155, at 243 (1973).

135. Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011, 1012 [hereinafter cited as *Local Rules Survey*].

136. *Local Federal Rules*, *supra* note 127, at 1265.

137. Because of the inherently discretionary nature of the certification device, it may be preferable to avoid formalizing it through rulemaking at the local or national level. Such rulemaking would more adequately apprise parties of the availability of the procedure, but (particularly if it went beyond merely specifying the nature of the procedure and the factors which should guide judicial discretion in deciding to invoke it) would inevitably destroy some of the flexibility which is one of the key assets of certification.

drawn from restrictions on local rulemaking. While some of the limitations developed for rulemaking may be inapplicable in the decisionmaking context, they provide the only available clues to the contours of Rule 83.

The chief limitation on the scope of Rule 83 power is that it may not be exercised in a manner inconsistent with the Federal Rules.<sup>138</sup> Broadly speaking, judicial action under Rule 83 can be "inconsistent" either in the strong sense of running flatly counter to the provisions of the rules, or in the weak sense of constituting an independent procedural norm or device in a field totally occupied by the Federal Rules. Since it is easiest to make the argument that certification is inconsistent with the rules in the weak sense (certification is obviously a novel device which operates on terrain arguably covered by the rules), we will first consider whether inconsistency in this sense is sufficient to make Rule 83 unavailable as a basis for certification.

At the outset, it must be acknowledged that there is considerable authority for the proposition that Rule 83 should not be invoked in those areas already covered by other Federal Rules. In *Hughes Brothers v. Callanan Road Improvement Co.*,<sup>139</sup> for example, the court recognized its authority under Rule 83 to regulate situations not provided for by the rules. However, it declined to use that authority to compel production of a person for the taking of a deposition on the ground that the party seeking discovery could invoke the sanctions of Rule 37(d) and thus the situation was already covered by the rules.<sup>140</sup> Similarly, many of the criticisms that have been leveled against the proliferation of local rules,<sup>141</sup> particularly those rules directed at predetermining the

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138. This limitation is expressly made applicable both to the rulemaking and decisionmaking aspects of Rule 83. See FED. R. Civ. P. 83.

It is also understood that rulemaking and decisionmaking under Rule 83 is invalid if inconsistent with the Constitution or with an act of Congress. See *Johnson v. Manhattan Ry.*, 289 U.S. 479, 503 (1933); *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635-36 (1924); *Sanders v. Russell*, 401 F.2d 241, 244 (5th Cir. 1968); 12 WRIGHT & MILLER, *supra* note 58, § 3153, at 228 & n.54 (1973). It is difficult to imagine any statutory or constitutional norms which would be violated by a district judge's decision to demand certification before allowing discovery to go forward. It might be argued that implicit in congressional creation of the antitrust laws is a mandate that courts should not impede recovery on legitimate claims by interposing procedural obstacles, and that certification is thus inconsistent with the antitrust laws. By the same token, however, Congress did not intend that the courts should be unduly permissive in granting access to that remedy. And, in any event, certification does not ultimately preclude a good faith claim.

139. 41 F.R.D. 450, 452 (S.D.N.Y. 1967).

140. *Id.* at 452-53.

141. 12 WRIGHT & MILLER, *supra* note 58, § 3152, at 223 (1973); *Local Federal Rules*, *supra* note 127, at 1259; *Local Rules Survey*, *supra* note 135, at 1012.

outcome of recurrent discovery disputes,<sup>142</sup> are in substance arguments that such local rulemaking is inconsistent in the weak sense with the overall structure of the Federal Rules. The notion is that the burgeoning number of local rules impairs the symmetry and flexibility of the federal system, encroaches upon areas that were wisely left to sound judicial discretion under the rules, and in general clutters the field within which the Federal Rules were to operate unimpeded.

While weak inconsistency sets limits on the exercise of Rule 83 power, there is good reason to believe it does not bar a certification procedure based upon Rule 83. There are many situations in which local rulemaking power has been exercised in areas covered by the Federal Rules in ways that enhance the overall operation of the federal procedural system. For example, local court rules have been used in the discovery area to maximize the extent to which the parties exercise private control of the discovery process. One widely adopted rule requires that counsel confer in good faith to resolve discovery disputes before a discovery motion will be heard.<sup>143</sup> Properly invoked, the certification procedure would have an analogous kind of ameliorative impact on the federal system.

Rule 83 has also been recognized as a basis for interstitial judicial actions which are arguably inconsistent with federal procedure in the weak sense by virtue of their proximity to matters specifically covered by particular rules, but which are important if various contingencies left open by the rules are to be properly handled. Thus, although Federal Rule 41(b) specifically covers the issue of dismissal for want of prosecution and indicates that it shall be allowed only upon the defendant's motion, it is well settled that a district court does not act in a manner "inconsistent with . . . [the] Rules" in dismissing sua sponte an action for lack of prosecution.<sup>144</sup> There are numerous examples in which courts have sustained the exercise of Rule 83 power in areas covered by other federal rules,<sup>145</sup> and there is no reason to believe that the weak inconsistency obstacle could not be surmounted by the certification procedure as well.

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142. See 12 WRIGHT & MILLER, *supra* note 58, § 3154, at 237-38 (1973); *Local Federal Rules*, *supra* note 127, at 1261-62.

143. See *United States v. Carter Prods., Inc.*, 28 F.R.D. 373, 375 (S.D.N.Y. 1961); *Local Rules Survey*, *supra* note 135, at 1048. See also 12 WRIGHT & MILLER, *supra* note 58, § 3154, at 237 (1973).

144. See *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962); *Darlington v. Studebaker-Packard Corp.*, 261 F.2d 903, 905 (7th Cir.), *cert. denied*, 359 U.S. 992 (1959); *Hicks v. Bekins Moving & Storage Co.*, 115 F.2d 406, 408-09 (9th Cir. 1940).

145. See generally *Local Rules Survey*, *supra* note 135.

At a more general level, it is significant that the principal arguments against judicial action that constitutes weak inconsistency all seem to be leveled at problems peculiar to exercise of the rulemaking power. The objections indicate a variety of concerns: that the flood of local rules tends to destroy the symmetry of the federal system, that out-of-district lawyers may be easily trapped by local procedural complications,<sup>146</sup> that some local rules are adopted without sufficiently careful consideration,<sup>147</sup> or that litigation is forced into procrustean molds without adequate sensitivity to the demands of individual cases.<sup>148</sup> But whatever force these objections may have in narrowing the scope of rulemaking power under Rule 83, they are inapplicable to decisionmaking power in general, and to the exercise of decisionmaking power to invoke a discovery certification procedure in particular. To allow a judge to demand certification in an appropriate case does not permanently introduce a formalistic rule into the procedure of a particular district; it simply gives added flexibility to the manner in which a court can efficaciously and judiciously supervise discovery in particular cases to avoid abuse.

A slightly different type of limitation on the exercise of Rule 83 power invalidates a local rule if it introduces basic procedural innovations that are so sweeping in scope that they should properly be left to the rulemaking power of the Supreme Court. While this notion has been articulated as a separate ground of invalidity, it can be thought of as a special instance of weak inconsistency since it precludes changes that, though logically consistent with the rules, amount to structural alteration of the extant procedural terrain. This limitation on Rule 83 was enunciated by the Supreme Court in *Miner v. Atlass*.<sup>149</sup> There the issue was whether district courts could authorize the taking of discovery depositions by local rule pursuant to Admiralty Rule 44, which was virtually identical to Federal Rule 83.<sup>150</sup> After rejecting the contention that district courts may never pass local rules in areas already dealt with in part by existing rules,<sup>151</sup> the Court

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146. 12 WRIGHT & MILLER, *supra* note 58, § 3152, at 219, 223 (1973).

147. See J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 133-34; 12 WRIGHT & MILLER, *supra* note 58, § 3152, at 220 (1973).

148. See sources cited note 142 *supra*.

149. 363 U.S. 641 (1960).

150. Admiralty Rule 44 provided:

In suits in admiralty in all cases not provided for by these rules or by statute, the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules.

151. 363 U.S. at 648-50. The Court stated: "[T]his Court's rules of admiralty prac-

concluded that the exercise of rulemaking authority under the particular circumstances was improper because such "basic procedural innovations [should] be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords."<sup>152</sup>

In analyzing the nature of the limits thus imposed on local rulemaking power, it is vital to understand just how radical the innovation in *Miner* was. The taking of depositions, for discovery purposes only, was a practice foreign to admiralty procedure and had in fact been one of the most significant changes introduced by the Federal Rules of Civil Procedure. Accordingly, the Court was extremely reluctant to allow such a major change to be made solely through local rulemaking. This was reinforced by the fact that admiralty has always been a field of federal jurisdiction in which "nationwide uniformity has . . . been highly esteemed."<sup>153</sup> The discovery certification procedure would be a substantially less radical departure from existing practice under the rules than was the authorization of discovery depositions in admiralty. Arguably, the procedure represents a less significant departure from prior practice than some other innovations which the *Miner* Court found permissible.<sup>154</sup> The discovery certification procedure is simply a technique which can be used within the context of the existing rules to assist a court in managing the discovery process and preventing abuse.

Turning to the question of inconsistency in the strong sense, a persuasive argument can be made that the certification procedure violates neither the spirit nor the letter of the Federal Rules. To avoid the problems of "strong" inconsistency, the certification procedure must comport with the notion of Rule 8 notice pleading and be consonant with the generally liberal discovery policies of the rules.<sup>155</sup>

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tice for the District Courts are not comprehensive codes regulating every detail of practice, and we would be slow to hold that the interstices may not be the subject of appropriate local regulation." *Id.* at 648. The Court then cataloged some examples of permissible local rulemaking. *Id.* at 649; see, e.g., note 154 *infra*.

152. *Id.* at 650.

153. *Id.*

154. *Id.* at 649 (local rule allowing a court to enter judgment on the uncontested portion of a claim prior to trial on the disputed issues described as an allowable exercise of Rule 83 power).

155. One could conceivably argue that a certification order is in effect an order to submit a more particularized pleading, that it is thus a procedural device operating in a field already regulated by Rule 8, and that it is therefore an instance of inconsistency in the weak sense. Such an argument, however, reflects a misunderstanding of the distinction between strong and weak inconsistency. Strong inconsistency will necessarily involve

There are essentially two grounds for thinking that Rule 8 and certification may be inconsistent. The first is that insistence on certification appears to circumvent Rule 8's disavowal of particularized pleadings. By requiring some factual specificity during the early phase of litigation, certification appears to run directly counter to the lax standards of notice pleading, and thereby to collide with the mandate implicit in the Federal Rules that once a pleading has met those standards, further factual elaboration is to be obtained through discovery.<sup>156</sup> The second possible ground for inconsistency derives from the fact that Rule 8 must be read in conjunction with Rule 12(e), which allows a party to bring a motion for a more definite statement. Originally, Rule 12(e) authorized a motion for a bill of particulars, but this provision was deleted by an amendment in 1948. Certification might be objectionable, then, because it appears to reintroduce the old bill of particulars that was expressly eliminated from the Federal Rules. These potential sources of inconsistency will be discussed in order.

Rule 8 provides that pleadings need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief";<sup>157</sup> that "[n]o technical forms of pleading . . . are required";<sup>158</sup> and that "[a]ll pleadings shall be so construed as to do substantial justice."<sup>159</sup> It was designed to "'discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement.'"<sup>160</sup> Numerous decisions have held that it is inappropriate to require higher standards for pleadings in special types of cases, including antitrust cases.<sup>161</sup>

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procedural innovation in an area already covered by the rules but, unlike weak inconsistency, it involves not merely adding a new norm or device to the rules, but adding something that is contrary to their explicit or implicit mandate. Moreover, while there is some analogy between a discovery certificate and a particularized pleading, it is more conceptually useful to think of the certificate as a procedural device intermediate between pleading and discovery but distinct from both. See notes 58-59 and accompanying text *supra*.

156. See *Nagler v. Admiral Corp.*, 248 F.2d 319, 322-23 (2d Cir. 1957) (Clark, C.J.); *Package Closure Corp. v. Sealright Co.*, 141 F.2d 972, 978-79 (2d Cir. 1944).

157. FED. R. CIV. P. 8(a)(2).

158. FED. R. CIV. P. 8(e)(1).

159. FED. R. CIV. P. 8(f).

160. 5 WRIGHT & MILLER, *supra* note 58, § 1201, at 58 n.11 (1969) (quoting Advisory Committee's 1955 Report, Note on Rule 8(a)(2)).

161. *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 554 (2d Cir. 1977); *Quality Mercury, Inc. v. Ford Motor Co.*, 542 F.2d 466, 472 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1089-90

In order to see why these considerations do not preclude basing a certification procedure on Rule 83, a number of points must be made. At the outset, it must be remembered that a discovery certificate is not merely a kind of particularized pleading, but rather, a hybrid procedure intermediate between pleading and discovery.<sup>162</sup> A number of consequences flow from the recognition of the intermediate status of the certification procedure. At the very least, this recognition makes it clear that certification is not the type of technical pleading done away with by Rule 8(e)(1). More importantly, it emphasizes that the certification process is not concerned with the "mere form of statement."<sup>163</sup> Certification is essentially a holding measure that will ultimately "prevent a party from having a trial"<sup>164</sup> only if the party is utterly unable to provide information from which a judge could reasonably infer that there is good ground to allow discovery to go forward. Unlike the special pleading practices Rule 8 was designed to eliminate, certification does not create the risk that a party's claim may be lost as a result of a technical misstep in verbal jousting. And whereas experience with special pleading rules showed that they tended to interpose delays without yielding any compensating informational gains,<sup>165</sup> certification is as likely to hasten as to delay trial on the merits. While it may postpone the onset of discovery, it compels sharper formulation of the issues and thereby expedites handling of the particular case once the certificate is submitted. Moreover, it creates systemwide incentives for better and earlier focusing of issues that should result in a net efficiency gain for the entire system.

In addition to recognizing that the certification procedure is distinguishable in significant ways from antiquated "special pleadings," it is important to remember that some degree of fac-

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(9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977); *Control Data Corp. v. IBM*, 421 F.2d 323, 326 (8th Cir. 1970); *New Home Appliance Center, Inc. v. Thompson*, 250 F.2d 881, 883 (10th Cir. 1957); *Nagler v. Admiral Corp.*, 248 F.2d 319, 322-24 (2d Cir. 1957); *Broyer v. B.F. Goodrich Co.*, 415 F. Supp. 193, 194 (E.D. Pa. 1976); see Clark, *Special Pleading in the "Big Case"*, 21 F.R.D. 45, 48 (1957). *Cf. Fulton Co. v. Beaird-Poulan, Inc.*, 54 F.R.D. 604, 609 (N.D. Miss. 1972) (antitrust action complaint must state a claim for relief with clarity but need not set forth a detailed history of the parties' relations or include details of an evidentiary nature, conclusory allegations, or analogous references); *Karlinsky v. New York Racing Ass'n, Inc.*, 310 F. Supp. 937, 940 (S.D.N.Y. 1970) (in an antitrust suit "that involves difficult questions of fact and law, as well as public issues, it is absolutely necessary that [the action] commence with a complaint that is in fact a short, plain and concise statement of the material facts").

162. See notes 58-59 and accompanying text *supra*.

163. See *Nagler v. Admiral Corp.*, 248 F.2d 319, 324 (2d Cir. 1957).

164. *Id.*

165. See *id.* at 322-25 & n.3; Clark, *supra* note 161, at 54.

tual specificity is required even under the liberalized pleading policies of Rule 8. A party is still required "to disclose adequate information regarding the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it."<sup>166</sup> The leading Supreme Court pronouncement on the pleading standard imposed by Rule 8 states that a pleading must give the opposing party "fair notice of what the plaintiff's claim is and the grounds upon which it rests."<sup>167</sup> What constitutes "fair notice" may of course vary with the complexity of a case. As stated by the court in *Kirihara v. Bendix Corp.*,<sup>168</sup> "in potentially complex cases, particularly in cases involving violations of the antitrust laws, the plaintiff should go beyond the 'short' requirements of Rule 8 if necessary to present a 'plain,' i.e., understandable and factual statement of the alleged antitrust violations."<sup>169</sup> A bare statement of conspiracy or injury under the antitrust laws without any supporting facts is insufficient.<sup>170</sup> Viewed in this light, the demands of discovery certification appear to be consistent with the minimal "fair notice" requirement of Rule 8.

The preceding considerations explain to a large extent why cases holding that special pleading standards should not be required in particular fields of litigation do not imply that discovery certification is inconsistent with the Federal Rules. Generally, these cases examine the issue of the appropriateness of special pleading requirements in the context of a motion to dismiss.<sup>171</sup> Subjecting a party to a sanction this draconian for failure to comply with a heightened standard of pleading conjures up memories of all the horrors of outmoded pleading practices. But certification carries no such stigma because it is not a pleading device at all.<sup>172</sup> In addition, certification is likely to advance rather than inhibit the resolution of disputed issues on the merits by clarify-

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166. 5 WRIGHT & MILLER, *supra* note 58, § 1202, at 64 (1969).

167. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

168. 306 F. Supp. 72 (D. Hawaii 1969).

169. *Id.* at 76.

170. *Heart Disease Research Foundation v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972).

171. *See, e.g.*, *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551 (2d Cir. 1977); *Quality Mercury, Inc. v. Ford Motor Co.*, 542 F.2d 466 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977); *New Home Appliance Center, Inc. v. Thompson*, 250 F.2d 881 (10th Cir. 1957); *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957); *Broyer v. B.F. Goodrich Co.*, 415 F. Supp. 193 (E.D. Pa. 1976); *Fulton Co. v. Beard-Poulan, Inc.*, 54 F.R.D. 604 (N.D. Miss. 1972); *Karlinsky v. New York Racing Ass'n, Inc.*, 310 F. Supp. 937 (S.D.N.Y. 1970).

172. *See* notes 58-59 and accompanying text *supra*.



ing what those issues are. Furthermore, a certification order's demand for more particularized information should not be conceived of as creating de facto a heightened standard of specificity in factual allegations. Rather, it should be understood as a recognition that the uniform standard of fair notice may demand greater specificity in an unusually complex case than in conventional litigation.

The second possible source of inconsistency stems from the seeming similarity of certification with the long-since jettisoned motion for a bill of particulars under Rule 12(e). Prior to 1948, Rule 12(e) allowed such a motion to be addressed to any matter that was not averred with sufficient definiteness or particularity to enable the moving party to draft a responsive pleading or prepare for trial.<sup>173</sup> This portion of Rule 12(e) was dropped after it became apparent that the availability of this motion created needless uncertainty as to the standard of "plainness" required by Rule 8. Additionally, a bill of particulars was not as effective a means of compelling disclosure of evidence as discovery.<sup>174</sup> While both certification and the former motion for a bill of particulars demand that a party who has filed a nebulous complaint provide additional information to assist the opposing party in comprehending the nature of the claim lodged against him, the two procedures are distinguishable in important respects. Certification is available in a much narrower range of cases than the old bill of particulars. Whereas a bill could be requested whenever a matter was not averred with sufficient definiteness or particularity, certification is proper in only a limited number of complex cases where substantial risks of discovery abuse justify the imposition of some restraints. Thus, the kind of systemwide uncertainty as to when a pleading was sufficiently definite to withstand a motion for a bill of particulars<sup>175</sup> is unlikely to result from certification. For a similar reason, the decision to order certification has a rather different focus than the decision to require a bill of particulars. In the latter, the emphasis is on eliciting facts that will clarify the *nature* of the dispute; whereas in the former, the focus is on determining the *existence* of a genuine dispute before allowing the process of discovery to go forward. This difference is important because it reduces the likelihood that claims will be dismissed on grounds unrelated to the merits (*i.e.*, nuisance value

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173. 5 WRIGHT & MILLER, *supra* note 58, § 1203, at 67 (1969).

174. *See id.* at 67-70.

175. *See id.* at 67-68.

settlements). Furthermore, because the Rule 12(e) motion for a bill of particulars examined the sufficiency of a pleading in the context of a motion to dismiss, the granting of such motions inevitably created greater tensions with Rule 8 than the issuance of a certification order. In sum, because of the pliability of the certification device, it is capable of fulfilling the particularizing aims of the old Rule 12(e) device without creating the problems that led to its demise.

Since certification's strong inconsistency with modern pleading rules is more apparent than real, the only remaining question is its possible inconsistency with the liberality of the discovery rules. No one would maintain that the discovery rules are to be construed with such liberality that they create a license to impose unlimited factfinding expenditures on an adversary. The rules themselves provide for protective orders and similar devices designed to prevent such abuses.<sup>176</sup> Certification is merely a technique a court can use to prevent the unjustifiable imposition of analogous costs at a stage in litigation too early for normal discovery remedies to come into play. Thus, far from being inconsistent with liberal discovery policies, certification would help to fine-tune the balance already inherent in the Federal Rules between open access to information and fairness in allocating discovery burdens. Moreover, it must be remembered that the certification procedure will not permanently forestall discovery so long as the plaintiff is in a position to meet the minimal informational threshold of the certification requirement.

There thus appear to be good grounds to believe that certification is not inconsistent in the strong sense with the liberality of the discovery rules. This is particularly true in light of the emerging tendency for judges to take a tougher stand in administering discovery to prevent abuses.<sup>177</sup> Far from being inconsistent with the discovery scheme of the Federal Rules, the discovery certification device, if used sensitively, can enhance the fairness of the overall discovery system. It can ease the process of clarifying issues in complex cases, thereby facilitating the management of the discovery process and encouraging resolution of disputes on the merits. It is a procedural device substantially less harsh in its effect than many of the rules or decisions that have been laid

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176. See, e.g., FED. R. CIV. P. 26(c). See also notes 114-25 and accompanying text *supra*.

177. Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1044-45 (1978). See also *SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp.*, 72 F.R.D. 110, 112 (N.D. Tex. 1976).

down pursuant to Rule 83,<sup>178</sup> and constitutes an arguably less significant divergence from the overall federal rule system than many other changes made pursuant to Rule 83 that have been sustained.<sup>179</sup> Rule 83, then, constitutes another basis upon which a district court could issue a certification order.

*C. The Inherent Power of a Court to Control the Proceedings Before It*

Even if there were not a sufficient basis for certification in the Federal Rules, there is strong reason to conclude that a court would be authorized to invoke such a procedure in appropriate cases by the use of its inherent power over its processes.<sup>180</sup> It has been understood for centuries that once a court is vested with jurisdiction, it necessarily acquires "judicial power commensurate with the jurisdiction conferred."<sup>181</sup> All courts, federal and state, have a broad and inherent power "over their own process, to prevent abuse, oppression and injustice."<sup>182</sup> This power is "as extensive and efficient as may be required by the necessity for . . . [its] exercise,"<sup>183</sup> and embraces a court's jurisdiction to control its proceedings and the persons who come before it or affect its dealings.<sup>184</sup> This power is typically referred to as "inherent

178. See, e.g., *Link v. Wabash R.R.*, 370 U.S. 626 (1962) (involuntary dismissal for failure of counsel to appear at a pretrial conference).

179. See *Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce*, 360 F.2d 103, 107-10 (2d Cir.), cert. denied, 385 U.S. 931 (1966) (providing a method for service on a foreign government); *Hare v. Family Publications Serv., Inc.*, 342 F. Supp. 678, 686 (D. Md. 1972) (Rule 83 invoked to justify court order requiring amendment of a complaint that failed to use separate counts as required by Rule 10(b)). Despite Rule 83's proscription of local rules inconsistent with the Federal Rules, there are many local rules in force which appear to be in direct conflict with the general rules. The clearest examples are found in the rules of the First Circuit, adopted pursuant to Federal Rule of Appellate Procedure 47, which parallels Rule 83. Several of those circuit rules state that the local rule is to be followed "notwithstanding the provisions of" specified Federal Rules of Appellate Procedure. E.g., 1ST CIR. R. 8, 11(c). See 12 WRIGHT & MILLER, *supra* note 58, § 3152, at 219 & n.21 (1973). Many of these rules remain in force merely because counsel are reluctant to challenge them and it would seldom be the case that their application would result in reversible error. *Id.* at 219; *Local Federal Rules*, *supra* note 127, at 1263-64.

180. The *Mountain View* court relied upon the inherent power notion as one basis for its decision to issue a certification order in that case. See *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (D. Utah, Jan. 18, 1978) (judge's letter to all counsel).

181. 1 MOORE, *supra* note 68, ¶ .60[6], at 633 (2d ed. 1977).

182. *Gumbel v. Pitkin*, 124 U.S. 131, 146 (1888); see 1 MOORE, *supra* note 68, ¶ .60[6], at 634 (2d ed. 1977).

183. *Gumbel v. Pitkin*, 124 U.S. 131, 146 (1888).

184. Gold, *Controlling Procedural Abuses: The Role of Costs and Inherent Judicial Authority*, 9 OTTAWA L. REV. 44, 74 (1977).

jurisdiction"<sup>185</sup> or "incidental jurisdiction."<sup>186</sup> As one author has stated, "[i]t is an overriding, supervisory jurisdiction, enabling the court to do what it must to maintain itself, its dignity, and its powers free from abuse by those who would enlist its auspices for purposes inconsistent with its own institutional interests and goals."<sup>187</sup>

Because discovery certification is such a new device, there is of course no direct precedent for employing a court's inherent jurisdiction in this manner. However, there are numerous situations in which a court's inherent power has been applied to remedy abuses analogous to those which may arise in the discovery context. For example, it is well settled that a court has power to dismiss a claim shown to be fictitious, a sham,<sup>188</sup> or frivolous.<sup>189</sup> Similarly, it is generally understood that a court may dismiss vexatious litigation.<sup>190</sup> Of course, it is seldom clear at the outset of an antitrust action whether some or all of the claims brought against a particular defendant are fictitious or are brought merely to escalate the litigation burden faced by a defendant, thus increasing settlement leverage with what is merely a vexatious claim. However, if a court has inherent jurisdiction to dismiss a claim which is fictitious, frivolous, or vexatious, there would seem to be no reason why a court could not stay discovery long enough to allow the plaintiff to certify as to facts that would show he is making a good faith claim. After all, a court has inherent power to stay actions pending before it,<sup>191</sup> and there is likewise authority

185. *Id.*

186. 21 C.J.S. *Courts* § 88 (1940). Gold, *supra* note 184, at 74 n.169. Inherent jurisdiction is the

"reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to insure the observance of the due process of law, to prevent improper vexation or oppression, and to do justice between the parties and to secure a fair trial between them."

*Id.* at 74 (quoting Jacob, *The Inherent Jurisdiction of the Court*, 23 CURRENT LEGAL PROB. 23, 51 (1970)).

187. Gold, *supra* note 184, at 74.

188. *See, e.g., Cunha v. Anglo Cal. Nat'l Bank*, 34 Cal. App. 2d 383, 93 P.2d 572 (1939) and cases cited therein. In *Cunha*, the case was dismissed after the plaintiff was given repeated opportunities to rebut affidavits filed by the defendants which refuted his claims.

189. *See, e.g., O'Connell v. Mason*, 132 F. 245, 247 (1st Cir. 1904).

190. *Patterson v. Northern Trust Co.*, 286 Ill. 564, 122 N.E. 55 (1919) (successive suits by beneficiary against trustee); *Scarcia v. United States Gypsum Co.*, 164 Misc. 825, 1 N.Y.S.2d 358 (1937); *see Cunha v. Anglo Cal. Nat'l Bank*, 34 Cal. App. 2d 383, 93 P.2d 572 (1939).

191. *Landis v. North Am. Co.*, 299 U.S. 248 (1936).

for the proposition that a court has jurisdiction "to control its own process and proceedings [so] as not to produce hardship."<sup>192</sup>

Of particular relevance to the certification issue is the general principle that a court possesses inherent jurisdiction to stay or dismiss proceedings in order to control and prevent abuse of its orders, processes, and procedures.<sup>193</sup> Two older cases exemplify the litigation in this area and have strong relevance to discovery abuses in the antitrust setting. *Stewart v. Butler*<sup>194</sup> involved an ejectment action brought by a purported heir who hoped to induce defendants "to buy their peace, rather than submit to vexatious and expensive litigation."<sup>195</sup> The plaintiff had a history of bringing actions against the heirs of wealthy individuals, claiming that he was an heir and had been deprived of his inheritance. In *Stewart*, the action was dismissed when it became clear the plaintiff was unable to overcome charges that he had "brought the action in bad faith and as a mere blackmailing scheme."<sup>196</sup> *Houston v. City of San Francisco*<sup>197</sup> dealt with settlement extortion on a grander scale. In that case, a plaintiff brought an action which named the city and county of San Francisco along with approximately 15,000 residents as defendants. The plaintiff claimed to be the rightful owner of a tract of land covering a large part of the city and county, yet he made no effort to take the case to court, where it would have suffered a speedy demise. Instead, he approached unsuspecting land owners with his claim, which was obviously designed to create doubt and uneasiness concerning the validity of titles, and offered to release his claim for a modest sum. Justice Field, in describing the facts, indicated that it was "notorious that . . . payment was obtained in a multitude of instances."<sup>198</sup> Noting that this type of scheme was a blatant "means of extorting moneys from the rightful possessors of the property" and amounted to "little less than . . . robbery,"<sup>199</sup> Justice Field promptly dismissed the case.

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192. *Ownbey v. Morgan*, 256 U.S. 94, 110 (1921).

193. Gold, *supra* note 184, at 76. See, e.g., *Bloniarz v. Roloson*, 70 Cal. 2d 143, 146, 449 P.2d 221, 223, 74 Cal. Rptr. 285, 287 (1969); *Arc Inv. Co. v. Tiffith*, 164 Cal. App. 2d Supp. 853, 330 P.2d 305 (1958); *State ex rel. Dillman v. Tedder*, 123 Fla. 188, 199, 166 So. 590, 595 (1936); *Ray v. Williams*, 55 Fla. 723, 724, 46 So. 158, 159 (1908); *Mahaffey v. State*, 87 Idaho 228, 232, 392 P.2d 279, 281 (1964).

194. 27 Misc. 708, 59 N.Y.S. 573 (1899).

195. *Id.* at 713, 59 N.Y.S. at 577.

196. *Id.*

197. 47 F. 337 (C.C.D. Cal. 1891) (Field, J.).

198. *Id.* at 339.

199. *Id.* at 340.

To the extent that the threat of discovery in a modern anti-trust action may become a form of "legalized blackmail," it seems clear under the above cases that a court has inherent jurisdiction to invoke whatever procedures it deems necessary to avoid such abuse. The inherent jurisdiction of a court—which is the ultimate foundation of the contempt power,<sup>200</sup> is arguably sufficient to justify imposition of fines on negligent attorneys,<sup>201</sup> and supports the dismissal of spurious actions<sup>202</sup>—should certainly be broad enough to allow a district judge to require certification when he deems it necessary. Certification is tough enough to help ferret out bad faith claims before heavy discovery costs and nuisance value settlements result, and yet sensitive enough to do so without permanently prejudicing viable claims.

#### IV. IMPLEMENTATION OF THE CERTIFICATION PROCEDURE

Having established that federal courts have ample authority to condition the availability of discovery on compliance with a certification order, it remains to analyze the factors which should operate to limit judicial discretion in invoking the procedure. Finally, we will examine the sanctions which could be invoked if a certification order were ignored.

##### A. *Limiting the Scope of Certification*

Analysis of the various possible bases of authority for discovery certification has already established that there are some built-in limits on the legitimate exercise of the certification device. Primarily, these limitations derive from the fact that certification in certain contexts could be inconsistent with the procedural regime of the Federal Rules. As implied by the discussion of Rule 83, issuance of a certification order pursuant to that rule would generally be inappropriate except in cases where the risk of discovery abuse was high, since in the ordinary case it would impair a plaintiff's right to liberal discovery once a pleading that passed muster under Rule 8 had been filed.<sup>203</sup> Similarly, a court would contravene the liberal amendment policy of Rule 15 if it conditioned grant of leave to amend on compliance with a certifi-

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200. Gold, *supra* note 184, at 76.

201. See Note, *Civil Procedure—Power of Federal Courts to Discipline Attorneys for Delay in Pre-trial Procedure*, 38 NOTRE DAME LAW. 158 (1962). But see *Gamble v. Pope & Talbot, Inc.*, 307 F.2d 729 (3d Cir. 1962), *cert. denied*, 371 U.S. 888 (1962).

202. See notes 188-92 and accompanying text *supra*.

203. See notes 155-72 and accompanying text *supra*.

cation order in circumstances where there were no grounds for denial of leave.<sup>204</sup> In general, the certification remedy should be available only where there is some basis in the rules for its exercise, and application of the certification procedure in contravention of this threshold condition would constitute a clear abuse of discretion.

Even after determining that the above inherent limits on certification power have not been exceeded, however, the judge must decide whether to exercise his discretion to invoke certification in a particular case. The central issue in this regard is whether the potential for discovery abuse in the case is sufficiently great to justify overriding the normal assumption that discovery should be allowed to proceed. As a practical matter, a court must decide whether plaintiff's fears that certification would cause needless delay and impose unfair obstacles on the acquisition of information exclusively in the possession of the defendant are outweighed by risks of settlement extortion and related abuses. Analysis of these considerations will help assuage plaintiff concerns and identify the factors that should guide judicial discretion in determining whether to require certification. From a plaintiff's perspective, certification appears as simply one more potential postponement in what is already an inevitably protracted proceeding. But any delay caused by certification in an action involving a bona fide claim can be eliminated if the plaintiff simply drafts a complaint with sufficient specificity to meet the certification challenge before it arises. Of course, if a nebulous claim lacks foundation, a plaintiff can hardly argue that he is prejudiced by delay. Moreover, a plaintiff cannot very well maintain that expenditure of effort on its part to pinpoint each party's involvement constitutes an undue burden when plaintiff's costs are compared with the tremendous expenses that must otherwise be borne by each of the defendants. And, of course, if the request for certification were found to be groundless, the defendant could be appropriately sanctioned.<sup>205</sup> To the extent that certification in a complex case helps focus the issues, it may actually facilitate rather than delay prompt resolution of disputed issues. And even if certification does not speed the case of the particular plaintiff, there is good reason to think it will expedite the processing of complex litigation in general, thereby benefiting the courts, other litigants seeking places on crowded calendars, and the public at large.

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204. See notes 70-74 and accompanying text *supra*.

205. See note 56 and accompanying text *supra*.

Perhaps the deepest concern from a plaintiff's standpoint is that in the process of alleviating risks of discovery abuse, certification will provide defendants with a veil behind which damaging information might remain concealed. There are two distinct dimensions of the problem of potential concealment. The first involves the risk of placing the plaintiff in a "Catch-22" situation—requiring plaintiff to adduce additional information to justify its claim before allowing discovery to proceed, while depriving it of the means to gain such information.<sup>206</sup> The second involves the risk that forcing the plaintiff to telegraph how much it already knows about a claim may simultaneously indicate how little it knows, thereby allowing a defendant the opportunity to secrete or destroy damaging information of which the plaintiff has no inkling.

Of the two concealment issues, the second is probably less serious as a practical matter. The disclosure by plaintiff of the facts in his possession might well deprive him of a certain tactical advantage. However, since elimination of surprise at trial is one of the main purposes of discovery,<sup>207</sup> it would be inconsistent for the plaintiff to argue that he should be allowed to go forward with discovery so that he may keep defendant from learning just "how much" he "knows." He must therefore rely on the contention that disclosure of facts in his possession would invite the defendants to engage in the destruction of documents and obfuscation of the discovery process.

Disclosure, however, would be unlikely to have this result. First, the disclosure of enough facts to satisfy a certification procedure does not necessarily mean that the plaintiff has disclosed all of the facts within its possession. Accordingly, certification does not put the defendant in a position to second-guess the extent of the plaintiff's knowledge. Second, the destruction of any documents or the withholding of information sought in discovery is a dangerous tactic. It is extremely difficult to insure that the other party will never learn about such destruction or retention through copies, memoranda that refer to such documents, or even the testimony of individuals who knew the documents existed or participated in their destruction or withholding. Any possible damage that could be inflicted by sensitive documents is greatly outweighed by the prejudice done to the whole case by the revela-

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206. Cf. Withrow & Larm, *supra* note 13, at 27 (referring to the difficulty of determining the extent to which issue definition should precede extensive discovery as a "chicken and egg" problem).

207. 8 WRIGHT & MILLER, *supra* note 58, § 2001, at 17 & n.16 (1970).



tion of an attempt to suppress such information. In the post-Watergate era, disapproval of attorneys who take ethical sabbaticals and the public's inherent suspicion of large organizations demand that a corporation be extremely circumspect with its document retention policies and that it be as liberal as possible in the production of documents. Finally, the slow but steady hand of a state bar disciplinary committee is always looming in the background in the form of actions directed against attorneys implicated in document destruction or discovery obfuscation.<sup>208</sup>

The most difficult problem in structuring an evenhanded certification procedure is striking a proper balance between the need to keep the doors of the judicial process open to plaintiffs with meritorious claims and closing those doors to those who exploit the present system to extort nuisance value settlements. Achievement of such a balance necessarily depends upon the sound exercise of judicial discretion on a case-by-case basis, but certain factors may be identified to help guide such discretion.

As has been stressed throughout this Article, the certification device should be invoked only in a narrow range of complex cases. Generally, it would only be appropriate in those involving a significant number of parties and particularly nebulous allegations. Certification is perhaps most likely to be appropriate in complex cases where the initial pleadings are devoid of any allegations actually tying each defendant into the claims averred. In addition, a judge should consider the relative intrusiveness of potential discovery. Where a claim is likely to spawn discovery requests that will send a dragnet through a defendant's business records and disrupt normal operations, there is a stronger call for certification than where a claim is made with sufficient specificity that discovery requests can be more narrowly confined. A closely related factor is the extent of the disproportion between the likely cost of early discovery to the respective parties. Still another factor is the availability of pertinent information to the plaintiff without discovery. A plaintiff should not be allowed to search indiscriminately through all the information in the defendant's possession when it has access to information which might narrow the scope of its claim, thereby narrowing the range of needed discovery, and lessening the burden on the defendant.

Vague conspiracy allegations pose a particularly sensitive problem which a viable certification procedure must be able to

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208. A lawyer would be subject to disciplinary action, for example, for concealing or knowingly failing to disclose "that which he is required by law to reveal." ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(3).

handle. Because of the very nature of the covert activity involved, discovery may be the only means of obtaining particulars to support the allegations. Often facts sufficient to establish a conspiracy claim crystalize only after bits of circumstantial evidence are distilled from information obtained by extensive discovery. In a somewhat analogous context, Professors Areeda and Turner caution against early foreclosure of discovery.<sup>209</sup> On the other hand, the conspiracy count in an antitrust case is all too often merely a stretch of boilerplate language thrown into a pleading as a catch-all. Allowing plaintiffs to bootstrap their way into extensive discovery on the basis of conclusory conspiracy allegations may thus be tantamount to tolerating discovery abuse.

The *Portland Retail Druggists*<sup>210</sup> case suggests that the certification procedure is flexible enough to deal with this problem. There the effect of the certification order was to stay discovery on the conspiracy claims while allowing discovery to go forward on the substantive antitrust issues. Generally, if the conspiracy existed at all, discovery on substantive issues would be sufficient to turn up either proof of conspiracy or information which would suffice for compliance with a certification order. Used in this manner, certification may constitute a useful discovery ordering technique. A court may allow a plaintiff to "pry open the crypt" in search of suspected conspiratorial conduct as soon as it can certify at least some hint of the corpse.

By scrupulously balancing the risks of delay and concealment against the potential for abuse, judicial discretion can steer a sound middle course between the Scylla of undue discovery limitations on plaintiffs and the Charybdis of spiraling discovery burdens on innocent defendants. If used with appropriate restraint, the certification device promises to be a balanced and sensitive device for eliminating blatant forms of discovery abuse in complex cases.

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209. In discussing the hesitancy with which a judge should approach granting summary judgment, Professors Areeda and Turner note

that early disposition might prematurely save the defendant from the exposure of his wrong. Many of the key facts are peculiarly within the defendant's knowledge. The existence of a conspiracy, for example, will be hidden from the world; knowledge can be expected to replace conjecture only after discovery. . . . And motive or intent can only be speculated about in advance of discovery or trial.

2 P. AREEDA & D. TURNER, ANTITRUST LAW § 316, at 60 (1978).

210. *Portland Retail Druggists Ass'n v. Abbott Laboratories*, No. 71-543 (D. Ore., filed Aug. 6, 1971); see notes 40-41 and accompanying text *supra*.

### B. Sanctions

In the last analysis, certification can be expected to have a salutary effect on the pretrial process only if the sanctions behind it are strong enough to induce compliance and deter the types of abuses it is designed to curtail. Generally, one would expect that the mere fact a party cannot proceed with discovery until the certification process is completed would be sufficient inducement for compliance. In difficult cases, however, more stringent sanctions such as involuntary dismissal and imposition of costs and attorneys' fees may be necessary. These constitute basic mechanisms with which the court may fashion a full range of measures to deal with noncompliance. Therefore, it will be useful to examine the sources of authority for these sanctions before proceeding to outline the ways in which a judge might match sanctions with types of noncompliance.

#### 1. Involuntary dismissal

The conditions governing involuntary dismissals are spelled out in Rule 41(b), which provides that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."<sup>211</sup> Because of the severity of the dismissal sanction, case law makes it clear that Rule 41(b) should be applied very sparingly.<sup>212</sup> At the same time, there is authority that, despite the language of the rule, involuntary dismissal may be ordered on the court's own motion.<sup>213</sup>

While there are numerous cases in which actions have been dismissed pursuant to Rule 41(b) for failure to comply with orders analogous to certification orders,<sup>214</sup> the ultimate availability of a Rule 41(b) dismissal as a sanction in such situations is adequately displayed in *Von Poppenheim v. Portland Boxing & Wrestling*

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211. FED. R. CIV. P. 41(b).

212. *J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318, 1324-25 (7th Cir. 1976); *Von Poppenheim v. Portland Boxing & Wrestling Comm'n*, 442 F.2d 1047, 1053 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972).

213. *Link v. Wabash R.R.*, 370 U.S. 626, 629-33 (1962); *Darlington v. Studebaker-Packard Corp.*, 261 F.2d 903,905 (7th Cir.), *cert. denied*, 359 U.S. 992 (1959); *Hicks v. Bekins Moving & Storage Co.*, 115 F.2d 406, 408-09 (9th Cir. 1940).

214. *See, e.g., Fendler v. Westgate-California Corp.*, 527 F.2d 1168 (9th Cir. 1975) (dismissed for failure to limit, as ordered, third amended complaint to explicitly stated claims so as to clarify the nature of the action); *Package Mach. Co. v. Hayssen Mfg. Co.*, 266 F.2d 56 (7th Cir. 1959) (dismissed for failure to furnish more specific statement of trade secrets allegedly pirated by defendants).

*Commission*.<sup>215</sup> A professional wrestler brought an antitrust action alleging that the Portland Boxing & Wrestling Commission and various other defendants had conspired to restrain trade in the wrestling business. Approximately fourteen months after the action was originally filed, the district judge requested the plaintiff to submit a detailed pretrial statement to help clarify the issues.<sup>216</sup> In particular, the court wanted a statement identifying with specificity what the conspiracy consisted of, a statement of expected testimony, and a description of the role the various parties had played in the alleged conspiracy.<sup>217</sup> After more than a year of patient extensions and the submission of three statements that failed to comply with the request, the judge finally granted the defendant's motion to dismiss under Rule 41(b).<sup>218</sup> In explaining this decision, the judge stated he had given the plaintiff ample warning and "'could not allow an antitrust case to continue when it was based solely on suspicion.'"<sup>219</sup>

*Von Poppenheim* provides support by analogy for the proposition that Rule 41(b) dismissal is appropriate where there has been repeated noncompliance with a certification order. Admittedly, the case is distinguishable from the typical situation in which certification would be invoked, since the orders occurred at a later stage of the proceeding than would be the case with a certification order and discovery was never stayed. In *Von Poppenheim* dismissal was arguably more justified because the plaintiff, through discovery, at least had access to the information required for the pretrial statement, if such information existed at all, whereas a certification order may completely preclude a party from seeking information through discovery channels pending adequate certification. But it must be remembered that the quantum of information required in an adequate certificate is really quite small. A plaintiff may comply with a certification order merely by establishing that there is no way to get access to certain information short of discovery.<sup>220</sup> The certifica-

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215. 442 F.2d 1047 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972).

216. *Id.* at 1049.

217. *Id.* at 1050.

218. *Id.* at 1051.

219. *Id.* at 1052 (quoting the district court order).

One of the interesting points about the Ninth Circuit's affirmance of *Von Poppenheim* is its suggestion that "less drastic alternatives should first be considered before dismissing an action under Rule 41(b)." *Id.* at 1053. See also *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1338-39 (9th Cir. 1970). Significantly, certification would constitute just such a "less drastic alternative" in many cases, since it can normally induce party compliance without relying on the austere dismissal sanction.

220. See notes 51-52 and accompanying text *supra*.

tion procedure will thus bar discovery from going forward altogether only if the plaintiff is unable to persuade the district court that there is some likelihood relevant material would emerge if discovery were allowed. Accordingly, manifest inability to comply with a certification order is arguably as good a basis for a Rule 41(b) dismissal as was repeated noncompliance with the order in *Von Poppenheim*. As the Ninth Circuit emphasized in that case, there comes a point at which the "rights of the defendants to be free from costly and harrassing litigation"<sup>221</sup> and limitations on judicial time and energy outweigh the right of a would-be plaintiff to maintain his action.<sup>222</sup>

## 2. Attorneys' fees and related expenses

While *Alyeska Pipeline Service Co. v. Wilderness Society*<sup>223</sup> reaffirmed the American rule that, absent specific statutory authority to the contrary, each party must bear its own counsel expenses, the Court there explicitly recognized that "a court may assess attorneys' fees . . . when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . .'"<sup>224</sup> This exception has typically been construed narrowly<sup>225</sup> and applied only in egregious cases.<sup>226</sup> Because the quantum of information necessary to pass the certification threshold is so minimal, however, there is a strong likelihood that, at least in some cases, noncompliance with a certification order would involve "bad faith" of sufficient magnitude to justify the imposition of this sanction.

In the most extreme cases, it might be appropriate to tax litigation expenses to the plaintiff's attorney. One possible basis for this course is 28 U.S.C. § 1927 which provides that: "[a]ny attorney . . . who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by

221. 442 F.2d at 1054.

222. *Id.*

223. 421 U.S. 240 (1975).

224. *Id.* at 258-59 (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974)).

225. See *Straub v. Vaisman & Co.*, 540 F.2d 591, 599-600 (3d Cir. 1976); *Adams v. Carlson*, 521 F.2d 168, 170 (7th Cir. 1975).

226. *E.g.*, *McEnteggart v. Cataldo*, 451 F.2d 1109, 1112 (1st Cir. 1971) (assessment of plaintiff's fees despite dismissal of action because plaintiff had to go to court to vindicate previously established constitutional right to a statement of reasons for nonrenewal of contract by state college); *Bell v. School Bd.*, 321 F.2d 494 (4th Cir. 1963) (continued pattern of evasion and obstruction with respect to school desegregation); *Rolax v. Atlantic Coast Line R.R.*, 186 F.2d 473 (4th Cir. 1951) (discriminatory and oppressive conduct by labor union made individual suit by black workers necessary).

the court to satisfy personally such excess costs."<sup>227</sup> As originally enacted this provision may have referred only to costs of court in the narrow, traditional sense which does not include attorneys' fees,<sup>228</sup> but in recent years there has been some scholarly suggestion that its scope is broad enough to permit shifting more of the litigation expense burden in suitable cases.<sup>229</sup> As indicated by one author, "when any person under the authority of the court takes a position dishonestly or frivolously and expenses arise from that action, that person should pay full compensation."<sup>230</sup> It will also be recalled from the discussion of Rule 11 that a court imposed expenses upon the attorney who derived his defendant list from the Philadelphia telephone directory.<sup>231</sup> Where the attorney has been instrumental in bringing a "bad faith" harassment action, personal liability for resulting burdens upon others seems clearly justified.

The recently proposed amendment of Rule 37(e) bears directly on the issue of awarding litigation expenses in appropriate cases. The new subdivision would allow a court in its discretion to "impose upon *any party or counsel* such sanctions as may be just, including the payment of *reasonable expenses and attorney's fees*" for failure to cooperate in framing a discovery plan or for abuse of the discovery process "in seeking, making or resisting discovery."<sup>232</sup> The Advisory Committee recognized that while protective orders under Rule 26(c) and section 1927 sanctions are available, they are seldom invoked. The Committee therefore concluded that the proposed change was necessary "to make explicit the power of the court to impose sanctions for *all forms* of discovery abuse."<sup>233</sup> Insofar as failure to provide a discovery certificate represents such an abuse, the new Rule 37(e), if adopted, provides ample authority for shifting the burden of expenses occasioned by filing of an action without adequate basis.

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227. 28 U.S.C. § 1927 (1970).

228. See Risinger, *supra* note 109, at 47-48. The section has consistently been so applied. *E.g.*, 1507 Corp. v. Henderson, 447 F.2d 540, 542 (7th Cir. 1971), and cases cited therein.

229. See Risinger, *supra* note 109, at 47-51; Note, *Civil Procedure—Power of Federal Courts to Discipline Attorneys for Delay in Pre-trial Procedure*, 38 NOTRE DAME LAW. 158, 168-69 (1963); 37 N.Y.U.L. REV. 947-48 (1962).

230. Risinger, *supra* note 109, at 51.

231. See *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F. Supp. 975, 983 (E.D. Pa. 1973); notes 105-08 and accompanying text *supra*.

232. 1978 PROPOSED AMENDMENTS, *supra* note 6, at 35 (emphasis added).

233. *Id.* at 36 (emphasis added).

### 3. *Range and flexibility of sanctions*

We can now summarize the possible sanctions for noncompliance with a certification order. The most severe sanction would involve dismissing the action and requiring either the plaintiff or his attorney to defray all expenses defendants incurred in defending the suit, including attorneys' fees. This burden could be scaled down in appropriate circumstances by dismissing the action and awarding attorneys' fees and costs, but not other defense expenses, and could be reduced still further by simply dismissing the action and allocating court costs in accordance with conventional procedures. In certain cases, where it appears the attorney has been operating in bad faith, but has filed a good cause of action against at least some defendants, it may be appropriate to impose some or all of the foregoing expenses on the guilty attorney, without dismissing the underlying claim. It is also conceivable that where a plaintiff's first certificate was inadequate but a second was deemed sufficient, the court might impose on the plaintiff the defendant's costs incurred in preparation for the challenge to the first certificate. If a party did comply with a certification order but the facts certified were ultimately proven false, or the certification was made in bad faith, the plaintiff or its counsel might be subject to perjury sanctions, or at a bare minimum, to those provided by Rule 11. Assuming that facts were certified in good faith, but plaintiff's allegations were later determined to be without merit, it might still be appropriate in certain circumstances for costs to be imposed in a manner that would place the expenses of early discovery on the plaintiff. And finally, as indicated at the outset, the mere deprivation of the right to proceed with discovery would probably be sufficient sanction to insure adequate compliance with the certification procedure in most cases.

As the foregoing summary of possible sanctions makes clear, a judge would have great flexibility in tailoring any sanctions imposed to the needs and circumstances of particular cases. The more drastic sanctions of dismissal and imposition of attorneys' fees and other costs should be reserved for dealing with cases of egregious noncompliance with a certification order and fairly blatant abuses of the federal procedural system. The determination of whether various costs should be borne by a plaintiff or his attorney would of course turn on where culpability for abuse lies. A plaintiff with an arguably valid claim should not be prejudiced by the malfeasance of his attorney unless the reality of the particular attorney-client relationship conforms to the legal theory that

the attorney is merely an agent acting at the behest of his client-principal. The fact that an attorney had a reputation for or record of bringing spurious suits might weigh in favor of imposing a stiffer sanction.<sup>234</sup> In general, the sanctions applied in connection with the certification procedure should be applied in a manner which will avoid undue severity and ultimately facilitate moving a case forward into the normal discovery track if the case warrants judicial disposition. However, where the certification identifies spurious claims, and particularly where a plaintiff's bad faith continues through the certification process, sanctions should be applied which will adequately compensate a defendant for the effects of the objectionable tactics of the plaintiff or its counsel.

#### V. CONCLUSION

One of the most notable difficulties with the initial applications of the certification procedure in *Portland Retail Druggists* and *Mountain View* was the uncertainty of the judges in those cases as to the legitimacy of the certification device. As a result, an undue amount of time was spent puzzling about the court's power to invoke what appeared to be a salutary procedural device. Our analysis has demonstrated that such judicial hesitancy is needless. Assuming that one is faced with a case of sufficient complexity, there are adequate grounds within the Federal Rules of Civil Procedure and the inherent power of a court to authorize use of the certification device. Exercised with appropriate restraint, certification promises to be an effective tool for managing discovery and curbing a limited but extremely egregious form of discovery abuse. Normal discovery sanctions are often too harsh or insufficiently flexible, hence judges become reluctant to invoke them and abusive discovery goes unchecked. Because of its great flexibility, certification can reach some of the abuses that often slip past normal discovery sanctions and aid the court in managing the course of discovery. Postponing access to discovery through certification is an appreciably milder sanction than others authorized by the Federal Rules, and its use will help to equalize early discovery burdens in complex cases. At a time when judges are looking for mechanisms to assist them in controlling discovery abuse, certification may thus be a particularly useful device in appropriate cases.

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234. Cf. *AAA v. Rothman*, 104 F. Supp. 655, 656 (E.D.N.Y. 1952) (judge ordered filing for future reference the name of an attorney who knowingly put forth a groundless claim).