OF VULNERABLE MONOPOLISTS: QUESTIONABLE INNOVATION IN THE STANDARD FOR CLASS CERTIFICATION IN ANTITRUST CASES

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I. INTRODUCTION

Some courts appear to have begun to revise the standard for granting class certification. They have done so in numerous areas of the law,[1] including, quite recently, antitrust.[2] The new standard, if there is one, may empower courts to find facts relevant to the merits in a way that historically they have not been permitted to do.[3]

Whether a new standard would make certification of classes more difficult is unclear. Certainly, the rationale judges have offered for this change suggests that may be the case. After all, courts have asserted that class certification can place corporate defendants at a strategic disadvantage, forcing them to settle even meritless cases.[4]

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1. *See, e.g.*, Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 269–70 (5th Cir. 2007) (finding that determination of factual issues at the certification stage is acceptable in this securities fraud case); *In re* Initial Pub. Offering Sec. Litig., 471 F.3d 24, 26–27 (2d Cir. 2006) (remarking that a lesser standard, such as "some showing," will not suffice in this securities manipulation case); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675–76 (7th Cir. 2001) (asserting that judges should make whatever factual inquiries necessary to determine class action status).

2. *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307, 311–12 (3d Cir. 2008) (referencing antitrust litigation and its standards).

3. *See, e.g.*, *Oscar Private Equity*, 487 F.3d at 269–70; *Szabo*, 249 F.3d at 674–75.

4. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 310; *see also* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1254 (2002).

If this is what courts are doing—ratcheting up the standard at class certification by forcing plaintiffs to make a showing on the merits—then it appears to be an unfortunate development. For a host of reasons, courts would likely do better to abide by the traditional approach to class certification. These reasons can be neatly divided into three categories.

First, the rationale for the change is unsubstantiated and implausible. The concern animating this possible new trend is that class certification forces large corporate defendants to settle weak cases against them. This proposition lacks support as either a factual or theoretical claim. Courts have not cited to any empirical basis for the view that unmeritorious class actions in general, or antitrust class actions in particular, are being brought with any frequency, or that other procedural mechanisms for dealing with weak claims (such as Federal Rule of Civil Procedure 11 or dispositive motions) are in any material way inadequate.[5] Nor have courts relied on studies showing that large corporate defendants are more averse to risk than typical class members or, equally relevant for present purposes, than the attorneys who represent the classes. Moreover, courts have not expressed a willingness to relax the class certification standard upon a showing that class members are vulnerable and corporate defendants are not, or that the enormous and growing costs of bringing and prosecuting antitrust class actions would otherwise discourage a suit entirely or force a cheap settlement in a particular case. Thus, the one-sided sympathy courts have recently shown for large corporate defendants seems difficult to defend.

A second reason to question this change is that it fits poorly in the existing procedural framework. More precisely, given the structure of litigation, a new class certification standard would be both unnecessary and impractical. The change is unnecessary because defendants who wish to challenge the merits in a class case can and do rely on a variety of existing procedural mechanisms, including summary judgment motions[6] and *Daubert* challenges.[7] Those procedures allow courts to assess whether plaintiffs have sufficiently reliable evidence to proceed to trial.

Further, class certification does not mesh well with resolution of factual merits issues. The class certification process is designed to occur—and under

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5. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 310 (relying, for example, on the unsubstantiated assertion in Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007), for the claim that certification causes defendants to settle weak claims).

6. *See* FED. R. CIV. P. 56(a)–(b).

7. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–95 (1993).

some local federal rules *must* occur—relatively early in litigation.[8] If judges are going to rule on merits issues at class certification similarly to the way they would at summary judgment—indeed, if they may go further at class certification, not merely assessing whether there is a genuine issue of material fact, but actually finding facts—then plaintiffs first should have the opportunity to develop the merits fully. Summary judgment has Rule 56(f), which allows plaintiffs to put off a motion to pursue the discovery necessary to respond to it.[9] Some comparable provision will likely need to be adopted as part of Rule 23 if it is going to involve what is in some ways an even deeper inquiry into the merits. Perhaps class certification should be taken up in conjunction with summary judgment, which typically occurs after fact discovery has closed. Or perhaps no certification decision should be made until the eve of trial or even after trial.

Indeed, the deep inquiry into the merits that would seem to occur under the new class certification standard implicates the Constitution. Plaintiffs in antitrust cases have a right to have a jury find the facts relevant to their claims for damages.[10] The new standard would appear to create an overlap between the responsibilities of the judge and jury. This sort of overlap is not new to the law. Judges ruling on claims in equity often have to resolve the same factual issues that juries must decide regarding claims at law. The Supreme Court has made clear how to deal with this overlap: judges should await and abide by the findings of the jury.[11] The Seventh Amendment may well require the same approach regarding class certification. If so, under the new approach, the decision on certification may have to occur *after* a jury trial on the merits.

The third reason to doubt the wisdom of the new class certification standard is the way in which courts might use it. Courts might not only resolve contested facts at an early stage in the case, but they might distort other aspects of the class certification standard in the process. In particular, they could put undue emphasis on the requirement of proving injury, or impact, at class certification.

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8. *See* FED. R. CIV. P. 23(c)(1)(A) (noting that class certification decision should occur "at an early practicable time"); N.D. GA. LOCAL CT. R. 23.1(B) (imposing a default deadline for filing motion for class certification of 90 days after filing of complaint); E.D. PA. LOCAL CT. R. 23.1(c) (same).

9. *See* FED. R. CIV. P. 56(f).

10. *See, e.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1959) (citation omitted).

11. Dairy Queen v. Wood, 369 U.S. 469, 479 (1962).

To understand this issue, two background points are necessary, one about the elements of an antitrust claim and the other about the class certification standard. To prevail on an antitrust claim, a plaintiff must prove three elements: an antitrust violation, causation, and impact (or fact of damage). For purposes of analyzing antitrust claims for class certification, however, courts often break up an antitrust claim into three different conceptual categories: (1) a violation of the antitrust laws; (2) individual injury (or impact) resulting from the violation; and (3) computation of damages.[12] To certify a class seeking damages under Rule 23(b)(3), a plaintiff must show that a class-wide trial would be sensible, and therefore, looking at the case as a whole, issues common to the class would predominate over issues individual to class members.[13]

As the Supreme Court has observed, often in antitrust cases, predominance is obvious.[14] For example, the crucial issue in litigation may be whether defendants engaged in a course of conduct that violated the antitrust laws, an issue that will be the same for all members of a class. So defendants resisting class certification are apt to ignore this sort of issue, focusing instead on the issue of impact. Defendants tend to argue that the evidence necessary to show this single element of plaintiffs' claims will vary by class member. The form this argument usually takes is that individual issues predominate regarding whether the alleged antitrust violation caused the relevant kind of harm to class members, that is, whether it had the requisite impact on each (or most) of them.[15] Courts sometimes rely on this

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12. *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008); Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 105 (2d Cir. 2007); *see also In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 86–87 (D. Conn. 2009) ("The injury and causation element has also been referred to as 'antitrust injury' and 'causation or impact.'").

13. *See* FED. R. CIV. P. 23(b)(3).

14. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (noting that predominance requirement of Rule 23(b)(3) is "readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws").

15. *See, e.g.*, Kohen v. Pac. Inv. Mgmt. Co. LLC (PIMCO), 71 F.3d 672, 677 (7th Cir. 2009). Writing for the court, Posner states:

> What is true is that a class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification. . . .

Id. (citation omitted); *see also In re* NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 523 (S.D.N.Y. 1996) (evidence showing "widespread injury to the class" sufficient).

argument—and perhaps now may find facts in doing so—to deny certification. Indeed, recent cases that imply a potential reworking of the class certification standard have focused on the issue of impact.[16]

But this framing of the issue can improperly skew the class certification standard. Given that plaintiffs can choose the theory of liability they present at trial, whether common issues predominate should depend largely on whether plaintiffs have a plausible enough class-wide theory to present. But whether common issues will predominate *at trial* does not depend on whether that jury will ultimately decide that plaintiffs' class-wide theory is correct when the trial is over. Asking courts to determine the factual validity of plaintiffs' class-wide theory at the class stage could thus lead courts to address the wrong issue.

Moreover, placing undue emphasis on "impact" could misdirect the class certification analysis in other ways as well. After all, the point of the rule is to determine whether it is sensible to have a class-wide trial (as opposed to hundreds or even thousands of individual trials).[17] As a result, the requirement is that common issues predominate in the case *as a whole*, not that they predominate in regard to *each and every element of a claim.* Logically, even if there are some individual issues relevant to impact, and even if those issues predominate in regard to that element in isolation, common issues may predominate in the case overall.[18] This is because antitrust trials generally focus on proof of the underlying violation, such as those reflected in the questions, "Did the defendants conspire to fix prices?" or "Did the defendant foreclose competition and, if so, how?" Moreover, even questions relating to the effects of the challenged conduct, such as "Did prices generally rise (or output generally fall) due to the challenged conduct?," tend not to turn on individual impact, but rather on whether the conduct as a whole had anticompetitive effects. It would therefore be unusual if proving impact on class members from artificially inflated prices were the

16. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 323–25; *Cordes*, 502 F.3d at 104–109; *see also* New Motor Vehicles Canadian Export Antitrust Litig., 522 F.3d 6, 26 (1st Cir. 2008) (holding that "when a Rule 23 requirement relies on a novel or complex theory as to injury, as the predominance inquiry does in this case, the district court must engage in a searching inquiry into the viability of that theory and the existence of facts necessary for the theory to succeed").

17. *See* FED. R. CIV. P. 23(b)(3) advisory committee's note ("It is only where . . . predominance exists that economies can be achieved by means of the class-action device.").

18. *See id.* (noting that "a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class").

focus of an antitrust trial. Nevertheless, because that is the issue that defendants tend to emphasize in opposing class motions, the element of impact can receive disproportionate attention at class certification, even if it will be only a minor issue at trial.

The combination of the overrepresentation of the impact issue and a possible new requirement for a heightened showing at the class stage might have an additional adverse effect on class plaintiffs. It could effectively force plaintiffs to prove something relevant to "the merits" at class certification that they would not need to prove at trial. The dispute about impact at the class stage tends to be about whether plaintiffs have evidence common to the class as a whole showing that all or nearly all class members were injured (typically by being forced to pay higher prices) by the challenged conduct.[19] The focus of that inquiry is generally whether the plaintiffs' evidence or methodology can show that all (or most) class members were injured, with the debate typically devolving into side-arguments about whether injury to certain categories or sub-categories of class members might not be proven by that evidence.

At trial, however, these questions rarely come to the fore. As long as a reasonably sizable proportion of the class suffered injury (perhaps something more than half), the existence of certain class members who were not harmed is largely immaterial. Further, the lack of injury to some class members does not figure in assessing class-wide damages—what matters is calculating the collective harm to those class members who *were* injured, not identifying those members who were *not*. Nor does a lack of injury play any other significant role in the proceedings. Thus, combining a dictate that courts should resolve "merits" issues at the class stage with existing class action jurisprudence might cause courts to delve deeply into factual disputes that they would otherwise never need to resolve.

The final reason to be skeptical of any newly claimed authority of judges to resolve merits issues during the class phase is that it would involve a back-door change to the procedural rules. The text and advisory notes for Rule 23 in its current incarnation do not contemplate that judges will rule on merits issues at class certification.[20] Nor do longstanding and germinal precedents interpreting Rule 23.[21] If some modification of the class certification process

19. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 324–25.

20. *See, e.g.*, Eisen v. Carlisle, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

21. *Id.* at 177–78.

is in order—if a procedural decision is going to morph into a merits determination—courts should follow the right method of effecting that change. A formal modification to Rule 23 would be appropriate. The deliberation built into the formal process of amending Rule 23 would bring to light, and perhaps help to resolve, the various difficulties discussed above.

In sum, various problems beset recent judicial experimentation with modifying the traditional class certification standard. Modifying the standard would address a problem that probably does not exist, distort the class certification process in a manner that would not work well, encourage other misapplications of certification doctrine, and change federal procedure in a way that lacks legitimacy. For these reasons, any such change would be ill-advised.

Part I provides the background for this Article. It explores a possible shift in the class certification standard in some recent judicial opinions, including in antitrust cases. Part II argues that this shift is premised on a questionable policy basis. Part III argues that a modification of the class certification standard appears in any to case be a bad idea, and that judicial resolution of facts relevant to the merits fits poorly with the class certification process and would likely require other substantial and unwise changes in certification procedure. Part IV claims that a new approach to resolving facts at class certification would appear to facilitate other questionable distortions in the class certification standard, including a seemingly novel and ill-advised application of the predominance requirement to assessing impact. Part V contends that even if there were sound policy reasons for changing the class certification standard, it is the kind of modification that is likely best pursued through the formal process for modifying the Federal Rules of Civil Procedure, not through a common law process that strains to reinterpret those Rules and binding precedents. Part VI concludes.

One qualification is in order at the outset. This Article sets forth only an initial set of concerns about a possible effort by some courts to alter the class certification standard. It does not purport to render final judgment on these issues. Nor does it offer the sort of support necessary to do so. Indeed, its major point is that greater deliberation should occur before such a significant change.

II. A POSSIBLE TREND TOWARD RESOLVING MERITS ISSUES AT CLASS CERTIFICATION

The first issue regarding possible changes to the standard for class certification is whether any have occurred. Some opinions have implied that

judges may deviate from the traditional approach to class certification—indeed, that they may even depart from the time-honored rule that judges should not decide factual issues regarding the merits at class certification. But most of these statements occur in dicta and are contradicted by other assertions in the very same opinions. Still, the judicial suggestion that class certification can be a kind of blackmail—that large corporate defendants settle class actions even in meritless cases—implies that courts at the least are considering ratcheting up the class certification standard, even if they have not yet done so.[22] As a result, whether such a change would be wise—and, indeed, whether the courts have the power to make it—are issues warranting careful attention.

A. The Traditional Standard

To certify a class, a plaintiff must satisfy all four requirements of Rule 23(a) and one of the provisions of Rule 23(b).[23] Rule 23(a) requires numerosity, commonality, typicality, and adequacy.[24] The most common form of a class action is under Rule 23(b)(3), in which issues common to the class predominate over issues affecting only individual class members, and the class mechanism is superior to other methods of adjudication. A class action seeking damages under federal antitrust law must ordinarily meet this standard.

Given these multiple requirements, the class certification analysis can become quite complex. But often it is not. In many antitrust cases, there is no meaningful dispute that the class is sufficiently numerous, that there are some issues common to class members, that the claims of the named plaintiffs are typical of the claims of the class as a whole, and that the named plaintiffs and the attorneys they have hired will represent the class adequately. The class certification decision turns instead on whether common issues predominate over individual issues and, more specifically, on the effect on that issue of the element of "impact" or "fact of damage."

By way of background, plaintiffs seeking to prevail on a claim of damages in an antitrust case must show that an antitrust violation caused them to suffer an appropriate form of harm.[25] The requisite impact—or fact of damage—often forms the crux of class certification.[26] Plaintiffs generally

22. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 310.
23. *See* FED. R. CIV. P. 23(a)–(b).
24. *See* FED. R. CIV. P. 23(a).
25. *Hydrogen Peroxide*, 552 F.3d at 311.
26. *See, e.g.*, *id.* at 320–25.

argue that they can prove impact through common evidence.[27] A shorthand for this claim is that they can show "common impact." Defendants assert that evidence of impact will vary by member of the class. Often whether a class will be certified under Rule 23(b)(3) will rise or fall depending on how a court approaches this issue.[28]

The traditional rule is that a court in deciding class certification should not resolve merits issues. The most famous statement of this proposition occurred in the Supreme Court's decision in *Eisen v. Carlisle*:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to

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27. *See, e.g.*, *In re* Mercedes–Benz Tele Aid Contract Litig., 257 F.R.D. 46, 55 (D.N.J. 2009) (quoting *Hydrogen Peroxide*, 552 F.3d at 311–12) ("Plaintiffs are not required to conclusively demonstrate the merit of their claims in order to obtain certification as a class[; r]ather, they must show that the elements of those claims are 'capable of proof at trial through evidence that is common to the class . . . .'"); Fogarazzo v. Lehman Bros., Inc., No. 03–CIV 5194 (SAS) 2009 U.S. Dist. LEXIS 67555 at *45 (S.D.N.Y. Aug. 4, 2009) (stating that "successful employment of a methodology and demonstration that the analysts' reports did indeed cause plaintiffs' loss is unnecessary at the class classification stage" because plaintiffs "need only prove by the preponderance of the evidence that loss causation can be proven on a class-wide basis"); McDonough v. Toys "R" Us, Inc., 638 F. Supp. 2d 461, 489 (E.D. Pa. 2009) (holding that it was sufficient in establishing predominance that plaintiffs had merely "demonstrated how common evidence could prove that the conspiracies caused supra-competitive prices").

28. Significantly, in federal antitrust cases brought by direct purchasers, courts allow plaintiffs to prove they were injured simply by showing that they were "overcharged"— they overpaid for a product or service due to an antitrust violation. As Judge Easterbrook has put it, "The monopoly overcharge is the excess price at the initial sale[.]" Paper Sys., Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 633 (7th Cir. 2002). Whether the plaintiff or class member "passed on" that overcharge down the chain of distribution, or was otherwise affected by the challenged conduct, is irrelevant to the determination of injury. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968). This rule greatly simplifies the "common impact" showing because it does not require a court to know anything about an individual plaintiff or class member other than that they overpaid for the product or service at issue. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 731–32 & n.12 (1977) (so-called direct purchaser rule designed to simplify analysis); *see generally* Joshua P. Davis & David F. Sorensen, *Chimerical Class Conflicts in Federal Antitrust Litigation: The Fox Guarding the Chicken House in* Valley Drug, 39 U.S.F. L. REV. 141, 172–73 & n.164 (2004).

> the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such "[a]s soon as practicable after the commencement of [the] action . . . ."[29]

A few points about this statement are worth noting. First, it is sweeping and categorical. In general, the Court declared, a judge should not decide issues on the merits at class certification.[30] Second and related, as a basis for this sweeping statement, the Court relied in part on the early stage in the litigation at which class certification is expected to occur. At class certification, it is not fair to ask the parties to put forward a persuasive case on the merits.

A third point, less central to the Court's reasoning, is that the Supreme Court put the standard in place in part out of a concern for defendants. It worried that plaintiffs might gain the benefit of provisional findings without defendants having an adequate opportunity to protect their rights. As the Court further explained:

> Additionally, we might note that a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative finds, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.[31]

This general approach raises a problem at class certification. One of the issues a court may have to determine is whether at trial the issue of impact (or fact of damage) will turn on common evidence, on evidence that pertains only to individual class members, or on some combination of the two. If the

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29. 417 U.S. 156, 177–78 (1974) (quoting FED. R. CIV. P. 23(c)(1)).

30. Even proponents of modifying the class certification standard have acknowledged this point. *See* 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, 377 (1996) (admitting that *Eisen* made a "sharp distinction between preliminary merits rulings and class action rulings"); Steig D. Olson, *"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 944 n.56 (2009) (quoting Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1265 (2002) ("The Court did not limit its holding to the unusual facts of the case, in which the plaintiffs sought and the defendants opposed the preliminary merits review. Instead, it used expansive and seemingly categorical language that has had a profound effect on class action practice ever since . . . .").

31. Eisen v. Carlisle, 417 U.S. 156, 178 (1974).

issue will depend on only common evidence, that tends to support the conclusion that common issues will predominate. If it will depend in substantial measure on evidence that varies by class member, that would weigh against finding that common issues predominate (although it may not by itself tip the scales against certification). The question is how a court can make this determination without deciding issues on the merits and, in particular, without making finds of fact that are reserved for the jury.

The traditional answer is that a court may take into account the issues relevant to the merits and assess whether plaintiffs have "shown that they *plan to prove* common impact by introducing generalized evidence which will not vary among individual class members."[32] In other words, the governing substantive law frames the relevant issues, and plaintiffs may *propose* a method of satisfying the substantive legal requirements through evidence that pertains to the class generally. But a court should not decide whether the plaintiffs ultimately will prevail at trial. Beyond a court assuring itself that the plaintiffs have proposed a colorable methodology for proving their case on a predominantly class-wide basis, there is no need at the class stage for a judge to delve deeply into the merits or to assess the persuasiveness of the plaintiffs' evidence or expert analysis. A showing that plaintiffs will put forward arguments and evidence that are predominantly common to the class to try to prove their case should suffice.

B. A Possible Break with Tradition

Some courts, however, have recently reasoned in a way that casts some doubt on this traditional approach to class certification, including in antitrust cases. Perhaps most notable for present purposes is the Third Circuit's recent decision in *In re Hydrogen Peroxide Antitrust Litigation*.[33] To be sure, even the *Hydrogen Peroxide* opinion is ambiguous on the crucial issue. On one hand, the Third Circuit at one point acknowledged that "the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is *capable of proof* . . . through evidence that is common to the class rather than individual to its members."[34] On the whole, this is a fairly good—if imprecise—statement of the traditional understanding of the class certification standing. It recognizes that the right issue is not whether plaintiff should *win* on impact, but only whether they will rely on common

32. *In re* Linerboard Antitrust Litig,, 305 F.3d 145, 152 (3d Cir. 2002) (emphasis added) (quoting *In re* Linerboard Antitrust Litig., 203 F.R.D. 197, 220 (E.D. Pa. 2001)).

33. 552 F.3d 305 (3d Cir. 2008).

34. *Id.* at 311–12 (emphasis added).

evidence in *attempting* to do so. (It is imprecise for at least two reasons: the issues need merely be *predominately*—not *entirely*—common for class certification to be appropriate;[35] and those common issues need merely predominate in the case *as a whole*, not necessarily regarding the *specific element of impact*.[36])

On the other hand, *Hydrogen Peroxide* contains other statements that suggest a novel approach to class certification, one that may even charge courts with making findings of fact on the merits as part of the certification decision. The Third Circuit stated at one point, for example, that certification "calls for findings by the court, not merely a 'threshold showing' by a party, that each requirement of Rule 23 is met," findings that must be based on a "preponderance of the evidence."[37] It further suggested that a trial "court must resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action."[38] The Third Circuit further suggested that these rules apply to expert testimony.[39]

These propositions from *Hydrogen Peroxide*—taken in conjunction with the statement appearing to endorse a traditional approach to class certification—are highly confusing, if not self-contradictory.[40] It seems clear that the Third Circuit did not intend to require plaintiffs to prove any of the elements of their claim by a preponderance of evidence at class certification; doing so would be inconsistent with asking them only to show, for example, that impact is *capable of proof* through common evidence, as opposed to requiring plaintiffs to *prove* impact through common evidence.[41]

Yet the court was opaque regarding what it means to require plaintiffs to show by a preponderance of evidence that antitrust impact is "capable of proof" through common evidence. Such a standard is a strange hybrid, neither fish nor fowl. It is an odd admixture of the ultimate burden of proof at trial, and some sort of preliminary showing. Only time will tell how, if at all, courts will try to synthesize these apparently disparate standards into a single determination. The wiser course might well be to treat *Hydrogen*

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35. *See* FED. R. CIV. P. 23(b)(3) (requiring that common issues predominate).

36. *Id.* (requiring predominance of common issues in regard to question of law or fact in general, not specifically for each element).

37. *Hydrogen Peroxide*, 552 F.3d at 307.

38. *Id.*

39. *Id.*

40. *See* Olson, *supra* note 30, at 935 n.5 (2009) (noting ambiguity in court's opinion in *Hydrogen Peroxide*).

41. *Hydrogen Peroxide*, 552 F.3d at 311–12.

Peroxide as an anomalous and potentially misleading opinion, one that did not affect any fundamental changes to class certification law.

That approach may be all the more tempting because the panel in *Hydrogen Peroxide* appears to have lacked the power to alter the law in the way it might be read as doing. As the *Hydrogen Peroxide* court itself acknowledged, in the Third Circuit a later panel is bound by the holdings in past panel opinions.[42] And past panels in the Third Circuit—including in *Linerboard*[43] and *Bogosian*[44]—entrenched the traditional class certification standard as settled law. As a matter of Third Circuit jurisprudence, only a decision by the Third Circuit sitting *en banc* could make the kind of changes to precedent at issue—and even then, as discussed below, the Third Circuit would of course be bound by Supreme Court precedent, including *Eisen*, as well as by Federal Rule of Civil Procedure 23.

But the issue of courts making findings of fact on the merits at class certification nevertheless warrants our attention. After all, a growing number of federal appellate courts have suggested that such findings may well be appropriate in general,[45] and now courts have made a similar suggestion in antitrust cases.[46] As a result, if no significant change to the certification standard has occurred yet, it may happen soon. This Article therefore addresses the dubious policy basis and the undesirable consequences of raising the class certification standard in antitrust cases.

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42. *Id.* at 318 n.18.

43. *See, e.g.*, *In re* Linerboard Antitrust Litig., 305 F.3d 145, 152 (3d Cir. 2002) (quoting *In re* Linerboard Antitrust Litig., 203 F.R.D. 197, 220 (E.D. Pa. 2001)).

44. Bogosian v. Gulf Oil Corp., 561 F.2d 434, 455 (3d Cir. 1977).

45. *See, e.g.*, Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 269–70 (5th Cir. 2007) (finding that trial court erred by holding that the class certification stage is the wrong time to rebut factual issues); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006) (stating that there might be an overlap between the findings for a Rule 23 requirement and a merits determination); Gariety v. Grant Thornton, 368 F.3d 356, 365 (4th Cir. 2004) (allowing for a "controlled discovery" before making the certification decision); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001) (asserting that some cases require a preliminary inquiry on the merits in order to determine class certification).

46. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 307; Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91 (2d Cir. 2007). "In deciding whether [the predominance requirement] is met, the district court must make a 'definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues.'" *Cordes*, 502 F.3d at 108 (quoting *Initial Pub. Offering*, 471 F.3d at 41).

III. A DUBIOUS POLICY ARGUMENT: VULNERABLE MONOPOLISTS?

Courts adopting a heightened standard at class certification have asserted that large corporate defendants often settle meritless class actions for substantial sums.[47] Indeed, that appears to be their primary justification for ratcheting up the requirements for certification. One would expect a firm empirical basis for such an important claim. But the courts do not offer any. They tend instead simply to cite other judicial decisions that have made the same claim with a similar lack of substantiation.[48]

Worse yet, an economic analysis focusing on agency costs suggests that this key factual proposition is dubious. Class counsel tend to be paid a contingent fee based on a percentage of the class recovery. In general, they have incentive to settle a case relatively early in litigation for less—not more—than a class action is worth. In contrast, defense attorneys charge by the hour. They ordinarily have incentive to protract litigation, not to resolve it near the beginning of the proceedings. These agency costs should tend to counteract the risk of successful strike suits.[49]

Moreover, there is an odd asymmetry to the reasoning of courts in this regard. They worry over the harm from false positives—corporations paying large sums when they have not violated antitrust laws. But they tend to ignore the costs of false negatives—a denial of certification depriving potential class members of any viable means to pursue meritorious claims.[50] What a strange world we inhabit when judges focus on the supposed vulnerabilities of large, multinational corporations and ignore the real vulnerabilities of the victims of corporate misconduct. This is especially odd in the antitrust context where there is a historical recognition from a public

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47. *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 310.

48. *See id.* (relying on the unsubstantiated assertion in Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007), for the claim that certification causes defendants to settle weak claims).

49. For a useful discussion of these incentives, see, for example, A. Mitchell Polinsky & Daniel L. Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 AM. L. & ECON. REV. 165 (2003).

50. Absent the class procedure, most class members would be effectively foreclosed from pursuing their claims due to the expenses involved, the undesirability of suing one's supplier, and other considerations. *See, e.g.*, *In re* Glassine & Greaseproof Paper Antitrust Litig., 88 F.R.D. 302, 307 (E.D. Pa. 1980) (observing that individual claims would be unjustifiably costly as well as wasteful of the court's time); *In re* Corrugated Container Antitrust Litig., 80 F.R.D. 244, 252 (S.D. Tex. 1978) (calling class treatment "superior" to the expensive alternative of individual suits); *see also* duPont Glore Forgan, Inc. v. Am. Tel. & Tel. Co., 69 F.R.D. 481, 487 (S.D.N.Y. 1975) (stating that Monsanto, a named plaintiff with a $130,000 claim, would forego its claim if required to proceed in complex litigation on an individual basis).

policy perspective of the importance of private actions—and class actions in particular—in the enforcement of the antitrust laws, and thereby to the proper functioning of the market economy.[51]

If courts were to take seriously the concern about false negatives, and not just false positives, they would not simply increase the showing plaintiffs must make to achieve class certification. Taking the merits into account at class certification does not have to mean merely that courts deny class certification in weak cases. Consideration of the merits could—and for the sake of consistency, one would think it should—translate to a lower class certification standard in cases in which plaintiffs have a particularly strong case on the merits and denial of class certification would in effect be fatal to their claims.

A. Excessive Concern for Corporate Defendants

1. Baseless Empirical Claims: No Data

A key factual predicate for courts raising the standard at class certification has been that defendants settle class actions not based on the merits, but simply to avoid the costs of litigation and the risks of a catastrophic loss despite their innocence. This proposition is counterintuitive. One would not think of large corporate actors as particularly vulnerable, especially compared to the victims of antitrust violations. Class certification may be more likely to level the playing field than to tilt it in favor of antitrust plaintiffs. Courts at one time recognized this imbalance.[52] Moreover, many

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51. The courts have repeatedly recognized that antitrust class actions play an important role in antitrust enforcement. *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (finding that antitrust class actions help enforce the antitrust laws and deter violations); *In re* Carbon Black Antitrust Litig., No. Civ.A.03–10191–DPW, 2005 WL 102966, at *9 (D. Mass. Jan. 18, 2005) ("Courts have noted that class actions are a particularly appropriate mechanism for achieving [antitrust] enforcement . . . ."); *In re* Bulk Extruded Graphite Antitrust Litig., No. Civ. 02–6030 (WHW), 2006 WL 891362, at *4 (D.N.J. April 4, 2006) ("[T]he antitrust class action is an important component in the federal scheme for deterring anti-competitive behavior.").

52. *See generally* Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251 (1972). "Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture." *Id.* at 266.

private antitrust cases recover sums far too large to be explained away based on litigation costs.[53]

But, of course, empirical evidence of corporate defendants settling weak antitrust claims would warrant taking this counterintuitive proposition seriously. The problem is that courts have not cited to any such evidence. Perhaps the most authoritative statement of the problem comes from the Supreme Court's decision in *Bell Atlantic v. Twombly*.[54] That decision, however, relied on *ipse dixit*.[55]

Consider the relevant portion of the Court's reasoning in *Twombly*. In subjecting plaintiffs to a higher pleading standard than had historically been required, the *Twombly* Court asserted the following: that the costs of antitrust litigation are high and difficult for judges to control,[56] and that these high costs cause defendants to settle even "anemic" cases before a court rules on summary judgment.[57]

To be sure, the *Twombly* Court cited to some sources to establish that antitrust cases involve high discovery costs,[58] a proposition that is not very controversial. More questionable was the support for the Court's claim that judges cannot control the costs of litigation. It relied on a quotation from a single judge—Judge Frank Easterbrook.[59] Judge Easterbrook—an *appellate* court judge on the Seventh Circuit—in turn provided only his own experience and reasoning as the basis for this position.[60] Without meaning any insult to Judge Easterbrook, it is striking that the Court did not cite the opposing view, which followed in the very next article in the very same symposium issue of the Boston University Law Review, of Judge Jack Weinstein—a *trial* court judge. Judge Weinstein asserted that courts generally can prevent abusive discovery, and that concerns about discovery abuse may just be a "scare tactic" among "other exaggerations designed to close the courthouse doors to those thought to be unworthy."[61]

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53. *See generally* Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 892–93 (2008) (analyzing recoveries in forty cases of approximately $50 million or more).

54. 550 U.S. 544 (2007).

55. *Id.* at 558–60.

56. *Id.*

57. *Id.* at 559.

58. *Id.* at 558–59.

59. *Id.* at 560 & n.6 (quoting Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989)).

60. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 635 n.* (1989).

61. Jack B.Weinstein, *What Discovery Abuse? A Comment on John Setear's* The Barrister and the Bomb, 69 B.U. L. REV. 649, 649 n.**, 653–54 (1989).

The Court's reasoning is yet more tenuous when it extends to the next proposition: that in a non-trivial number of cases high litigation costs cause defendants to settle "anemic" cases before summary judgment. (If this occurs in a trivial number of cases, it hardly seems like an appropriate basis for raising the pleading or class certification standard in general.) For this proposition, the Court cited no authority whatsoever. As Judge Weinstein suggested, the specter of plaintiffs filing suits without any merit to obtain a settlement based on the cost of litigation—sometimes called "strike suits"—may just be another "scare tactic" used to foreclose certain kinds of suits,[62] including antitrust litigation.

Certainly, there is good reason to question whether strike suits occur with any frequency, at least in antitrust class actions. Plaintiffs, and not just defendants, pay the high costs of discovery. Indeed, one study suggests that in the cases involving the highest discovery costs, the burden falls disproportionately on plaintiffs.[63] Just as defendants may settle to avoid the cost of discovery, plaintiffs may not file suit unless they believe they have a solid case out of a concern about those same costs.

2. Agency Costs: Defendants Probably Do Too Well

Moreover, the likelihood of plaintiffs filing strike suits decreases yet more in light of agency costs. These can arise because attorneys at times have interests in tension with those of their clients. In particular, defense counsel are paid by the hour. They have incentives to engage in motion practice and to protract litigation.[64] They are likely to encourage their clients not to settle before obtaining a ruling on all potentially dispositive motions, including motions to dismiss, for summary judgment, and for class certification. The increasingly stringent standard at summary judgment—particularly in conscious parallelism cases[65]—sometimes provides a good reason for defendants to heed their attorneys' advice in this regard.

In contrast, plaintiffs' counsel in antitrust class actions generally proceed on a contingent basis, paying the costs of litigation themselves and recovering those costs and receiving payment for their time only if the

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62. *Id.* at 654.

63. *See* Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 547–53 (1998).

64. *See* Polinsky & Rubinfeld, *supra* note 49, at 186–87.

65. *See* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585–86 (1984).

litigation is successful. In general, they prosper most if they settle early, even for a relatively modest amount, particularly factoring in risk. That ordinarily would provide them the highest return per hour and eliminates the chance of an outright loss. In light of these incentives, it is not at all obvious that they would be willing to pursue dubious litigation, risking valuable time and a substantial net financial loss.

Of course, perhaps empirical evidence could refute this reasoning. That empirical evidence would likely include the number or percentage of antitrust lawsuits—or lawsuits in general—that settle before a ruling on summary judgment, as well as some indication of whether those lawsuits have some merit.

Coming up with an objective measure of "meritless" lawsuits would not be easy. Presumably, any lawsuit that settles for significantly in excess of the cost of litigation is not meritless. After all, defendants should not settle for that amount unless they face some meaningful prospect of losing at trial.[66]

However, the converse is not necessarily true. Plaintiffs might well settle for a relatively small sum even though their case has merit. This is most obviously true because defense counsel are likely to have much better information, particularly in cases based on circumstantial evidence. Whether plaintiffs can discover evidence of an illegal agreement—if there is one—depends on a host of factors, including how skillful and lucky plaintiffs are during discovery, how much relevant evidence defendants created that is not easily explained away and that was preserved, and whether defendants abide by the letter and spirit of the discovery rules.

None of the sources on which the Court relied addressed these issues. Thus, not only does the *Twombly* Court's implication that a significant number of "anemic" antitrust class actions settle before summary judgment lack an empirical basis, it is not particularly plausible.[67]

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66. Of course, a defendant might be risk averse and settle out of fear of judicial error. But, given the right to appeal, that judicial error would ultimately have to survive the scrutiny of at least two out of three appellate judges. Additionally, plaintiffs—and the lawyers who represent them—are also likely to be averse to risk, a consideration that should figure in the settlement discussions.

67. For a careful analysis—and rejection—of the argument that class actions constitute a form of legalized blackmail see Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

B. Inadequate Concern for Class Members

At least as striking as the lack of foundation for the possibly excessive judicial concern that large corporations are delicate creatures in need of protection is the apparent inadequate judicial concern for the potential victims of corporate misconduct. They, too, warrant consideration. If courts are going to adjust the class certification standard in light of the merits—if they are going to make findings of fact, and not inquire merely into how plaintiffs propose to prove their case—then they could do so to minimize the likelihood that plaintiffs with strong cases will lose for purely procedural reasons.

Courts could pursue this standard by adjusting the plaintiffs' burden on class certification in appropriate cases. Currently, a judge deciding whether to certify a class must consider the benefits in terms of justice and efficiency for the parties and the court of allowing plaintiffs to pursue their claims collectively rather than on an individual basis.[68] Of course, it is difficult to characterize—much less quantify—the considerations that figure in that analysis. And the class certification standard has a fair amount of formalism built into it. The requirement of numerosity, for example, is usually associated with a somewhat formal minimum fixed number varying from twenty to forty class members,[69] even though the size at which a group

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68. *See, e.g.*, Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 424 (4th Cir. 2003) (quoting *In re* A.H. Robins Co., 880 F.2d 709, 740 (4th Cir. 1989)) (holding that courts are to "give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case best serve the ends of justice for the affected parties and . . . promote judicial efficiency"); *see also* Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 156 (1982) (internal quotation marks omitted) (holding that one of the central purposes of class actions is to conserve "the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23"); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974) (noting that the "principal purpose" of Rule 23 is "efficiency and economy of litigation"); Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 946 (9th Cir. 2009) (citations omitted) (noting that the determination as to whether common issues predominate "requires an assessment of the relationship between individual and common issues" which "takes into consideration all factors that militate in favor of, or against, class certification . . . The overarching focus remains whether trial by class representation would further the goals of efficiency and judicial economy"); 2 ALBA CONTE & HERBERT B. NEWBERG NEWBERG ON CLASS ACTIONS, § 4:24 (4th ed. 2002) (noting that "[j]udicial economy factors and advantages over other methods for handling the litigation as a practical matter underlie the predominance and superiority requirements for class actions certified under Rule 23(b)(3)").

69. *See, e.g.*, Markham v. White, 171 F.R.D. 217, 221 (N.D. Ill. 1997) (noting that numerosity can be satisfied with a class as small as 17 to 30 members and holding a class of

becomes "so numerous that joinder of all members is impracticable"[70] varies a great deal depending on the kind of case and the nature of the plaintiffs. But the underlying purpose of the class certification standard is an analysis of what would be just and efficient, requiring a judge to decide whether collective litigation or individual litigation makes more sense.

The reality in some cases is that denial of class certification will be dispositive. The alternative to a collective action often is not individual litigation, but no litigation at all. In these cases, defendants can avoid liability no matter how guilty they are. Courts might take this reality into account. They might recognize that depriving plaintiffs of any meaningful opportunity to pursue their claims—particularly if those claims appear to be meritorious—would be unjust. And they might respond accordingly, perhaps lowering the standard for certification commensurate with the strength (and maybe the size or importance) of plaintiffs' claims.

On the other hand, perhaps intermingling the merits with the class certification decision in this way is unwise. If so, that should be true in regard to the supposed "vulnerable" corporate defendants as well. What is good for the goose should be good for the gander. If we are worried about corporate defendants settling meritless cases because of class certification—so-called false positives—we should also be concerned with plaintiffs abandoning litigation because of a denial of class certification—false negatives. Yet the courts' tinkering with the class certification standard seems generally to have been inattentive to the latter concern.

IV. A POOR PROCESS FOR GAUGING THE MERITS

A. An Unnecessary and Unhelpful Addition to Summary Judgment

One of the puzzles regarding the possibility of a heightened standard at class certification is that it appears to be unnecessary. If, as some courts have suggested, plaintiffs bring cases lacking merit, defendants need not await trial to prove that this is so. First, the Supreme Court has recently raised the standard for surviving a motion to dismiss, requiring lower courts to throw out cases at the pleadings stage where plaintiffs have not alleged a

35 to 40 members is numerous); Hendricks-Robinson v. Excel Corp., 164 F.R.D. 667, 671 (C.D. Ill. 1996) (holding class of 38 members is numerous); Riordan v. Smith Barney, 113 F.R.D. 60, 62 (N.D. Ill. 1986) (noting in securities cases a class of 25 to 50 members is often sufficient for numerosity and holding class of 29 members is numerous).

70. FED. R. CIV. P. 23(a).

"plausible" claim.[71] Second, where cases survive early dispositive motions, defendants have an opportunity to test the legal merits and the sufficiency of plaintiffs' evidence through a motion for summary judgment, among other procedural mechanisms.[72] And the Court has already ratcheted up the showing plaintiffs must make to survive summary judgment as well, particularly in antitrust cases. It is unclear why yet another screen is necessary that takes the evidence into account.

A possible objection to this point—one noted by the Court in *Twombly* in raising the standard for a sufficient pleading—is that the discovery that occurs before a motion for summary judgment may itself cause a good deal of harm.[73] Defendants may settle, this reasoning runs, to avoid the cost and disruption of that discovery. It is worth noting, as discussed above, that the Court has cited no empirical basis for this factual argument, nor explained why the enormous costs of antitrust litigation in particular put more pressure on well-financed corporate defendants than they do on plaintiffs and their lawyers.

But even if it were true, a heightened standard at class certification is a poor fix for this problem for various reasons. First, the Court has already addressed the issue by raising the standard in *Twombly* for a complaint to survive a motion to dismiss. Taking additional measures—without first seeing whether the supposed problem persists—may well be overkill. Second, class certification is an awkward method for screening the merits. The class certification requirements are designed to determine the most efficient means of bringing a case to trial, not the likelihood of the class prevailing. The fit between the class certification standard and an assessment of the merits is therefore poor.

The third reason that raising the class certification standard appears to be an unwise means of addressing any perceived harm from excessive discovery is that the certification process itself involves extensive discovery. So, unlike a ruling on a motion to dismiss, much of the supposed harm from discovery will be done before a ruling on class certification. Moreover, raising the standard for certification will likely *increase* the discovery necessary for that ruling, including the costs for expert discovery, which is already very expensive in antitrust cases.[74] After all, it would be unfair for a court to rule

71. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

72. Note also motions to dismiss and *Daubert* motions.

73. *Twombly*, 550 U.S. at 569–70.

74. In *EPDM*, for instance, which was decided in 2009 after the Second Circuit required courts to delve into the merits at the class stage, the court certified a direct purchaser class in an antitrust case only after considering in some detail the (opening and rebuttal) reports of *six*

on contested issues of fact without first allowing plaintiffs adequate discovery not only to determine whether they can rely on common evidence at trial—as would suffice under the traditional class certification standard—but also to make their very best case that their evidence is more persuasive than a defendant's on any contested issues that the court proposes to resolve in deciding class certification. Indeed, even summary judgment does not allow courts to rule on factual issues, only to determine that there is insufficient evidence to give rise to a genuine issue of material fact. Allowing—or encouraging—courts to reach further into the merits than summary judgment, and to do so using a device like class certification that is designed to occur relatively early in litigation, would create difficulties that are numerous and vexing.

B. A Premature Evaluation of the Merits: Delay Certification?

1. "Early" Determinations Should Not Be on the Merits

Class certification is generally designed to occur early in litigation. Until recently, Federal Rule of Civil Procedure 23(c) directed courts to determine whether to certify a class "[a]s soon as practicable after the commencement of a class action."[75] After recent changes, the rule now requires the court to make that determination "at an early practicable time."[76] The language change was designed to reflect that prevailing practice sometimes allows for delay in the class certification decision, and that it does so for good reason. After all, as the advisory committee notes indicate, the certification process requires some discovery.[77] But those same notes also point out that "an evaluation of the probable outcome on the merits is not properly part of the certification decision."[78] A heightened class certification standard would deviate from this bedrock premise. In doing so, it would make the common theme under the old and new version of Rule 23 about the timing of the certification decision—that it should occur "early"—impractical, if not unfair. Indeed, some courts continue to have a local rule requiring plaintiffs to move for class certification soon after litigation begins, including, for example, the Eastern District of Pennsylvania's imposition of a default

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different economists (three each for the plaintiffs and defendants). *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 90–103 (D. Conn. 2009).

75. FED. R. CIV. P. 23(c) 2003 amendments advisory committee's note.

76. FED. R. CIV. P. 23(c) (2008).

77. FED. R. CIV. P. 23(c) 2003 amendments advisory committee's note.

78. *Id.*

deadline of ninety days after the filing of a complaint for plaintiffs to move for certification.[79]

If courts are going to make factual findings as part of class certification, the process should be delayed. In antitrust class actions, plaintiffs often begin at a grave disadvantage. The plaintiffs generally are direct purchasers of the good or service that is the target of alleged anticompetitive conduct. They do not have the information about the defendants' behavior—or about much of the economic circumstances in which that behavior takes place—that lies at the heart of most federal antitrust cases. Only through the slow and challenging process of forcing defendants to make disclosures can they hope to approximate defendants' access to the information and evidence on which the case will depend. Plaintiffs should have the opportunity to acquire this information before the court rules on any factual issues. A presumption that a certification decision will occur "early" in the litigation—or a default rule requiring plaintiffs to move for certification within ninety days of filing a complaint—simply makes no sense under a heightened certification standard.

2. The Equivalent of Rule 56(f)?

Whether or not the class certification decision is delayed in general, under a heightened class certification standard, some procedural mechanism should be put in place to ensure that plaintiffs are not forced to pursue class certification before they have had an adequate opportunity for discovery. Summary judgment has such a mechanism. Under Rule 56(f), a party may explain why it cannot present facts in support of its position in lieu of, or in addition to, opposing a motion for summary judgment on the merits.[80] The most common use of this provision is to argue that more discovery is necessary before the court rules. Given that a heightened class certification standard would entail a court not merely assessing whether a plaintiff has sufficient evidence to go to trial, but also actually making findings of fact, some equivalent of Rule 56(f) would seem to be necessary regarding class certification. A plaintiff should have the option of requesting additional discovery instead of—or in addition to—moving for class certification at some prescribed time or juncture in the process of adjudication. Otherwise, class certification creates a strategic opportunity for defendants. Simply by dragging their heels in discovery, they may be able to deprive a plaintiff of

79. E.D. PA. LOCAL CT. R. 23.1(c); *see also, e.g.*, N.D. GA. LOCAL CT. R. 23.1(B) (imposing default deadline for filing motion for class certification of ninety days after filing of complaint).

80. FED. R. CIV. P 56(f).

the ability to make an adequate showing at class certification. Indeed, the way in which litigation schedules are typically organized, plaintiffs file the class motion at some point before fact discovery has closed, and often well before. As a result, forcing plaintiffs to prove key parts of the merits of their case before the close of discovery not only introduces potential unfairness to the process, but also could reward defendants for—and encourage—gamesmanship and delaying tactics.

3. Await Summary Judgment or Trial?

An alternative to adjusting the timing of class certification on an *ad hoc* basis would be to delay it until the evidence is presented at summary judgment or trial. Of course, this would be at odds with using the class certification decision to filter out meritless cases before the parties pay for a costly discovery process. But, as noted above, the class device is poorly adapted to play that role anyway. And at least defendants would not feel the supposed pressure that a class certification decision places on them to settle. The class decision would remain uncertain until summary judgment confirms the plaintiffs can substantiate their claims with evidence, or trial goes one step further and resolves all factual issues on the merits.

Either approach would be a significant departure from current practice (although, in reality, some courts have already begun considering class certification much later in the process in antitrust cases in particular).[81] But they would both makes some sense under a heightened certification standard. After all, the system is designed so that courts do not assess the evidence before summary judgment or rule on contested factual issues until at or after trial. Until summary judgment, the parties cannot reasonably be required to have developed the evidence to support their arguments. And before trial, they cannot reasonably be expected to be in a position to put their best case before the finder of fact. Changing part of the overall system—requiring the parties put forward persuasive evidence before summary judgment or to make their best case before trial, much less doing so "early" in the proceedings—necessarily runs counter to the design of civil litigation. So any heightened inquiry at class certification involving the resolution of disputed facts on key merits issues may fit best within civil litigation after a summary judgment proceeding or trial on the merits, when it ordinarily occurs.

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81. *See, e.g.*, *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 83–84 (D. Conn. 2009) (hearing and deciding class certification after merits expert reports were submitted).

To be sure, awaiting summary judgment or, especially, trial before a decision on class certification could give rise to problems of its own. It is unlikely that the trial could bind class members, who would have no desire for certification if the named plaintiffs lose. Moreover, at minimum, a separate determination would be necessary of damages owed to the class. Deciding class certification and summary judgment simultaneously might be more practical, and could offer some efficiencies, allowing the parties, for example, to develop evidence relevant to merits and class certification at the same time and to rely on a single set of expert reports.[82] On the other hand, delaying the class certification decision until summary judgment or trial would protract a period of uncertainty about the stakes in litigation.

But these concerns are reasons to retain the traditional class certification standard, not to adopt a new standard and force it to occur early in the litigation, when doing so would make no procedural sense. To quote the Supreme Court in *Eisen*, an early determination of factual issues on the merits as part of class certification risks prejudicing the parties "since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials."[83] That concern should be taken just as seriously when the prejudice will be visited on plaintiffs as on defendants (the latter being the focus of the Court's concern in *Eisen*). If courts are going to change the standard for class certification on their own, they should also alter its timing so that the process respects the parties' legal rights. Indeed, a delay in the class certification until after trial may not only be good policy, it may even be required by the Constitution.

C. A Violation of the Right to Trial by a Jury

A constitutional problem flows from the general rule for resolving factual issues necessary to both equitable and legal claims. The judge is charged with finding the facts relevant to any equitable claims. But the Supreme Court in *Dairy Queen* held that the judge must await and abide by any overlapping findings the jury makes in resolving a plaintiff's legal

82. The current practice usually involves two rounds of expert reports, one at the class stage and another on the merits at summary judgment. That process makes some sense under a regime where the courts impose a lesser burden for class certification and do not insist on resolving factual disputes among experts about the nature of plaintiffs' proof. But, if there is to be a heightened review of plaintiffs' proofs and evidence at the class stage, forcing the parties to produce two rounds of expert reports on essentially the same matters seems far less justified. Addressing class certification and summary judgment at the same time might hold the potential for some real gain in efficiency.

83. Eisen v. Carlisle, 417 U.S. 156, 178 (1974).

claims.[84] Plaintiffs have a right to a trial by jury in federal antitrust cases.[85] Reasoning by analogy to the equity context, the right to a trial by jury would seem to ensure that a judge first let a jury rule on the merits and then honor the jury's factual findings that bear on class certification.

This reasoning may stand on even firmer footing than analogy. The origins of the modern class action lie in equity.[86] Nothing in Rule 23 suggests its drafters would—or could—upset the constitutional balance between legal and equitable rulings. As long as courts abide by the understanding of the class certification decision reflected in Rule 23 and its notes, a class certification decision early in litigation does not threaten this balance. As noted above, the advisory notes to the current rule do not contemplate "an evaluation of the probable outcome on the merits," much less findings of fact regarding the merits. But if judges stray into making those findings, they would appear to be trespassing in the province of the jury. Under *Dairy Queen*, any such findings should await the jury's factual findings.[87]

In response to this constitutional concern, some courts have suggested that finding facts at class certification is akin to doing so regarding jurisdictional issues. But the analogy is imperfect. Courts generally avoid resolving issues pertaining to the merits in addressing jurisdiction. They generally refuse, for example, to delve into likelihood of success in determining whether a plaintiff's claim satisfies the amount-in-controversy requirement of diversity jurisdiction, employing a very low threshold of "good faith" as sufficing instead. To be sure, part of the rationale for this approach is practical. It would not make sense for a court to decide the merits to determine whether it has jurisdiction to decide the merits. But, regardless, judicial resolution of the limited facts pertinent to jurisdiction provides a weak basis for waving away potential Seventh Amendment problems resulting from a substantial expansion of the judicial role at class certification.

Indeed, courts in a different context have worried about the Seventh Amendment right to jury trial at the class certification stage. The issue has arisen when plaintiffs have sought bifurcation to allow at least some issues to be tried on a class-wide basis, even if a court determines that others would

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84. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 (1962).

85. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1959) (citing Fed. R. Civ P. 57, 38, 39, and case law applying the rules).

86. *See* FED. R. CIV. P. 23 advisory committee's note (1937) (amended 2009); Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 392 n.318 (2003).

87. 369 U.S. at 479.

not be suitable for class treatment. Relying on the Seventh Amendment Reexamination Clause, courts have suggested that plaintiffs cannot have one jury decide certain issues and then have a later jury decide other, overlapping issues.[88] Not to take the constitutional issue similarly seriously in the context of a heightened standard at class certification would appear to involve an unprincipled inconsistency.

V. A DISTORTION OF THE PREDOMINANCE REQUIREMENT

Resolving contested facts at the class stage would likely exaggerate the role that proving antitrust injury, or "impact," plays in antitrust class action jurisprudence. It is no coincidence that the central focus of *In re Hydrogen Peroxide Antitrust Litigation* is on plaintiffs' ability to prove impact on a predominantly class-wide basis.[89] Unfortunately, making the so-called "common impact" requirement more prominent could distort the rules governing class certification in three principal ways.

First, it could shift attention from whether the trial will involve predominantly common issues (which is the right inquiry) to whether the plaintiff will ultimately prevail on those issues (which is the wrong inquiry). Given that plaintiffs are the masters of their complaint and their theory of liability, whether common issues predominate should depend largely on whether plaintiffs have a plausible theory that they can present at trial that mainly pertains to the class as a whole. Whether common issues will likely predominate at trial does not depend on whether a jury will ultimately decide that plaintiffs' class-wide theory is correct *at the conclusion of the trial.*

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88. *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 433 (5th Cir. 1998); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302–03 (7th Cir. 1995). This argument is strained. Among other failings, it relies on a misreading of a key decision by the U.S. Supreme Court, Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494 (1931), which is best understood as addressing the Right to Jury Clause, not the Reexamination Clause. But a discussion of that issue is beyond the scope of this article. For a full development of the argument regarding the Seventh Amendment see Joshua P. Davis and Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure,* 17 GEO. MASON L. REV. 969 (forthcoming 2010), *available at* http://ssrn.com/abstract=1578459.

89. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008). The court asserted that:

> The task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial.

Asking courts to determine the factual validity of plaintiffs' class-wide theory at the class stage—if that is what might now be required—would thus address the wrong issue.

Judicial resolution of factual issues at class certification could distort the class analysis in a second way. It could augment the already outsized role that "common impact" plays in a typical class motion. Properly interpreted, Rule 23(b)(3) requires only that common issues predominate overall in a case, not that they predominate in regard to each and every element of a claim. Courts at times miss this point in focusing largely on common impact—to the exclusion of other likely more important issues for trial—in the predominance inquiry. Inviting courts to resolve factual issues regarding impact could exacerbate this tendency.

There is a third way in which judicial resolution of contested facts might distort class certification. It could effectively force plaintiffs to prove something relevant to "the merits" at class certification that they would not need to prove on "the merits" at any other stage in the case, including at trial. The inquiry into common impact is at times framed as addressing whether plaintiffs can show with class-wide evidence that all or virtually all class members suffered at least some harm. In reality, however, as long as harm is reasonably widespread across the class, it is highly unlikely that the issue of the proportion of the class that suffered harm—for example, whether 60%, 75%, or 99% of the class members paid overcharges—*would even come up at a class trial.*[90] Plaintiffs' counsel do not dwell at trial on the claims of class members for which they have no evidence of injury, but rather focus their impact and damages evidence at trial on those in the class that they *can* prove were injured. Defense counsel, for their part, are primarily concerned with the claims of class members who plaintiffs will attempt to show *were harmed*, and with the aggregate damages for which their clients may be liable. Defense counsel have no reason to care about the claims of those class members who plaintiffs concede *were not harmed*. Thus, as long as plaintiffs exclude the non-injured class members from the damages claim, defendants

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Id. at 311–12.

90. This argument is meant to address cases like *Hydrogen Peroxide*, where the question at issue is whether plaintiffs' class-wide evidence of impact could show that all or merely some class members suffered injury. It is not meant to address situations where defendants do not merely suggest the inapplicability of plaintiffs' evidence to some categories of class members, but rather contend that proving impact would be *entirely* individualized and would need to be done literally on a class member by class member basis. Individualized issues regarding impact would likely predominate, for example, in an antitrust case where plaintiffs pursue damages in the form of "lost profits."

would have no real reason to bring up the fact that there are some class members who were not injured. It is not surprising, then, that common impact finds no expression in frequently used jury instructions and verdict forms in antitrust class trials. As a result, a requirement that plaintiffs show *at the class stage* that all or almost all class members suffered impact—and a further judicial resolution of contested facts in evaluating that showing—could shift the focus of the predominance inquiry under Rule 23(b)(3) away from the proper issue (the case to be presented at trial) and to an idiosyncratic issue that may matter only for purposes of class certification (which percentage of the class suffered harm).

To see why a heightened burden with respect to "common impact" could have troubling consequences, one needs to understand the interplay between the procedural requirements of class certification and the substantive requirements of proving an antitrust claim at trial. As to the substantive requirements, to prevail on an antitrust claim, a plaintiff must prove three main elements: an antitrust violation, causation, and impact (or fact of damage). For purposes of analyzing antitrust claims for class certification purposes, however, courts often break up an antitrust claim into three different conceptual categories: (1) a violation of the antitrust laws; (2) individual injury (or impact) resulting from the violation; and (3) computation of damages.[91] The "impact" category, which tends to be the focus of the class certification inquiry in the antitrust context, refers to a showing that a plaintiff or class member suffered *at least some of the requisite type of injury due to the challenged conduct.* As it is typically analyzed, antitrust impact incorporates "causation" as part of the analysis, *i.e.*, the question is, "Did defendants' conduct cause class members the requisite type of harm?"[92] In antitrust class actions brought by purchasers of a product directly from the entity charged with the violation, plaintiffs typically allege they suffered damage in the form of payment of artificially inflated prices, or overcharges.[93] Paying an overcharge on at least one transaction during the class period caused by the alleged anticompetitive

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91. *Hydrogen Peroxide*, 552 F.3d at 311; Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 105 (2d Cir. 2007).

92. Impact incorporates two different issues. The first is whether the class member suffered harm, or injury-in-fact. The second is whether the conduct caused "legal injury," i.e., whether the injury is "of the type the antitrust laws were intended to prevent and [flows] from that which makes the defendants' acts unlawful." *Cordes*, 502 F.3d at 106 (citation omitted).

93. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 729 (1977) ("[T]he overcharged direct purchaser . . . is the party 'injured in his business or property' within the meaning of [the Clayton Act].").

conduct suffices to show—as a legal and factual matter—impact or the "fact of damage."[94] This concept is distinct from the *quantum* of damages suffered by an individual class member or by the class as a whole.[95] Courts have traditionally held that even where the amount of damages "is not susceptible to class-wide proof, that is not enough to defeat class certification."[96] Accordingly, because proving the violation tends to be inherently common to the entire class, and individualized issues regarding proof of damages will not prevent a class from being certified, defendants tend to home in on plaintiffs' proof of impact in challenging class certification.

As to the procedural requirements, to certify a class seeking overcharge damages a plaintiff must satisfy, among other things, Rule 23(b)(3). That rule requires a showing that a class-wide trial would be superior to other methods of adjudication, and that issues common to the class as a whole predominate over issues individual to particular class members. Rule 23(b)(3) makes clear that the predominance and superiority inquiries relate mainly to questions of the efficiency and practicality of trying the case on a class-wide basis.[97] The focus of the predominance requirement, as the Third

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94. The terms "impact," "antitrust injury," and "fact of damage" are often used interchangeably in antitrust cases. *See In re* Ins. Brokerage Antitrust Litig., 579 F.3d 241, 269 (3d Cir. 2009) (". . . the element of antitrust injury—that is, the fact of damages . . ."); *In re* Linerboard Antitrust Litig., 203 F.R.D. 197, 214 (E.D. Pa. 2001) (equating "impact" and "fact of damage"); *In re* Plastic Cutlery Antitrust Litig., No. 96–CV–728, 1998 WL 135703, at *1 (E.D. Pa. Mar. 20, 1998) (equating "impact" and "injury").

95. The distinction between fact of damage and quantum of damages arose out of a body of law recognizing that showing the amount of damages suffered by an antitrust plaintiff can pose difficult and thorny problems of proof. As a result of that problem, and so as not to allow an antitrust defendant to escape liability where it was the defendant that created the uncertainty associated with quantifying damages in the first place, courts have relaxed the burdens associated with quantifying damages. *See, e.g.*, Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 264 (1946). The price of admission, however, to the relaxed burden relating to quantum of damages, is that the plaintiff must show that it suffered "fact of damage," or some antitrust injury flowing from the defendant's conduct. *Id.* at 263.

96. *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 103 (D. Conn. 2009) (citing numerous cases distinguishing "fact of damages" from "amount of damages").

97. Indeed, two of the four factors that Rule 23(b)(3) explicitly asks courts to consider in determining whether a class should be certified focus on whether a class action would be practical or efficient: "(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." FED. R. CIV. P. 23(b)(3)(C)–(D).

Circuit explained in *Hydrogen Peroxide*, is to "'consider how a trial on the merits would be conducted if a class were certified.'"[98]

This combination of the procedural "predominance" requirement with the main substantive elements of an antitrust claim tends to immediately put antitrust defendants opposing class certification on their heels. This is because issues of proof at the trial of many, if not most, antitrust conspiracy or monopolization cases will focus on whether defendants engaged in conduct that violated the antitrust laws. Issues such as whether defendants conspired to do what plaintiffs claim, and whether that conduct, if proven, harms competition generally, will invariably be the same for all members of the class. Thus, the main issues at an antitrust trial—namely, whether plaintiffs can demonstrate the violation itself and prove a link between the violation and harm to competition generally through higher prices or reduced output—tend not to implicate individual issues at all. This kind of analysis can explain a key observation of the Supreme Court: "Predominance [of common issues] is a test readily met in certain cases alleging . . . violations of the antitrust laws."[99] And, not surprisingly, for at least two decades, courts have routinely certified direct purchaser damages cases as class actions—perhaps more regularly than in any other field of substantive law.[100]

Where courts have denied class certification in antitrust cases, it has typically been because they have found that individual issues with regard to proving impact would predominate. Indeed, because antitrust defendants tend to concede the commonality of proving the violation, class certification motions in the antitrust arena tend to turn on the question of "common impact." Defendants usually focus their challenge to class certification primarily by arguing that proof that class members paid overcharges will

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98. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 n.8 (3d Cir. 2008) (quoting Sandwich Chef, Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 218 (5th Cir. 2003)).

99. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997).

100. *See In re* Mercedes-Benz Antitrust Litig., 213 F.R.D. 180, 187 (D.N.J. 2003) (quoting *In re* Glassine & Greaseproof Paper Antitrust Litig., 88 F.R.D. 302, 306 (E.D. Pa. 1980)) ("Antitrust defendants resisting class certification routinely argue that the complexity of their particular industry makes it impossible for common proofs to predominate on the issue of antitrust impact[,] but the argument 'is usually rejected where the conspiracy issue is the overriding one.'"); Bank v. Elec. Payment Servs., Inc., No. 95-614-SLR, 1997 WL 811552, at *21 (D. Del. Dec. 30, 1997) (explaining that proof of a course of conduct to restrain trade "is generally considered a common question that predominates over other issues"); 6 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS, § 18:25 & n.4 (4th ed. 2002) ("[C]ommon liability issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues.").

require evidence that varies by class member. Defendants may contend, for instance, that prices move in no particular pattern over time and across customers; that larger customers with more buying power get discounts or rebates unavailable to smaller customers; that purchasers in certain regions or areas were unaffected by or even benefitted from the challenged conduct; and thus, that the variability in harm across the class will give rise to individual issues that could predominate at a class trial. Plaintiffs, for their part, in addition to refuting the defendants on the specifics of these kinds of arguments, typically counter with an economist that applies a form of the "rising tide lifts all boats" metaphor, making the point that the baseline from which prices were set is higher due to the anticompetitive conduct as reflected in an observed "pricing structure." According to plaintiffs, because of this structure, variances in prices paid by class members are irrelevant to the question of common impact. Class members may have differential bargaining power and pay different prices, plaintiffs say, but because the baseline is higher, all of them pay inflated prices due to the challenged conduct. Thus, recourse to individualized proof that class members were impacted by the conduct is unnecessary.[101]

Under the prevailing standard, plaintiffs have tended to win this battle the vast majority of the time. And it is unclear at this point whether *Hydrogen Peroxide* materially alters the common impact analysis. The Third Circuit, for instance, did "not question plaintiffs' general proposition, which the District Court accepted, that a conspiracy to maintain prices could, in theory, impact the entire class despite a decrease in prices for some customers in parts of the class period, and despite some divergence in the prices different plaintiffs paid."[102] Moreover, the Third Circuit explicitly reaffirmed its long-held view that plaintiffs can show common impact merely by demonstrating that an antitrust violation caused prices to be

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101. *See, e.g.*, Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d. Cir.1977). Explains the court:

> If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage.

Id. at 455; *EPDM*, 256 F.R.D. at 89 (explaining that variation in prices paid by, or bargaining power of, class members are not impediments to a finding of common impact where there is a standardized pricing structure or the conspiracy affects the "base" price from which negotiations begin).

102. *Hydrogen Peroxide*, 552 F.3d at 325.

generally inflated and that class members made some purchases at the higher price, despite variance in prices paid.[103] Further, *Hydrogen Peroxide* may simply be an instance of plaintiffs having an unusually difficult impact case to make because the record appeared to show very little impact to the class at all from the challenged conduct. The court noted that "the price was lower, not higher, at the end of the class period than at the beginning. And the evidence, as interpreted by defendants' expert, shows that through much of the class period the production of hydrogen peroxide was increasing rather than decreasing."[104] Where prices may have been unaffected by the challenged conduct or affected only slightly, given the noise typically present in market-wide pricing data, it may be difficult to discern a pattern that reveals widespread overcharges to the class. And yet, even on these facts, the court noted that "[t]he current record suggests it may be possible to overcome some obstacles to class certification by shortening the class period or by fashioning sub-classes."[105] Accordingly, it remains to be seen what effect, if any, *Hydrogen Peroxide* will have on how courts analyze and apply the common impact requirement.

It is, however, conceivable that some courts may read *Hydrogen Peroxide* as having imposed a heightened requirement for establishing common impact. If so, and if the decision turns out to be part of a new trend toward finding facts at the class stage, litigants and courts may find themselves enmeshed in complex and highly technical disputes about whether plaintiffs have established that class-wide impact can be proven without resorting to individualized proof. The obvious inefficiency and cost of adjudicating such disputes at the class stage counsel against this approach. But there are more substantive problems associated with applying a heightened common impact requirement.

Indeed, there are three principal errors in the way the common impact requirement is sometimes stated—all of which may be exacerbated if courts decide to grapple with the underlying factual and methodological debates relating to common impact. All three of these prevalent misconceptions about the class certification standard are embodied in the statement of the defense expert in *Hydrogen Peroxide*, Professor Janusz Ordover, an economist. Professor Ordover's role in opposing class certification was to determine "'whether, assuming a conspiracy of the kind described in the Complaint, the Plaintiffs will be able to show, through common proof, that

103. *Id.* at 325–26 (quoting *Bogosian*, 561 F.2d at 455).
104. *Id.* at 326.
105. *Id.* at 325 n.26.

all or virtually all of the members of the proposed class suffered economic injury caused by the alleged conspiracy.'"[106]

The first problem with what is apparently Professor Ordover's attempt to characterize the "common impact" requirement is that it implies that plaintiffs must "show through common proof" that class members were impacted. But that is a distortion of the predominance requirement. As the *Hydrogen Peroxide* court recognized, plaintiffs are not actually required, at the class stage, to *demonstrate* that class members were injured in fact, but only that they will proffer evidence capable of showing that class members were impacted.[107] Moreover, Professor Ordover's statement implies that plaintiffs must show that they will *ultimately* be able to prove impact with common evidence. What should matter at the class stage is that plaintiffs have a plausible *theory* of class-wide impact such that plaintiffs will be able to prosecute and ultimately try the case based on that theory. Indeed, the focus of the predominance inquiry is supposed to be on the trial, and the court's prediction about how specific issues will be presented at trial. The *Hydrogen Peroxide* court makes this clear with its repeated admonitions that the predominance inquiry should turn on how plaintiffs will prove their case *at trial*.[108] So important was this proposition that the Third Circuit quoted the following 2003 advisory committee note to Rule 23 not once, but *twice*: "A critical need is to determine how the case will be tried."[109]

Given that the focus in addressing class certification is on how the trial will be conducted—and, more specifically, on whether the evidence and legal theories presented at trial will be predominantly common to the class—it should not matter whether a jury might ultimately reject a plaintiff's mode of proof *after* the class-wide trial has been completed. What matters is that

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106. *Id.* at 313.

107. The nub of the issue is not whether plaintiffs can establish the facts they will need to succeed on the merits at trial. Rather, the issue is whether plaintiffs will be able to show that their claims are capable of being proved with predominantly common evidence. McDonough v. Toys "R" Us, Inc., 638 F. Supp. 2d 461, 479 (E.D. Pa. 2009) (citing *Hydrogen Peroxide*, 552 F.3d at 311–12) ("The relevant question is not whether each element can be proved but whether such proof will require evidence individual to class members.").

108. *Hydrogen Peroxide*, 552 F.3d at 311 n.8 (quoting Sandwich Chef, Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 218 (5th Cir. 2003)) (noting that Rule 23(b)(3) requires consideration of "'how a trial on the merits would be conducted if a class were certified'"); *id.* at 317 (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166 (3d Cir. 2001) (stating that a court may, at the class stage, "'consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take'"); *id.* at 319 (referring to the concept of a "trial plan" for class certification purposes in order to focus attention on "the likely shape of a trial on the issues").

109. *Id.* at 312, 319 (quoting FED. R. CIV. P. 23 advisory committee's note).

plaintiffs will be able to *try their case* on a class-wide basis, not that the jury will decide in plaintiffs' favor or that plaintiffs' class-wide theory will ultimately succeed. At the point the jury decides, *the trial is over* and predominance (or lack thereof) is no longer relevant from an efficiency or manageability perspective. In an article that convincingly substantiates this point, Steig D. Olson rightly concludes as follows about the appropriate burden at the class stage: "If the plaintiffs have advanced a plausible theory for proving their case on a class-wide basis, and defendants have provided no reason to conclude that the plaintiffs will not be able to take that theory to a jury, then class-wide issues should predominate in the litigation."[110]

The second flaw in Professor Ordover's approach to the "common impact" requirement is that his "assuming a conspiracy" preface improperly frames the issue. It implies that evidence of impact has to be predominantly common. There is no such requirement. Rule 23(b)(3) asks whether "questions of law or fact common to class members predominate over any questions affecting only individual members."[111] It does *not* require a finding that individual issues are non-existent, or even that common issues must predominate as to *each element* of plaintiffs' claim. Fairly read, the Rule requires only that common issues of law or fact would predominate *with respect to the case as a whole*. Following this very reasoning, the Second Circuit Court of Appeals in *Cordes* reversed a denial of class certification, and instructed the district court to determine whether there were individual issues pertaining to proof of impact, *and even if so*, whether those issues would defeat predominance: "Even if the district court concludes that the issue of injury-in-fact presents individual questions, however, it does not necessarily follow that they predominate over common ones and that class action treatment is therefore unwarranted."[112] Thus, the plaintiffs' burden is not to attempt to prove *impact* with predominantly common evidence; it is to attempt to prove their case *as a whole* with predominantly common evidence.

The difference between these two propositions is subtle, but important—especially in antitrust cases where proving impact is unlikely to be the focus of any trial. The following example illustrates the point. Plaintiffs demonstrate that proving the antitrust violation (and all of the elements of that violation) would be entirely common to the class. Plaintiffs further show

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110. Olson, *supra* note 30, at 951–52.

111. FED. R. CIV. P. 23(b).

112. Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 108 (2d Cir. 2007).

that at any trial of the case, proof of the violation is likely to consume three-quarters of the time of trial and similarly comprise three-quarters of the evidence shown to the jury. In such a circumstance, even if plaintiffs would not be able, as Professor Ordover put it, to "show, through common proof, that all or virtually all of the members of the proposed class suffered economic injury caused by the alleged conspiracy[,]"[113] common issues still might predominate at trial.[114] In the antitrust context, the nature of direct purchaser monopolization and conspiracy cases are such that the bulk of the trial is likely to be spent on common issues regardless of the evidence relating to impact. This is so because antitrust trials generally focus on proof of the underlying violation: "Did the defendants conspire to fix prices?" or "Did the defendant foreclose competition and, if so, how?" Moreover, even questions relating to the effects of the challenged conduct—such as, "Did prices generally rise (or output generally fall) due to the challenged conduct?"—tend to turn on whether the conduct as a whole had anticompetitive effects. It would therefore be highly unusual if proving impact on class members from allegedly artificially inflated prices would play a substantial role at an antitrust trial. In *Newberg on Class Actions*, the authors canvassed the relevant antitrust cases and found that "common liability issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues."[115] Accordingly, courts should take care to put the inquiry into common impact in its proper context. Determining that individual issues would predominate with regard to proof of impact at trial is an insufficient basis to find a lack of predominance under Rule 23(b)(3). A court should deny class certification only if individual issues regarding impact predominate not only over common issues regarding impact, but also over all of the common issues at trial.

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113. *Hydrogen Peroxide*, 552 F.3d at 313.

114. *See Cordes*, 502 F.3d at 108.

> The question of injury-in-fact, which in this case is equivalent to whether a particular plaintiff would have paid more in the but-for world, may not be common. We do not discount the possibility that the individual questions raised by injury-in-fact might then predominate over the several common questions. Perhaps a trial would focus largely on what particular plaintiffs would have paid in the but-for world. But that is not necessarily so.

Id. (internal footnote omitted).

115. *See* CONTE & NEWBERG, *supra* note 100, at § 18:25 & n.4.

Finally, there is a third misconception inherent in Professor Ordover's approach to "common impact" that could improperly embed itself in class action jurisprudence if courts were to interpret *Hydrogen Peroxide* as requiring a heightened factual burden for this element of the claim. Professor Ordover implies that plaintiffs must produce at the class stage common evidence showing that "all or virtually all of the members of the proposed class suffered economic injury caused by the alleged conspiracy."[116] Because defendants typically concede that proving the antitrust violation will proceed with predominantly, if not exclusively, common evidence, the bulk of the dispute between the parties over antitrust class motions often relates to this very formulation. This artifact of the way the briefing of class motions tends to play out often places an undue emphasis on common impact. Plaintiffs typically attempt to show that they have methods or evidence capable of showing that the vast majority of the class paid overcharges due to the challenged conduct. The defendants, on the other hand, target their attack on the alleged gaps in plaintiffs' proof, attempting to show that plaintiffs' evidence does not cover all class members and that certain individuals or subgroups are not accounted for by plaintiffs' or their expert's analyses. Plaintiffs have tended to win this battle, in part because courts have not in the past required plaintiffs to show more than that they have a plausible method of proving class-wide impact, and also because courts have rarely imposed a strict "all or nearly all" requirement. Instead, courts generally have required simply that plaintiffs present class-wide evidence capable of demonstrating "widespread injury" to the class, *not* that common evidence or methods are capable of showing that all class members have been injured.[117]

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116. *Hydrogen Peroxide*, 552 F.3d at 313.

117. *See* Kohen v. Pac. Inv. Mgmt. Co. LLC (*PIMCO*), 571 F.3d 672, 677–78 (7th Cir. 2009) (stating that the possibility that not all class members were injured does not preclude class certification); *In re* Wellbutrin SR Direct Purchaser Antitrust Litig., No. 04–5525, 2008 WL 1946848, at *10 (E.D. Pa. May 2, 2008) (quoting *In re* NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. 493, 523 (S.D.N.Y. 1996) ("'Even if it could be shown that some individual class members were not injured, class certification, nevertheless, is appropriate where the antitrust violation has caused widespread injury to the class.'"); J.B.D.L. Corp. v. Wyeth–Ayerst Labs., 225 F.R.D. 208, 219 (S.D. Ohio 2003) (explaining that widespread injury to the class is sufficient to show common impact); *In re* Northwest Airlines Corp. Antitrust Litig., 208 F.R.D. 174, 223 (E.D. Mich. 2002) ("[T]he 'impact' element of an antitrust claim need not be established as to each and every class member; rather, it is enough if the plaintiffs' proposed method of proof promises to establish 'widespread injury to the class' as a result of the defendant's antitrust violation."); *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 321 (E.D. Mich. 2001) ("[C]ourts have routinely observed that the inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class.").

Whichever way the relevant formulation is framed ("all or nearly all" or "widespread injury"), courts deciding facts about the scope and breadth of plaintiffs' impact evidence for class certification purposes might reach issues that, paradoxically, never need to be decided at all, including at a class trial. In other words, at the class stage, the court would be asked to resolve complicated methodological questions about what share of the class, if any, is not covered by plaintiffs' evidence of impact. At trial, however, issues relating to members of the class who did not suffer overcharges may never come up, let alone be resolved by a jury. Accordingly, asking whether virtually all class members suffered injury would conflict with the Third Circuit's repeated admonition that, in assessing predominance, a court must focus on "how a trial on the merits would be conducted if a class were certified."[118]

To illustrate how "common impact" analysis may impose a greater burden on plaintiffs at class certification than at trial, consider a hypothetical case where plaintiffs' evidence shows impact to "only" 600 out of 1,000 members of a proposed class. The relevant predominance question given this fact is: Would issues pertaining to the 40% of the class that is not covered by plaintiffs' impact evidence likely predominate over all of other common issues at an antitrust trial? There are many reasons to think it would not.

Plaintiffs' case at trial would, first and foremost, almost certainly focus on proof of the antitrust violation. Plaintiffs could then present their evidence showing that at least 60% of the class paid overcharges due to the challenged conduct. Finally, the plaintiffs could present a damages methodology that computed aggregate overcharges only to the injured members of the class.[119] Thus, even where plaintiffs' evidence would fail to show impact for a material number of class members, it is by no means obvious that "individualized" evidence would predominate at trial. Indeed, the plaintiffs are likely never to bring up the 40% for which they had no evidence of impact.

Defendants, for their part, would typically spend the bulk of the trial denying they engaged in the challenged conduct in the first place or contesting that it was anticompetitive. Defendants would then categorically assert that no plaintiff or class member paid any overcharges at all—either

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118. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 n.8 (3d Cir. 2008) (quoting Sandwich Chef, Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 218 (5th Cir. 2003)) (internal quotation marks omitted).

119. There is no theoretical reason why an economist could not devise a methodology to compute class damages accurately using market-wide data that does not incorporate damages to the non-injured minority.

because prices did not go up at all during the damages period, or because any increases in price were due to factors other than the challenged conduct.[120] Assuming plaintiffs' damages analysis does not seek recovery for those who were not overcharged and restricts the claim to purchases that incurred overcharges, it is not clear why defendants would dwell on the non-injured class members, and for what purpose. Accordingly, there is no *a priori* reason that individual issues pertaining to the non-injured minority would predominate at a class trial. At minimum, a defendant should have to present a trial plan in which it details precisely what role individualized issues with respect to proof of impact would play in order to defeat predominance with respect to impact. If a defendant cannot make that showing—if plaintiffs will attempt to prove impact through predominantly common evidence, even though that evidence may fail to establish injury for many class members—then a court should rule that the predominance requirement is satisfied.

There are undoubtedly several potential objections to this analysis. One is that impact is an element of an antitrust claim, and thus plaintiffs cannot obtain a judgment on behalf of the class without showing that all class members have satisfied each element of the claim. The problems with this objection are twofold. First, as long as there are a sufficient number of class members impacted by the challenged conduct to satisfy the numerosity requirement of Federal Rule of Civil Procedure 23(a)(1),[121] it is unclear what legal basis there is for requiring that plaintiffs prove that every (or almost every) class member satisfies every element of every claim. Courts and litigants have long accepted the idea that classes can, and often do, include at least some members who were not injured, and further that the presence of

120. *See, e.g.*, Transcript of Jury Instructions at 2315–16, *In re* High Pressure Laminates Antitrust Litig., 00 MD 1368 (CLB) (S.D.N.Y. May 23, 2006) (instructing the jury that the defendant denies that it participated in the alleged conspiracy to fix prices and "also denies that the Class and the Subclass suffered any compensable damages"); Final Jury Instructions at 14, *In re* Tricor Direct Purchaser Antitrust Litig., Civ. No. 05–340–SLR (Consolidated) (D. Del. Nov. 25, 2008) ("Defendants deny that they have a monopoly, and assert that any conduct they engaged in was reasonable and based upon independent, legitimate business and economic justifications, without the purpose or effect of injuring competition. They also contend that their actions have had pro-competitive effects that benefitted competition and patients."); Transcript of Jury Instructions at 1354, *In re* Vitamins Antitrust Litig., MDL No. 1285 (D.D.C.) (instructing the jury that one of the defendants "contends that the alleged agreements were repeatedly broken and hence were largely ineffective in limiting real competition between the choline chloride producers. [Defendant] also contends that other factors in the alleged agreements, for example, changes in the cost of raw materials, had significant independent impact on the price").

121. FED. R. CIV. P 23(a)(1) (requiring that a class consist of members so "numerous that joinder of all members is impracticable").

such class members would not bar class certification or entry of a class judgment.[122] Indeed, even the most exacting version of the "common impact" formulation—Professor Ordover's "all or *nearly all*"—reflects an implicit acknowledgement that the presence of some non-injured class members is not legally prohibited. Furthermore, courts have long accepted the idea that proof of impact need not apply to all class members. Indeed, in a recent decision by the Seventh Circuit Court of Appeals, Judge Posner explained that "a class will often include persons who have not been injured by the defendant's conduct . . . . Such a possibility or indeed inevitability does not preclude class certification."[123]

The second problem with the objection that classes may not contain uninjured members is that courts do not, in fact, generally impose any such requirement at trial. Neither jury instructions in antitrust class cases, nor class verdict forms, ordinarily require plaintiffs to show that all class members have been injured, or even to establish "common impact" at trial. Juries, instead, are typically asked to determine simply whether "the plaintiffs," "the class" or "class members" paid overcharges due to anticompetitive conduct, not whether "all or nearly all" suffered antitrust injury or even whether the injury was "widespread."[124] When it comes to trial, therefore, courts leave it up to juries to decide, presumably within some

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122. To be sure, a class representative, as opposed to an absent class member, would be required to prove it suffered antitrust injury, and thus had standing to bring a claim. Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 100–01 (2d Cir. 2007) (holding that class representative must be part of the class and suffer the same injury as the class and class claims must be fairly encompassed within the representative's claims).

123. Kohen v. Pac. Inv. Mgmt. Co. LLC (*PIMCO*), 571 F.3d 672, 677–78 (7th Cir. 2009).

124. *In re* High Pressure Laminates Antitrust Litig., 00 MD 1368 (CLB), Trial Transcript, May 23, 2006. Tr. at 77 (reviewing verdict form which states, in part, "[Question] Six asks you to determine whether the national Class members paid more for high pressure laminates as a result of the agreement or conspiracy, and you will answer that yes or no"); *In re* Tricor Direct Purchaser Antitrust Litig., Civ. No. 05–340–SLR (Consolidated), Final Jury Instructions, Nov. 25, 2008, pp. 45–46 ("The Direct Purchaser Plaintiffs allege that due to defendants' anticompetitive conduct . . . they have been overcharged for their Tricor purchases. Such overcharges, if proven to be the result of anticompetitive conduct, are an appropriate indicator that these plaintiffs have suffered antitrust injuries."); Louisiana Wholesale Drug Co. Inc. v. Sanofi–Aventis U.S., L.L.C., 07–Civ–7343 (HB), Verdict Sheet, p. 2 ("Do you find that the Plaintiffs have satisfied their burden of proving that they and the class they represent incurred damages by having to pay more for leflunomide due to the period of time, if any, that Defendant's Citizens Petition delayed the FDA's approval of generic leflunomide?"); *In re* Vitamins Antitrust Litig., MDL No. 1285 (D.D.C.). Tr. at 1363 ("If you find that there was a violation of antitrust laws that caused an overcharge to the plaintiffs and class members, you must then consider the amount of that overcharge.").

reasonable band, how "widespread" among the class injury must be in order to have a reasonable basis to find that the "the class" was injured by the challenged conduct. Accordingly, in most cases, the court does not appear to impose an absolute legal bar against certifying classes with substantial numbers of non-injured members.

What is more, given that there is no formal "common impact" requirement at trial, juries may never need to decide whether plaintiffs' impact evidence fails to show injury to 40% of the class. Plaintiffs could present their class-wide evidence, saying they believe it covers all or nearly all, but admitting that it might "only" cover 60% of the class, and then never return to the issue again. It is by no means obvious that this supposed defect in plaintiffs' case would prohibit a class-wide trial or be a bar to a class-wide judgment, raising a serious question about whether courts should be resolving complicated "merits" disputes about the breadth and scope of plaintiffs' impact evidence at the class stage.

A second potential objection to certifying classes with substantial numbers of non-injured class members is that it could complicate the presentation of class damages at trial. However, if plaintiffs present their damages to the class as a whole, in the aggregate, there is no reason why the presence of non-injured class members in that class should make the analysis difficult or prejudice the defendants. And courts have repeatedly found that "the use of an aggregate approach to measure class-wide damage is appropriate."[125] For instance, in *Louisiana Wholesale Drug Co., Inc. v. Sanofi-Aventis U.S., L.L.C.*, the jury was simply instructed, "State the dollar amount that the Plaintiff class was overcharged."[126] To the extent that the latter, aggregate damages methodology is used, issues relating to non-impacted class members are easily accounted for. The plaintiffs' expert could simply compute damages only to the injured class members. For instance, a plaintiffs' economist could rely upon market-wide data to analyze the difference between the average actual prices the class paid, and the average

125. *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 324 (E.D. Mich. 2001). In *NASDAQ Mkt.-Makers Antitrust Litig.*, the court upheld the use of an aggregate damages calculation in a highly complicated horizontal price-fixing conspiracy, involving a class of more than one million members, stating that such damages analyses "have been widely used in antitrust, securities and other class actions." *In re* NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. 493, 525 (S.D.N.Y. 1996). In its extended discussion of aggregate damages, the *NASDAQ* court explained that such an approach is not only permissible, but has "obvious case management advantages," including eliminating the need for individual damage proofs at trial. *Id.* at 524–26, 525.

126. Louisiana Wholesale Drug Co., Inc. v. Sanofi–Aventis U.S., L.L.C., 07–Civ–7343 (HB), Verdict Sheet, p. 2.

prices the class would have paid absent the challenged conduct to arrive at the average overcharge and then multiply that by the total volume of class purchases.[127] If done correctly, the use of class-wide averages would implicitly account for the fact that 40% of the class paid no overcharges. To the extent it did not, that would be an issue relating to quantum of damages, not impact. Defendants could challenge that at trial just like they could challenge other aspects of the plaintiffs' damages analysis.

If there was some impediment to presenting damages to the class in the aggregate, plaintiffs could prove damages by determining the percentage of the total overcharge on the products at issue or absolute amount of the overcharge per product sold. For instance, in *In re High Pressure Laminates Antitrust Litigation*, the jury was asked to determine "whether the national Class members paid more for high pressure laminates as a result of the agreement or conspiracy," and if so, by how many "cents per square foot."[128] Here, too, there is no *a priori* reason why this means of assessing damages would be rendered impossible by the presence of non-injured class members. The key issue under this method would be the total volume of purchases on which to assess the overcharge damages, which would either be stipulated by the parties or contested at trial.

A final potential objection is that permitting classes to be certified with substantial numbers of non-injured entities would violate class members' due process rights. From the perspective of 60% of the class that has suffered injury, to the extent that the non-injured are allocated some of the class award, the share going to the injured may have been diluted unfairly. The courts can solve this problem by ensuring that the class award is accurately and efficiently allocated to members of the class, and if the evidence reveals that certain class members suffered no harm, courts should not allow them any recovery or perhaps should permit them only a nominal recovery.

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127. Indeed, using averages in just this way is standard practice in antitrust damages analyses. Averaging can accurately compute class damages but cannot (by itself) determine which of the class members were harmed or how many class members were harmed. *See, e.g.*, Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd., No. 05–12024 PBS, 2009 WL 2914313, at *14 (D. Mass. Aug. 29, 2009) (noting that the defendant had criticized one of plaintiffs' class expert economists "because his economic analysis only models how much the *average* price of sharps containers from all supplies in the industry would have fallen, rather than showing that all class members would have paid lower prices in the but-for world") (emphasis in original). In effect, the defendant in this case was criticizing plaintiffs' damages analysis *not* for inaccurately assessing damages to the class, but rather simply because the damages analysis could not, by itself, establish common impact.

128. Transcript of Jury Instructions at 2333–34, *In re* High Pressure Laminates Antitrust Litig., 00 MD 1368 (CLB) (S.D.N.Y. May 23, 2006).

To be sure, this proposal raises a question about whether it is fair to include the non-injured entities in the class. After all, by virtue of being in the class, their claims would be litigated and extinguished even though they would not recover under the plaintiffs' theory. There are, however, a few reasons to be skeptical of this objection. The first is that these are entities for which plaintiffs have no admissible evidence that they suffered any injury, and thus it is unlikely that any would be giving up valuable claims even in theory.

The second reason to question an objection on behalf of presumably non-injured class members is that they can preserve their rights by opting out. Before including any entities in a damages class, class members must receive notice of the action, which notice must describe plaintiffs' allegations and theories, defendants' defenses, and other particulars about the action. If there is a settlement, the notice must describe, among other things, the plaintiffs' plan of allocation. Importantly, the notice must provide each member of a damages class with the opportunity to exclude itself from the class should that class member not wish to be bound by any class settlement or judgment. Thus, non-injured class members would have had an opportunity to opt out of the class before they were bound by any class result.

Finally, the practical reality of a denial of class certification in most cases is that the injured and non-injured plaintiffs alike cannot recover at all. Most antitrust claims are simply too expensive and complicated to prosecute as individual actions. Thus, it would be perverse to refuse to certify a class out of concern for the rights of the non-injured members of the class when the result would be that those who are injured cannot recover, and the defendant keeps all of its allegedly ill-gotten gains.[129]

In short, judicial resolution of contested facts at class certification would tend to exacerbate three ways in which courts already place inappropriate emphasis on impact at class certification. The three ways courts excessively on impact are: first, by requiring plaintiffs to *prove* impact with common evidence rather than merely showing that they will be able to plausibly *attempt to prove* impact through common evidence at trial; second, by asking whether common issues predominate regarding *impact* rather than whether they predominate in the case *as a whole*; and, finally, by framing common impact as requiring proof of harm to *all or virtually all class members* rather than simply inquiring whether the *evidence that will be put forward at trial*

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129. For a discussion of a similar misuse of concerns about class conflicts to deny class certification to the detriment of all class members, see Davis & Sorensen, *supra* note 28, at 141–44 (2004).

regarding impact will be common, even if it does not prove harm for many class members.

VI. IRREGULAR AMENDMENTS TO THE PROCEDURAL RULES

The Supreme Court made clear in *Eisen* that Rule 23 does not contemplate courts deciding the merits as part of the class certification decision.[130] That holding would seem to apply with greatest force to the resolution of disputed factual issues. In antitrust claims for damages, as a matter of constitutional law, that decision is reserved for a jury after trial. If indeed some courts are attempting to revise the traditional standard for class certification, their decision to do so through a common law method suffers from a significant procedural defect: it does not abide by the ordinary protocol for amending the Federal Rules of Civil Procedure.

This procedural defect in turn gives rise to two costs. First, it detracts from the legitimacy of the new class certification standard. The rules amendment process was implemented in part for reasons of procedural fairness. It attempts to put in place a group of decisionmakers who to some degree represent different perspectives. Also, it gives all stakeholders some opportunity—however imperfect—to voice their concerns and to promote their interests. In contrast, the judicial changes to class certification depend on the composition of a single three-judge panel, and are informed largely by the arguments of the litigants that happen to appear in a particular case.

A second cost of amending the class certification standard by judicial decision is that it may well produce a lower-quality outcome. Courts are subject to important institutional constraints. They are poorly situated, for example, to gather empirical evidence. Their focus is on the facts of the cases before them, and they tend to consider only those arguments that the litigants place before them. Indeed, not even the parties to litigation are generally aware in advance that a judicial panel is contemplating a significant change in the law. Litigants are therefore poorly situated to raise—much less to develop fully—the entire panoply of considerations relevant to legal reform. It is therefore unsurprising that courts, in modifying class procedure, have relied upon unsubstantiated and improbable factual assertions, and have devised legal standards that may create constitutional problems. In formulating a general rule, the formal amendment process has various competitive advantages that are likely to yield better substantive results than an appellate court seizing on a case to make a sweeping revision.

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130. Eisen v. Carlisle, 417 U.S. 156, 177–78 (1974).

A. Procedural Deficiencies

The process for amending the Federal Rules of Civil Procedure has become more public and protracted over the years. A blue ribbon committee drafted the original Rules in about a year and a half in the 1930s.[131] Now the process is more elaborate.[132] First, an advisory committee proposes changes after public meetings.[133] Next, the advisory committee considers the comments and suggested modifications to its proposal.[134] The committee then sends its recommendations to the judicial conference, which, upon approval, sends them along to the United States Supreme Court.[135] Any changes the Court adopts become final unless Congress rejects them within seven months of receiving them.[136] The process generally takes a total of about three years.[137] There is now a greater element of participatory democracy than in the original adoption of the rules.[138]

Courts have long recognized that the formal process for amending the Federal Rules of Civil Procedure is entitled to deference. In addressing the standard for pleading under Rule 8(a)(2), for example, the Supreme Court has repeatedly stated that the judiciary should not alter the pleading standard on its own in particular kinds of cases, but rather should abide by the language of the Rules. In responding to the policy argument in favor of a heightened pleading standard in employment discrimination cases, the Court stated in *Swierkiwicz* (quoting its earlier decision to the same effect in *Leatherman*), "Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"[139] To be sure, the

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131. RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD F. SHEMAN & JAMES E. PFANDER, CIVIL PROCEDURE: A MODERN APPROACH 197 (5th ed. 2009).

132. For an overview of the process, see generally Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L. 901 (2002).

133. MARCUS, REDISH, SHEMAN & PFANDER, *supra* note 131, at 197 (citing 28 U.S.C. § 2073(c)).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Linda Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 800 (1991).

139. Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514–15 (2002) (quoting Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993)).

Twombly[140] Court arguably modified the pleading standard without following proper procedure. But the *Twombly* Court's reluctance to admit that is what it was doing—if, in fact, that is what the Court did—in an odd way confirms its view of the proper way to pursue reform.[141] The *Twombly* Court's sheepishness suggests that the judiciary should not change the Rules without going through the formal process.

The lopsided nature of the possible novel class certification standard discussed in this paper may result in part from this procedural deficiency. One would expect that in open deliberations, the issue of maintaining some symmetry would arise. If a court increases the requirements for certification when a plaintiff has a particularly weak case, then perhaps it should ease those requirements when a plaintiff's case is particularly strong. The failure of courts to justify the new asymmetry—or even to acknowledge it—may reflect the limitations of making broad policy decisions in the context of litigation.

B. Substantive Deficiencies

Limited institutional competence may explain other deficiencies in the new standard as well. As Scott Hemphill has argued in a different setting, courts suffer from what he calls an "aggregation deficit."[142] They have before them the facts of only a single case. They are not designed to amass empirical information to make the factual judgments that inform rulemaking.[143] For this reason, it is perhaps unsurprising that courts would suggest that defendants often settle class actions that lack merit without offering any support for this proposition. Courts may be accustomed to relying on such "rough guesses"[144] regarding factual issues.

Courts have other disadvantages in making rules as well. They may have difficulty anticipating all of the consequences of the changes they make. This disadvantage can explain the ripple effects of allowing judges to make findings of fact at class certification, including the potential for increased costs of discovery, delay of the class certification decision, and even

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140. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

141. Similarly, under the *Erie* doctrine, courts are more reluctant to conclude that a Federal Rule of Civil Procedure is "substantive" than they are to make the same judgment about a judge-made rule. In part, this is because they give greater weight to the considered judgment of the formal rules amendment process than to the common law method of reform.

142. C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 101, 103 (2009).

143. *Id.*

144. *Id.*

constitutional problems when judges decide issues that should await resolution by a jury. These issues are grave and warrant sustained attention; they are not mere afterthoughts to be dismissed casually. But they may not receive the careful consideration they deserve if litigants are unaware that a federal appellate panel is considering a significant change in the rules. Under those circumstances, appellate judges are forced to anticipate and address all of the ramifications of their actions on their own, without the benefit of the adversarial system, much less a protracted deliberative process.

VII. CONCLUSION: A BAD SOLUTION TO AN IMPLAUSIBLE PROBLEM

If courts have recently begun to increase the burden on plaintiffs at class certification, that may be a poor solution to a problem that does not actually exist. The concern that seems to be motivating this shift is the protection of large corporations from settling meritless cases because class certification allows for a form of legal extortion. But this possibility is implausible as a matter of theory and unsubstantiated as a matter of fact. Meanwhile, the change—if it is to be implemented in a manner that is sensible, and perhaps even constitutional—has various ramifications. It may delay the certification decision, add to the discovery necessary for that decision, and lead courts away from the most sensible determination regarding whether class treatment is appropriate. These ramifications should be studied carefully before departing from settled law. The most appropriate forum for such a change, and arguably the one required by law, is the Civil Rules Advisory Committee as part of the formal process for amending the Federal Rules of Civil Procedure, and not federal judges acting on an *ad hoc* basis.