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Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification

Linda S. Mullenix

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DROPPING THE SPEAR: THE CASE FOR ENHANCED SUMMARY JUDGMENT PRIOR TO CLASS CERTIFICATION

Linda S. Mullenix*

*After granting the defendant’s motion for summary judgment, therefore, and since (as was predictable, given the district judge’s ground) no one stepped forward to pick up the spear dropped by the named plaintiffs, the judge denied the motion for class certification.*¹

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1. Cowen v. Bank United, 70 F.3d 937, 941 (7th Cir. 1995).

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I. INTRODUCTION

In the swamp of summary judgment literature,² academics,³ commentators,⁴ treatise-writers,⁵ empiricists,⁶ and practitioners⁷ pay scant attention to the role of summary judgment in class action litigation, prior to class certification.⁸ This lacuna is perhaps justified by the

2. There is a sizeable body of summary judgment scholarship; much of it generated after the Supreme Court's 1986 "trilogy" of cases on summary judgment standards. See *infra* note 10. For a collection of academic and empirical scholarship relating to summary judgment prior to the Court's trilogy, see Joe Cecil, Rebecca N. Eyre, Dean Miletich, and David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. OF EMPIRICAL LEGAL STUDIES 861, 865 n.10 (2007).

3. See, e.g., John Bronstein, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Towards Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004); Edward Brunet, *Summary Judgment is Constitutional*, 93 IOWA L. REV. 1625 (2008); Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329 (2005); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007); Adam N. Steinman, *An Ounce of Prevention: Solving Some Unforeseen Problems With the Proposed Amendments to Rule 56 and the Summary Judgment Practice*, 103 NW. U. L. REV. 230 (2008); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007).

4. See, e.g., David L. Shapiro, *The Story of Celotex: The Role of Summary Judgment in the Administration of Civil*, in CIVIL PROCEDURE STORIES 343-70 (Kevin M. Clermont, ed. 2004); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897 (1998).

5. EDWARD BRUNET & MARTIN H. REDISH, *SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE* (3d ed. 2009).

6. See Joe Cecil and George Cort, Memorandum, *Report on Summary Judgment Practice Across Districts with Variations in Local Rules* (Federal Judicial Center, Aug. 13, 2009); Joe Cecil and George Cort, Memorandum, *Supplemental Analyses of Summary Judgment Local Rules Practices* (Federal Judicial Center May 30, 2009); Joe Cecil and George Cort, Memorandum, *Report on Summary Judgment Practice Across Districts with Variations in Local Rules* (Federal Judicial Center April 2, 2008); Cecil, Eyre, & Miletich, *supra* note 2, at 861.; Joe S. Cecil, Rebecca N. Eyre, Dean Miletich, and David Rindskopf, *Trends in Summary Judgment Practice: 1975-2000* (Federal Judicial Center 2007); Joe Cecil and George Cort, Memorandum, *Estimates of Summary Judgment Activity in Fiscal Year 2006* (Federal Judicial Center June 15, 2007); and Joe Cecil and George Cort, Memorandum, *Initial Report on Summary Judgment Practice Across Districts with Variations in Local Rules* (Federal Judicial Center Nov. 2, 2007).

7. See, e.g., Georgene M. Vairo, *Through the Prism: Summary Judgment After the Trilogy*, American Law Institute-American Bar Association Continuing Legal Education ALI-ABA Course of Study (July 2007).

8. See FED. R. CIV. P. 23(c)(1) (directing courts to determine at "an early practicable time" whether a proposed class action may be maintained as a class action. See also MANUAL FOR COMPLEX LITIGATION FOURTH at § 21.133 (Federal Judicial Center 2004) (timing of the certification decision and pre-certification threshold dispositive motions); Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* 29-33 (Federal Judicial Center

corresponding scant attention paid by courts—in reported decisions, at least⁹—to summary judgment prior to class certification. This is unfortunate.

This brief article makes the case for enhanced judicial scrutiny of summary judgment motions prior to the class certification decision. This argument is congruent (and convergent) with the Supreme Court's summary judgment trilogy,¹⁰ the Court's twin pleading decisions in *Twombly*¹¹ and *Iqbal*,¹² the Third Circuit's decision in *Hydrogen Peroxide*,¹³ and the suggestions from various quarters that courts ought

1996) (rate of pre-certification rulings on motions to dismiss was approximately 80 percent in three of four districts studied and about 60 percent in other districts; approximately three out of ten cases were terminated as a result of a summary judgment motion). The findings of this study are discussed at greater length, *infra* note 22.

It is, of course, possible to move for summary judgment after class certification, and many of the reported decisions dealing with summary judgment and class actions occur in this posture. This article does not address the issues relating to summary judgment after class certification. See discussion *infra* Part I, concerning the strategic decision to seek summary judgment prior to or after class certification.

9. As Professor Stephen Burbank correctly points out—a view this author completely endorses—it is inherently misleading to venture broad theories about summary judgment practice based on reported courts decisions, because reported decisions do not provide a reliable means for assessing actual summary judgment practice in the courts. See Burbank, *supra* note 3, at 604. See also Cecil, Eyre, & Miletich, *A Quarter-Century of Summary Judgment Practice*, *supra* note 2, at 869-67 (commenting on the same problems of empirical research concerning summary judgment based on reported decisions, and surveying problematic studies). See *infra* notes 54-62 (citing cases in which courts have granted pre-certification summary judgment motions, and reasons in support of summary judgment practice before ruling on the class certification motion).

10. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (clarifying the shifting allocations of burdens of production, persuasion, and proof at summary judgment); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-56 (1986) (applying heightened evidentiary standard of proof in libel action to judicial assessment of propriety of summary judgment); *Matshushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (holding antitrust plaintiff with an inherently implausible claim was subject to dismissal at summary judgment). For assessments of the summary judgment trilogy, see Marcy J. Levine, Comment, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1996 Supreme Court*, 37 EMORY L. J. 171 (1988); John E. Kennedy, *Federal Summary Judgment: Reconciling Celotex v. Catrett with Adickes v. Kress and Evidentiary Problems Under Rule 56*, 6 REV. OF LITIG. 227 (1987).

11. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). See generally Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063 (2009); Kendall W. Hannon, Note, *Much Ado About Twombly? A Study of the Impact of Bell Atlantic Corp. v. Twombly on Rule 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C.L. REV. 431 (2008).

12. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

13. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307-09 (3d Cir. 2008) (clarifying the requirements of the “rigorous analysis” standard for class certification; requiring that class proponents prove class certification requirements by a preponderance of the evidence and that courts resolve all disputed issues of fact in order to certify a class). The Third Circuit's *Hydrogen Peroxide* decision joins a series of similar appellate decisions requiring heightened certification

to evaluate the merits of proposed class actions during the class certification process.¹⁴ Summary judgment prior to class certification, then, is a logical—and desirable—extension of these trends.

This article argues that summary judgment before class certification embodies a sensible timing accommodation between the heightened pleading requirements of *Twombly/Iqbal* and the heightened class certification requirements of *Hydrogen Peroxide*. The argument for a summary judgment determination prior to class certification is based on the fact that class certification changes the litigation dynamic, being disconnected from the underlying merits of the dispute. The argument for summary judgment prior to class certification is based on the simple premise that if an individual plaintiff's case is so fatally defective (factually and legally) even after discovery, then the court ought to end the case and not permit class certification to proceed. The argument for

requirements and merits-determinations at class certification. *See also* Oscar Private Equity Inv. v. Allegiance Telecomm., Inc., 487 F.3d 261 (5th Cir. 2007); *In re* Public Offering Sec. Litig., 471 F.3d 24 (2d Cir. 2006); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356 94th Cir. 2004); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001). For commentary on these appellate cases as embodying a trend that is “chipping away” at the *Eisen* rule, see generally Steig D. Olson, “Chipping Away”: *The Misguided Trend Towards Resolving Merit Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935 (2009).

14. *See* Robert G. Bone and David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251 (2002) (urging abolition of the so-called “*Eisen* rule”); Roy Alan Cohen and Thomas J. Coffey, *Judicial Review of Class Certification Applications — The Compelling Case for a Merits-Based Gate-Keeper Analysis*, 76 DEF. COUNS. J. 257 (April 2009) (stating that the Second Circuit’s decision in *Miles v. Merrill Lynch & Co.*, 471 F.3d 24, 32-33 (2d Cir. 2006) provides guide for courts to address role of merits in class certification); Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 TENN. L. REV. 1 (2001) (arguing that consideration should be given to procedures for determining the merits of the individual claims and the size of the class before a suit is certified as a class suit); Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004) (arguing in favor of a merits assessment of claims prior to judicial approval of a proposed class action settlement); Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366 (1966) (proposing an amendment to FED. R. CIV. P. 23(b)(3) to provide for an assessment of the merits, to be included as part of the superiority analysis of class action treatment); Geoffrey P. Miller, *Review of the Merits of Class Action Certification*, 33 HOFSTRA L. REV. 51 (2004) (arguing in favor of “weak-form” rules to permit reasonable inquiries into the merits as relevant to class certification); and Douglas M. Towns, Note, *Merit-Based Class Action Certification: Old Wine in a New Bottle*, 78 VA. L. REV. 1001 (1992). *But cf.* Olson, *supra* note 13, at 939:

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

summary judgment prior to class certification is based on efficiency and fairness rationales; summary adjudication before class certification supports the goals of Federal Rule of Civil Procedure 1 to secure the just, speedy, and inexpensive determination of all civil actions. This is especially compelling when confronted with a legally and factually deficient complex litigation.

This proposal for pre-certification summary judgment adjudication does not violate the so-called *Eisen* rule.¹⁵ It has nothing to do with the *Eisen* rule, because the *Eisen* rule only comes into play at the point at which a judge must evaluate whether to certify a proposed class action. Pre-certification evaluation of a summary judgment motion effectively avoids the *Eisen* rule by forcing a merits determination prior to class certification, in an individual case setting. If an individual plaintiff has a viable claim, pre-certification summary judgment adjudication will not undermine the possibility for class litigation. On the contrary, if a plaintiff has a fatally defective case after summary judgment discovery, then courts ought not to sanction a plaintiff's advantage achieved through class certification of an aggregation of multiple bad claims. Moreover, if a plaintiff at summary judgment drops the spear of class litigation and no one else rises to champion the class, then the litigation ought to be at an end.

Historically, federal reception to summary judgment practice has been characterized by two general trends. From 1938 through the Supreme Court's 1986 trilogy, many federal judges viewed summary judgment as a disfavored motion.¹⁶ The Court's 1986 trilogy of summary judgment decisions ushered in the second modern era of summary judgment practice.¹⁷ Numerous commentators have suggested that the Court's 1986 trilogy, then, embodied a signal from the Supreme Court to federal judges to utilize summary judgment procedure more often as a means to respond to factually deficient cases.¹⁸

Parallel to these trends, courts historically have manifested ambivalent views concerning the use of summary judgment in complex

15. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974).

16. See Cecil, Eyre, & Miletich, *supra* note 2, at 862 ("Prior to the Supreme Court's trilogy of decisions in 1986, summary judgment was viewed as an underused and somewhat awkward tool that invited judicial distrust.") (citing authorities).

17. "Common perceptions regarding summary judgment have undergone a remarkable transformation in the past two decades." *Id.*

18. *Id.* ("The trilogy has been widely viewed as a turning point in the use of summary judgment, signaling a greater emphasis on summary judgment as a necessary means to respond to claims and defenses without sufficient factual support.").

litigation.¹⁹ Prior to 1986, federal courts generally held the view that summary judgment should be used sparingly in complex antitrust actions,²⁰ and it was almost a boilerplate proposition that complex cases were not suitable for summary adjudication. As is well-known, the Supreme Court substantially eroded this historical resistance to the use of summary judgment to resolve complex cases in its 1986 *Matsushita* decision.²¹

Prevailing jurisprudence has long suggested that complex cases, by virtue of their complexity, are especially not suitable for summary adjudication. This article argues that the case for summary judgment prior to class certification is based on the same proposition: that complex cases are especially suitable for summary disposition in an appropriate case. Convergent with heightened pleading and rigorous class certification standards, a requirement for pre-certification summary judgment stands the boilerplate opposition to summary judgment in complex cases on its head. Rather than endorsing an implicit presumption against summary judgment in complex classes, the argument for pre-certification summary judgment is based on the concept that complex litigation is especially suited for summary judgment consideration.

Finally, the idea that judges ought to rule on summary judgment motions prior to class certification is not new, and indeed, has been urged as a possible Rule 23 amendment. More than fifteen years ago, during the first phase of proposed amendments to Rule 23, proponents suggested that Rule 23 be amended to require judges to consider Rule 12 and Rule 56 motions prior to class certification.²² These proposals did

19. See BRUNET & REDISH, *supra* note 5, at § 9.3.

20. *Id.*; see *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464 (1962).

21. 475 U.S. 574 (1986). See *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 475 (7th Cir. 1988) (the 1986 trilogy makes “clear that, contrary to the emphasis of some prior precedent, the use of summary judgment is not only permitted but encouraged in . . . antitrust cases.”). *But cf.* *Eastman Kodak Co. v. Image Technical Serv.*, 504 U.S. 451 (1992) (reversing grant of summary judgment in antitrust illegal tying case; distinguishing *Matsushita*). Brunet and Redish indicate that the erosion of resistance to the use of summary judgment in complex antitrust cases had been building among federal courts for some years prior to the Court’s *Matsushita* decision. See BRUNET & REDISH, *supra* note 5, at § 9.5. For a lengthy analysis of the *Matsushita* decision, see *id.* at § 9.6.

22. See Willging, Hooper & Niemic, *supra* note 8, at Appendix A, Proposed Rule 23 – 1993, and Appendix B, Proposed Rule 23 – 1995. The 1993 proposal would have amended Rule 23(d)(1)(B) to state:

[In the conduct of actions to which this rule applies, the court may make appropriate orders that:] (B) decide a motion under Rule 12 or 56 before the certification determination if the court concludes that the decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay

not gain traction and were abandoned, along with an array of other proposals. Moreover, the use of enhanced summary judgment prior to class certification also has received tacit endorsement from class action scholars at the Rand Institute for Civil Justice²³ and support from researchers at the Federal Judicial Center.²⁴

Much has changed in the litigation landscape in the more than fifteen years since reformers first urged the Advisory Committee on Civil Rules to incorporate a provision that would provide explicit authority to federal judges to rule on summary judgment motions prior to class certification. The desirability of such a provision now has considerable doctrinal and policy support—from the Supreme Court and federal appellate courts—embodied in the general trends requiring heightened pleading in complex cases and rigorous analysis of class certification requirements.²⁵

Id. at 94. The proposed Advisory Committee Note to this new provision provided: “*Subdivision (d)*. The former rule generated uncertainty concerning the appropriate order of proceeding when a motion addressed to the merits of claims or defenses is submitted prior to a decision on whether a class should be certified. The revision provides the court with discretion to address a Rule 12 or Rule 56 motion in advance of a certification decision if this will promote the fair and efficient adjudication of a controversy. *See* MANUAL FOR COMPLEX LITIGATION, SECOND, § 30.11.” *Id.* at 98. This proposed addition to Rule with regard to Rule 12 and 56 motions was carried forward to the proposed 1995 amendments. The 1995 amendments also added provisions permitting the judge to assess the merits of claims and defenses at the time of class certification. *Id.* at 101-02.

23. *See* DEBORAH R. HENSLER, BONNIE DOMBEY-MOORE, BETH GIDDENS, JENNIFER GROSS, ERIK K. MOLLER, AND NICHOLAS M. PACE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN at 26 (Rand Institute for Civil Justice Monograph 1999):

Judge presiding over class actions should use their summary judgment and dismissal powers, when appropriate – as many do now. Preserving the line between certification based on the form of the litigation (*e.g.*, numerosity, commonality, superiority) and dismissal and summary judgment based on the substantive law and facts seems likely to produce consistent signals to parties as to what types of cases will be certified than conflating the two decisions.

See also Deborah R. Hensler and Thomas D. Rowe, Jr., *Beyond “It Just Ain’t Worth It:” Alternative Strategies for Damage Class Action Reform* at 142 n.13 (Rand Institute for Civil Justice 2001) (“Under existing rules judge can, of course, dismiss class actions for failure to state a claim or by summary judgment.”).

24. In commenting on the proposed 1993 and 1995 amendments to Rule 23, *see supra* note 22, the authors of the empirical study of four federal district courts noted: “Having explicit authority to so rule, however, might influence any judge who has felt constrained to avoid ruling on such motions prior to class certification.” *See* Willging, Hooper & Neiemic, *supra* note 8, at 29.

25. *See supra* notes 10 and 13.

II. SUMMARY JUDGMENT PRIOR TO CLASS CERTIFICATION: STRATEGY AND BASIC PRINCIPLES

A. *Empirical Studies of Summary Judgment Prior to Class Certification*

We do not know a great deal about summary judgment prior to class certification, and what we do know consists of somewhat dated empirical data.²⁶ Although the Federal Judicial Center (FJC) has conducted numerous empirical studies of summary judgment practice in federal court in the post-trilogy era,²⁷ these studies do not illuminate the use of summary judgment in complex litigation or the subset of class action cases.²⁸ Rather, the FJC summary judgment studies collect data relating to trends in summary judgment filings (and dispositions) based on substantive categories of cases, such as contracts, civil rights, torts, and a catch-all “other” category.²⁹ What the FJC summary judgment studies do not inform is the percentage or rate of substantive cases pursued as class action litigation; moreover, the FJC summary judgment studies also do not address summary judgment disposition either prior to class certification or after class certification.

The Federal Judicial Center has also conducted a number of studies of class action practice in federal courts. Most recently, these studies have focused on the impact of the Class Action Fairness Act of 2005 (CAFA)³⁰ on federal courts’ diversity dockets.³¹ The first phase of the FJC’s long-term CAFA study examined whether CAFA has resulted in increased original or removal class action filings in federal court.³² “Phase II of the Center’s CAFA impact study will address the nature and sources of underlying class claims; class discovery; remand rulings; pre-trial motions practice; class certification activity; and the process of

26. The only Federal Judicial Center study to examine pre-certification dispositive motions is the Center’s 1996 empirical study of class action practice in four judicial districts. See Willging, Hooper & Neiemic, *supra* note 22.

27. See *supra* note 6.

28. For a discussion of the potential use of pre-certification dispositive motions in Multidistrict Litigation (MDL) practice, see *infra* pp. 52-54.

29. See, e.g., Cecil, Eyre, & Miletich, *supra* note 2.

30. Pub. L. 109-2, 119 Stat. 4 (2005).

31. See Thomas E. Willging and Emery G. Lee III, *The Impact of the Class Action Fairness Act of 2005: Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules 2* (Federal Judicial Center April 2007) (finding a 46 percent increase in class action activity from January to June 2006; also reporting an increase in diversity removal cases to federal courts).

32. *Id.*

reviewing settlements.”³³ Because this portion of the FJC impact project is not yet completed, there is no currently available data on federal court practice with regard to pre-certification dispositive motions.

The only extant empirical study of federal pre-certification summary judgment motions, then, is the FJC’s 1996 study of class action practice in four federal district courts (the Northern District of Illinois, the Eastern District of Pennsylvania, the Northern District of California, and the Southern District of Florida).³⁴ The study examined both pre-certification Rule 12 motions to dismiss, as well as Rule 56 summary judgment motions, and many of the Center’s conclusions are based on combined data for the two sets of motions.³⁵

With regard to all types of pre-certification motions, the 1996 FJC study concluded that approximately two out of three cases in each of the four district courts issued rulings on a Rule 12 motion to dismiss, a Rule 56 motion for summary judgment, or a *sua sponte* dismissal order.³⁶ Of the cases in which litigants filed a motion to dismiss, courts issued rulings in between 73 percent and 81 percent of the cases, depending on the district.³⁷ Obviously, this high percentage of adjudication indicates that federal judges in these four districts were willing to issue rulings on dispositive motions, rather than deferring such rulings.

With regard to the subset of Rule 56 motions, the FJC study documented that the vast majority of summary judgment motions were filed by defendants.³⁸ Judges in two district courts issued rulings on summary judgment approximately 85 percent of the time, and judges in the other two districts issued rulings 60 percent of the time.³⁹ Courts granted motions for summary judgment in whole or in part in more than half the rulings (54 percent to 68 percent) in three of the four districts.⁴⁰ In the fourth,⁴¹ summary judgment motions were granted in whole or in part 39 percent of the time.⁴²

33. See *Progress Report of the Advisory Committee on Civil Rules on the Impact of CAFA on the Federal Courts* 1 (Federal Judicial Center November 7, 2007).

34. Willging, Hooper & Neiemic, *supra* note 22.

35. *Id.*

36. *Id.* at 171, Table 24.

37. The FJC study found that this rate of ruling approximates the rate of rulings found in three studies of motions to dismiss in general litigation. *Id.* at 33 n.104.

38. *Id.* at 33, n.105, 125 Figure 26, and 172 Table 26.

39. *Id.* at 33, n.106; 126 Figure 27. The study notes, with regard to summary judgment motions: “[the] data that are comparable to and, overall, somewhat higher than the rate of rulings in a study of general civil litigation.” *Id.*

40. *Id.* at 172, Table 26.

41. The FJC study considered the Northern District of Illinois somewhat of an anomaly in the study, because of the district court’s jurisprudence disfavoring summary judgment motions in the

The FJC study also found that judges generally took a longer time to rule on motions for summary judgment than on other motions to dismiss. The median time from the filing of the first motion for summary judgment to the first summary judgment ruling was less than four months in two courts, and more than seven months in the other two courts.⁴³ Seventy-five percent of all motions for summary judgment were resolved in 7.9, 15.4, 16.8, and 5.2 months in the four courts.⁴⁴

In assessing its findings of data on combined Rule 12 and Rule 56 motions to dismiss, the FJC broadly concluded:

On the one hand, motions to dismiss are filed and granted more frequently in class action litigation than in ordinary civil litigation. Such data indicate that a relatively large number of cases are found to be without legal or factual merit, or both. Comparison with data from a 1974 study of (b)(3) class actions indicates, however, that the rate of dismissal and summary judgment is lower in the current study than it was during the 1966-1972 in one federal district court.

On the other hand, defendants generally appear to have had an opportunity to test the merits of the litigation and obtain a judicial ruling in a reasonably timely manner, particularly for motions to dismiss. Testing the factual sufficiency of claims via summary judgment, however, may take more than a year for some rulings in some courts.

For at least one-third of the cases in our study, judicial rulings on motions terminated the litigation without a settlement, coerced or otherwise. The settlement value of other cases was undoubtedly influenced by rulings granting motions for partial dismissal or partial summary judgment and by rulings denying such motions.⁴⁵

The 1996 FJC findings are notable for several reasons. First, the 1996 FJC data may prove surprising to many class action practitioners, who anecdotally believe that judges are disinclined to rule on pre-certification dispositive motions, preferring instead to defer such rulings until after class certification. The FJC data seems to disprove that impressionistic belief. Second, the FJC data suggests that pre-certification motion practice (including rulings on such motions) generally tracks the same incidence of dispositive motion practice as in

class action context. Nonetheless, the study concluded that even in light of this historical resistance to such summary judgment motions, district judges in the Northern District of Illinois did grant summary judgment dismissals in class action litigation.

42. *Id.* at 172, Table 26.

43. *Id.* at 173, Table 29.

44. *Id.*

45. *Id.* at 34.

ordinary litigation. This finding may prove surprising to critics of summary judgment, who believe that federal judges excessively use dispositive motions to eliminate categories of cases based on the judge's subjective predilections. The FJC findings seem to refute any theory or argument that judges utilize dispositive motions or summary judgment to excessively dismiss class action litigation.

However, the 1996 FJC findings with regard to summary judgment practice in class action litigation must be cabined by the limitations of that study, as well as its timeliness.⁴⁶ The FJC study examined pre-certification motion practice in only four federal district courts,⁴⁷ and at least one of the districts the FJC identified as an outlier with regard to its views on summary judgment.⁴⁸ The database, then, was extremely limited. In addition, the FJC data is now approximately fifteen years old. In the interim, there has been a sea-change in pleading and motions practice, in both ordinary and complex federal class action litigation. Hence, Phase II of the FJC's CAFA impact study, which contemplates a new empirical study of dispositive motion practice, should provide important new data on trends in federal court against this changed litigation landscape.⁴⁹

B. Existing Jurisprudence on Pre-Certification Summary Judgment Practice

Federal Rule of Civil Procedure 23 is silent concerning the timing of summary judgment motions in relation to class certification.⁵⁰ Federal Rule of Civil Procedure 56 likewise makes no reference to summary judgment in the context of class action litigation.⁵¹ The 2003 amendments to Rule 23 changed the language concerning the timing of class certification, instructing courts to make a class certification determination "at an early practicable time."⁵² The Federal Judicial Center advises federal judges to feel free to ignore local rules calling for specific time limits relating to the class certification determination, but

46. *Id.* at 4-5.

47. *Id.*

48. *Id.* at 30.

49. See *Progress Report of the Advisory Committee on Civil Rules on the Impact of CAFA on the Federal Courts* 1 (Federal Judicial Center November 7, 2007).

50. *Id.* at 94.

51. See FED. R. CIV. P. 56.

52. See FED. R. CIV. P. 23(c)(1).

instead to apply the 2003 amended Rule 23(c)(1) certification timing provision.⁵³

Perhaps more importantly, the Federal Judicial Center now informs federal judges that in tandem with the 2003 amended timing provision, judges are permitted to rule on motions or to dismiss by summary judgment before ruling on class certification.⁵⁴ Indeed, the FJC instructs that:

Given the flexibility in the rules, the most efficient practice is to rule on motions to dismiss or for summary judgment before addressing class certification. Ruling on class certification may prove to be unnecessary. The most important actions you can take to promote settlement are to rule on dispositive motions and then, if necessary, rule on class certification.⁵⁵

The Federal Judicial Center's current position urging federal judges to rule on pre-certification dispositive motions diverges from the historical position of some federal courts—most notably the Seventh Circuit⁵⁶—that interpreted the Supreme Court's ruling in *Eisen v. Carlisle & Jacqueline*⁵⁷ to require that courts rule on class certification before making any ruling on the merits of the case.⁵⁸ This interpretation

53. See Barbara J. Rothstein, *Managing Class Action Litigation: A Pocket Guide for Judges* (Federal Judicial Center 2009) (“Considering this rule, you should feel free to ignore local rules calling for specific time limits; they appear to be inconsistent with the federal rules and, as such, obsolete”) (citing the MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.133). The 1996 FJC empirical study of class action practice also examined the impact of local rules on the timing of dispositive and summary judgment motions, and generally concluded that it seemed doubtful that local rules had an effect on judge's rulings on pre-certification motions. See Willging, *et al.*, *supra* note 22, at 94.

For commentary on the amendment to Rule 23(c)(1) and its effect on pre-certification dispositive motions, see BRUNET & REDISH, SUMMARY JUDGMENT § 10:16 (3d ed. 2009); JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS § 3:1 (5th ed. 2009) (timing of class action determination – “early practicable time” requirement).

54. Rothstein, *supra* note 53, at 8.

55. *Id.* at 8-9.

56. The Seventh Circuit has had a historical antipathy to granting summary judgment motions prior to class certification motions. See, e.g., *Koch v. Standard*, 962 F.2d 605, 607 (7th Cir. 1992) and *Rutan v. Republican Party of Ill.*, 868 F.2d 943, 947 (7th Cir. 1989). In both these cases, the Seventh Circuit expressed its view that it is improper for a district court to delay ruling on a class certification motion until after having decided a motion to dismiss. *But cf.* *Cowen v. Bank United*, 70 F.3d 937 (7th Cir. 1995) (allowing for district court discretion to decide summary judgment motions prior to class certification).

57. 417 U.S. 156 (1974).

58. See, e.g., *Nance v. Union Carbide Corp.*, 540 F.2d 718, 723 n.9 (4th Cir. 1976) *vacated*, 431 U.S. 952 (1977) (quoting *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 354 (7th Cir. 1975)). See also Willging, Hooper & Neiemic, *supra* note 22, at 29, 94 (discussing the divergent views of federal courts regarding ruling on pre-certification dispositive motions).

of *Eisen*, in relation to the timing of dispositive motions, was predicated on avoiding one-way intervention or opt-out by class members who would know the outcome on the merits in advance of class certification.⁵⁹ However, despite this theoretical *Eisen* doctrinal barrier, some other federal courts historically permitted courts to rule on pre-certification dispositive motions, viewing such motions as a partial or complete waiver of the protection against one-way intervention.⁶⁰

Whatever may have been the historical disinclination of some federal courts to eschew ruling on pre-certification dispositive motions, it now seems well-established that federal courts not only have the authority to rule on dispositive motions prior to class certification,⁶¹ but

59. *Hudson v. Chicago Teachers' Union*, 922 F.2d 1306, 1317 (7th Cir.), *cert. denied*, 501 U.S. 1230 (1991); *Peritz*, 523 F.2d at 353-54; *Issen v. GSC Enter., Inc.*, 522 F. Supp. 390, 395 (N.D. Ill. 1981) (discussing one-way intervention problem).

60. *See, e.g., Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984) (implicit waiver where the defendant assumes the risk of the limited effect of its summary judgment motion); *Peritz* 523 F.2d at 354 n.4 (noting that defendants may waive one-way intervention protection by moving for summary judgment prior to class certification); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 762 (3d Cir. 1974) (en banc) *cert. denied*, 419 U.S. 885 (1974) (pre-certification dispositive motion constituted an explicit waiver of the protection against one-way intervention; use of "test case" prior to class certification ruling); *Hyman v. First Union Corp.*, 982 F. Supp. 8, 11 (D.D.C. 1997) (discussing problem of one-way intervention and defendant's waiver by pre-certification summary judgment motion; concluding that defendants explicitly waived right); *Issen v. GSC Enter., Inc.*, 522 F. Supp. 390, 395 n.8 (N.D. Ill. 1981) (waiver of one-way intervention protection).

61. *See, e.g., Wiesmueller v. Kosobucki*, 513 F.3d 784, 787 (7th Cir. 2008); *Pisciotta v. Old Nat'l Bancorp.*, 499 F.3d 629 (7th Cir. 2007); *Kehoe v. Fidelity Fed. Bank & Trust*, 421 F.3d 1209, 1211 n.1 (11th Cir. 2005) ("[I]t is within the court's discretion to consider the merits of the claims before their amenability to class certification"); *Estate of Gleiberman v. Hartford Life Ins. Co.*, 94 Fed. Appx. 944, 948 (3d Cir. 2004) (no abuse of discretion for the trial court to determine that the named plaintiff had failed to state a claim upon which relief could be granted prior to determining class certification); *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 93 (D.C. Cir. 2001); *Schweizer v. Trans Union Corp.*, 136 F.3d 233, 238 (2d Cir. 1998); *Cowen v. Bank United of Tex., FSB*, 70 F.3d 937, 941 (7th Cir. 1995) (Rule 23(c)(1) allowing for wriggle room for court to rule on pre-certification summary judgment motion); *Thompson v. County of Medina, Ohio*, 29 F.3d 238, 241 (6th Cir. 1994); *Adamson v. Bowen*, 855 F.2d 668, 677 n.12 (10th Cir. 1988); *Floyd v. Bowen*, 833 F.2d 529, 534-35 (5th Cir. 1987); *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984); *Wall v. Leavitt, Medicare & Medicaid* 302350, 2008 WL 744429 at *1 (E.D. Cal. 2008); *Villagran v. Central Ford, Inc.*, 524 F. Supp. 2d 866, 882 (S.D. Tex. 2007) (a suit pleaded as a class action may be resolved by deciding a motion to dismiss or for summary judgment even before class certification is decided); *Encarnacion ex rel. George v. Astrue*, 491 F. Supp. 2d 453, 459 (S.D.N.Y. 2007) (district court may reserve decision on class certification motion pending disposition of summary judgment motion); *Foti v. NCO Fin. Sys., Inc.*, 424 F. Supp. 2d 643, 647 n.2 (S.D.N.Y. 2006) (district court may properly consider motion to dismiss prior to issue of class certification); *Good v. Altria Group, Inc.*, 231 F.R.D. 446 (D. Me. 2005); *Evans v. Taco Bell Corp.*, 2005 WL 2333841, *4 n.6 (D.N.H. 2005) ("It is well-settled that, absent prejudice to the plaintiff, a court may decide a defendant's motion for summary judgment in a putative class action before taking up the issue of class certification"); *Coburn v. Daimler Chrysler Serv. of North America, L.L.C.*, 2005 WL 736657, at *7 (N.D. Ill. 2005) ("[P]recedent makes clear that the presence or potential presence of

that this is a preferred case management approach.⁶² Moreover, the argument that the Court's *Eisen* decision prevents a court from ruling on a pre-certification dispositive and summary judgment motions seems definitively to have been laid to rest:

[The plaintiff] also relies on *Eisen v. Carlisle & Jacquelin* . . . in which the Supreme Court held that it was inappropriate to make a preliminary assessment of the merits of a case in order to determine if it could be maintained as a class action. *Eisen* makes clear that the determination of whether a class meets the requirements of Rule 23 must be performed separately from the determination of the merits, but it does not require the class certification to be addressed first. "There is nothing in Rule 23 which precludes a court from examining the merits of plaintiff's claims on a proper Rule 12 motion to dismiss or Rule 56 motion for summary judgment simply because such a motion" precedes resolution of the issue of class certification. *Lorber v. Beebe*, 407 F. Supp. 279, 291 n.11 (S.D.N.Y. 1976). *See also Adames v. Mitsubishi Bank, Ltd.*, 133 F.R.D. 82, 87 n.1 (E.D. N.Y. 1989). The decision to award summary judgment before acting on class certification was well within the discretion of the district court,

a class action does not alter a plaintiff's basic requirement of establishing all the elements of any cause of action alleged in a complaint"); *Garcia v. Veneman*, 211 F.R.D. 15, 19 n.2 (D.D.C. 2002) ("A court may certainly decide dispositive motions prior to determining whether the case may be maintained as a class action"); *Allen v. Aronson Furniture Co.*, 971 F. Supp. 1259, 1261 (N.D. Ill. 1997). In 2007, the Federal District Court for the Southern District of Texas granted a series of pre-certification summary judgment motions, citing the same boilerplate endorsement of the court's discretion to issue such rulings. *See, e.g., Villigran v. Central Ford, Inc.*, 524 F. Supp. 2d 866, 882 (S.D. Tex. 2007). *See also* MCLAUGHLIN, *supra* note 53. ("It is well established that nothing in Rule 23 precludes a district court from exercising its discretion to address the merits of the putative class' claims on a motion to dismiss for failure to state a claim or on a motion for summary judgment before addressing class certification.") (citing cases); CHARLES ALAN WRIGHT, ARTHUR R. MILLER, AND MARY KAY KANE, 7AA FED. PRAC. & PROC. CIV. § 1785, 381 (3d ed. 2009) ("Under circumstances in which the merits of plaintiffs' claims can be readily resolved on summary judgment, defendant seeks an early disposition of those claims, and plaintiffs are not prejudiced as a result, a district court does not abuse its discretion by resolving the merits on summary judgment before considering the question of class certification.").

62. *See, e.g.,* BRUNET & REDISH, SUMMARY JUDGMENT § 10:16 ("A court should be vigilant in deciding a summary judgment motion before certifying a class to save litigants unnecessary expense and to economize on judicial time. For these reasons, we encourage prompt judicial consideration of summary judgment motions in class actions"); Rothstein, *supra* note 53; MANUAL FOR COMPLEX LITIGATION, FOURTH § 11.34 (Federal Judicial Center 2004) ("[S]ummary judgment is as appropriate in complex litigation as in routine cases"); § 21.133 ("[M]ost courts agree, and Rule 23(c)(1)(A) reflects, that such pre-certification rulings on threshold dispositive motions are proper, and one study found a substantial rate of precertification rulings on motions to dismiss or for summary judgment. Precertification rulings frequently dispose of all or part of the litigation."). A minority of courts still look with disfavor on precertification summary judgment motions. *See, e.g., Quezada v. Loan Center of Cal., Inc.*, 2009 WL 3711970, at *3 (E.D. Cal. 2009) ("However, early resolution of a motion for summary judgment before class certification is often inappropriate . . .").

particularly since [the plaintiff] never moved to certify the purported class. *See Christensen v. Kiewit-Murdock Inv. Corp.*, 815 F.2d 206, 214 (2d Cir. 1987).⁶³

With the *Eisen* decision⁶⁴ no longer a doctrinal barrier to pre-certification consideration of summary judgment motions, courts have articulated general principles to guide district judges' discretion in considering such pre-certification summary judgment motions. Courts agree that ruling on a dispositive motion prior to addressing class certification may be appropriate where there is sufficient doubt regarding the likelihood of success on the merits of the plaintiff's claims.⁶⁵ It is likewise appropriate to rule on a summary judgment motion prior to class certification to prevent inefficiency⁶⁶ or avoid waste,⁶⁷ particularly the high transaction costs associated with class

63. *Schweizer v. Trans Union Corp.*, 136 F.3d 233, 239 (2d Cir. 1998). *See also Adamson v. Bowen*, 855 F.2d 668, 677 n.12 (10th Cir. 1988) (in appropriate cases, a court may use accelerated summary judgment procedure before class certification to test the plaintiff's right to proceed to trial) (citing *WRIGHT, MILLER & KANE, FED. PRAC. & PROC. CIV.* § 1785).

64. 417 U.S. 156 (1974).

65. *See, e.g., Askew v. Holladay*, 2009 WL 1767632 (E.D. Ark. 2009) (court may dismiss a case on its own motion if it determines that plaintiffs have failed to state a claim upon which relief can be granted or by using an accelerated summary judgment procedure before class certification to test the plaintiffs' right to proceed to trial (citing *Shook v. El Paso County*, 386 F.3d 963, 974 (10th Cir. 2004)); *Adamson*, 855 F.2d at 677 n.12. *See also Cowen v. Bank United*, 70 F.3d 937, 941 (7th Cir. 1995); *Floyd v. Bowen*, 833 F.2d 529, 534 (5th Cir. 1987); *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984); *Goldsby v. Ford Motor Co.*, 183 F. Supp. 2d 943, 948-49 (D. Mich. 2001) (if court determines plaintiff's claims are without merit, there is no harm in dismissing named plaintiff's case without explicitly deciding class certification issue); *Thurmond v. Compaq Computer Corp.*, 171 F. Supp. 2d 667, 683 (D. Tex. 2001) (on defendant's summary judgment motion, a district court may examine the merits of the named plaintiffs' claims and dispose of those claims prior to class certification); *Allen v. Aronson Furniture Corp.*, 971 F. Supp. 1259, 1261 (N.D. Ill. 1997); *Trull v. Lason Sys., Inc.*, 982 F. Supp. 600, 603-04 (N.D. Ill. 1997). *But cf. Quezada v. Loan Center of Cal., Inc.*, 2009 WL 3711970, at *3 (E.D. Cal. 2009) (suggesting that pre-certification summary judgment is often inappropriate because "the relative merits of the underlying dispute are to have no impact upon the determination of the propriety of the class action,") (citing *Thompson v. County of Medina*, 29 F.3d 238, 241 (6th Cir. 1994); *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984). *See also Chavez v. Ill. State Police*, 251 F.3d 612, 630 (7th Cir. 2001) ("It is preferable to review a motion for class certification first [because] a quick disposition on the merits often is not possible.").

66. *See, e.g., Cruz v. American Airlines*, 150 F. Supp. 2d 103 (D.D.C. 2001), *aff'd on other grounds*, 356 F.3d 320 (D.C. Cir. 2004) (resolution of cross-summary judgment motions might eliminate need for court to consider class certification motion; therefore, district court could consider summary judgment motions first in the interests of preserving judicial resources, as well as the resources of the litigants).

67. *See, e.g., Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984) ("To require that notice be sent to all potential plaintiffs in a class action when the underlying claim is without merit is to promote inefficiency for its own sake"). At times a court may consider a proposed class action both meritless and wasteful. *See, e.g., Cavanaugh v. Humboldt County*, 1999 WL 96017, at *2

litigation, such as providing notice⁶⁸ or discovery.⁶⁹ In addition, it is appropriate for a court to rule on summary judgment prior to class certification where neither the plaintiff nor members of the putative class would be prejudiced by the ruling.⁷⁰

C. *Strategic Considerations Relating to Pre-Certification Summary Judgment*

As the Federal Judicial Center study documented, almost all pre-certification summary judgment motions are filed by defendants.⁷¹ This fact comports with common sense because there would be little or no point for a plaintiff to file a putative class action, and then request a court to determine whether the plaintiff was entitled to a summary judgment. Until the court certifies a class action, the litigation remains

(N.D. Cal. 1999) (citing *Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984) (“It is reasonable to consider a Rule 56 motion [before class certification] when early resolution of a motion for summary judgment seems likely to protect the parties and the court from needless and costly further litigation.”). *See also* *Christensen v. Kiewit-Murdock Inv. Corp.*, 815 F.2d 206 (2d Cir. 1987) (district court had discretion to decide summary judgment motion before class certification motion to protect both the parties and the court from needless and costly further litigation); *Quezada v. Loan Center of Cal., Inc.*, 2009 WL 3711970, at *3 (E.D. Cal. Nov. 06, 2009) (“[H]owever, early resolution of a motion for summary judgment before class certification often is inappropriate, and it is within the court’s discretion to decide a summary judgment motion first where granting the motion ‘is likely to protect the parties and the court from needless further and costly litigation’”) (citing *West v. Circle K Stores, Inc.*, 2006 WL 355214, at *1 (E.D. Cal. 2006)).

68. *See, e.g.*, *Trull v. Lason Sys., Inc.*, 982 F. Supp. 600, 603-04 (N.D. Ill. 1997) (granting summary judgment prior to class certification is an appropriate procedure) (citing *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984) for proposition that “[t]o require notice to be sent to all potential plaintiffs in a class action when the underlying claim is without merit is to promote inefficiency for its own sake.”).

69. *See, e.g.*, *Good v. Altria Group, Inc.*, 231 F.R.D. 446 (D. Me. 2005) (stay of class action against tobacco company defendants warranted pending determination of defendants’ summary judgment motion which could be dispositive and plaintiffs’ pending motion for class certification could require extensive discovery).

70. *See, e.g.*, *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 93 (D.C. Cir. 2001) (“[W]here the merits of the plaintiffs’ claims can be readily resolved on summary judgment, where the defendants seeks an early disposition of those claims, and where the plaintiffs are not prejudiced thereby, a district court does not abuse its discretion by resolving the merits before considering the question of class certification”); *Villagran v. Central Ford, Inc.*, 524 F. Supp. 866, 882 (S.D. Tex. 2007) (same); *Coburn v. Daimler Chrysler Serv. North America, L.L.C.*, 2005 WL 736657, at *8 (N.D. Ill. 2005) (no unfairness in proceeding to adjudicate summary judgment prior to class certification based on numerous prior scheduling orders); *Hyman v. First Union Corp.*, 982 F. Supp. 8, 11 (D.D.C. 1997) (deciding summary judgment motion before class certification motion because neither party would suffer significant prejudice, and it “was more practicable to do so”). *But cf. In re New Motor Vehicles Canadian Export Antitrust Litig.*, 229 F.R.D. 35, 40-41 (D. Me. 2005) (granting plaintiffs’ motion to stay action on defendant General Motor’s summary judgment motion; judge not sufficiently altered to defendant’s desire for accelerated summary judgment).

71. *See supra* note 38.

an individual lawsuit against the defendant. Thus, assuming a court granted a plaintiff's summary judgment prior to class certification, that ruling would only bind the named class representative, but not the putative class (which has yet to be certified).⁷²

Correlatively, it is fairly well-accepted that defendants, then, must make a strategic decision whether to seek a summary adjudication of a named plaintiff's claims, prior to class certification.⁷³ Should the defendant prevail on a pre-certification motion, then the defendant gains a binding merits ruling only on the class representative's claims.⁷⁴ The defendant does not gain a binding merits determination against the putative class, however.⁷⁵ Instead, most courts that have considered summary judgment motions prior to class certification observe that if the court grants the defendant's summary judgment motion, then the class

72. This possibility raises the specter of one-way intervention, and waiver of the protection against one-way intervention, discussed *supra* at nn.57-58. In theory a plaintiff could attempt, after a positive summary judgment ruling, to assert that ruling as collateral estoppels after class certification. The author knows of no reported decision permitting offensive collateral estoppels of a plaintiff-favoring summary judgment ruling prior to class certification, asserted after class certification.

73. See generally BRUNET & REDISH, *supra* note 5, at § 10:16 (tactics regarding summary judgment and class actions; noting that because a trial order certifying a class action increases the settlement value of the case considerably, defense counsel should evaluate the potential filing of a motion for summary judgment before consideration of a class certification).

74. See Schwarzschild v. Tse, 69 F.3d 293, 297 (9th Cir. 1995) ("a decision rendered by the district court before a class that has been properly certified and notified is not binding on anyone but the named plaintiffs"); Brotherson v. The Professional Basketball Club, L.L.C., 2009 WL 3286112 (W.D. Wash. 2009) (order disposing of claims on summary judgment would not bind putative class members); Coalition to Defend Affirmative Action v. Regents of Univ. of Mich., 539 F. Supp. 2d 960, 974 (E.D. Mich. 2008) (dismissal prior to class certification is res judicata as to the class representatives, but has no effect on the putative class members); see generally JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 3.3 ("Defendants should consider, however, that in moving to dismiss or for summary judgment prior to class certification, prevailing on the motion will provide them only with *stare decisis* protection rather than res judicata protection as to absent class members").

75. See Schwarzschild v. Tse, 69 F.3d 293, 297 (9th Cir. 1995); Wright v. Schock, 742 F.2d 541, 543-44 (9th Cir. 1984) ("Where the defendant assumes the risk that summary judgment in his favor will have only *stare decisis* effect on members of the putative class, it is within the discretion of the district court to rule on the summary judgment motion first"); Bush v. Rewald, 619 F. Supp. 585, 600 (D. Haw. 1985).

However, where defendants seek summary judgment knowing of the possibility that other plaintiffs will enter the case and not be bound thereby, and where defendants are willing to settle for the benefits of *stare decisis* rather than risk those of res judicata, it is not for the plaintiff or the court to deter them from assuming the risk.

Id. (citing Wright, 742 F.2d at 541. See also Roberts v. American Airlines, Inc., 526 F.2d 757, 762-63 (7th Cir. 1975) (summary judgment against named plaintiffs would not protect defendants against other members of the class under doctrine of res judicata).

certification motion becomes moot.⁷⁶ Unless another litigant or putative class member “picks up the dropped spear,” the class litigation will effectively end.⁷⁷

Defendants, however, may not leverage a successful pre-certification summary judgment motion—as against an individual named class representative—into a class-wide binding effect by seeking class certification after a court has dismissed the plaintiff’s claims for lack of merit.⁷⁸ On the contrary, defendants may obtain a class-wide preclusive effect if they successfully move for summary judgment on the merits of the class claims, after a court certifies a class.⁷⁹ Judge Richard Posner, for the United States Court of Appeals for the Seventh Circuit, has aptly described the defendant’s choices:

Class actions are expensive to defend. One way to try to knock one off at low cost is to seek summary judgment before the suit is certified as a class action. A decision that the claim of the named plaintiffs lack merit ordinarily, though not invariably, disqualifies the named plaintiffs as proper class representatives. The effect is to moot the

76. See, e.g., *Coalition to Defend Affirmative Action v. Regents of Univ. of Mich.*, 539 F. Supp. 2d 960, 974 (E.D. Mich. 2008) (entry of summary judgment against class representatives’ claims had effect of mooting motion for class certification); *Beth V. by Yvonne V. v. Carroll*, 876 F. Supp. 1415, 1422 (D. Pa. 1995) (where defendant is entitled to summary judgment prior to class certification, court could dismiss motion for class certification as moot); *Haas v. Boeing Co.*, 1992 WL 221335, at *8 (E.D. Pa. Sept. 4, 1992) (granting defendant’s summary judgment motion and denying class certification motion as moot); cf. *Jibson v. Michigan Educ. Ass’n-NEA*, 30 F.3d 723, 734 (6th Cir. 1994) (where district court properly determined that plaintiffs were not entitled to relief and granted summary judgment to defendant, court not required to rule on the motion for class certification).

77. Nothing, however, prevents another class representative from stepping forward to represent the class.

78. See *Ortiz v. Lyon Mgmt. Group, Inc.*, 157 Cal. App. 4th 604, 620 (4th Dist. 2007) (“[D]efendant cannot cite a single case in which a defendant obtained class certification after first obtaining summary judgment against the named plaintiff’s individual claim”). *But cf.*, *Benfield v. Mocatta Metals Corp.*, 1993 WL 148978 at *2 (S.D.N.Y. 1993) (“Thus, where, as here, a plaintiff’s claims are dismissed prior to class certification, absent class members would be prejudiced if a court subsequently granted certification, and bound them to an adverse judgment”). See also *Bieneman v. City of Chicago*, 838 F.2d 962, 964 (7th Cir. 1988) (“[A] class representative who has lost on the merits may have a duty to the class to oppose certification, to avoid the preclusive effect of the judgment . . .”).

79. See, e.g., *Dorfman v. Law School Admission Council, Inc.*, 2001 WL 1754726, at *2 (E.D. Pa. 1978) (“It is the actual certification of an action as a class action . . . which alone gives birth to ‘class as jurisprudential entity,’ changes the action from a mere individual suit with class allegations into a true class action . . . and provides that sharp line of demarcation between an individual action seeking to become a class action and an actual class action”); *Robinson v. Sheriff of Cook County*, 167 F.3d 1155, 1157 (7th Cir. 1999) (“The plaintiff’s lawyer . . . would not be happy to have this case certified as a class action and then dismissed; that would have res judicata effect on any unnamed class members who did not opt-out”).

question whether to certify the suit as a class action unless the lawyers for the class manage to find another representative. They could not here because the ground upon which district court threw out the plaintiff's claims would apply equally to any other member of the class. After granting the defendant's motion for summary judgment, therefore, and since (as was predictable, given the district judge's grounds) no one stepped forward to pick up the spear dropped by the named plaintiffs, the judge denied the motion for class certification.

When the procedure we just described is followed, the defendant loses the preclusive effect on subsequent suits against him if class certification but saves the added expense of defending a class action and may be content to oppose members of the class one by one, as it were, by moving for summary judgment, every time he is sued, before the judge presiding over the suit decides whether to certify it as a class action.⁸⁰

Whether to pursue summary judgment adjudication prior to class certification, then, chiefly embodies a defendant's kind of strategic Sophie's choice. On the one hand, if a defendant assesses that a plaintiff's factual and legal allegations are fatally defective, the defendant has little to lose by pursuing summary judgment at that point. If the defendant pursues a summary judgment motion and prevails, the defendant assumes two possible negative risks: Either another plaintiff may pick up the class action spear, or alternatively the defendant will be subjected to successive rounds of repetitive litigation by individual class members pursuing individual claims.

Anecdotal experience suggests, however, that when a defendant defeats a named class representative's claims through summary judgment prior to class certification, neither of the two downside risks occur.⁸¹ Thus, a prevailing defendant may be reasonably confident that

80. *Cowen v. Bank United*, 70 F.3d 937, 941-42 (7th Cir. 1995). See also *Postow v. OBA Fed. Sav. & Loan Ass'n.*, 627 F.2d 1370, 1382 (D.C. Cir. 1980) (defendants, in moving for summary judgment prior to class certification, assume the risk that a judgment in their favor will not protect them from subsequent suits by other potential class members, "for only the slim reed of *stare decisis* stands between them and the prospective onrush of litigants"). See also MCLAUGHLIN, *supra* note 53, at § 3:3 ("The sparse case law addressing whether a defendant may obtain certification of a plaintiff class after defendant has obtained a favorable ruling on the merits of the named plaintiff's individual claim holds that it cannot.").

81. The author knows of no empirical data documenting the extent to which plaintiffs that suffer a defeat at summary judgment, prior to class certification, are replaced by another class representative who then successfully pursues the class litigation. In addition, the author knows of no empirical study documenting the incidence of subsequent, repetitive individual litigation after a named class representative's claims have been dismissed prior to class certification. From conversation with defense counsel over approximately twenty years, defense counsel report that

another class representative will not step up to pursue the class litigation, nor will successive plaintiffs renew individual litigation against the defendant based on the allegations dismissed by summary judgment. Moreover, if a defendant prevails on summary judgment prior to class certification, this merits-based determination tends to lessen the enthusiasm of counsel to pursue further individual or class litigation, unless counsel can remedy the pleading defects and be confident to survive a *stare decisis* ruling in subsequent litigation.

On the other hand, when presented with a factually and legally deficient class action case, some defense attorneys strategically prefer to allow the class to be certified,⁸² and then move for summary judgment in order to gain a class-wide preclusive effect of the summary judgment ruling. Again, based on anecdotal evidence, defense attorneys elect this option less often, because pursuing this strategy involves transaction costs, such as certification discovery and extensive certification motions practice that could otherwise be avoided by a pre-certification summary judgment motion. In addition, seeking summary judgment after class certification entails the added risk that the court might not grant the defendant's summary judgment, which would place the defendant in a weakened bargaining position, facing the prospect of class trial, additional transaction costs, and a forced settlement.

It should be noted, however, that defense counsel routinely motions for summary judgment after class certification, even where it is not abundantly certain that the plaintiff's allegations are fatally defective. And, in some instances, courts may receive cross-motions for summary judgment by both plaintiffs and defendants after class certification. If the court grants either parties' motion, the plaintiff or defendant gains the class-wide preclusive effect of the court's ruling. Indeed, some courts may prefer to defer ruling on the summary judgment motion until after class certification, precisely to provide such a class-wide preclusive effect to its ruling.

Notwithstanding that summary judgment is available to the litigants after class certification (which provides the additional benefit of class-wide preclusion), there are powerful arguments in support of the thesis that deciding summary judgment prior to class certification is a preferred approach to handling complex class action litigation. The historical

they rarely, if ever, face additional litigation if they prevail on a pre-certification summary judgment motion.

82. In situations where defense counsel is convinced that the plaintiff's case is fatally defective, some defense counsel elect not to oppose class certification. This is a highly unusual situation in class action practice, but it does occur.

resistance to pre-certification summary judgment in the class action context has eroded considerably over time, as the realities of the transaction costs of complex litigation have become manifest. Transaction costs for class litigation in the digital age have grown exponentially. In addition, recent pleading jurisprudence, as well as class certification standards, reflects the judiciary's growing concern with liberal notice pleading and easy class certification, in light of the *in terrorem* effect of class certification. As discussed below, these trends are now coalescing to buttress the argument in favor of enhanced or mandatory summary judgment prior to class certification.

III. CLASS ACTION SUMMARY JUDGMENT IN THE POST-*TWOMBLY/IQBAL* ERA

As indicated above, in the early 1990s when the Advisory Committee on Civil Rules was considering various reforms to Rule 23, one proposal would have codified a provision explicitly permitting judges to rule on dispositive Rule 12 or Rule 56 motions prior to ruling on class certification motions.⁸³ The Advisory Committee abandoned this proposed amendment after 1995.

In the ensuing fifteen years, federal courts have undergone a sea-change in attitudes towards civil litigation generally, and complex litigation specifically. Four trends are noteworthy and bear on consideration of the role of summary judgment in class action litigation. First, the Supreme Court has retreated from the norm of liberal notice pleading and instead articulated a regime of heightened pleading requirements.⁸⁴ Second, federal appellate courts have now clarified the "rigorous analysis" standard for class certification, in effect endorsing heightened class certification requirements.⁸⁵ Third, prominent academics have, in various formulations, urged that courts utilize some form of merit-based analysis in connection with class certification.⁸⁶ Finally, the debate over pre-certification discovery converges with these trends to support the argument for enhanced summary judgment practice prior to class certification.

Each of these trends is discussed in the following sections. More importantly, each of these trends—and the convergence of these trends—support the argument for enhanced summary judgment practice

83. See *supra* note 22.

84. See *supra* notes 11-12.

85. See *supra* note 13.

86. See *supra* note 14.

prior to class certification. Requiring summary adjudication prior to class certification is consistent with these trends and, as argued below, embodies a preferable procedural approach to resolving the several problems that have animated these developing trends.

A. *The Heightened Pleading Trend*

Perhaps the most revolutionary development in federal practice in the past five years has been the Supreme Court's retrenchment in *Bell Atlantic Corp. v. Twombly*⁸⁷ and *Ashcroft v. Iqbal*,⁸⁸ of the liberal notice pleading regime embodied in *Conley v. Gibson*⁸⁹ and its progeny.⁹⁰ Significantly for the conversation concerning summary judgment practice in complex litigation, both *Twombly*⁹¹ and *Iqbal*⁹² are grounded in fairness and efficiency rationales, including in *Twombly* the *in terrorem* effect of complex litigation on defendants to settle.

87. 550 U.S. 544 (2007). The *Twombly* and *Iqbal* decisions have generated a substantial body of academic and practitioner commentary. See generally Damon Amyx, *The Toll of Bell Atlantic Corp. v. Twombly: An Argument for Taking the Edge Off the Advantage Given Defendants*, 33 VT. L. REV. 323 (2008); Janice R. Ballard, *Bell Atlantic v. Twombly: Has the Court Re-Set the Bar With a Heightened Pleading Standard?*, 32 AM. J. TRIAL ADVOC. 183 (2008); Bone, *Twombly*, supra note 11, at 873.; Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431 (2008); Hannon, Note, supra note 11; Harvey Kurzweil, Eamon O'Kelly, & Susannah P. Torpey, *Twombly: Another Swing of the Pleading Pendulum*, 9 SEDONA CONF. J. 115 (2008); Smith, supra note 11; A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009); Spencer, supra note 11; Michelle Spiegel, *Ashcroft v. Iqbal: The Question of a Heightened Standard of Pleading in Qualified Immunity Cases*, 4 DUKE J. CONST. L. & PUBLIC POL'Y SIDEBAR 375 (2009); Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90 (2009); *Pleading Standards*, 123 HARV. L. REV. 252 (2009); J. Douglas Richards, Symposium, *The Future of Pleading in the Federal System: Debating the Impact of Bell Atlantic v. Twombly*, 82 ST. JOHN'S L. REV. 849 (2008).

88. 129 S.Ct. 1937 (2009).

89. 355 U.S. 41 (1957).

90. See, e.g., *Swierkiewicz v. Sorema*, 534 U.S. 506, 511-12 (2002) (rejecting heightened pleading requirement in employment discrimination civil rights litigation; upholding liberal pleading requirements under FED. R. CIV. P. 8 (a)(2)); *Leatherman v. Tarrant County*, 507 U.S. 163, 164 (1993) (federal courts may not apply more stringent pleading standard in civil rights cases alleging municipal liability under 42 U.S.C. § 1983). In dissent in *Twombly*, Justices Stevens and Ginsburg noted that *Conley*'s "no set of facts" language had been cited by the Supreme Court in dozens of the Court's opinions. "In not one of those sixteen opinions was the language 'questioned,' 'criticized,' or 'explained away.' Indeed, today's opinion is the first by any Member of this Court to express any doubt as to the adequacy of the *Conley* formulation." See *Twombly*, 550 U.S. at 571, 577 n.4 (J. Stevens and Ginsburg, dissenting) (citing cases in which Court endorsed the *Conley* liberal pleading standard).

91. 550 U.S. 544 (2007).

92. 129 S. Ct. 1937 (2009).

*Twombly*⁹³ involved an antitrust class action brought on behalf of local telephone service subscribers against major telephone companies, alleging violations of Section 1 of the Sherman Antitrust Act.⁹⁴ The plaintiffs alleged that the defendant telephone companies had engaged in parallel, conspiratorial conduct to inhibit the growth of local phone companies, and to eliminate competition in territories where any one company was dominant.⁹⁵ The federal district court dismissed the complaint for failure to state a claim upon which relief could be granted under Rule 12(b)(6),⁹⁶ but the United States Court of Appeals reversed, holding that the district court had applied the incorrect pleading standard.⁹⁷ The Supreme Court granted certiorari to address the question concerning the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.⁹⁸

The Supreme Court reversed.⁹⁹ In considering the proper pleading standard under Rule 8(a)(2),¹⁰⁰ the Court revisited standards developed pursuant to the Court's landmark *Conley*¹⁰¹ decision. The Court concluded that while a complaint that is challenged by a Rule 12(b)(6) motion does not need detailed factual allegations, a plaintiff has an obligation to provide the grounds for entitlement to relief, which requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action."¹⁰²

In order to withstand a threshold Rule 12(b)(6) motion to dismiss, the Court set forth a pleading standard of reasonable plausibility in support of the claim, constituting an entitlement to relief.¹⁰³ Pursuant to this standard, a pleader's factual allegations must be enough to raise a right to relief above the speculation level.¹⁰⁴ The Court cautiously

93. 550 U.S. 544 (2007).

94. 15 U.S.C. § 1.

95. 550 U.S. 544 (2007).

96. 313 F. Supp. 2d 174, 176 (S.D.N.Y. 2003).

97. 425 F.3d 99, 114 (2d Cir. 2005).

98. *Twombly*, 550 U.S. at 553.

99. *Id.*

100. FED. R. CIV. P. 8(a)(2), which requires that a pleader set forth only "a short and plain statement of the claim showing that the pleader is entitled to relief."

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

102. *Twombly*, 550 U.S. at 555.

103. *Id.*

104. *Id.*, 550 U.S. at 556. Applying the standard to the plaintiff's Section 1 Sherman Act antitrust allegations, the Court held that:

[S]tating such a claim requires a complaint with enough factual matter (taken as true) to suggest an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of

indicated that it did not require heightened pleading of specifics, “but only enough facts to state a claim to relief that is plausible on its face.”¹⁰⁵

In the context of the *Twombly* litigation, the Court’s plausibility standard for pleading antitrust allegations was largely grounded in the Court’s appreciation of the substantial transaction costs—especially discovery costs—entailed in complex antitrust litigation.¹⁰⁶ The Court noted: “Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive.”¹⁰⁷ The Court also was not sanguine that groundless cases could be “weeded out” by careful case management techniques early in the discovery process,¹⁰⁸ or that case management techniques would suffice to curb discovery abuses in dubious, complex cases.¹⁰⁹ Furthermore, the Court linked problems relating to discovery abuse with the potential *in terrorem* settlement pressure placed upon defendants, especially in complex cases:

illegal agreement.

Id.

105. *Id.*, 550 U.S. at 570. The Court held that: “Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.” *Id.*

106. *Id.* at 558.

107. *Id.* The Court added: “As we indicated over 20 years ago . . . , ‘a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.’”

In forceful language, dissenting Justices Stevens and Ginsburg rejected the majority’s central policy rationale for its heightened pleading standard:

The transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of pretrial discovery . . . Even if it were not apparent that the legal fees petitioners have incurred in arguing the merits of their Rule 12(b)(6) motion have far exceeded the cost of limited discovery, or that those discovery costs would burden the respondents as well as petitioners, that concern would not provide an adequate justification for this law-changing decision. For in the final analysis it is only lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges’ independent appraisal of the plausibility of profoundly serious factual allegations, that could account for this stark break from precedent.

Id. at 596-97 (J. Stevens and J. Ginsburg, dissenting).

108. *Id.* at 559.

109. *Id.* Dissenting Justices Stevens and Ginsburg contended that the majority’s practical concerns in antitrust litigation did not merit “the court’s dramatic departure from settled procedural law.” *See id.* at 573. The dissenters argued that the majority’s practical concerns merited careful case management, strict discovery control, careful scrutiny of evidence at summary judgment, and lucid instructions to the jury, but they these concerns did not justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying the charges that they had engaged in collective decision-making. *Id.* at 572-73.

And it is self-evident that the problem of discovery abuse cannot be solved by “careful scrutiny of evidence at the summary judgment stage,” much less “lucid instructions to juries”; . . . the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.¹¹⁰

More broadly, the Court in *Twombly* interred any conflicting pleading standards derived from *Conley*’s famous “no set of facts” language.¹¹¹ The Court suggested that, after “puzzling the profession for 50 years,” the prevailing *Conley* standard was “best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”¹¹² The *Conley* language did not, in the Court’s view, provide a minimum standard of adequate pleading to govern a complaint’s survival.¹¹³

In *Iqbal*,¹¹⁴ the Supreme Court laid to rest the question whether *Twombly*’s plausibility pleading standard applied beyond the antitrust context. *Iqbal* involved the claims of a Pakistani Muslim detained by federal authorities after the September 11th terrorist attacks.¹¹⁵ *Iqbal* alleged that he was deprived of various constitutional protections while he was in federal custody and that he was subjected to harsh conditions of confinement by virtue of his race, religion, or national origin.¹¹⁶ He sued various federal officials, including the former Attorney General of the United States and the Director of the Federal Bureau of Investigation.¹¹⁷

The defendants raised the defense of qualified immunity from suit and moved to dismiss for failure to state a claim.¹¹⁸ Both the district court and appellate court rejected the defendant’s motion to dismiss, concluding the plaintiff’s complaint was sufficient to state a claim despite the defendant’s official status.¹¹⁹

110. *Id.* at 559 (internal citations omitted).

111. *Id.* at 562-63.

112. *Id.* at 563.

113. *Id.*

114. 129 S. Ct. 1937 (2009).

115. *Id.* at 1942.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

The Supreme Court reversed, holding that Iqbal's pleadings were insufficient.¹²⁰ Relying on *Twombly*, the Court held that although the Rule 8 pleading standard did not require detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."¹²¹ The Court reaffirmed two working principles from *Twombly*: (1) the tenet that a court must accept as true all allegations contained in a complaint is inapplicable to legal conclusions,¹²² and (2) only a claim that states a plausible claim for relief survives a motion to dismiss.¹²³ Applying these principles to the allegations in Iqbal's complaint, the Court held that the plaintiff's bare assertions, much like the pleading of conspiracy in *Twombly*, amounted to nothing more than a formulaic recitation of the elements of a constitutional discrimination claim. As such, the allegations were conclusory and not entitled to be assumed true: "It is the conclusory nature of the respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."¹²⁴

The Court in *Iqbal* elaborated on three crucial pleading points. First, the Court held that its plausibility standard announced in *Twombly* was not limited to antitrust cases. Instead, the Court stated that the Court's decision in *Twombly* expounded the pleading standard for all civil actions and that it applied to antitrust and discrimination cases alike.¹²⁵ Second, the Court held that the question presented by a Rule 12(b)(6) motion to dismiss—challenging the legal sufficiency of pleading allegations—"does not turn on controls that a district court might place on the discovery process."¹²⁶ In *Iqbal*, then, the Court again

120. *Id.* at 1942-43. Four Justices dissented, and would have held that Iqbal's complaint satisfied Rule 8(a)(2). The dissenters argued that the fallacy of the majority's position was in looking at the plaintiff's relevant assertions in isolation. See *id.* at 1954-61 (J. Souter, Stevens, Ginsburg and Breyer, dissenting).

121. *Id.* at 1949.

122. *Id.* The Court held that:

[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice . . . Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.

Id.

123. *Id.* at 1950. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]' that the 'pleader is entitled to relief.'"

124. *Id.* at 1951.

125. *Id.* at 1953.

126. *Id.* The Court indicated that its rejection of the careful case management approach was especially important in suits where government official defendants are entitled to assert the defense of qualified immunity. "The basic thrust of the qualified-immunity doctrine is to free officials from

rejected the argument that careful case management could temper the burdens imposed by allowing a legally deficient complaint to proceed.¹²⁷ Third, the Court held that “the Federal Rules of Civil Procedure do not require courts to credit a complaint’s conclusory statement without reference to its factual context.”¹²⁸

Taken together, the Court’s decisions in *Twombly*¹²⁹ and *Iqbal*¹³⁰ represent a ratcheting-up of pleading standards in federal court. *Twombly* involved underlying class action litigation;¹³¹ *Iqbal* did not.¹³² Although technically eschewing the language of “heightened pleading,” the Court in both cases effectively created more substantial pleading burdens to withstand dismissal at the pleading stage.

The Court’s rationales supporting enhanced pleading standards in both cases reflect the Court’s concerns with the realities of modern civil litigation. In *Twombly*, the Court justified more stringent review of pleading allegations in light of the substantial transaction costs generated by discovery in complex litigation, coupled with the *in terrorem* effect of such litigation on the defendant’s willingness to settle.¹³³ Hence, the Court coupled an efficiency rationale with a fairness concern.¹³⁴ And, although *Iqbal* did not involve class litigation, the Court expressed similar concern for the disruptive and burdensome effect of the litigation process on governmental officials—most notably discovery.¹³⁵ Moreover, in both cases the Court reiterated its skepticism that careful case management techniques could serve to temper transaction costs, burdensome intrusions, or litigation fairness.¹³⁶

the concerns of litigation, including “the avoidance of disruptive discovery.” *Id.* In dissent, Justice Breyer argued that the litigants had not presented sufficient evidence to show that careful case management techniques could not be fashioned to protect the defendants from burdensome intrusions. Justice Breyer suggested, consistent with the Second Circuit’s decision, that a trial court “can structure discovery in ways that diminish the risk of imposing unwarranted burdens on public officials.” *See id.* at 1961-62 (J. Breyer, dissenting).

127. *Id.*

128. *Id.* at 1954.

129. 550 U.S. 544.

130. 129 S. Ct. at 1937.

131. 550 U.S. at 544.

132. 129 S. Ct. at 1937.

133. *See* 550 U.S. at 544.

134. *Id.*

135. 129 S. Ct. at 1937.

136. 550 U.S. 544 (2007); 129 S. Ct. at 1937

B. Heightened Class Certification Standards

The trend towards requiring greater specificity and plausibility in pleading civil cases has been paralleled in recent years by a similar appellate trend requiring heightened class certification standards.¹³⁷ In a series of appellate decisions, federal courts have ratcheted-up the standards of production and proof in satisfaction of class certification.¹³⁸ Moreover, the rationales underlying the articulation of these heightened class certification standards accord with the rationales supporting heightened pleading standards: fairness and efficiency.

The Third Circuit Court of Appeals has offered perhaps the clearest articulation of heightened class certification standards in its 2008 decision of *In re Hydrogen Peroxide Antitrust Litigation*.¹³⁹ In what may be the most influential decision relating to class certification since the Supreme Court decided *Amchem Prods., Inc. v. Windsor*,¹⁴⁰ the Third Circuit issued a sweeping opinion articulating standards of proof likely to have a tremendous impact on all class litigation.¹⁴¹ The *Hydrogen Peroxide* decision carries significant weight because Chief Judge Anthony Scirica, the opinion's author, has served as the Chair of the Standing Committee on Rules of Practice and Procedure, on the Advisory Committee on Civil Rules, and Chair of the Judicial Conference Working Group on Mass Torts.¹⁴²

Since 1982, federal courts routinely have recited that class certification is proper only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites" of Rule 23 are met.¹⁴³ In *Hydrogen Peroxide*, Judge Scirica insightfully noted that extant class certification jurisprudence provided federal courts with little guidance on the proper standard of proof in implementing this rigorous analysis language.¹⁴⁴ Hence, the Third Circuit stepped into this breach and articulated standards of proof district courts should apply at class certification.¹⁴⁵ These standards, consistent with emerging heightened pleading

137. See *supra* note 13.

138. See *supra* note 13.

139. 552 F.3d 305 (3d Cir. 2008).

140. 521 U.S. 591 (1997).

141. 552 F.3d at 305.

142. In 2008, Chief Justice Roberts named Judge Scirica as Chair of the Executive Committee of the Judicial Conference. Over his lengthy career, Judge Scirica has been extensively involved with reform of Federal Rule 23.

143. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

144. *In re Hydrogen Peroxide*, 552 F.3d at 315-16.

145. *Id.*

jurisprudence, reflected a growing concern with lax application of class certification standards.

The Third Circuit clarified three key aspects of class certification procedure that heightened judicial obligations and the burdens of production and persuasion by the proponents seeking class certification. First, a district court must make *findings* that all Rule 23 requirements are met, and may not certify a class action based merely upon a “threshold showing” by the party seeking certification.¹⁴⁶ Second, a district court must resolve all factual or legal disputes relevant to certification, even if that determination overlaps with merits-based questions intertwined with the underlying claims.¹⁴⁷ And third, a district court must consider all conflicting expert testimony.¹⁴⁸

The *Hydrogen Peroxide* litigation involved an antitrust class action by direct purchasers of hydrogen peroxide and related chemicals against chemical manufacturers.¹⁴⁹ The plaintiffs brought the action under § 4 of the Clayton Act, alleging a conspiracy in restraint of trade violating § 1 of the Sherman Act, 15 U.S.C. § 1.¹⁵⁰ After extensive discovery and a certification hearing including conflicting expert testimony, the district court certified the class under Fed. R. Civ. P. 23(b)(3).¹⁵¹ The defendants sought interlocutory appeal contending that the class certification failed to satisfy Rule 23(b)(3)’s predominance requirement.¹⁵² The defendants argued that the court erred in (1) applying too lenient a standard of proof, (2) failing to meaningfully consider the defense expert’s views while crediting the plaintiff’s experts, and (3) applying a presumption of antitrust impact under *Bogosian v. Gulf Oil Corp.*¹⁵³ The Third Circuit agreed, and remanded the case for further review.¹⁵⁴

Historically, antitrust actions have been among the easiest to certify because courts have found conspiracy allegations sufficient to bootstrap class-wide findings of predominance required by Rule 23(b)(3). The *Hydrogen Peroxide* decision, then, marked a significant departure for the undemanding class certification of antitrust cases.¹⁵⁵ However,

146. *Id.* at 316.

147. *Id.* at 316 - 17.

148. *Id.* at 323.

149. *Id.*

150. 15 U.S.C. §1; 552 F.3d at 308.

151. *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163, 167 (E.D. Pa. 2007).

152. 552 F.3d at 309.

153. *Id.* at 312; 561 F.2d 434 (3d Cir. 1977).

154. *In re Hydrogen Peroxide*, 552 F.3d at 327.

155. *See id.*

notwithstanding the antitrust context of its rulings, the Third Circuit was emphatic that the clarified standards of proof articulated in its decision applied to all substantive class actions, not just antitrust actions.¹⁵⁶ The Third Circuit announced that the district court had erred in applying too lenient a standard of proof with respect to Rule 23 requirements and that courts may no longer accept a mere “threshold showing” by plaintiffs.¹⁵⁷ Thus, the Third Circuit set forth clarified standards of proof to guide class certification analysis in all future proposed class actions.

First, Rule 23 class certification requirements are not mere pleading requirements. Courts may delve beyond the pleadings to determine if class certification requirements are met, and courts must make *findings* that each Rule 23 requirement is satisfied.¹⁵⁸ “Factual determinations necessary to make Rule 23 *findings* must be made by a preponderance of the evidence.¹⁵⁹ In other words, to certify a class the district court must find the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.”¹⁶⁰ The evidence and arguments a court considers in evaluating the suitability of a proposed class for certification also requires rigorous analysis. Importantly, a party’s mere assurance that it intends or plans to meet certification requirements in the future is insufficient.¹⁶¹

Second, a court must resolve disputed issues raised at class certification:

Under these Rule 23 standards, a district court exercising proper discretion in deciding whether to certify a class will resolve factual disputes by a preponderance of the evidence and make findings that each Rule 23 requirement is met or is not met, having considered all the relevant evidence and arguments presented by the parties.¹⁶²

Third, a court may not decline to resolve relevant certification disputes because there may be an overlap between the certification requirement and an underlying merits issue.¹⁶³ The Court stated that this evaluation does not violate the *Eisen* rule.¹⁶⁴ Hence, a court’s rigorous

156. *Id.* at 321-22.

157. *Id.* at 321.

158. *Id.* at 320.

159. *Id.*

160. *Id.*

161. *Id.* at 321.

162. *Id.* at 320.

163. *Id.* at 316-17.

164. *Id.* (citing *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (7th Cir. 2001) and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)).

analysis may include preliminary inquiry into the merits; a court may consider the substantive elements of the case to envision how an actual trial would proceed.¹⁶⁵

Fourth, expert opinion testimony requires rigorous analysis and should not be uncritically accepted as establishing a Rule 23 requirement, merely because the court holds that the testimony should not be excluded.¹⁶⁶ Weighing conflicting expert testimony may be integral to a rigorous analysis of Rule 23.¹⁶⁷ In the underlying litigation, the district court erroneously gave weight only to the plaintiff's expert testimony that class-wide impact could plausibly be demonstrated by two possible methodologies, while not crediting conflicting defense expert testimony that those methodologies were incorrect and unworkable.¹⁶⁸

Judge Scirica partially drew authority for the Court's conclusions based on Rule 23 amendments that became effective in 2003. Rule 23(c)(1)(A) was amended to change the timing of class certification, to encourage discovery into certification requirements, and to avoid premature certification decisions.¹⁶⁹ The 2003 amended Advisory Committee Note introduced the concept of a trial plan, to focus judicial attention on a rigorous analysis of a likely trial on the merits.¹⁷⁰ The 2003 amendments eliminated conditional class certification. The Standing Committee advised that conditional class certification was deleted to avoid suggestion that certification could be granted on a tentative basis, even if it was unclear that Rule 23 requirements were satisfied.¹⁷¹

The Third Circuit also addressed various formulaic standards the Court indicated will no longer suffice to permit class certification. Generally, the Court repudiated any mechanical language that might signify that the plaintiff's burden at class certification was lenient.¹⁷² The Court indicated that it was incorrect that a plaintiff need only demonstrate an "intention" to try the case in a manner that satisfies the predominance requirement. Consequently, courts misapply Rule 23 if

165. *In re Hydrogen Peroxide*, 552 F.3d at 316-17.

166. *Id.* at 323.

167. *Id.*

168. *Id.* at 325.

169. *Id.* at 318-320. See MANUAL FOR COMPLEX LITIGATION, FOURTH, *supra* note 8.

170. *In re Hydrogen Peroxide*, 552 F.3d at 319.

171. *Id.* at 319-20.

172. *Id.* at 322.

they find a plaintiff need only make a “threshold showing” of certification requirements.¹⁷³ Emphatically, the Court instructed:

A “threshold showing” could signify, incorrectly, that the burden on the party seeking certification is a lenient one (such as a prima facie showing or a burden of production) or that the party seeking certification receives deference or a presumption in its favor. So defined, “threshold showing” is an inadequate and improper standard.¹⁷⁴

In antitrust class actions, the Court repudiated the notion that in horizontal price-fixing conspiracy cases courts, when in doubt, may apply a presumption favoring class certification. The Third Circuit concluded that such presumptions “invite error.”¹⁷⁵ Moreover, the Court rejected the notion that certification-favoring presumptions can relieve district courts of their obligations to conduct a rigorous analysis in *any* type of class action. “Although the trial court has discretion to grant or deny class certification, the court should not suppress ‘doubt’ as to whether a Rule 23 requirement is met—no matter what the area of substantive law.”¹⁷⁶

Finally, the Third Circuit addressed the Supreme Court’s famous suggestion in *Amchem*, that the Rule 23(b)(3) “predominance test is readily met in certain cases alleging securities fraud or violations of the antitrust laws.”¹⁷⁷ Acknowledging this, the Third Circuit instead contended that “it does not follow that a court should relax its certification analysis, or presume a certification requirement is met, merely because a plaintiff’s claims fall within one of those substantive categories.”¹⁷⁸

The Third Circuit also drew support for its clarification of certification standards from the parallel universe of heightened pleading cases, most notably *Twombly*.¹⁷⁹ The Court recognized the relevance of those pleading decisions for heightened scrutiny at the point of class certification, and for similar rationales relating to fairness and

173. *Id.* at 321.

174. *Id.*

175. *Id.*

176. *Id.* at 321-22.

177. *Id.* (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997)).

178. *In re Hydrogen Peroxide*, 552 F.3d at 322.

179. *Id.* at 310. The *Hydrogen Peroxide* appeal was decided before the Supreme Court decision in *Iqbal*.

efficiency.¹⁸⁰ Indeed, much of the court's analysis surrounding the class certification process resonates in similar analysis in *Twombly*.¹⁸¹

The *Hydrogen Peroxide* decision sets forth a lengthy exposition of class certification jurisprudence, the rigorous analysis standard, and the rationales justifying heightened scrutiny of class certification requirements.¹⁸² The Third Circuit's exposition joins other federal appellate circuits that—within the last five years—similarly have embraced more stringent merit-based evaluations of class certification requirements.¹⁸³ The general thrust of these decisions, collectively, requires a more careful, calibrated examination of whether a proposed class action may proceed, and eschews facile class certification.

C. *Academic Commentary and the Merits-Evaluation Trend*

The trend among federal courts in articulating heightened pleading standards and rigorous class certification standards has been paralleled by a trend in academic commentary over the last decade urging federal courts to adopt some form of merit-based analysis in the class action context.¹⁸⁴ Almost all this commentary is grounded in similar rationales: that complex class litigation ought not to proceed until a court takes a meaningful “peek” at the merits, in the interests of efficiency and fairness. This commentary is grounded in the recognition that complex litigation is unlike ordinary or bipolar litigation,¹⁸⁵ that class action litigation entails substantial transactional and reputational costs and

180. But proper discretion does not soften the rule: a class may not be certified without a finding that each Rule 23 requirement is met. Careful application of Rule 23 accords with the pivotal status of class certification in large-scale litigation, because “denying or granting class certification is often the defining moment in class actions (for it may sound the “death knell” of the litigation on the part of plaintiffs, or create unwarranted pressure to settle non-meritorious claims on the part of defendants). . . .” *Newton*, 259 F.3d 154 at 162. See *id.* at 167 (“Irrespective of the merits, certification decisions may have a decisive effect on litigation.”); see also *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). In some cases, class certification “may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.” FED. R. CIV. P. 23 Advisory Committee's Note, 1998 Amendments. Accordingly, the potential for unwarranted settlement pressure “is a factor we weigh in our certification calculus.” *Newton*, 259 F.3d at 168 n.8. The Supreme Court recently cautioned that certain antitrust class actions may present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

181. 550 U.S. 544 (2007).

182. See 552 F.3d 305 (3d Cir. 2008).

183. See *supra* note 13.

184. See *supra* note 14.

185. See, e.g., *Hazard*, *supra* note 14, at 2 (noting that the valuation of claims in ordinary litigation is more easily accomplished than in class action litigation; valuation of class claims is more difficult for four enumerated reasons).

litigation burdens,¹⁸⁶ and that class action litigation—at the point of class certification—asserts inertial pressure on defendants to settle the litigation.¹⁸⁷ Moreover, this commentary is grounded in the premise that at least some class action litigation is frivolous or legally deficient, and ought not to proceed or to be settled.¹⁸⁸ The rationales underlying the academic proposals for merits-based class certification parallel the reasoning underlying the decisions in *Twombly*,¹⁸⁹ *Iqbal*,¹⁹⁰ and the *Hydrogen Peroxide*¹⁹¹ line of cases.

The emergence of academic commentary suggesting merits-based analysis is noteworthy because of the longstanding jurisprudential barrier presented by the so-called *Eisen* rule, which historically has been urged as prohibiting any merits-based analysis at the class certification stage.¹⁹² Generally, plaintiffs especially resisted any judicial scrutiny of the underlying merits of their class allegations, preferring the settlement leverage gained through uncritical class certification. Defendants, on the other hand, have urged courts to apply a rigorous analysis standard at class certification that would permit courts to probe beyond the pleadings to evaluate whether the asserted claims and defenses—in relation to the underlying law—may be pursued in the class action format.¹⁹³ In both instances, plaintiffs and defendants alike have invoked the *Eisen* rule in support of their contentions. Against the

186. See Bone & Evans, *supra* note 14, at 1286-1319 (analyzing error-cost factors in class certification decisions).

187. See generally McGuire, *supra* note 14, at 370-76 (discussing the impact of class certification and the benefits of a preliminary assessment of the merits of the underlying claims); Bone & Evans, *supra* note 14, at 1286-1319; Hazard, *supra* note 185, at 10 (discussing problem of settlement blackmail). See also *In the Matter of Rhone-Poulenc Rorer*, 51 F.3d 1293 (7th Cir. 1995) (same).

188. See generally Kozel & Rosenberg, *supra* note 14, at 1849 (recognizing the existence of frivolous class actions that are settled for their nuisance value only); Bone & Evans, *supra* note 14, at 1328 (“A preliminary screening of the merits in all class actions will help deter frivolous suits by controlling abuse of the settlement leverage certification creates.”).

189. 550 U.S. 544 (2007).

190. 129 S. Ct. 1937 (2009).

191. 552 F.3d 305 (3d Cir. 2008).

192. *McGuire*, 168 F.R.D. at 376-80 (1996) (discussing the *Eisen* rule).

193. See Hazard, *supra* note 14, at 2. Professor Geoffrey Hazard has correctly characterized this debate as a contest of heated political rhetoric:

The contending dies often seem to be talking about very different transactions. On behalf of votaries for claimants, it is asserted that wholesale rip-offs are involved, in which defendants have unjustly enriched themselves at the expense of unprotected ordinary citizens. On behalf of defendants, it is alleged that the class suit itself is blackmail. Of course, much of this talk is simply the shield-banging media rhetoric that has become all too customary an accompaniment to litigation involving high stakes.

Id.

backdrop of this considerable *Eisen* kerfuffle, scholars have converged on the thesis that *Eisen* does not present a jurisprudential bar to merit-based considerations during the class certification process.¹⁹⁴

For example, Professor Geoffrey Hazard has proposed that the Advisory Committee on Civil Rules ought to consider procedures for determining the merits of individual claims and the size of the class before the suit is certified as a class suit. “The basic idea,” he writes, “is to reverse the decision in *Eisen v. Carlyle & Jacquelin* and to provide for an initial judgment on the merits of class members in relation to the claims.”¹⁹⁵ Moreover, Professor Hazard has noted that “there is nothing inherent in a class suit that would prevent a determination of merits of some of the claims before addressing the problem of class certification;” that is, that the *Eisen* decision presents no such obstacle.¹⁹⁶

Professor Hazard’s proposal entails amendments to Rule 23 that would permit a court conditionally to certify a class, conduct pretrial discovery with respect to the scope and scale of a limited subset of typical claims, and try those claims to establish typical values. If the plaintiff prevailed, the court would revoke the conditional certification and certify the entire class; if the defendant prevailed, the court would decertify the class.¹⁹⁷

Professors Robert G. Bone and David S. Evans have proposed a root-and-branch approach to the *Eisen* doctrine, suggesting that it ought to be abolished.¹⁹⁸ These commentators suggest that courts should assess the class certification requirements (for numerosity, commonality, typicality, adequacy, predominance, and superiority)¹⁹⁹ based on evidence, including a merits-evaluation of the certification requirements and a showing of likelihood of success on the merits of each requirement.²⁰⁰ This approach is preferable, its authors argue, to courts attempting to screen deficient merits-based class litigation through strict pleading standards or penalties for frivolous filings.²⁰¹

The Bone-Evans proposal to require judges to conduct a merits-based analysis of class certification requirements is based on cost-benefit policy rationales:

194. Cf. Bone & Evans, *supra* note 14, at 1251 (urging abolition of the *Eisen* rule).

195. Hazard, *supra* note 14, at 4.

196. *Id.* at 9.

197. *Id.* at 4-6.

198. Bone & Evans, *supra* note 14, at 1264-76.

199. See FED. R. CIV. P. 23(a) and 23(b)(3).

200. Bone & Evans, *supra* note 14, at 1327-30. They characterize their proposal as “modest.” *Id.* at 1327.

201. *Id.* at 1328.

Rule 23 calls for a “rigorous analysis” of each class certification requirement. Moreover, as we have seen, some of those requirements, such as commonality, typicality, predominance and superiority, call on the court to predict the likely litigation path of the lawsuit, and this kind of prediction often requires an evaluation of the strength of the issues on the facts of the case. The *Eisen* rule, in effect, imposes an independent constraint on the scope of the certification inquiry in the name of avoiding prejudice, maintaining procedural purity, reducing errors, and conserving litigation resources. Such a constraint might be an acceptable gloss on Rule 23 if its purported benefits were clear and substantial enough. But they are not.

Our policy arguments also have broader implications. The error-and-process-cost analysis supports our more ambitious proposal that judges conduct a merits review as part of every certification decision regardless of whether merits-related issues are directly relevant to a certification requirement. Limited precertification discovery would be allowed on all the salient issues in the case, and the trial judge would make and justify a determination whether class members’ substantive claims have a significant likelihood of success. The merits inquiry need not be elaborate or extensive. The goal would be to avoid certifying class actions when the class claims are all substantively frivolous or extremely weak.²⁰²

Professor Geoffrey P. Miller is the third prominent academic to contribute to the merits-based class certification debate,²⁰³ and he too has endorsed some version of a merits-based inquiry at class certification.²⁰⁴ In parsing the *Eisen* decision, Professor Miller has contributed a useful schema of *Eisen* interpretations that courts have applied in construing this problematic decision. Thus, Professor Miller explains that some courts pursuant to *Eisen* have adopted “strong-form” rules that prohibit the court from inquiring into the merits of the claims and require courts instead to accept as true the well-pleaded allegations in the complaint.²⁰⁵ Other courts have adopted “weak-form” rules that permit a court to make reasonable inquiries into the merits relevant to class certification requirements.²⁰⁶ In a third variation, a few courts have adopted “super-weak” rules that either permit or require a court to evaluate the class’s likelihood of success in the litigation.²⁰⁷

202. *Id.* at 1327-28.

203. *See generally* Miller, *supra* note 14, at 51.

204. *Id.* at 84-87.

205. *Id.* at 55-59.

206. *Id.* at 59-62.

207. *Id.* at 62.

Professor Miller argues that both strong-form and super-weak form rules have little foundation in the law and are not supported by the *Eisen* decision.²⁰⁸ Professor Miller instead endorses the weak-form merits rule, which he states is “easy to justify under existing law.” A court that applies the weak-form rule “is simply engaged in the normal and expected judicial task of marshalling relevant evidence and applying law to facts. In fact, any reasonable interpretation of Rule 23 mandates a weak-form rule, since the framers of the rule must have intended to equip trial courts with the resources to make an informed and reasoned decision.”²⁰⁹

Similar to other academic commentators, Professor Miller supports his merits-based rule preference based on relevant underlying social policy rationales: the intersection of merits evaluation with preclusion doctrine, the effects of merits evaluation on the relative settlement posture of plaintiffs and defendants, and judicial economy concerns. In these arenas, Professor Miller argues that the weak-form merits rule comports with preclusion concerns (the problem of one-way intervention),²¹⁰ and “offer a better mix of settlement effects than either of the alternatives.”²¹¹ Regarding judicial efficiency, Professor Miller concedes that the efficiency of weak-form merits rule is more ambiguous, because weak-form rules are more burdensome at the front end of litigation than strong-form rules. Nonetheless, Miller concludes that:

Preliminary inquiries under a weak-form rule might have the efficiency-enhancing effects to the extent that they focus the trial court’s attention on the case at any early point in the litigation and induce better trial and pretrial management. Preliminary merits rulings under weak-form rules may also facilitate earlier settlements²¹²

Finally, Professor David Rosenberg and Randy J. Kozel have suggested one of the most interesting merits-evaluation proposals.²¹³ These commentators have proposed that courts engage in mandatory summary judgment adjudication on class claims as a pre-requisite to final approval of any settlement agreement.²¹⁴ The authors view the mandatory summary judgment process as a means to overcome the

208. *Id.* at 63-64.

209. *Id.* at 64.

210. *Id.* at 69-78.

211. *Id.* at 78-82.

212. *Id.* at 83-84.

213. See Kozel & Rosenberg, *supra* note 14.

214. *Id.* at 1853, 1860.

nuisance-settlement problem in class action litigation.²¹⁵ According to Kozel and Rosenberg, some percentage of meritless class litigation is nonetheless pursued because “paying off the proponent of the meritless claim or defense rather than incurring the greater expense of litigating to have it dismissed may well be the opponent’s rational (and expected) course of action.”²¹⁶

Again, social policy rationales are offered in support of the mandatory summary judgment model. Nuisance class action suits, it is argued, “decrease social welfare by vexing and taxing the victimized party, encouraging misallocation of legal resources, and diminishing public confidence in the civil liability system.”²¹⁷ Moreover, the prospect of nuisance settlements distorts the incentives of potential litigants to take socially appropriate levels of precaution against risk. Therefore, “mandating summary judgment as a condition precedent to entering into an enforceable settlement agreement eliminates the potential payoff from nuisance-value strategies, removing any incentive to employ them.”²¹⁸

The authors’ model for mandatory summary judgment, they explain, is simple. Class claims would have to be submitted for merits review on summary judgment as the precondition for the parties to enter into an enforceable class settlement.²¹⁹ This procedure, they contend, would not add significant costs, as compared to the costs of settling non-nuisance class actions.²²⁰ The mandatory summary judgment model, however, contemplates that such a merits-based review would occur after class certification, rather than prior to class certification.²²¹ Kozel and Rosenberg contend that pre-certification merits review provides minimal advantages that are “overshadowed by prohibitive costs.”²²² Therefore, these commentators argue that mandatory summary

215. *Id.* at 1850. “The civil justice system is rife with situations in which the difference in cost between filing and ousting meritless claims or defenses makes the nuisance-value strategy profitable.” *Id.* at 1851.

216. *Id.*

217. *Id.* at 1852.

218. *Id.* at 1853.

219. *Id.* at 1861-62.

220. *Id.* at 1871-72. This is because, the authors contend, current standards for judicial approval of class settlements entail far more extensive expenditures and substantive analyses to evaluate the merits of the class claims, relative to the showing that would be required for mandatory summary judgment.

221. *Id.* at 1890-93.

222. *Id.* at 1893-94; 1896-1901.

judgment, if fully effective, is far more efficient than pre-certification merits review as a means of preventing nuisance-value claims.²²³

Collectively, academic commentary by influential scholars within the last decade manifests a trend towards endorsing some sort of merits review during the class certification process.²²⁴ These proposals share common ground in the fundamental policy reasons supporting such merits-based scrutiny of class claims. This academic commentary is consistent and convergent with the growing trends in federal decisional law that requires more specificity and plausibility in pleading and more rigorous analysis of class certification motions. While varying in detail and degree, the academic proposals urge courts to assess the underlying merits of class claims, or class certification requirements, during the process of certifying a class action. Somewhat separately, Kozel and Rosenberg would require a regime of mandatory summary judgment adjudication after class certification but prior to settlement authorization.

Hence, the academic universe has moved a considerable distance from eschewing merits-based evaluations in the class action context. But, having conceptually embraced the thesis that some merits evaluation in complex litigation is appropriate—if not necessary—the most logical, efficient, and fair approach is to require summary judgment adjudication prior to class certification on the individual plaintiff's claims. All current proposals are wrongheaded in this: merits-evaluation during the class certification comes too late to avoid substantial transaction costs, judicial inefficiency, and fairness concerns.

In a post-*Hydrogen Peroxide* world,²²⁵ the class certification process has become increasingly burdensome and costly under heightened “rigorous analysis” requirements. Thus, proceeding with the class certification process entails massive transaction costs involved with pre-certification discovery and motion practice.

Pre-certification summary judgment adjudication, in effect, avoids the class certification process altogether if the defendant prevails on the motion and the plaintiff has filed a legally and factually insufficient complaint. Assuming that a plaintiff's complaint survives a Rule 12(b)(6) motion to dismiss, the availability of pre-certification summary judgment permits discovery limited to the named plaintiff's claim—which constitutes a cabined investigation and a contained cost.

223. *Id.* at 1892-93.

224. *See id.* at 1891 (“Though its validity as a purely judicial creation remains questionable in the federal system, PCMR [pre-certification merits review] has been gaining support in recent years from influential commentators and federal appellate courts alike.”) (citing authorities and cases).

225. 552 F.3d 305 (3d Cir. 2008).

If the plaintiff's claims cannot withstand a summary adjudication, the plaintiff should not be able to gain an aggregation advantage by allowing class certification without a ruling on the summary judgment motion. It is simply unfair and inefficient to postpone merits evaluation until the class certification hearing or some other post-certification opportunity (such as a precondition to settlement authorization).

D. *The Pre-Certification Discovery Debate*

A rule requiring pre-certification summary judgment adjudication in advance of class certification also ameliorates problems relating to the nature and scope of pre-certification discovery. The extent to which parties to a class action litigation should be able to gain access to discovery prior to class certification, as well as the scope of that discovery, has become a heated and controversial debate.

Generally, prior to the class certification decision, plaintiffs seek expansive general discovery into the class claims,²²⁶ including discovery relating to the merits of the class claims.²²⁷ Defendants, on the contrary, seek to cabin discovery as much as possible—to limit the ability of plaintiffs to conduct a fishing expedition into the defendants' records and practices. Defendants also seek to cabin discovery because of the substantial transaction costs involved in responding to plaintiff's expansive merits-based discovery requests. Hence, most defendants seek to limit pre-certification discovery only to information relating to satisfaction of class certification requirements, rather than wholesale merits discovery on class members' claims.²²⁸

Courts have taken different approaches to authorizing or limiting discovery before the class certification motion. There is some authority for the proposition that if it is evident from the nature of the claims pleaded and applicable law that the record is adequate for a court to decide whether a class may be certified, a court may decline to order pre-certification discovery to either party.²²⁹ In the post-*Hydrogen-*

226. *See, e.g.*, *American Nurses' Ass'n v. Illinois*, 1986 WL 10382, at *2 (N.D. Ill. 1986) (plaintiffs seek general discovery on merits issues underlying employment discrimination claims).

227. *Id.*

228. *Id.*; *See, e.g.*, *Borskey v. Medtronics, Inc.*, 1998 WL 122602, at *3 (E.D. La. 1998) (“Therefore, before the Court fully releases the hounds of discovery to flush out the entire spectrum of possible plaintiffs, the Court finds it prudent to focus the spotlight on those criteria that the named plaintiffs allegedly possess.”).

229. *See, e.g.*, *Fogie v. Rent-A-Center, Inc.*, 867 F. Supp. 1398 (D. Minn. 1993). *Accord*, THE MANUAL FOR COMPLEX LITIGATION, FOURTH, *supra* note 8, at §21.14 (“A threshold question is whether precertification discovery is needed. Discovery may not be necessary when claims for

*Peroxide*²³⁰ class certification era, it seems increasingly unlikely that many courts will certify class actions based on the facial sufficiency of the pleadings alone.

In most class action litigation, the question whether a proposed class action is suitable for certification is a contested issue. Hence, when the facts relevant to class certification are disputed, or when the party opposing class certification contends that the claims or defenses raise individualized issues, most courts recognize that some discovery may be necessary.²³¹ The nature and scope of permissible discovery prior to class certification typically is contended by the parties.

In this situation, courts often bifurcate discovery between certification issues and merits issues underlying the class allegations,²³² in order to balance the competing needs of and burdens on the parties.²³³ However, a judicial order bifurcating discovery often leads to contention among the parties concerning the characterization of discovery requests; in many instances, it is not always clear what information has bearing on class certification issues only, as opposed to underlying merits concerns. The Federal Judicial Center and federal courts have recognized that there is not always a bright line between discovery limited to certification issues only, and merits discovery on the underlying claims.²³⁴ Moreover, the Judicial Center has suggested that some pre-certification discovery into the merits of the claims is generally more appropriate for complex cases that are likely to continue even if the litigation is not certified as a class action.²³⁵

relief rest on readily available and undisputed facts or raise only issues of law (such as a challenge to the legality of a statute or regulation.)”).

230. 552 F.3d 305 (3d Cir. 2008).

231. MANUAL FOR COMPLEX LITIGATION, FOURTH, *supra* note 8, at §21.14. It is generally improper for a court to dismiss a proposed class action, without any precertification discovery, if the pleadings do not conclusively establish that the Rule 23 requirements are met. *See Walker v. World Tire Corp.*, 563 F.2d 918, 921 (8th Cir. 1977).

232. MANUAL FOR COMPLEX LITIGATION, FOURTH, *supra* note 8.

233. *See, e.g., Nat’l Org. for Women, Inc. v. Sperry Rand Corp.*, 88 F.R.D. 272 (D. Conn. 1980) (balancing the needs of plaintiffs and defendants for precertification discovery, and limiting discovery of both parties).

234. *Id.*

235. *Id.*

Allowing some merits discovery during the precertification period is generally more appropriate for cases that are large and likely to continue even if not certified. On the other hand, in cases that are unlikely to continue if not certified, discovery into aspects of the merits unrelated to certification delays the certification decision and can create extraordinary and unnecessary expense and burden. If merits discovery is stayed during the precertification period, the judge should provide for lifting the stay after deciding the certification motion.

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

Requiring a court to evaluate and adjudicate pre-certification summary judgment motions effectively would address the related problem of permissible pre-certification discovery. In this regard, the prevailing approach—that recommends bifurcation of discovery between class certification evidence and merits evidence—has it backwards. This approach is inefficient, contentious, and often difficult to apply. Thus, rather than limiting pre-certification discovery to information related to the satisfaction of class certification requirements, pre-certification discovery should be limited to merits discovery of the plaintiff's claims that is necessary to support or oppose a summary judgment motion.

Limiting discovery to the underlying merits of the plaintiff's claims prior to class certification satisfies various social policy goals. It is both efficient and fair. First, cabining merits discovery prior to class certification limits the exposure of both parties to the substantial transaction costs entailed in wholesale discovery of class claims. If a plaintiff's complaint is legally and factually deficient, there is scant justification to expose a defendant to wholesale class-wide merits discovery before class certification.

Further, if the defendant prevails on the pre-certification summary judgment motion, limited merits discovery prior to class certification eliminates the transaction costs entailed in certification discovery, as well as the related costs of litigating the class certification motion. Limiting discovery to the merits of the plaintiff's claims, for the purposes of a summary judgment motion, also avoids the contentious debates concerning what discovery requests relate to certification issues only, and what discovery requests bear on underlying merits issues.

Limited merits discovery prior to class certification also benefits the named plaintiffs. To the extent that a plaintiff may have lacked factual or evidentiary support for his or her claims at the time of filing the class complaint, limited merits discovery prior to class certification permits the plaintiff to develop its case and to avoid summary judgment dismissal. Indeed, such limited merits discovery—provided the plaintiff has legally and factually viable claims—may enhance the class litigation itself if the plaintiff is able to withstand the defendant's summary judgment motion prior to class certification. Without regard to the suitability of the action to class certification, a prevailing plaintiff that withstands pre-certification summary judgment has the advantage of learning that a court believes the action is viable enough to proceed to trial.

IV. SUMMARY JUDGMENT IN MDL PROCEEDINGS

A. *The Non-Class Action Aggregation Movement*

This article has largely focused on the role of summary judgment, prior to class certification, as a means for efficiently and fairly adjudicating complex litigation. Although class action litigation undoubtedly will remain a procedural fixture for resolving large-scale disputes, other non-class aggregation methods for addressing complex litigation exist and may become a primary means for resolving such cases. Thus, the Federal Judicial Center has studied the expanding role of multidistrict consolidation in federal civil litigation,²³⁶ and it has documented an increasing trend among federal courts to utilize this procedural mechanism.²³⁷

The multidistrict litigation statute provides for the transfer of cases from various federal district courts to a single, designated MDL court, for consolidated and coordinated pre-trial proceedings.²³⁸ The FJC has documented an increasing trend of the Panel of Multidistrict Litigation to grant MDL status to major litigation and to order MDL transfers.²³⁹ The FJC study has found that the Panel is more likely to order MDL transfer if the proceeding includes class allegations.²⁴⁰ In addition, the study finds that a substantial percentage of class action litigation transferred under MDL auspices is terminated during the MDL pretrial process.²⁴¹

In analyzing this trend towards increased use of MDL proceedings, the FJC has concluded that this trend partially is the result of the increased difficulty in obtaining class certification, especially in mass

236. See 28 U.S.C. § 1407 (the “Multidistrict Litigation” statute; otherwise known as MDL proceedings). See generally, Symposium, *The Problem of Multidistrict Litigation*, 82 TUL. L. REV. 2199 (2008).

237. See Emery G. Lee, Margaret Williams, Richard A. Nagareda, Joe S. Cecil, Thomas E. Willging, & Kevin M. Scott, *The Expanding Role of Multidistrict Consolidation in Federal Civil Litigation* (Draft paper, Federal Judicial Center 2009); see also Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883 (2001) (documenting increasing numbers of MDL proceedings).

238. See *supra* note 237.

239. Lee, Williams, Nagareda, Cecil, Willging, & Scott, *supra* note 237, at 2, 9.

240. *Id.* at 2-3, 9-10.

The study found that the MDL panel is more likely to order MDL transfer in proceedings raising claims relating to air disasters, antitrust, intellectual property, and securities issues. The study also found that the overwhelming majority of MDL cases were products liability cases, and that asbestos cases made up a substantial part of the whole. *Id.* at 2-3.

241. *Id.* at 24.

tort litigation.²⁴² Hence, MDL proceedings have become a surrogate means for aggregating litigation and at the same time avoiding the rigors (and possible rejection) of the class action rule. Thus, the FJC has concluded:

Details aside, the big-picture emerges: Courts are very unlikely to certify class actions for the litigation of mass torts. Still, the practical need to avoid duplicative discovery and other inefficiencies of pretrial litigation remains for the parties on both sides, counsel, and the courts. The observed inclination toward a higher grant rate for MDL motions in products liability cases thus can be understood as a partial substitute for litigation inefficiencies now unavailable via class certification. From the standpoint of defendants, MDL transfer makes for greater efficiencies in pretrial process without the additional pressure to settle that arises from the increased variance in the potential outcome associated with class certification.²⁴³

Whether defendants prefer MDL transfer and consolidated proceedings—because these proceedings avert the settlement pressure concomitant with potential class certification—remains an open question and is an inquiry outside the scope of this article. One might be skeptical of this proposition, however, because class certification is available in MDL proceedings, thereby diluting the theory that MDL proceedings circumvent the class action rule in some way.²⁴⁴

For the purposes of this discussion, however, attention should be paid to MDL forum proceedings, assuming there is a documented trend towards resolving complex litigation under MDL auspices. If this is true, then the locus of inquiry should be on the role of pre-trial motions in MDL proceedings as a means to resolve complex litigation (parallel to the role of dispositive pre-certification motions in class action litigation). If some substantial percentage of MDL litigation involves class action litigation, then the argument for pre-certification summary adjudication is the same for MDL proceedings.

Defendants should, in appropriate MDL cases, seek summary judgment of the named plaintiffs' claims, and MDL judges should resolve such motions prior to deciding a class certification motion.

242. *Id.* at 21.

243. *Id.*

244. Having suggested that MDL proceedings are both desirable and favorable to defendants because these proceedings are a surrogate for class action litigation, the FJC study nonetheless notes a high correlation between grants of MDL motions and the presence of a request for class certification. The FJC study suggests that "the connection between MDL treatment and requests for class certification also reflects other practical effects that bear close attention." *Id.* at 22.

Concededly, resolving summary judgment motions may become complicated where an MDL proceeding has consolidated multiple, competing class actions. Nonetheless, summary judgment prior to a class certification decision is an efficient and fair means for resolving complex litigation in an MDL proceeding, just as it would be in a single district court proceeding. The form of the proceeding (MDL) ought not to alter the soundness of the principle that summary adjudication of an individual plaintiff's claim ought to precede class certification.

B. Dispositive Motion in MDL Procedure

Finally, it should be noted that MDL judges clearly have the power to rule on dispositive motions to dismiss and on motions for summary judgment.²⁴⁵ The FJC has noted that the MDL process effectively centralizes the application of various means for pretrial scrutiny.²⁴⁶ Hence, the FJC has suggested that: "Interpretation and application of the *Twombly* pleading standard, the Court's summary judgment trilogy, and the *Daubert* admissibility standard understandably are not identical across the federal system. MDL treatment for pretrial proceedings, however, effectively operates to lend a unitary yardstick for the making of such rulings."²⁴⁷

Thus, whether complex litigation is pursued under class action auspices in a single federal court or through a consolidated MDL proceeding, litigants are authorized to pursue dispositive motions and judges are authorized to resolve such motions. The desirability of such procedure seems manifest; the only question concerns the extent to which judges ought to be required to rule on such motions. This article urges that the federal rules make explicit a requirement that federal judges evaluate and rule on summary judgment prior to creating a large, aggregate litigation, either through class certification or through some other non-class aggregate procedure.

V. CONCLUSION

More than fifteen years ago, proponents suggested an amendment to Rule 23 that specifically would have given federal judges discretion to rule on dispositive Rule 12(b)(6) and Rule 56 motions prior to class

245. See David F. Herr, MULTIDISTRICT LITIGATION MANUAL: PRACTICE BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION § 9:21 (2009) (citing cases); see also Lee, *et al.*, *The Expanding Role of Multidistrict Consolidation*, *supra* note 237, at 26 n.98.

246. Lee, Williams, Nagareda, Cecil, Willging, & Scott, *supra* note 237, at 26.

247. *Id.*

certification.²⁴⁸ In the firestorm of heated emotions surrounding the *Amchem*²⁴⁹ and *Ortiz*²⁵⁰ settlement classes—then working their way through the federal appellate system—this proposed amendment was abandoned along with many other Rule 23 proposed amendments. The proposal for pre-certification review of dispositive motions was attacked as an illegitimate incursion on the *Eisen* doctrine; the plaintiffs’ bar especially viewed this proposal as constituting a prohibited judicial venture into assessing the merits of claims in the class action context.

That was then, and this is now. In hindsight, the proposed amendment relating to pre-certification dispositive motions seems entirely innocuous; the proposal was not mandatory and merely would have given judges explicit authorization to decide pre-certification dispositive motions, where Rule 23 does not on its face provide such judicial guidance. Moreover, the *Eisen* argument seems entirely to be a red herring. Judicial consideration of pre-certification dispositive motions on the named class representative’s claims have nothing at all to do with the *Eisen* rule, and any number of federal courts have consistently pointed this out.

As this article has suggested, codifying a provision that explicitly authorizes federal judges to rule on pre-certification summary judgment motions has a great deal to recommend it. Such a provision would be congruent with and parallel to trends in heightened pleading and heightened class certification requirements, as well as commentary by influential legal scholars that merits examination in the class action context is not only permissible, but desirable. As is true of most rule amendments, promulgating a provision with regard to pre-certification dispositive motions—at this point—would consist of little more than codification of existing practice. Many federal courts, it seems, have abandoned any historical resistance to reviewing and granting pre-certification dispositive motions.

The need for a rule amendment now is essentially the same as in the early 1990s, when advocates first suggested this proposal. Although judges already have discretion to rule on dispositive motions prior to class certification, many do not exercise this discretion. Admittedly, we do not have good empirical evidence—actually, any empirical evidence—concerning why judges decline to rule on pre-certification dispositive motions. Some judges, at least, are chary to rule on

248. See *supra* note 22.

249. 521 U.S. 591 (1997).

250. 157 Cal. App. 4th 604.

dispositive motions in absence of clear authorization in Rule 23. Other judges may eschew ruling on pre-certification dispositive motions based on some pre-conceived notion that a court must rule on class certification prior to ruling on any dispositive motions. Some judges may decline ruling on pre-certification motions in the misguided or mistaken belief that such procedure is prohibited by the *Eisen* rule. Finally, some judges may defer ruling on a pre-certification summary judgment rule, based on the historical premise that complex cases are almost never suitable for summary judgment disposition.

A rule amendment specifically authorizing consideration of pre-certification dispositive motions would provide federal judges with a rule-based text upon which to proceed. A weak-form version of such an amendment would replicate the discretionary language in the 1993 and 1995 proposals; a strong-form version of such an amendment would require judges to rule on dispositive motions and not defer consideration until after class certification. The Advisory Committee Note to this provision could indicate that the provision was a codification of existing law, that pre-certification consideration of dispositive motions did not violate the *Eisen* rule, and that best practices entailed deciding pre-certification motions in a timely fashion. A provision authorizing or mandating judicial ruling on pre-certification dispositive motions could be located either in Rule 23, Rule 12, Rule 56, or in some combination of the rules.

The focus of this article and proposal has been on pre-certification summary judgment practice, rather than the Rule 12(b)(6) motion to dismiss. Critics of the Court's *Twombly*²⁵¹ decision have suggested that the plausibility pleading standard visits a harsh and unfair consequence on plaintiffs, prior to discovery. In a similar vein, critics of the *Hydrogen Peroxide*²⁵² line of cases, requiring heightened proof to satisfy the rigorous analysis test for class certification, have assailed this ratcheting-up of the class certification standards, with its concomitant cost and expense.

Enhanced summary judgment practice prior to class certification, then, represents an intermediate position between dismissing a case as facially deficient on a Rule 12(b)(6) motion, but avoiding the transaction costs and fairness concerns associated with meeting the heightened class certification requirements for class certification. In focusing pretrial practice on summary judgment, this provides more leniency at the

251. 550 U.S. 544 (2007).

252. 552 F.3d 305 (3d Cir. 2008).

pleading threshold, but it affords plaintiffs the opportunity for limited merits discovery on the pre-certification summary judgment motion. As explained above, pre-certification summary judgment practice, with discovery limited to the merits of the plaintiff's individual claims, strikes a sensible and fair accommodation to the pre-certification discovery dilemma.

However, it should be noted that this proposal for enhanced summary judgment prior to class certification might require differential or more careful application, depending on the substantive nature of the type of class litigation pursued. The need for a ruling on summary judgment prior to class certification may be most compelling in Rule 23(b)(3) damage class action context. On the other hand, summary judgment before class certification might be less compelling in the context of Rule 23(b)(2) injunctive or declaratory class actions, where the remedy is classwide. Similarly, certain types of class actions — such as antitrust or Title VII pattern-and-practice class actions — that depend on inherently classwide proof, also might not be suitable for pre-certification summary judgment adjudication.

Finally, the case for enhanced pre-certification summary judgment practice entails modification of the still-prevailing mindset that summary judgment is not suitable in complex cases. This proposition seems ill-conceived and outmoded; complexity itself provides no basis for a free pass to class certification or settlement. Given the realities of modern class litigation and the substantial costs, expenses, and judicial resources involved in resolving such litigation, the informal presumption ought to be the reverse of the historical view. Hence, complex litigation ought to be viewed as especially suitable for summary judgment adjudication, given the size and complexity of the stakes involved.