AMERICAN ANTITRUST INSTITUTE

PRIVATE ANTITRUST ENFORCEMENT CONFERENCE

SUPPORTING MATERIALS

SESSION III: CLASS CERTIFICATION - MAKING SENSE OF CLASS CERTIFICATION DOCTRINE, ECONOMICS, AND ECONOMETRICS

- Joshua P. Davis, *Classwide Recoveries*, 82 GEO. WASH. L. REV. 890 (2014).
- Joshua P. Davis, Eric L. Cramer, and Caitlin May, *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858 (2014).
- Joshua P. Davis and Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 18 GEO. MASON L. REV. 969 (2010).
- Joshua P. Davis and Eric L. Cramer, *Of Vulnerable Monopolists?: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 RUTG. L. J. 355 (2009).

University of San Francisco School of Law

University of San Francisco Law Research Paper 2013-16

CLASSWIDE RECOVERIES

Joshua P. Davis

Classwide Recoveries

*Joshua P. Davis**

Abstract

Classwide recoveries can have important advantages over individual recoveries. They can, for example, allow plaintiffs to pursue litigation when individual actions would be uneconomical, and they can make possible a statistical approach that is often not feasible in ordinary litigation. This Article makes these points and then explores subtler issues. In doing so, it focuses on situations in which classwide recoveries can offer a way to tailor a defendant's overall liability to the precise harm it caused. The circumstances in which this benefit accrues are important: when some but not all members of a group suffered injury, and when identifying those members of the group that were harmed is impossible or impractical. This issue has great significance. A recent controversy in class certification jurisprudence is whether plaintiffs must show harm to all or virtually all members of a proposed class to satisfy Federal Rule of Civil Procedure 23. This Article suggests a novel and counterintuitive thesis: class treatment and classwide recoveries can be particularly valuable precisely when some courts have questioned the propriety of class certification. To be more precise, classwide recoveries can impose just the right amount of liability on a defendant when plaintiffs can show the total harm the defendant has caused but cannot identify which class members suffered resulting injuries. Ironically, some courts have expressed reluctance to certify classes in just these circumstances.

*"For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."***

Table of Contents

---

* Associate Dean for Faculty Scholarship, Professor of Law, and Director of the Center for Law and Ethics, University of San Francisco School of Law. I am grateful for insightful comments from Elizabeth Cabraser, Eric Cramer, Mort Davis, Connie de la Vega, Howie Erichson, David Franklyn, Deborah Hussey Freeland, Myriam Gilles, Tristin Green, Pat Hanlon, Geoff Hazard, Deborah Hensler, Bill Hing, Sam Issacharoff, Rob Kulick, Thom Main, Rick Marcus, Josh Rosenberg, Steve Shatz, Charlie Silver, Hal Singer, and Tom Willging. Royce Barber, Jamie Bodiford, Veronica Francis, and Nick Larson provided excellent research assistance. All errors remain my own.

** Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

Introduction

Classwide recoveries can hold various advantages over individual recoveries. Perhaps the best known advantage of the class action is the ability to allow plaintiffs with small claims to band together, pursuing litigation that otherwise would not be feasible.[1]

Less frequently recognized is the opportunity aggregate litigation affords to use statistics to improve judicial decisionmaking. Courts in individual litigation tend to rely on the speculation of witnesses about the facts—and on the speculation of jurors about the veracity and accuracy of witness testimony. Aggregate litigation, in contrast, affects a large enough group that the parties can readily move beyond anecdotes to a statistical inquiry.

This Article explores yet another potential advantage of aggregate litigation—that class certification can be especially valuable precisely when *not all class members suffered harm*. This is so because class certification can enable a court to award a recovery based on the injury to the class as a whole rather than having to calculate recovery on an individual basis.

---

1 *See, e.g.*, Butler v. Sears, Roebuck & Co., 702 F.3d 359, 362 (7th Cir. 2012), *cert. granted, vacated, and remanded*, 133 S. Ct. 2768 (2013), *reinstated*, 727 F.3d 796 (7th Cir. 2013).

This last advantage is important and could lead to a somewhat counterintuitive approach to class certification doctrine. Indeed, a crucial issue—often *the* crucial issue—in class certification today is how a court should respond if some portion of a proposed class did not suffer harm from the conduct at issue. Some courts have reaffirmed the longstanding view that certification may nevertheless be appropriate.[2] Recently, others have implied that plaintiffs must show injury to all—or virtually all—class members to carry their burden for certification.[3] This Article suggests reasons to doubt the wisdom of imposing an "all or virtually all" requirement at class certification.

Part I provides background for the analysis. Part I.A defines classwide recoveries as that term is used in this Article. Part I.B explains a potential doctrinal impediment to classwide recoveries in some cases: some courts have implied that class certification requires plaintiffs to offer evidence that can show a defendant caused harm to all or virtually all members of a class. Part I.C notes that allowing classwide recoveries would render the "all or virtually all" requirement inappropriate, at least in some cases. Part I.D situates classwide recoveries within a theoretical framework, noting their relationship to an entity or public law model and an aggregation or private law model.

Part II explores various potential benefits of classwide recoveries. Part II.A explains why classwide recoveries make sound procedural sense. Indeed, that practical reality may explain judicial use of classwide recoveries more than any theoretical consideration. Assessing the overall injury a defendant's conduct caused can be more expedi-

---

2 *See, e.g.*, Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010); DG *ex rel.* Stricklin v. Devaughn, 594 F.3d 1188, 1198 (10th Cir. 2010); Kohen v. Pac. Inv. Mgmt. Co. (*PIMCO*), 571 F.3d 672, 677 (7th Cir. 2009) ("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 . . . ." (citations omitted)); Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 106–07 (2d Cir. 2007); *In re* Urethane Antitrust Litig., 251 F.R.D. 629, 638 (D. Kan. 2008); Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. 293, 310 (D.D.C. 2007); *In re* Rubber Chems. Antitrust Litig., 232 F.R.D. 346, 353 (N.D. Cal. 2005); J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., 225 F.R.D. 208, 219 (S.D. Ohio 2003); *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 321 (E.D. Mich. 2001).

3 This issue can arise under the predominance requirement of Federal Rule of Civil Procedure 23(b)(3), under the requirement of manageability under Federal Rule of Civil Procedure 23(b)(3)(D), and in consumer cases regarding ascertainability. *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 325–26 (3d Cir. 2008); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 28 (1st Cir. 2008); *In re* Light Cigarettes Mktg. Sales Practices Litig., 271 F.R.D. 402, 416–17 (D. Me. 2010); *infra* Part I.B.

tious and more accurate when courts deal with harm to a large number of individuals on a classwide basis rather than individual litigation.

Parts II.B and C explore some subtler benefits of classwide recoveries, particularly when a court would have difficulty determining which class members have meritorious claims. Part II.B explains why classwide recoveries can produce lower error costs than individual recoveries. As a predicate for this analysis, it is important to distinguish between two kinds of potential error: first, imposing the wrong amount of liability on defendants; and second, awarding the wrong amount of compensation to plaintiffs.[4]

As to liability, classwide recoveries can allow courts to require defendants to pay precisely the amount of harm that they cause. This serves a number of valuable policy goals, most notably achieving optimal deterrence. Individual recoveries, in contrast, can lead to defendants paying more or less than the damages they cause and, as a result, to excessive or insufficient deterrence.

The analysis is somewhat more complicated, however, regarding compensation. Some subtlety is required in assessing whether classwide recoveries provide closer to optimal compensation for plaintiffs than do individual recoveries. A court may be able to allocate the classwide recovery to members of the plaintiff class in proportion to the injury each suffered, perhaps by conducting informal mini-hearings or empowering a special master to undertake factual inquiries. In the cases of interest, however, the court will not be able to determine which class members suffered the relevant form of injury. Under those circumstances, a court may have to take recourse to some kind of formula, possibly even relying on a simple pro rata distribution. If so, a classwide recovery would produce *higher* error costs than individual recoveries if those costs are measured as the absolute difference between the actual outcome and the right outcome for each plaintiff. Classwide recoveries, however, will result in *lower* error costs if they are measured as the *square* of that difference.[5]

Despite these conflicting results regarding compensation, three considerations suggest that classwide recoveries are attractive. First,

---

4 This Article assumes throughout that the substantive law is efficient. It assumes, in other words, that imposing any liability greater or lesser than a proper application of the law to the facts would be, respectively, excessive or insufficient.

5 As discussed below, a common approach to measuring error costs is to measure the square of the difference between the right result and the actual result (that is, multiply that difference by itself) rather than simply to measure the absolute difference. One benefit of this approach is that it always produces a positive number so that errors in opposite directions do not cancel out.

measuring error costs by squaring the difference between the actual recovery and the right recovery is appropriate for those class members who are averse to risk. Squaring the difference helps to capture that, for risk-averse litigants, large errors are disproportionately harmful. For class members with large claims, risk aversion is likely the norm. Second, where members of a potential class have small claims, allowing a classwide recovery is often necessary to permit class certification and achieve any compensation whatsoever. If plaintiffs are unable to pursue legal redress without a class, denial of certification effectively means defendants win regardless of the merits,[6] a de facto rule that produces high error costs. Whether class members' claims are large or small, classwide recoveries are thus likely to produce lower error costs in terms of compensation than individual recoveries. Finally, classwide recoveries yield lower *total* error costs—considering both liability and compensation—than do individual recoveries.

Part II.C addresses another subtle benefit of classwide recoveries. When courts calculate recovery on a classwide basis as opposed to an individual basis, the possible outcomes in litigation transform—to borrow terms from mathematics—from a discontinuous to a continuous function. To be more precise, under an individualized approach, small changes in the findings of fact regarding the odds that particular plaintiffs suffered harm can produce a large, discrete change in the remedy awarded. In contrast, under a classwide approach, those same small changes in factual findings have only an incremental effect on recovery. Continuous functions in terms of the outcomes at trial can have significant benefits over discontinuous functions—such as treating similar cases similarly, allowing for predictability, encouraging sensible litigation expenditures, and facilitating settlements.

These various benefits support certifying classes and allowing classwide recoveries despite plaintiffs' failure to show injury to all class members—indeed, *particularly* when not all class members suffered the relevant form of harm.

The above analysis assumes, for the most part, that the parties will litigate through trial. Part II.D then addresses some issues that arise if that assumption is relaxed. In particular, it offers some preliminary thoughts about the effects of settlement and uncertainty on the analysis above.

---

6 *See, e.g.*, McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 219–20, 234 (2d Cir. 2008) (denying class certification and acknowledging that doing so would likely be fatal to plaintiffs' claims).

Part III turns to two potential criticisms of classwide recoveries.[7] The first is theoretical. It can be understood to derive from academic criticism of a parallel doctrine, market-share liability.[8] Market-share liability is implicated when courts can identify numerous victims of a legal violation but cannot determine which member of a group of potential defendants caused harm to each victim.[9] Courts face a parallel problem—or, perhaps, the better term is a "mirror image" problem—when they can identify a defendant that violated the law but not which members of a group of potential plaintiffs suffered resulting injury. Critics of market-share liability have argued that it is inappropriate to hold a defendant liable for harm that it probably did not cause.[10] Part III.A explains that no similar problem besets classwide recoveries. Unlike market-share liability, classwide recoveries would hold a defendant liable only for the harm that it probably caused.

A second potential criticism of classwide recoveries is more practical. It is that they could cause defendants to pay too much—that they could allow class certification to put undue pressure on defendants to settle even meritless lawsuits or cause a court to impose excessive liability.[11] Neither version of this criticism is persuasive. First, there is little evidentiary or theoretical support for the notion that class certification regularly causes defendants to pay more than they should in settling litigation.[12] Second, the inclusion of uninjured members in a class should not affect a defendant's total liability, if it is calculated appropriately.

Part IV concludes that there are strong policy reasons to award classwide recoveries, even—indeed, especially—when classes include uninjured members.

---

7 This Article does not address potential objections to classwide recoveries based on standing, due process, and the Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2012). For a discussion of those issues, see Joshua P. Davis, Eric L. Cramer & Caitlin V. May, *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858 (2014).

8 *See, e.g.*, Benjamin C. Zipursky, *Evidence, Unfairness, and Market-Share Liability: A Comment on Geistfeld*, 156 U. PA. L. REV. PENNUMBRA 126 (2007).

9 Sindell v. Abbott Labs., 607 P.2d 924, 928 (Cal. 1980).

10 *See* Zipursky, *supra* note 8, at 134–35.

11 This concern has motivated recent changes in the law, most notably the Supreme Court's adjustment to the pleading standard in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), but also various federal appellate court decisions imposing a heightened standard at class certification. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 309–10 (3d Cir. 2008); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 26 (1st Cir. 2008).

12 For a careful critique rejecting the argument about legal blackmail, see Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1388–90 (2003).

I. Classwide Recoveries and Class Certification

A. Classwide Recoveries

A court awards a classwide recovery in a class action when it calculates an aggregate award to the class as a whole rather than a separate award to each individual class member.[13] Allocation of the overall recovery to members of the class occurs only after a class trial.[14] The allocation process can assume various forms, including individual hearings before a judge, a magistrate, or a special master, or approval of a formula or similar method submitted by class counsel. Calculating recovery on a classwide basis—as opposed to an individual basis—can make a great deal of difference.

Consider an example. Imagine litigation in which 100 women sue an employer claiming that they suffered discrimination because they were denied promotions that were instead awarded to less qualified men. In total, the employer deprived the 100 women of 60 positions. Assume that the women can all establish that they were better qualified than all of the men who were promoted. Determining which 60 women would have been promoted but for the discrimination, however, is quite difficult. The promotion criteria are too subjective, and the women have credentials that are too similar. Further assume that each woman who would have been promoted is entitled to recover $10,000 in back wages. The outcome in this case might be dramatically different depending on whether the court adopts an individualized or classwide approach to recovery.

Using an individualized approach, each of the 100 women may be able to show that she more likely than not suffered $10,000 in harm as a result of discrimination. After all, each woman had a 60% chance of being promoted but for the discrimination, which should satisfy the preponderance of the evidence standard.[15] The cumulative effect of aggregating these individual claims would be to impose liability on the employer of $1 million—$10,000 each to the 100 women.

In contrast, employing a classwide measure of recovery, the court might limit liability to the $600,000 in total damages that the class as a whole suffered from sex discrimination. After all, in total, only 60 women—not 100 women—were each deprived of $10,000 in lost wages. That $600,000 could then be allocated among the members of

---

13 Davis, Cramer & May, *supra* note 7, at 861.

14 *Id.*

15 I assume here that the only issue in dispute is which women were harmed by the discriminatory practice. I also put aside the issue of whether courts are willing to rely on purely statistical evidence in assessing liability.

the class in some reasonable manner, perhaps by distributing the funds on a pro rata basis so that each class member receives $6,000.[16]

A similar issue has arisen in the antitrust context. Not many antitrust class actions reach trial, but the jury instructions in those that have—or those that have come close enough for the court to adopt jury instructions—are revealing. They ask the jury only to determine the damages of the class as a whole, not to determine the damages of individual class members.[17] Classwide recoveries may well be the norm in how courts conduct antitrust class trials.[18]

As is likely apparent from the above discussion, the choice between an individualized approach and a classwide approach to recovery has profound consequences. Before exploring them systematically, however, it is worth noting a reciprocal relationship between class certification doctrine and classwide recoveries: class certification doctrine could limit the possibilities for classwide recoveries, and classwide recoveries could enhance the prospects for class certification.

B. Class Certification as Potentially Limiting the Possibilities for Classwide Recoveries: "All or Virtually All"?

As the above example suggests, classwide recoveries can play an important role when courts know the total harm a defendant caused but have difficulty identifying which members of a group suffered the relevant form of injury. Class certification doctrine as it has developed in some courts holds the potential to prevent aggregate litigation in just these sorts of cases.

This is so because an emerging issue in class certification decisions—in some cases the most significant issue—is whether plaintiffs must show a defendant's conduct harmed all or virtually all members of a proposed class to satisfy Federal Rule of Civil Procedure 23.[19]

---

16 As a doctrinal matter, the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), has cast doubt on whether a court may proceed in this manner. *See id.* at 2560–61 (suggesting the need for individualized inquiry in some employment discrimination actions, at least in some circumstances). For an analysis of this issue, see generally Davis, Cramer & May, *supra* note 7.

17 Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 RUTGERS L.J. 355, 393–96 & nn.120–28 (2009) [hereinafter Davis & Cramer, *Vulnerable Monopolists*].

18 *See id.*

19 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 325–26 (3d Cir. 2008) (noting crucial issue at class certification is common impact); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 28 (1st Cir. 2008); Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969, 970–71 (2010) [herein-

How this issue arises depends on context, including the substantive law on which plaintiffs rely for their claims.

In antitrust, courts generally address this issue under the rubric of common impact. The relevant judicial reasoning proceeds through the following steps: harm to all or virtually all class members is necessary for common impact, common impact is necessary for predominance, and predominance is necessary to certify a class under Federal Rule of Civil Procedure 23(b)(3).[20]

To elaborate a bit, one of the elements of an antitrust claim is that the conduct at issue caused the relevant form of harm (sometimes called impact, fact of damage, or antitrust injury) to a plaintiff.[21] Whether plaintiffs in a proposed class action can attempt to show the relevant harm to the class as a whole through common evidence has come to be known as the issue of "common impact."[22] Some courts have indicated that common impact is a requisite for common issues to predominate in an antitrust case. This approach is manifest in some recent cases where courts have suggested that plaintiffs must offer evidence capable of showing harm to all or virtually all members of a proposed class to establish common impact and, thereby, predominance.[23] To be sure, for various reasons, this development in doctrine is suspect.[24] But what matters for present purposes is that some courts

---

after Davis & Cramer, *Politics of Procedure*]; Davis & Cramer, *Vulnerable Monopolists*, *supra* note 17, at 362.

20 *In re Hydrogen Peroxide*, 552 F.3d at 325–26; *New Motor Vehicles*, 522 F.3d at 28.

21 Davis & Cramer, *Vulnerable Monopolists*, *supra* note 17, at 362–63.

22 Davis & Cramer, *Politics of Procedure*, *supra* note 19, at 970.

23 *In re Hydrogen Peroxide*, 552 F.3d at 325–26; *New Motor Vehicles*, 522 F.3d at 28.

24 First, in past decisions—including binding precedents in some federal circuits—courts have certified classes even if plaintiffs could not show that all of the members of the proposed class were harmed. *Compare In re* Linerboard Antitrust Litig., 305 F.3d 145, 152 (3d Cir. 2002) (holding predominance does not require proof of harm to all class members), *with In re Hydrogen Peroxide*, 552 F.3d at 325–26 (implying proof of harm to all or virtually all class members is necessary to satisfy predominance). Second, courts have recognized that common issues can predominate in a case as a whole even if they do not predominate regarding impact or fact of damage. Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 108–09 (2d Cir. 2007); *see also* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1196 (2013) ("Rule 23(b)(3), however, does *not* require a plaintiff seeking class certification to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof. What the rule does require is that common questions *predominate* over any questions affecting only individual [class] members." (alterations in original) (internal quotation marks and citations omitted)). Third, some of the very courts that have implied the "all or nearly all" requirement have recognized the class certification standard should focus on trial, *In re Hydrogen Peroxide*, 552 F.3d at 311–12, yet antitrust trials rarely address common impact at all, and if they do, they address only whether there is widespread harm to the class, not whether "all or virtually all" class members suffered injury. Davis & Cramer, *Vulnerable Monopolists*, *supra* note 17, at 392–96. For these various reasons, the courts that have rejected the "all or nearly all" requirement may well have firmer

have used the issue of common impact to imply that plaintiffs must be able to show harm to all or virtually all members of a class for certification in antitrust cases.

The same pattern can play out in Racketeer Influenced and Corrupt Organizations Act ("RICO"),[25] fraud, and consumer cases. Sometimes in these cases, as in antitrust cases, the relevant legal consideration is predominance.[26] If recovery would require proof specific to individual claims—such as whether each class member relied on an alleged misrepresentation—courts may rule that common issues do not predominate over individual issues, rendering certification under Federal Rule of Civil Procedure 23(b)(3) inappropriate.[27] Courts taking this approach may impose, in effect, a required showing of harm to all or virtually all class members. Yet another form the issue can take is ascertainability, a requirement recognized by some federal courts.[28] According to the reasoning of some courts, if plaintiffs in consumer cases cannot show who was harmed by the practice at issue—for example, if members of a class are not identifiable from a defendant's records and are unlikely to have retained proof of a relevant purchase—the class is not ascertainable and class certification is inappropriate.[29] Concern about ascertainability can thus lead courts to require evidence at class certification of harm to all or virtually all class members.

To be sure, not all courts have accepted the "all or virtually all" requirement. Indeed, a growing number of courts have explicitly rejected it. As Judge Posner explained in his influential decision in *Kohen v. Pacific Investment Management Co.* ("*PIMCO*")[30]:

> [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

---

grounding in class certification doctrine. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551–52 (2011); Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010); DG *ex rel.* Stricklin v. Devaughn, 594 F.3d 1188, 1198 (10th Cir. 2010); Mims v. Stewart Title Guar. Co., 590 F.3d 298, 308 (5th Cir. 2009); Kohen v. Pac. Inv. Mgmt. Co. (*PIMCO*), 571 F.3d 672, 677 (7th Cir. 2009).

25 Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961–1968 (2012).

26 *See, e.g.*, McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 222 (2d Cir. 2008).

27 *Id.* at 227–28, 234.

28 The requirement of ascertainability can in turn derive from various other class certification requirements, such as manageability or predominance. *See generally* Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305 (2010).

29 *Id.*

30 Kohen v. Pac. Inv. Mgmt. Co. (*PIMCO*), 571 F.3d 672 (7th Cir. 2009).

> 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, despite statements in some cases that it must be reasonably clear at the outset that all class members were injured by the defendant's conduct.[31]

According to Posner, it is sufficient for class certification if plaintiffs can show harm that is widespread among class members—that is, that the class does not include "a great many persons who have suffered no injury at the hands of the defendant."[32] Still, in jurisdictions that do adopt the "all or virtually all" requirement, it may greatly restrict the potential for awarding classwide recoveries.

C. The Effect of Classwide Recoveries on Class Certification

On the other hand, allowing classwide recoveries might facilitate class certification, permitting it where plaintiffs would not be able to satisfy the "all or virtually all" requirement. Classwide recoveries obviate the need for individualized inquiries regarding harm that could otherwise frustrate efforts to litigate and try a case on a class basis. Allowing plaintiffs to recover on a class basis would not, however, mean that class certification is always appropriate. It would change only the showing plaintiffs must make.[33]

Without classwide recoveries, plaintiffs must either make an appropriate showing[34] that they will be able to prove harm to individual

---

31 *Id.* at 677 (citations omitted); *see also* Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 823 (7th Cir. 2012); Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010); *In re* Flonase Antitrust Litig., 284 F.R.D. 207, 227 (E.D. Pa. 2012) ("I agree with the analysis in [*PIMCO*] and with other courts that '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.'" (quoting *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 320–21 (E.D. Mich. 2001))).

32 *PIMCO*, 571 F.3d at 677.

33 The class certification standard—even in an age of aggregate proof—is not, as others have suggested, circular. *Cf.* Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 126 (2009) ("Certification based simply on assertions in the complaint or an admissible expert submission exhibits a troubling circularity. The legitimacy of aggregation as a procedural matter would stem from the shaping of proof that presupposes the very aggregate unit whose propriety the court is to assess."). Courts must decide whether they will allow classwide recoveries, and, if they do, that will affect plaintiffs' burden at class certification. As discussed below, however, either way plaintiffs have a requisite showing they must make for class certification to be appropriate.

34 The somewhat vague phrase "make an appropriate showing" is deliberate. The burden on plaintiffs at class certification has never been pellucid, but recent federal court decisions have made it murkier yet. There seems to be a consensus that plaintiffs need not carry the same burden at class certification that they would have to carry to prevail at trial. Amgen Inc. v.

class members through common evidence—rendering the issue common—or that any individual issues relating to harm do not render class certification inappropriate.[35]

With the availability of classwide recoveries, the analysis is quite different. Plaintiffs merely need to make an appropriate showing that they will be able to calculate the aggregate harm to the class.[36] If they can achieve that, the court will be able to impose a judgment against the defendant and in favor of the class as a whole. Issues pertaining to the allocation of any recovery the class obtains could become an administrative matter, not one that bears on the certification decision. The "all or nearly all" requirement would then have no significant relationship to whether the court should certify a class.

To understand the possibilities—and limits—of calculating classwide recoveries, and their potential effect on class certification, it is helpful to review some recent judicial decisions in which these issues arose. The discussion below addresses litigation involving employment discrimination claims, antitrust claims, and fraud claims.

1. Employment Discrimination

Employment discrimination litigation offers an illustration of the potential effect on class certification of allowing classwide recoveries. The representative plaintiffs may be able to show with a high level of certainty using aggregate statistics that the class as a whole suffered adverse treatment by an employer on an impermissible basis. They may also be able to show the total harm the discriminatory conduct caused the class. It may be impossible or impractical, however, to identify which employees suffered injury. Under these circumstances, a classwide recovery would facilitate certification.

This analysis can explain the Ninth Circuit's decision, sitting en banc, in *Dukes v. Wal-Mart Stores, Inc.*[37] Plaintiffs brought an action

---

Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1195 (2013) ("Merits questions may be considered [in addressing class certification] to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."). Yet some courts have framed the class certification standard in a way that makes it difficult to distinguish the two. Resolution of this issue is unnecessary, however, for present purposes. For further discussion of the issue, see Davis, Cramer & May, *supra* note 7. *See also* Davis & Cramer, *Vulnerable Monopolists*, *supra* note 17.

35 Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 107–08 (2d Cir. 2007).

36 *See* Davis, Cramer & May, *supra* note 7, at 861.

37 *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010), *rev'd*, 131 S. Ct. 2541 (2011).

against Wal-Mart under Title VII of the Civil Rights Act of 1964[38] for sex discrimination.[39] In seeking class certification, plaintiffs offered, among other sources of evidence, a statistical analysis purporting to show that Wal-Mart had a bias against women in compensation and promotion.[40] The Ninth Circuit addressed Wal-Mart's argument that it had the legal right to challenge whether any particular member of the class numbering over a million would have received the same treatment even if Wal-Mart had not acted in a discriminatory manner in general.[41] Conducting over a million mini-trials on this issue could render a class action unmanageable and, as a result, class certification inappropriate.[42]

The trial court had held that individualized inquiries were unnecessary because it could instead assess the overall harm to the class.[43] Then, in a later stage in which Wal-Mart would have no interest,[44] it could allocate the overall recovery among class members. Relying on the Ninth Circuit's opinion in *Domingo v. New England Fish Co.*,[45] the trial court held that a lump sum award to the class as a whole is appropriate when the employment practices at issue make it difficult to determine precisely which of the claimants would have received more pay or been given a better job absent discrimination, but when it is clear that many would have.[46]

The Ninth Circuit reserved judgment about how precisely the trial should proceed, but it seemed to agree that a classwide approach could be proper.[47] In particular, it discussed with approval an earlier case, *Hilao v. Estate of Marcos*,[48] in which experts provided an assessment of the amount the class should recover based on selecting a subset of the overall claims, using statistics to gauge the merits of the claims in that subset, and drawing statistical inferences about the likely rate of success of the claims of the class as a whole.[49] In *Hilao*,

---

38 42 U.S.C. §§ 2000e–2000e-17 (2006).

39 *Dukes*, 603 F.3d at 577.

40 *Id.* at 600.

41 *Id.* at 578–79.

42 *Id.* at 624–27 (discussing relationship between calculating class recovery and trial manageability).

43 Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 179 n.49 (N.D. Cal. 2004).

44 *See id.*

45 Domingo v. New Eng. Fish Co., 727 F.2d 1429 (9th Cir. 1984).

46 *Dukes*, 222 F.R.D. at 176.

47 *Dukes*, 603 F.3d at 628.

48 Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996).

49 *Dukes*, 603 F.3d at 625–27.

the jury then evaluated the experts' analysis and drew its own conclusions about the appropriate classwide recovery.[50]

One way to understand the Ninth Circuit's *Dukes* decision is as an endorsement of a classwide—rather than an individualized—approach to recovery. Such an endorsement could make sense of the court's willingness not to look into the merits of each claimant, but rather to use a method that would enable the court to assess the overall harm done to the class.[51]

Still, the possibility of a classwide recovery did not ensure the propriety of class certification. Plaintiffs still had to make a showing that they could satisfy the elements of an employment discrimination claim using predominately common evidence. Indeed, the Ninth Circuit judges on appeal disagreed about whether plaintiffs had provided sufficient evidence in this regard.[52] The majority held that plaintiffs had submitted sufficient statistical and anecdotal evidence of a company-wide policy of discrimination for class certification purposes.[53] The dissent disagreed, claiming, inter alia, that the evidence pertained only to particular stores or parts of the country.[54] The Supreme Court ultimately agreed with the dissent, reversing class certification.[55] Regardless, the key point for present purposes is that class certification is not automatic even when courts allow classwide recoveries. Permitting that form of relief merely alters the showing that plaintiffs must make.[56]

2. Antitrust

The issue of classwide recovery affects antitrust cases. Numerous courts have instructed juries, for example, to award damages to the class as a whole—or to plaintiffs or to the plaintiff class—rather than

---

50 *Hilao*, 103 F.3d at 784.

51 The Ninth Circuit acknowledged that the trial court had endorsed a classwide approach to recovery. *Dukes*, 603 F.3d at 624 n.49 (noting the trial court proposed calculating the "lump sums" reflecting the total losses of the class from failure to promote and to provide equal pay based on sex discrimination). The Ninth Circuit did not, however, rule on whether that approach would be proper. *Id.* at 628.

52 *Id.* at 628–29 (Ikuta, J., dissenting).

53 *Id.* at 628 (majority opinion).

54 *Id.* at 635 (Ikuta, J., dissenting).

55 Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556–57 (2011).

56 To be sure, the Supreme Court, in reversing the Ninth Circuit's certification of the class, expressed doubt about a classwide approach to recovery. *Id.* at 2560–61. For a discussion of the significance of the Court's reasoning in *Wal-Mart* for classwide recoveries, see Davis, Cramer & May, *supra* note 7, at 887–88.

to individual class members.[57] Those courts have reserved for a later proceeding the allocation of the total award among class members.

The Third Circuit failed to recognize the significance of this practice in *In re Hydrogen Peroxide Antitrust Litigation*.[58] The trial court had certified a class of purchasers of hydrogen peroxide and related chemicals.[59] On appeal, the defendants raised only one issue: whether common issues predominated over individual issues as required by Federal Rule of Civil Procedure 23(b)(3).[60] As is typical of the class certification decision in direct purchaser antitrust litigation, predominance hinged on whether plaintiffs could show fact of damage—or "antitrust impact"—through predominantly common evidence.[61]

The trial court had accepted the opinion of the plaintiffs' expert that, given the structure of the market and of pricing, a conspiracy to raise prices would inflate the amount that all purchasers paid.[62] In contrast, the defendants' expert disagreed with the conclusion that "the Plaintiffs will be able 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."[63] The defense expert contended, inter alia, that different forms of hydrogen peroxide have different supply and demand curves, that prices for hydrogen peroxide declined for significant periods during the alleged conspiracy, and that the prices paid by different purchasers did not "move together"—prices to some increased while prices to others stayed the same or decreased.[64]

In reversing the class certification decision, the Third Circuit criticized the trial court for conducting an insufficiently searching inquiry into the conflicting expert analyses. Although the standard the Third Circuit articulated for class certification was murky, it made clear its view that, at class certification, a trial court should not accept an expert's analysis uncritically—at least not in the face of a conflicting expert opinion.[65]

---

57 Davis & Cramer, *Vulnerable Monopolists*, *supra* note 17, at 394–96 & n.124.

58 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008).

59 *Id.* at 307–08.

60 *Id.* at 310.

61 *Id.* at 311–12.

62 *Id.* at 312–13.

63 *Id.* at 313 (internal quotation marks omitted).

64 *Id.* at 313–14.

65 *Id.* at 323–25.

The Third Circuit's reasoning is particularly pertinent because of the way it framed the issue for the trial court on remand.[66] The appellate panel directed the trial court to determine whether the alleged conspiracy "impact[ed] the entire class."[67] The Third Circuit seemed to require plaintiffs to show that some very substantial portion of the class—perhaps all or virtually all—suffered injury as a prerequisite to establishing predominance under Federal Rule of Civil Procedure 23(b)(3).[68]

The Third Circuit failed, however, to relate this potential requirement to how a class action trial would proceed. This failure is odd given that the *Hydrogen Peroxide* court identified trial as the polestar for the certification decision.[69] If trial would involve an assessment of damages on a classwide basis, the inquiry into whether an antitrust violation harmed all or virtually all class members would not be relevant. The pertinent issue for trial would be whether plaintiffs could show the harm to the class as a whole.

To be sure, the plaintiffs' ability to satisfy this standard in *Hydrogen Peroxide* was not clear. In this regard, consider the court's discussion of variations in price during the alleged price fixing.[70] The Third Circuit noted there was evidence that the prices to some buyers increased while the prices to others stayed the same or decreased.[71] At least three states of affairs are consistent with this description. First, perhaps those buyers and only those buyers who experienced a price increase during the life of the alleged conspiracy suffered antitrust injury. If so, a class comprising that group would seem proper for certification, even under the standard articulated by the Third Circuit.

A second possibility is that the variations in price suggest that causation would be difficult to determine for any given entity that

---

66 *Id.* at 325. How searching an inquiry is appropriate at the class certification stage is an issue beyond the scope of this Article. Eric Cramer and I have argued that the heightened standard the Third Circuit imposed does not make procedural sense. Davis & Cramer, *Politics of Procedure*, *supra* note 19, at 981–82; Davis & Cramer, *Vulnerable Monopolists*, *supra* note 17, at 374–81.

67 *In re Hydrogen Peroxide*, 552 F.3d at 325. Whether the Third Circuit really meant the entire class—as opposed to, for example, the overwhelming majority of the class—is unclear, as that issue was not before the court.

68 *Id.* This standard has been criticized elsewhere, inter alia, as conflating predominance regarding a single element of a claim—in this case impact or fact of damage—with predominance regarding the case as a whole. *See* Davis & Cramer, *Politics of Procedure*, *supra* note 19, at 1006–08.

69 Davis & Cramer, *Politics of Procedure*, *supra* note 19, at 989.

70 *In re Hydrogen Peroxide*, 552 F.3d at 314.

71 *Id.*

bought hydrogen peroxide. The price-fixing conspiracy might have influenced the prices the conspirators charged in some cases, but other dynamics in individual negotiations may have led to prices for particular customers that were the same as they would have been even absent the conspiracy.[72] Simply because a purchaser paid more, or less, than before the onset of the conspiracy might not mean that the purchaser did or did not pay inflated prices as a result of the conspiracy. Carving out a class of only those buyers that suffered antitrust injury would not be easy to accomplish. Nevertheless, a statistical analysis might enable plaintiffs to calculate the total harm caused by the price-fixing conspiracy. Aggregate data might be available to assess all of the relevant variables influencing the prices that sellers of hydrogen peroxide as a group charged. Using this data, an expert might well be able to determine with a high degree of confidence the *overall effect* of the conspiracy on the amounts class members paid, even if the expert might not be able to conclude with a similar degree of confidence that any given buyer paid more than it would have but for the conspiracy.

A third state of affairs is also possible. The market for hydrogen peroxide might be so fractured, the supply and demand curves so variable, and the pricing so idiosyncratic, that an expert could not offer an adequate analysis of the impact of the conspiracy either on any individual class member or on the class as a whole.

Allowing a classwide recovery would have a significantly different effect depending on which scenario occurs. Its impact would be limited in the first and third scenarios: in the first scenario, class certification would seem to be possible in any case, at least for a narrowly defined class; in the third scenario, a classwide recovery would not solve the difficulties of calculating damages. In the second scenario, however, a class might be certifiable if the court were willing to award a classwide recovery, but not otherwise.[73]

---

72 The First Circuit's comments in *New Motor Vehicles* should be noted:

> Plaintiffs seem to rely on an inference that any upward pressure on national pricing would necessarily raise the prices actually paid by individual consumers. There is intuitive appeal to this theory, but intuitive appeal is not enough. Even if it is fair to assume that hard bargainers will usually pay prices closer to the dealer invoice price and poor negotiators will usually pay prices closer to the MSRP, a minimal increase in national pricing would not necessarily mean that *all* consumers would pay more.

In re New Motor Vehicles Canadian Export Litig., 522 F.3d 6, 29 (1st Cir. 2008).

73 Of course, the plaintiffs would have to satisfy the other criteria for class certification, including the numerosity, commonality, typicality, and adequacy requirements of Federal Rule of Civil Procedure 23(a).

3. Fraud

The light cigarettes litigation provides another example of the potential effect of classwide recoveries on class certification. Cigarette manufacturers had allegedly misled the public about the health benefits of smoking "light" rather than "full flavored" cigarettes[74]—apparently, there are not any.[75] In litigation brought by the federal government, a court concluded that there was "overwhelming" evidence that the industry used deceptive trade descriptors to induce smokers to purchase light cigarettes.[76] Additionally, private plaintiffs sued under RICO,[77] alleging that they were victims of fraud.[78] The trial court certified a class.[79]

The Second Circuit appeared to acknowledge that denial of class certification would in effect allow the companies to avoid paying compensation for any harm they caused,[80] but it nevertheless reversed the trial court.[81] Among its reasons for doing so was that the substantive legal claims at issue would not admit of a classwide inquiry into the harm from the defendants' conduct.[82] According to the Second Circuit, each class member, for example, would have to show that she personally relied on the deception to be able to recover damages.[83] For this reason, according to the court, common issues would not predominate over individual issues, and class certification was therefore inappropriate.[84]

---

74 McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 220 (2d Cir. 2008).

75 *See id.* at 221.

76 United States v. Phillip Morris USA, Inc., 449 F. Supp. 2d 1, 430–31, 852 (D.D.C. 2006).

77 18 U.S.C. § 1964(c) (2012).

78 *McLaughlin*, 522 F.3d at 219.

79 *Id.* at 221.

80 *See id.* at 219 ("While redressing injuries caused by the cigarette industry is one of the most troubling . . . problems facing our Nation today, not every wrong can have a legal remedy, at least not without causing collateral damage to the fabric of our laws." (internal quotation marks and citations omitted)).

81 *Id.* at 221.

82 *See id.* at 222.

83 *Id.* at 222–26.

84 *Id.* at 227. The Supreme Court has since held that plaintiffs need not establish individual reliance in at least some RICO cases. Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639, 641–42 (2008). *McLaughlin* may therefore no longer be good law. *See, e.g.*, Spencer v. Hartford Fin. Servs. Grp., Inc., 256 F.R.D. 284, 297 (D. Conn. 2009) (certifying a class and holding that *McLaughlin* is no longer good law on the issue of whether a plaintiff alleging a RICO violation must prove individual reliance after *Bridges*). On the other hand, difficulties with using common evidence to prove causation in RICO cases may nevertheless impede class certification, at least in some cases. *See* UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 133–36 (2d Cir. 2010).

In reaching this conclusion, the Second Circuit suggested in various contexts—including in discussing reliance, causation, and injury—that a classwide approach to determining the harm from defendants' fraud would necessarily require speculation.[85] Plaintiffs proposed to show, for example, that the deception increased demand, resulting in a correlative increase in the price of light cigarettes.[86] In addition to rejecting this measure of damages, the court indicated that such a showing would not work because various other factors might account for the price, such as rates of cigarette consumption, income levels of smokers, population, taxes, advertising expenditures, production costs, and consumers' knowledge of health risks.[87]

The Second Circuit's analysis in this regard can be understood in at least two ways. First, the court may have merely recognized correctly that a classwide approach to recovery would not be viable—that, for example, the data simply was not available to allow a statistician to determine the effect of the deception on the aggregate demand for light cigarettes, and therefore on price. If so, a classwide analysis of damages would not be possible, and so it would not enable the trial court to certify a class.

Under a second reading of the court's analysis, however, a classwide approach to recovery might work. Take, for example, the measure of harm the Second Circuit seemed to approve: the increase in the number of sales of packs of cigarettes—whether light or full-flavored—occasioned by the deception.[88] According to the Second Circuit, individualized information would be necessary to determine liability to individual plaintiffs.[89] Some plaintiffs would have bought light cigarettes even with full disclosure of their actual health effects, so they experienced no harm. Others would have replaced light cigarettes with regular cigarettes and did not suffer any out-of-pocket loss. The court reasoned that only purchasers who would have bought fewer cigarettes of any kind without the fraud suffered the right kind of reliance and injury to recover.[90] It concluded that an individualized inquiry would be necessary to determine whether each class member was harmed.[91]

---

85 *McLaughlin*, 522 F.3d at 225–29.

86 *Id.*

87 *Id.* at 230.

88 *Id.* at 228.

89 *Id.*

90 *Id.*

91 *Id.*

But in this kind of case, a classwide assessment of harm might be possible. A statistician might be able to identify the variables that inform the volume of cigarette sales, both light and full-flavored. Controlling for those variables, and analyzing the impact of the disclosure of truthful information about the health effects of light cigarettes, the statistician might be able to determine the overall effect of the false information on sales of cigarettes. If so, a classwide approach to calculating harm could work.[92] That classwide approach to recovery might have allowed for class certification, even if plaintiffs could not show that all or virtually all class members suffered harm.

4. The Reciprocal Relationship of Certification and Classwide Recovery

In modern procedure, class certification generally is necessary for a court to award a classwide recovery.[93] After all, unless all members of an affected group are party to a single legal action and bound by a single judgment, awarding a recovery to the group as a whole seems impractical.

As the above discussion indicates, often the converse is true as well. Allowing courts to award a classwide recovery can facilitate class certification. Calculation of the overall harm to the class may remove individual issues from the litigation, enabling a court to address the claims of the class members all at once. That approach, for example, might have allowed for class certification in *Hydrogen Peroxide* and the light cigarettes litigation.

This reciprocity shows how classwide recovery and class certification can complement one another. It does not, however, reveal whether either serves the public good.

---

92 The Second Circuit also seemed to deny class certification because it was skeptical that the fraud had any effect, a skepticism it based in part on the fact that the price of light cigarettes did not vary—it was always the same as full-flavored cigarettes—and in part on the failure of sales of light cigarettes to decrease when a report was published showing that light cigarettes are not healthier than full-flavored cigarettes. *Id.* at 229–30. This apparent lack of evidence of injury could well justify the defendants prevailing on the merits, although it is an odd issue for a court to resolve at class certification. After all, the court is supposed to determine, in relevant part, whether trial will involve common issues, not whether the plaintiff will prevail on those common issues at trial. *See, e.g.*, Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 592 (9th Cir. 2010).

93 The class device is not the only method for seeking a recovery that benefits a group. Lawyers, for example, can obtain a result that benefits a large number of people or entities—not necessarily their clients—and later seek compensation from the beneficiaries. *See generally* Trustees v. Greenough, 105 U.S. 527 (1881). This doctrine, however, plays a modest role in modern civil procedure. Many thanks to Charlie Silver for making this point.

D. Class as Aggregate or Entity

In assessing classwide recoveries, it is useful to note the two ways David Shapiro has developed to conceive of class actions.[94] One he calls the "aggregation model."[95] He explains that, according to this model, the plaintiffs in a collective action are just "a number of individuals"[96] or "an 'aggregation' of individuals,"[97] so that the "the individual who is part of the aggregate surrenders as little autonomy as possible."[98] The second he labels the "entity model," in which "the *entity* is the litigant and the client."[99] Of course, in reality, devices for collective litigation—including the class action—are virtually always a hybrid of the two, a point that Shapiro recognizes.[100]

Moreover, these two models may best be understood not as offering distinct understandings of class actions but rather as marking the ends of a continuum. The aggregation model emphasizes the rights and interests of individual class members.[101] The entity model focuses on the rights and interests of the class as a whole, as well as the benefits to society of the class action device.[102]

A rigid, formal approach to the class as aggregate or entity risks privileging form over substance. The aggregation model might hold sway, for example, when individual rights and interests are paramount; the entity model might do so when the good of the class as a whole has primacy over the good of individual class members or when the class device can serve a public goal that is more important than individual recoveries.

Seen from this perspective, as Myriam Gilles has suggested, the aggregation model might be usefully associated with a private law conception of class litigation, a conception that attends in particular to the compensation of individual class members.[103] The entity model, in contrast, might correlate, inter alia, to a public law conception that

---

94 David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917–18 (1998).

95 *Id.* at 918.

96 *Id.* at 917.

97 *Id.*

98 *Id.* at 918.

99 *Id.* at 919. An example of the entity approach occurred when the Seventh Circuit refused to apply ordinary ethical rules in the class context, reasoning that "[i]n a class action, the client is the class." Rand v. Monsanto Co., 926 F.2d 596, 600 (7th Cir. 1991).

100 Shapiro, *supra* note 94, at 919.

101 *See id.* at 918.

102 *See id.* at 923–34.

103 *See* Gilles, *supra* note 28, at 308–10.

prioritizes the societal benefits of class litigation, including its ability to deter conduct that violates the law.[104]

What is striking about classwide recoveries, however, is that they hold the potential for benefits that reflect both private law and public law values, as well as those that transverse—or perhaps transcend—the two. Part II explores these benefits.

II. Assessing Classwide Recoveries

Classwide recoveries can have various advantages over individual recoveries. Part II.A addresses some of the more straightforward advantages—the efficiency of adjudicating on behalf of a large group all at once and the accuracy permitted by statistical rather than anecdotal inquiry. Parts II.B and C then address subtler advantages, exploring, respectively, error costs and the differences between continuous and discontinuous outcomes in litigation.

A. Procedural Benefits from Classwide Recoveries

Awarding classwide recoveries rather than individual recoveries can simplify and streamline litigation while enhancing accuracy. This is true for litigation in general, as well as with regard to the adjudication of class certification in particular.

1. Efficient and Accurate Litigation

Calculating the classwide recovery of a group should involve substantially less expense in terms of time, money, and other resources than calculating an individual recovery for all of the group's members. The adversarial proceedings need merely assess the liability of a defendant to the class as a whole. A court can then use a less formal and less expensive process to allocate compensation to class members.

a. Individualized Inquiries Are Costly

In a case involving a class of plaintiffs, any individualized assessment of evidence would likely prove extraordinarily expensive, assuming it would be feasible at all. Consider the light cigarettes example. Assuming that each plaintiff has the wherewithal to pursue a claim—and that doing so makes sufficient economic sense—individual litigation would require massive resources. A jury would have to hear testimony from each buyer. Discovery would delve into each plaintiff's habits and values. An overall assessment of the sale of light ciga-

104 *See id.* at 309.

rettes—both before and after disclosure of the key information—would be much more efficient. By contrast, individual trials would involve all of the expense of a class trial in addition to the costs of an inquiry into the circumstances of a particular plaintiff. After all, it would be difficult to determine the likelihood that any given smoker relied on a manufacturer's deception without knowing how often smokers in general tend to rely on the kinds of fraudulent assertions at issue.

b. Individualized Inquiries Are Often Inaccurate

Further, an assessment of individual circumstances often will be inaccurate. This point, too, applies to the light cigarettes cases. Assessing whether a particular buyer would have bought the cigarettes if she had had full information would be extraordinarily difficult. The buyer herself can only guess at the impact the misleading statements had on her, and that assumes good faith. She may dissemble, and a jury may accept that she is telling the truth—or vice versa. Cumulative individual assessments of reliance are apt to produce less useful results than a statistical effort to determine the extent to which false information increased overall consumption of a product.[105]

Recent empirical research, largely in the context of criminal adjudication, has shown how inaccurate witnesses are in identifying actors relevant to litigation[106] and more generally in recalling events,[107] and how poorly fact finders fare in distinguishing true from false testimony—as well as their exaggerated confidence in their ability to draw this distinction.[108] Although the criminal and civil contexts are importantly different, the powerful evidence of inaccuracy in criminal adjudication should give rise to serious doubts about the accuracy of individual civil adjudication.

c. Individualized Inquiries Often Will Not Enhance a Classwide Analysis

Indeed, once a court calculates the overall harm caused by illegal conduct, assessing evidence of individual harm may have little value. Consider an antitrust case in which plaintiffs establish that defendants

105 In other words, the sum of a collection of individualized inquiries could easily result in far greater—or lesser—liability than any plausible aggregate analysis.

106 *See, e.g.*, DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 50–89 (2012).

107 *See id.* at 90–119.

108 *See id.* at 125–27, 180–83.

conspired to raise prices above competitive levels. Assume the plaintiffs are able to show with a compelling statistical analysis that the overall effect of the conspiracy was to increase prices by $100 million. A dispute exists, however, as to which class members paid more as a result of the conspiracy. Assuming it is impossible or impractical to determine with confidence which members of the class paid an overcharge, one outcome of litigation could be an allocation of the money so that each member of the class receives compensation based on its volume of purchases.

Now imagine that the defendants wish to contest each individual's entitlement to recover. The defendants want the opportunity to demonstrate that a particular buyer would not have paid lower prices even in the absence of an illegal conspiracy. If the defendants were to make that showing successfully, a simplistic view might suggest that that plaintiff should forfeit her recovery and, more importantly from the defendants' perspective, the defendants' total liability should decrease by the amount of the overcharge ascribed to the plaintiff at issue. But that is not so. After all, the aggregate analysis produced an *average* loss, fully recognizing that not all members of the class were necessarily harmed. The recovery that the individual plaintiff loses, then, should be allocated to other class members.

More generally, once a court determines the overall effect of an illegal course of conduct, the effort to defeat the claim of any particular individual should result in an *increase* in the recovery of *other* individuals, not in a *decrease* in a defendant's overall liability. As a result, from the defendant's perspective, the effort to disprove the claims of individual class members hardly seems worthwhile.[109] Failure to recognize this phenomenon could result in a judgment at odds with itself. The court might calculate the total damages on a classwide basis and then, inappropriately, reduce the total damages if an individual plaintiff fails to prove its case. Recognition of this phenomenon could allow for less expensive litigation without sacrificing accuracy.

d. Summary

In sum, there are various procedural benefits to awarding classwide recoveries when it would be relatively easy to identify the group potentially harmed by illegal conduct and to calculate the total harm

---

109 Judge Posner appears to have overlooked this point in worrying that the inclusion of uninjured members in a class may increase defendants' liability. Kohen v. Pac. Inv. Mgmt. Co. (*PIMCO*), 571 F.3d 672, 677–78 (7th Cir. 2009). As discussed in Part III.B.2 of this Article, a proper analysis of aggregate liability would prevent this possibility.

the group suffered, even when—indeed, *especially* when—it would be difficult and expensive to determine which individuals within that group suffered harm. Under these circumstances, a plaintiff class could prove the damages it suffered as a whole. Including an analysis of individual circumstances in this effort would not likely be worthwhile—it would be expensive, it may well be inaccurate, and it often will not have any effect on a defendant's total liability.

Courts would often do better to enter a classwide judgment based on the total harm a defendant caused. The defendant then would have no further interest in the case. The court could allocate the recovery to individual class members in a practical manner, applying a less formal and less costly process than ordinary litigation and perhaps lowering the burden of proof as appropriate. Using a formal process only in setting the amount of a defendant's total liability can help to ensure that litigation is as efficient as possible.

2. Simpler Determinations of Class Certification

Allowing classwide recoveries could also provide a more specific procedural benefit: making litigation of class certification less burdensome for courts and parties. Plaintiffs could merely show widespread harm to the class and propose a method of calculating a classwide recovery rather than establishing harm to all or virtually all class members.[110] In those situations, individual class members' injuries would be irrelevant at trial and, therefore, at class certification. Doing so would greatly decrease the complexity of the class certification decision, and similarly decrease the time and money courts and parties dedicate to the issue.

Simplifying the class certification decision would be no minor procedural improvement. Litigating class certification has always been expensive, often costing the parties many hundreds of thousands or even millions of dollars in hard costs (such as expert witness fees) and attorney time. The recent ratcheting up of the class certification standard has placed a greater burden on courts to hold hearings, scrutinize evidence, and rule on factual issues.[111] The result is an ever

---

110 To be clear, plaintiffs would still have to satisfy the other requirements under Federal Rule of Civil Procedure 23, such as the numerosity, typicality, commonality, and adequacy requirements of Rule 23(a). All that would change is the requirement some courts now impose that plaintiffs show harm to all or virtually all class members.

111 Paul A. Howell, Jr., Waldemar J. Pflepsen, Jr. & Aileen D. Warren, *A Survey of the Developing Standards for Class Certification*, *in* CONFERENCE ON INSURANCE AND FINANCIAL SERVICES INDUSTRY LITIGATION 145, 163 (A.L.I.-A.B.A. Course of Study, July 9–10, 2009), *available at* Westlaw SR007 ALI-ABA 145.

more expensive and time-consuming process. Eliminating some of the most costly and controversial issues—such as whether all or virtually all members of a class suffered harm—could greatly alleviate the burden on the court and the parties.

B. Error Costs

Another potential benefit of classwide recoveries is lower error costs. This section undertakes an analysis of the relative error costs of individualized and classwide recoveries. In doing so, it separates out two perspectives. The first is whether the defendant pays the right amount. The policy generally associated with imposing proper liability on a defendant is deterrence (although other policies may be implicated as well). The second perspective is whether each plaintiff receives the right recovery, a perspective associated with compensation.

In individual recoveries, these two amounts are often the same—the law generally requires a defendant to pay for the harm it caused and entitles a plaintiff to receive compensation for the injury it suffered.[112] But classwide recoveries break this symmetry. A defendant may pay the right amount for the total harm it imposed on the plaintiff class as a group, but that amount may be allocated in a way that provides some class members insufficient and others excessive compensation.

Part II.B.1 makes an important observation—that in appropriate cases classwide recoveries result in lower error costs regarding defendants' liability than individual recoveries do. Part II.B.2 explores the somewhat more complicated effects of the two approaches on error costs in calculating plaintiffs' compensation. It leads to two conclusions in particular that support classwide recoveries: first, they produce relatively low error costs for risk-averse plaintiffs, which will include many plaintiffs with large claims; and second, they produce relatively low error costs for plaintiffs who cannot afford to pursue individual litigation, which will hold true for many plaintiffs with small claims. Part II.B.3 explains that, considering *both* liability and compensation, classwide recoveries produce lower total error costs than individual recoveries do. Part II.B.4 concludes that, on the whole, attention to error costs supports awarding classwide recoveries in appropriate cases.

---

112 RESTATEMENT (SECOND) OF TORTS § 901 (1979).

1. Liability of Defendants: Deterrence

Proper calculation of a defendant's liability can serve various policy goals, including deterrence. Depending on one's philosophical perspective, deterrence can be one of the most important—or even *the* most important—goal of the law. The influential law and economics movement, for example, sees law as designed not to achieve justice retrospectively, but to create incentives prospectively.[113] According to this view, it is crucial to consider whether a rule will discourage socially harmful conduct and encourage socially beneficial conduct.[114] Even from other points of view—whether of the practicing judge or the pragmatic scholar—incentives tend to figure prominently today in formulating legal doctrine.

The standard view under an approach concerned with incentives is that liability should reflect the actual harm a defendant's conduct causes. That way the defendant will internalize the social harm from its conduct, and not just the social benefits as reflected in its profits. In theory, a defendant will act in an economically rational manner, so that it expects to gain more than it will lose.[115] If a defendant pays less than the harm it causes, it may engage in behavior that does more harm than good; if a defendant pays more than that harm, it may forego conduct that would benefit society as a whole.

Focusing on deterrence provides a strong justification for using the entity model in crafting class relief.[116] When a defendant has harmed only some members of a large group, and it is not possible to determine which members the defendant harmed, classwide recoveries can allow for just the right amount of liability to optimize deterrence. Appendix A provides a formal proof of this point.

The following examples illustrate a phenomenon that lurks behind complicated damages calculations in various settings. In address-

---

113 For a seminal work that makes this point, see R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1–6 (1960).

114 *Id.*

115 Of course, various policy considerations can lead courts to award more or less than the actual damages resulting from a rights violation. Federal antitrust law illustrates this point. By statute, actual damages in antitrust actions are automatically trebled because, inter alia, sometimes illegal conduct may not be detected, and so single damages would be expected to be insufficient for optimal deterrence. 15 U.S.C. § 15(a) (2012). On the other hand, various categories of damages are not available in antitrust cases, such as prejudgment interest and the harm from allocative inefficiency. *See* Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 130 (1993). The following analysis takes these policy decisions as a given and assumes that the current legal measure of damages for each cause of action promotes efficiency.

116 *See* David Shapiro, *supra* note 94, at 919.

ing class actions, courts make decisions—often implicitly—about whether they will calculate recoveries on an individual or classwide basis. These decisions affect the amount of liability. When the universe of those potentially harmed by alleged wrongdoing can be identified, and the total harm to the group can be calculated, but the individuals who suffered harm cannot be distinguished within the group from those who did not, a classwide approach to recovery can do better at calibrating liability than can an individualized approach. These points can inform analysis of employment discrimination, antitrust, and fraud litigation, among other areas of the law.

a. Employment Discrimination

Employment discrimination litigation provides a case in point. A class of plaintiffs may be able to show with a high level of certainty using aggregate statistics that they suffered adverse treatment by an employer based on their membership in a protected group. It may, however, be difficult or impossible to identify with confidence which employees suffered injury.

Under these circumstances, an individualized approach could result in excessive or insufficient liability. Recall the prior example in which 60% of a class of 100 women would have been promoted but for sex discrimination. Under an individualized approach, each woman might be entitled to the $10,000 she would have received if she had been promoted.[117] After all, it is more likely than not that each would have advanced to a better job. The employer would then be liable for $1 million. But we know with certainty that not all of the women should be entitled to recover that sum. Only 60 could have been promoted.

Alternatively, imagine that only 40 of the 100 women lost a promotion because of sex discrimination. Under an individualized approach, none of the women would be able to satisfy the preponderance of evidence standard. Any particular woman would probably not have been promoted even if there had been no discrimination. The employer would face no liability despite compelling evidence that it violated the legal rights of 40 women.

An individualized approach to recovery, then, can give rise to excessive or inadequate liability. A classwide approach, in contrast, could calibrate liability at just the right amount. If 60% of a class of 100 women failed to receive a promotion because of sex discrimina-

117 *See supra* Part I.A.

tion, the employer could be forced to pay the wages lost by that percentage of the class for a total liability of $600,000—precisely the harm the legal violation caused. If 40% of the class failed to receive a promotion, awarding $400,000 would have the same effect. For purposes of liability and deterrence—that is, from the perspective of the employer—the court could award just the right amount.[118]

b. Antitrust

Antitrust provides another example. Imagine that a conspiracy among competitors increased the price of airplanes by altering the list price. The list price generally served as a point of departure for individual negotiations. 100 individual buyers each purchased one airplane, paying on average $100 million per airplane.[119] The court is persuaded by a statistical analysis establishing with a high degree of confidence that some large percentage of the class—say 80% of the buyers—paid more than they would have but for the conspiracy—on average by 10%. The remaining 20% of buyers appear to have paid the same price as they would have without the conspiracy.

Further assume that it is difficult or impossible to determine which buyers paid too much and which did not. This is so because the prices that individual buyers paid do not correlate perfectly over time. Some rose while others stayed the same or fell. As a result, the effect of the list price on any given negotiation is unclear. A statistician may be much more confident in characterizing the overall effect of the conspiracy on price, and the percentage of the class adversely affected, than in concluding that all class members were harmed or in identifying which specific class members paid an overcharge.

In this hypothetical, under an individualized approach to recovery, each class member might be able to show by a preponderance of evidence that it paid too much. Having established the fact of damage, a relaxed standard applies in deciding the quantum of damages.[120] A possible result is that the court would award each class member about $10 million in damages based on the estimated 10% overcharge.

---

118 To be sure, allocating that liability among members of the class could prove tricky. The court—perhaps through a special master—could undertake a pragmatic, informal inquiry into the circumstances of class members to determine how much, if anything, each woman would recover; or the award could simply be distributed in some formulaic manner, perhaps even on a pro rata basis. These efforts might provide only rough justice from the perspective of compensation. *See infra* Part II.B.2.

119 Matters become a bit more complicated if some purchasers bought multiple airplanes, but the fundamental point holds true.

120 *See, e.g.*, Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 266 (1946).

The class recovery would total $1 billion.[121] The statistical analysis indicates, however, that this amount is excessive.[122] In reality, the total harm caused by the defendants is $800 million—an average overcharge of 10% on 80% of the sales.

Conversely, if the percentage of class members who overpaid were to dip too low, none would recover. Plaintiffs would obtain no damages even if, for example, the court could conclude with great confidence that the defendants conspired and by doing so imposed a 10% overcharge on, say, 30% of the class, resulting in total damages of $300 million.

A good argument can be made that current antitrust law often allows for classwide recoveries and does not require individualized proof of damages.[123] The reality is that in various antitrust class actions, courts have approved jury instructions asking whether a defendant or group of defendants harmed the class a whole, and, assuming liability to the class, how much total damage the conduct caused to the class.[124] The potential for classwide recoveries to optimize liability provides a sounds basis for this approach.

c. Fraud

To be sure, a classwide recovery would not be appropriate in all cases. In particular, in some situations multiple individual inquiries are necessary to assess cumulative liability. An example might include when individual reliance is an element of a claim for fraud. When the overall impact of the defendant's conduct cannot be determined using a classwide approach—when there are, for example, insufficient data available to determine the overall effect of the misrepresentation—then individual litigation may be necessary.

On the other hand, if an aggregate approach *is* possible, it would likely be preferable to assessing reliance case by case. An individualized inquiry into damages could produce higher error costs regarding

---

121 This amount would then be trebled under federal antitrust law. 15 U.S.C. § 15(a) (2012).

122 Alternatively, an economist—or the court—might assess the average overcharge by looking to the class as a whole, not just to those class members who paid an overcharge. If so, the court is in effect calculating overcharge damages on a classwide basis, just as this Article recommends. Indeed, courts generally appear to proceed in this way—avoiding excessive damages in effect by calculating classwide damages in a manner that makes impact on individual class members beside the point. *See generally* Davis & Cramer, *Vulnerable Monopolists*, *supra* note 17, at 392–96.

123 *See generally id.*

124 *Id.* at 394–96.

liability than a classwide approach. Recall, for example, the measure of harm the Second Circuit seemed to approve in *McLaughlin v. American Tobacco Co.*,[125] the light cigarettes case: the increase in the number of sales of packs of cigarettes—whether light or full-flavored—occasioned by the deception.[126] This is just the kind of case in which a classwide recovery could potentially do better than an individualized approach at minimizing error costs.

In individual litigation, each plaintiff might be able to rely in part on background probabilities to prove individual reliance. If smokers in general would be more likely than not to buy extra cigarettes because of the fraud, the industry might be held liable to all buyers for the average amount of additional cigarettes each one would have been expected to purchase, even if significant numbers of smokers did not buy additional cigarettes as a result of defendants' conduct.[127] The industry's overall liability could then be excessive. Alternatively, if smokers in general would not buy more cigarettes because of the fraud, none of them might be able to recover, even if the fraud increased the total sales of cigarettes by a significant—and calculable—amount. The industry would have found a way to commit fraud without incurring liability. A classwide recovery, in contrast, can take into account the larger pattern, guarding against excessive or insufficient liability. It optimizes liability and deterrence by looking at the effect of the fraud on sales of cigarettes in general.

2. Awards to Plaintiffs: Compensation

Classwide recoveries can optimize liability in a way that individualized recoveries do not. Matters are more complicated, however, regarding compensation.

A classwide approach can potentially be consistent with adjusting compensation to individual circumstances. A court may be able to conduct individual hearings—or informal inquiries, perhaps with the

---

125 McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008).

126 *Id.* at 228.

127 To be precise, the reasoning would proceed in two steps. First, if most plaintiffs would buy more cigarettes as a result of the fraud, then each plaintiff might be able to show that the fraud more likely than not caused *her* to buy extra cigarettes. Second, she could then recover based on the average number of extra cigarettes purchased by each buyer who was *affected by the fraud*. This last point bears emphasis. Because each plaintiff probably was one of the buyers who relied on the fraud, in calculating damages what would be relevant is the average amount of additional cigarettes purchased by each buyer *who bought additional cigarettes*. The analysis of the average would ignore those buyers who did not buy extra cigarettes. After all, each plaintiff has met her burden of proof that she is not one of those buyers.

assistance of a special master—to identify which class members were harmed and by how much.

The analysis is more interesting, for present purposes, when allocating recoveries to class members in proportion to their injuries is not possible or practical. The court will then have to distribute compensation in a way that achieves only rough justice. To take a simple example, a court entirely unable to distinguish among class members might divide a recovery on a purely pro rata basis. Under this approach, whether classwide recoveries or individual recoveries produce higher error costs in terms of compensation depends on how those error costs are measured.[128]

One way to measure error costs would be to take the absolute difference between the actual compensation each plaintiff *does* receive and the compensation each plaintiff *should* receive. As discussed in Part II.B.2.a, measured in this way, classwide recoveries produce higher error costs than individual recoveries do.[129] On the other hand, a common practice is to measure error costs as the *square* of the difference between the actual and proper compensation to each plaintiff. Under that approach, as addressed in Part II.B.2.b, classwide recoveries produce lower error costs than individual recoveries do.[130]

Despite these conflicting results, two practical considerations suggest that classwide recoveries might do a better job than individual recoveries at awarding appropriate compensation. First, litigants with large claims may tend to be averse to risk. As a result, the better measure of error costs for them may be the square of the difference between the actual and right awards in litigation. Doing so weighs large errors—which risk-averse litigants experience as disproportionately harmful—more heavily than small errors.

A second practical consideration is that classwide recoveries may be necessary for class certification, and class certification may be necessary for plaintiffs with small claims to pursue litigation at all. As analyzed in Part II.B.2.c, for these claims, plaintiffs' inability to obtain any recovery—as the Second Circuit acknowledged would likely occur

---

128 As noted above, for various policy reasons the law does not always award the actual harm a plaintiff suffers. Plaintiffs in federal antitrust cases, for example, may receive treble their damages, and they cannot recover for certain categories of harm. *See supra* note 115. This Article assumes that the legal standard for compensation is efficient for purposes of the following analysis.

129 Appendix B provides a proof for this claim.

130 Appendix C sets forth a proof of this proposition.

in the light cigarettes case[131]—tends to produce high error costs. A rule that plaintiffs simply lose, regardless of the merits, can produce inaccurate results.

a. Actual vs. Right Result

Classwide recoveries produce higher error costs than do individual recoveries if measured as the absolute value of the difference between the actual result and right result at trial.[132] An example illustrates this point.

Imagine, as discussed above, that an employer has discriminated against various women out of a group of 100 interested in a promotion. All of the women are similarly situated. The only contested issue is which of the women suffered harm as a result of a violation of Title VII. Each plaintiff that suffered the relevant form of injury is entitled to a judgment of $10,000. All of the others should recover nothing.

i. Individual Approach

Applying the ordinary preponderance of the evidence standard, all of the women should prevail if more than half of them suffered injury. After all, it is more likely than not true that any given woman suffered discrimination.[133] On the other hand, if fewer than half suffered injury, the odds that any given woman did are less than 50%, and all of the women should lose.

Assume that 60 women suffered discrimination. All 100 would be expected to win, even though 40 of them should lose. The error costs will then be 40 x $10,000 for a total of $400,000.

Alternatively, if only 40 of the women suffered discrimination, all of them will lose in litigation. The 40 who should have won will each be improperly deprived of $10,000—resulting in error costs of $400,000.

ii. Classwide Approach

With a classwide recovery, the group of women will obtain precisely the right total recovery in the aggregate. If 60 suffered discrimination, that amount will be $600,000; if 40, $400,000. If this recovery is

131 *McLaughlin*, 522 F.3d at 231–33.

132 The algebraic proof in Appendix B establishes this proposition.

133 The analysis would be more complicated if other factors informed whether any given woman suffered discrimination, but the underlying logic should not be affected by that complexity.

allocated on a pro rata basis, each woman will receive $6,000 or $4,000, respectively.

Some plaintiffs will receive too little and some too much. To take the first example—where 60 women suffered discrimination—60 women will receive $4,000 less than the full recovery to which they are entitled, and 40 women will receive $6,000 even though they should recover nothing. The total error would then be 60 x $4,000 + 40 x $6,000, for a total of $480,000.

Alternatively, if 40 women suffered discrimination, and each receives $4,000, 40 women would receive $6,000 too little, and 60 women would receive $4,000 too much—for total error costs of 40 x $6,000 + 60 x $4,000, or $480,000 total.

iii. Comparing Error Costs

In both examples, an individual approach would produce lower error costs than a classwide approach would if error costs are measured as the difference between the actual result and the right result at trial. The total error costs would be, respectively, $400,000 and $480,000. As the algebraic proof in Appendix B shows, individual recoveries generally fare better than classwide recoveries when using this measure of error costs.

b. Squaring the Difference

Simply calculating the difference between the actual and right result in litigation is not, however, the only way to gauge error costs. Scholars often treat large errors as worse than small errors—an approach that makes sense for litigants who are averse to risk.[134] Allocating a classwide recovery on a pro rata basis to all class members will not do as good a job as individual recoveries at approximating just the right result (no class member may obtain precisely the right recovery), but a pro rata approach tends to decrease the size of the error in any given case, that is, the largest errors will be smaller than they would be with individualized recoveries. If large errors are more concerning than smaller errors—as is likely to be the case for plaintiffs

---

134 *See* Joshua Davis, *Expected Value Arbitration*, 57 OKLA. L. REV. 47, 88–89 & n.159 (2004) (citing Michael Abramowicz, *A Compromise Approach to Compromise Verdicts*, 89 CALIF. L. REV. 231, 247 (2001); Saul Levmore, *Probabilistic Recoveries, Restitution, and Recurring Wrongs*, 19 J. LEGAL STUD. 691, 704–05 (1990); Neil Orloff & Jery Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159, 1165–68 (1983)).

with large claims—classwide recoveries have an advantage over individual recoveries.

This point can be made more precisely. If error costs are defined as the square of the difference between the actual result and the right result in litigation, then individual recoveries produce higher error costs than classwide recoveries do.[135] The example from above proves useful. Recall that 100 women were passed over for a promotion in favor of less qualified men.

i. Individual Approach

Under an individualized approach, if 60 women suffered discrimination, then each woman will receive $10,000. For 60 of the women, that is just the right result. Forty of the women, however, should receive nothing. Squaring the difference between the actual result and the right result, the error costs would be $40 \times 10{,}000^2$—or 4×10^9.

Alternatively, if 40 women suffered discrimination, then no women will recover. That is appropriate for 60 of the women, but 40 women should receive $10,000. Squaring the difference between the actual result and the right result, the error costs would again be $40 \times 10{,}000^2$—or 4×10^9.

ii. Classwide Approach

With a classwide recovery, the same adjustment must be made, squaring the amount of the error in each case. If 60 of the women suffered discrimination, every class member will receive $6,000. The 60 women who should win will receive $4,000 too little, and the 40 who should lose will receive $6,000 too much. The resulting error costs are: $60 \times 4{,}000^2 + 40 \times 6{,}000^2 = 2.4 \times 10^9$.

iii. Comparing Error Costs

Using the square, the error costs under an individual approach are 4×10^9, and under a classwide approach they are 2.4×10^9. Indeed, in general, the error costs are greater under an individualized approach—as Appendix C proves.

c. Denial of Class Certification as a Death Knell

This abstract analysis should be tempered to reflect the practical reality that in some cases allowing a classwide recovery is necessary for class certification, and class certification is necessary for many

135 Appendix C provides a proof of this claim.

class members to have any chance at relief. Often individual litigation simply is not economically viable. A woman seeking $10,000 in damages as a result of employment discrimination, for example, would be hard pressed to obtain legal representation. In these instances, a refusal to allow a classwide recovery—and the resulting denial of class certification—means an automatic win for a defendant. That rule can produce high error costs.

More specifically, any time more than half of the class suffered injury, a rule that the defendant wins would produce higher error costs than taking a classwide approach to recovery. As shown in Appendix D, that is true whether error costs are measured as the difference between the actual result and the right result of litigation or as the square of that difference.[136]

As to the difference between the actual result and the right result, once again the employment discrimination example demonstrates the point. In the example, 60 women suffered injury from the employer's conduct. All of the women will receive $6,000, even though 60 should receive $10,000 and 40 should receive nothing. The error costs that a classwide approach would produce are: 60 x $4,000 + 40 x $6,000, or $480,000. A rule that the employer wins would mean no woman would recover anything, depriving 60 women of $10,000 to which they are entitled, resulting in total error costs of $600,000. A classwide recovery would thus produce significantly lower error costs than would awarding no recovery at all. Squaring the difference between the actual result and the right result would just exaggerate this disparity.

This analysis suggests an interesting possibility. Assuming it is appropriate for courts to use the certification decision as a screening device regarding the merits, they could apply a variation of the preponderance of the evidence standard in assessing how widespread the injury must be to certify a class. If most members of a class suffered the relevant form of injury, the proof in Appendix D establishes that a classwide recovery will produce lower error costs in regard to compensation than will denying class certification.

The same is not true, however, if less than half the class suffered injury. Then, awarding the class nothing will produce lower error costs—as measured by the square of the difference between the actual compensation given and the right amount of compensation due—than a classwide recovery will.[137] An appropriate rule could then be that a

136 Appendix D provides an algebraic proof for these claims.

137 Under these circumstances, the analysis is the same as applying an ordinary preponderance of the evidence standard, as addressed in Appendix B. Recall, however, that if error costs

court should deny class certification if plaintiffs cannot show a *majority* of the class suffered injury. A showing that all or virtually all class members suffered injury, however, should not be required. To be clear, though, this last point ignores that classwide recoveries would still produce lower total error costs—including both liability and compensation—than individualized recoveries, as discussed in the next section.

3. Total Error Costs

One way to determine whether classwide or individual recoveries are preferable is to consider overall error costs, regarding both liability and compensation. Although these two kinds of errors may in some sense be incommensurable, we might make the simplifying assumption that an error cost of $1 regarding liability is equivalent to an error cost of $1 regarding compensation. As shown in Appendix E, the classwide approach produces lower total error costs, whether those costs are measured as the difference between the actual and the right result of litigation or as the square of that difference.[138]

The employment discrimination example once again proves useful. If 60 women suffered injury, the analysis above demonstrates the total error costs. A classwide recovery would produce no error costs from the perspective of deterrence and $480,000 in error costs from the perspective of compensation. An individualized approach would produce $400,000 in error costs from each perspective for total error costs of $800,000. The analysis is symmetric, so that the same results follow if 40 women out of the 100 were robbed of a promotion by sex discrimination.

4. Summary of Analysis of Error Costs

When a defendant injures some members of a group of plaintiffs, but it is impossible or impractical to identify which ones, classwide recoveries perform quite well as assessed by error costs. They produce lower error costs than individual recoveries in terms of *liability*. On the other hand, they produce higher error costs than individual recoveries in terms of *compensation* if those costs are measured as the difference between the actual and right result at trial. But they have other advantages. Classwide recoveries produce relatively low error costs if they are measured by the *square* of the difference between the

---

are measured as the *square* of the difference between the actual and right result at trial, classwide recoveries produce lower error costs. *See* Appendix C.

138 Appendix E provides an algebraic proof of this proposition.

actual and right result, a measure that is likely appropriate for risk-averse litigants, which will tend to include those with large claims. Classwide recoveries also produce relatively low error costs if one considers the reality that a denial of class certification will often prove fatal to all of the plaintiffs' claims, which will generally hold true for plaintiffs with small claims. Finally, classwide recoveries produce lower *total* error costs, including both deterrence and compensation (however measured), than do individualized recoveries. All told, an analysis of error costs supports using classwide recoveries in appropriate cases.[139]

C. The Benefits of Continuous over Discontinuous Functions

Another striking attribute of classwide recoveries—as opposed to individualized recoveries—is that a continuous function describes the result of litigation. That result will depend on a court's assessment of the probability that plaintiffs are correct regarding each element of the claims at issue. Under an individualized approach, a small change in the court's assessment of the odds of causation can result in a large, discrete shift in the amount a court awards. Under a classwide approach, in contrast, that small change will correspond to a small incremental adjustment in the award. In other words, as the percentage of a class that is harmed varies, liability can increase by a discrete jump under an individualized approach as opposed to a smooth, incremental increase under a classwide approach.[140]

---

139 One final point regarding error costs is intriguing. An argument could be made that excessive compensation is not an error cost. After all, no one appears to be harmed by excessive compensation. Rather, it provides an undeserved benefit.

To be sure, excessive compensation could give rise to undesirable incentives. Buyers might purchase goods or services subject to an antitrust violation to obtain a recovery, people might decide to work for a sexist employer with the hope of bringing a Title VII claim, or smokers might buy light cigarettes that they know are not good for them just to recover in fraud. These scenarios, however, seem implausible.

Of course, the excessive recovery has to come from somewhere—from a defendant paying too much or another plaintiff receiving too little. We took those harms into account, however, in the above analysis. We need not also treat excessive recovery as an additional error cost. Indeed, according to this line of reasoning, taking both into account could be a version of double-counting. For related reasons, economists generally focus on deterrence, not compensation, in assessing legal standards.

Modifying the analysis, however, to consider only insufficient compensation—and not excessive compensation—as an error cost is beyond the scope of this Article. Still, many thanks to Josh Rosenberg for raising the issue.

140 If we assume each class member is similarly situated, and a pro rata allocation of the class recovery, this point applies both from the perspective of the defendant's liability and from the perspective of the recovery of each individual class member.

Figure 1 depicts the outcomes with individual recoveries.

FIGURE 1. INDIVIDUAL RECOVERY

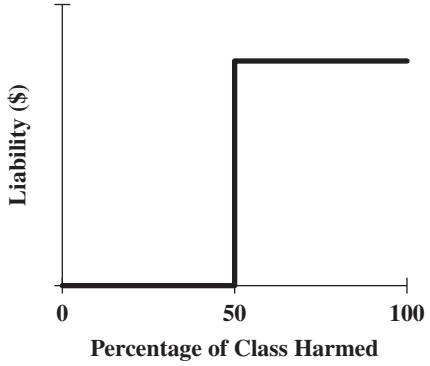
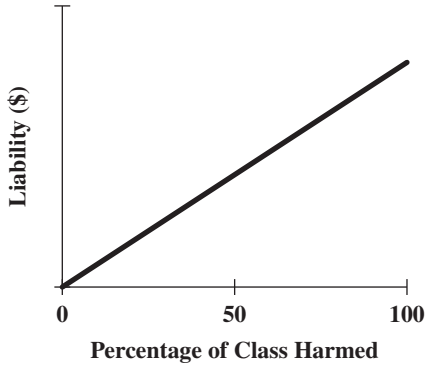


Figure 2 depicts the outcomes with a classwide recovery.

FIGURE 2. CLASSWIDE RECOVERY



The employment discrimination hypothetical provides a simplified but instructive example. Assume that an employer failed to promote some portion of 100 female employees on illegal grounds, depriving each of the women of $10,000. Assuming the court knows all the facts with complete certainty, the outcome in the case will change dramatically depending on whether the employer discriminated against 51 or 50 women. If 51, under an individualized approach each plaintiff can prove causation by a preponderance of the evidence and will recover in full. If only 50, no plaintiff can carry her burden of proof and none will recover. In other words, under an individualized approach, a very small change in the facts corresponds to a very large and discrete change in the result—from a total recovery of $1 million to a recovery of nothing. In contrast, under a classwide approach to damages the consequences are incremental: the employer

is liable for a total of $510,000 if it discriminated against 51 women and $500,000 if it discriminated against 50 women. Using a measure of recovery that produces continuous as opposed to discontinuous outcomes can have profound effects.

1. Intrinsic: Treating Similar Cases Similarly

The example involving employment discrimination suggests an intrinsic reason that discontinuous functions are troubling. The difference between discrimination against 51 or 50 women seems relatively minor. Yet the impact that difference can have on litigation is great. Parties who are similarly situated—the employer or employees in each circumstance—experience markedly different treatment under the law.

That sort of unequal treatment seems wrong. The principle of treating similarly situated litigants in a similar manner is central to our legal system. It not only animates procedural doctrines such as the *Erie* doctrine—in which courts have held that parties should not be subject to dramatically different legal standards merely because of the happenstance of whether they are in federal or state court[141]—but it is also fundamental to how we structure our legal system—helping to explain, for example, why we use stare decisis in an effort to treat similar cases alike.[142]

2. Instrumental: Predictability

Another effect of a discontinuous function is that it renders the results in a case unpredictable. People do not like unpredictability—or its close cousin, uncertainty. They tend to be risk-averse, particularly in litigation. That is a significant reason why such a high percentage of cases settle.[143] Continuous functions tend to produce more predictable and certain results.

3. Instrumental: More Sensible Litigation Expenditures

Discontinuous functions give rise to other problems. One of them involves expenditures on litigation. Key facts are often uncertain in litigation. Which side will prevail in a factual dispute often

---

141 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74–75 (1938).

142 *See* RONALD DWORKIN, LAW'S EMPIRE 165–66, 219–24 (1986).

143 *See, e.g.*, W. Kip Viscusi, *Product Liability Litigation with Risk Aversion*, 17 J. LEGAL STUD. 101, 119–21 (1988); *see also* Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 81.

depends on the skill and efforts of its attorneys and experts—and, therefore, on the amount of money a party spends on litigation.

By changing the outcomes at trial from discontinuous to continuous, classwide recoveries can promote reasonable investments in litigation. The benefit of this change is most obvious when the evidence on a key issue hovers just at the cusp between liability and no liability. In those circumstances, a continuous function can avoid what could otherwise be excessive litigation costs. The point is somewhat subtler when an evidentiary issue lies clearly on one side or the other of that cusp. It may actually be, though, that a continuous function would encourage investment in litigation that could provide valuable clarity regarding a dispute.

As to the first point—that continuous functions can help avoid excessive expenditures on litigation—consider the antitrust example involving price fixing in the market for airplanes. Assume it is unclear whether just over or just under 50% of the buyers paid more for their airplanes because of the conspiracy. Further, assume that there is no way to tell which buyers paid too much. Finally, assume that causation is the only issue the parties contest.[144] Under an individualized approach to recovery, small changes in the likelihood of causation would have a dramatic effect on the course of the litigation. Those small changes would dictate whether each plaintiff recovers $10 million—for an aggregate liability of $1 billion—or whether each plaintiff recovers nothing. As a result, the amount of time and money the parties will pour into prevailing on causation could be extraordinary.

In contrast, under a classwide approach to damages, relatively little would turn on any marginal shift in the percentage of plaintiffs who suffered injury. If 49% suffered injury, the classwide recovery would be $490 million. If 51% did, the classwide recovery would be $510 million. The total difference to the parties would be $20 million, not $1 billion. The incentive to make a marginal investment in litigation to influence the court would be correspondingly smaller.

On the other hand, in some cases, a classwide approach to recovery could encourage a greater investment in litigation than an individualized approach. Consider, for example, if in the same case the dispute were about whether 24% or 26% of the plaintiffs paid inflated prices. Under an individualized approach, this issue would be irrelevant. All that would matter is whether the plaintiffs could satisfy the

144 If the parties were to contest other issues, that would complicate the analysis, but it would not alter the fundamental point.

preponderance of the evidence standard. Under a classwide approach, in contrast, the parties would have some incentive to invest in this issue; it would have an incremental effect on their recovery. If the goal is to minimize litigation expenditures, this possibility detracts from the benefits of a classwide approach.[145] A moderate investment in litigation, however, can be desirable. Assuming it should matter what percentage of plaintiffs a defendant harmed—an issue that seems significant—an effort by the parties to explore this issue could lend valuable clarity to the legal proceedings.

These observations about likely expenditures on litigation retain importance even though most cases settle. After all, parties often litigate for a protracted period of time—and can spend a great deal of money and effort on motions to dismiss, motions for class certification, and motions for summary judgment, as well as on discovery—before they agree to resolve a legal dispute. The possible outcomes of trial should inform how much the parties spend before settlement, just as it should inform the terms on which they settle.[146]

4. Instrumental: Increased Likelihood of Settlement

The shift from discontinuous to continuous results from trial also could affect the likelihood of the parties settling under a classwide approach to recovery, as compared to an individualized approach.[147] One of the main reasons parties do not settle is differing predictions

---

145 Nevertheless, the expenditures under a classwide approach would likely not be as great as might occur under an individualized approach when the odds of plaintiffs and defendants prevailing on an element are nearly even. The reason is that a shift in the probabilities on such an issue under a classwide recovery approach would generally have only an incremental impact on damages. Under an individualized approach, in contrast, a great shift in liability could occur from only a small change in the odds that a defendant is liable.

Still, whether individualized or classwide recoveries will produce lower litigation costs is in part an empirical issue: how often is the likelihood of the plaintiff being right on any given element close to the preponderance of the evidence standard, and how often is that likelihood clearly on one or the other side of that standard? In this regard, keep in mind that whether courts calculate recoveries on an individualized or classwide basis will affect which cases settle and, as a result, the likely expenditures in those cases that involve protracted litigation. Along these lines, note that, as discussed in Part II.C.4 of this Article, the cases that are the least likely to settle under an individualized approach to recovery are the ones that will likely generate the highest expenditures—cases in which the parties disagree about the odds of prevailing in a way that spans the cusp between plaintiffs recovering nothing and plaintiffs recovering fully.

146 *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 972, 979–80 (1979).

147 *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1297–98 (2002) (considering settlement in assessing class certification standards).

about the likely outcome at trial.[148] If two parties assign significantly different expected values to litigation, the benefits of settlement—including saving time and money and avoiding risk—may not be sufficient to bridge the gap between them. Each side may anticipate doing better on average through litigation than the best settlement offer the other side is willing to make. Discontinuous functions can exaggerate the effect of differing predictions.

For example, if the plaintiffs in the airplane price-fixing case believe with great confidence that they can show at least 60% of the buyers were injured, and the defendants believe with similar confidence that they can show at most 40% of the buyers were injured, the difference in the expected value they each assign to the case under an individualized approach to recovery could approach the full potential recovery of $1 billion. If the plaintiffs are right, their total recovery will be $1 billion. If the defendants are right, they will have no liability. The limited possibility each side recognizes that it may be wrong may shrink this gap a bit, but the gap is likely to remain large. Settlement may prove impossible unless and until judicial rulings modify the parties' predictions.

Under a classwide approach to damages, in contrast, the expected value of the plaintiffs might be about $600 million, and the expected value of the defendants might be about $400 million. The disparity would be $200 million, not $1 billion. Further, as the parties acquire more information, it may well narrow. In this way, classwide damages can increase the likelihood of settlement.[149]

---

148 *See* Joshua P. Davis, *Toward a Jurisprudence of Trial and Settlement: Allocating Attorney's Fees by Amending Federal Rule of Civil Procedure 68*, 48 ALA. L. REV. 65, 131 n.135 (1996).

149 A similar point applies regarding the likelihood of settlement as it does to litigation expenditures: in some circumstances classwide recoveries could decrease—rather than increase—the likelihood of settlement. *See supra* Part II.C.3. The reason is that if the parties agree, for example, that the percentage of the class injured lies on one side or the other of the cusp between outcomes, an individualized approach to damages could cause the expected value they assign to be closer than under a classwide approach.

But this effect is likely to be less pronounced than the one discussed in the text. The reason is that the disparity in the predictions regarding the outcome under a classwide recovery—with its incremental effect on damages—and an individualized recovery where the parties agree on the result is not likely to be that great. In contrast, the disparity could be very significant between a classwide approach and an individualized approach where the parties' disagreement would cause a discontinuous shift in a defendant's liability.

Theoretical modeling by itself, however, is unlikely to resolve this issue. An empirical question is crucial: how often in litigation will parties disagree about whether plaintiffs can satisfy the preponderance of evidence standard and how often will they agree on that issue but disagree about how far on one side or the other of that standard the probabilities lie?

D. Notes on Settlement and Uncertainty

Two final considerations that are important in assessing classwide recoveries are the effects of settlement and uncertainty. Settlement tends to convert discontinuous functions into continuous functions. It may cause a recovery to vary in proportion to the odds of the plaintiff prevailing, rather than producing discrete, all-or-nothing results.[150] This point has particular force where there is uncertainty in litigation, so that it is hard to know, for example, whether plaintiffs will have just enough evidence to prevail or not quite enough. Moreover, uncertainty means that different plaintiffs' cases may produce varying results at trial, even if the plaintiffs are similarly situated.[151]

Uncertainty and settlement could have an impact on the difference between the measures of recoveries with individualized and classwide litigation, particularly where the evidence hovers reasonably near the burden of persuasion. Because of uncertainty, the defendant may agree to settle with any given individual for an amount that approximates the partial recovery available under a classwide approach.[152] Further, rather than all plaintiffs with similar claims winning, or all of them losing, some of each may occur.[153] That may convert the outcome for the defendant to something close to a continuous function (although it would not necessarily do the same for each individual plaintiff).

Similarly, settlement and uncertainty can together soften the stepwise function that otherwise occurs with individualized recoveries, mitigating some of the most concerning consequences of an individualized approach and the discontinuous outcomes it produces. For example, as a result of uncertainty, investment in litigation may have only a marginal effect on expected value—and therefore on the amount of any settlement—rather than producing a discrete shift in outcome. The defendant may perceive any investment in litigation as having an incremental impact on the settlement value of any particular case or on the number of cases it will win or lose.

A complete analysis of this issue is beyond the scope of this Article, as is any effort to provide a mathematical model that takes into

---

150 *See generally* Davis, *supra* note 134 (discussing the relative effects of a continuum of results versus an all-or-nothing result).

151 Many thanks to Howie Erichson and Sam Issacharoff for emphasizing these points. For an insightful discussion of uncertainty (or, to be more precise, different kinds of uncertainty) and settlement, see Howard M. Erichson, *Uncertainty and the Advantage of Collective Settlement*, 60 DEPAUL L. REV. 627 (2011).

152 *See* Abramowicz, *supra* note 134, at 240.

153 *See* Bone & Evans, *supra* note 147, at 1298.

account settlement and uncertainty. A few points, however, are worth making, even if they are only preliminary.

First, in cases that fall beyond a critical distance from the burden of proof, the results under a classwide approach and an individualized approach will be starkly different. For example, in a case involving the preponderance of the evidence standard, if many plaintiffs can clearly show—or clearly cannot show—they are more likely than not correct, a cumulative approach will yield distinct outcomes from a classwide approach. The uncertainty about which party would win in each individual case will decrease rapidly, and, as a result, the expected value of individual and classwide recoveries will diverge similarly rapidly.[154] Markedly different settlements in classwide and individual litigation should result. For example, if an employer discriminates against 75 of 100 women—or 25 of 100 women—all of the women should have a very high chance of winning or losing, respectively, in individual litigation. In the former case, the expected value of recovery for each woman should approximate her full damages; and in the latter case, it should approach nothing at all. Under a classwide approach, in contrast, each plaintiff would expect to recover in proportion to the percentage of the group of women who suffered discrimination.

Second, many cases of protracted litigation involve disparate predictions about the odds in litigation. That can explain why parties do not settle.[155] Those disparate predictions can cause the outcomes to appear discontinuous to the litigants. In other words, what matters is not uncertainty about the outcome in litigation that converts a discontinuous function into a continuous function—it is the *perception* of uncertainty. Unrealistic optimism on the part of one or both parties, combined with discontinuous results in individual litigation, thus may undermine settlement efforts.

Third, litigants will not know for much of the litigation whether they are going to settle—and, as practicing lawyers say, they must litigate as if they are going to trial. The potential adverse consequences of individualized litigation may occur—including, for example, excessive investment in litigation—even if the vast majority of cases ultimately reach a negotiated resolution.

---

154 Abramowicz, *supra* note 134, at 243.

155 *See* Mnookin & Kornhauser, *supra* note 146, at 975 ("To the extent that one or both of the parties typically overestimate their chances of winning, more cases will be litigated than in a world in which the outcome is uncertain but the odds are known.").

III. Responding to Possible Objections

Classwide recoveries, then, have various attractive qualities. They are also subject to potential criticism. This Article will address two of these criticisms: first, the theoretical concern that classwide recoveries ease the plaintiffs' burden regarding causation; and, second, the practical concern that they may place undue pressure on defendants to settle meritless cases.[156] Each of these points warrants careful consideration. The gist of a response to each one, however, can be summarized briefly. First, a classwide recovery will hold a defendant liable only for harm that it probably caused. Second, neither evidence nor theory supports the claim that class actions or classwide recoveries tend to cause defendants to pay an excessive amount in settlement or after trial.

A. Comparing and Contrasting Market-Share Liability

Allowing classwide recoveries in cases where a court may have difficulty identifying which plaintiffs were harmed has important similarities to market-share liability.[157] Both involve difficulties identifying parties to a causal relationship.

In market-share liability, the identity of the *wrongdoer* is unclear. We may know that a plaintiff consumed a drug and suffered an injury as a result, but we cannot determine which manufacturer produced the drug. Market-share liability addresses this issue by allowing a plaintiff to recover from each manufacturer of a drug in proportion to that manufacturer's market share.

Regarding the classwide recoveries discussed in this Article, the identity of the *injured plaintiffs* is difficult to determine. We may know, for example, that a particular corporation violated the antitrust laws and the total resulting harm from that violation, but we are unsure which purchasers of the good or service at issue paid inflated prices. Classwide recoveries resolve this problem by allowing the class as a whole to recover for the total harm a defendant has caused.

In light of the underlying similarity between classwide recoveries and market-share liability—the identity of a party to the causal relationship is unknown—it is unsurprising that academic analysis of one can cast light on the other. Mark Geistfeld, for example, in defending

---

156 A companion article in this Symposium addresses potential doctrinal concerns regarding classwide recoveries based on standing, due process, and the Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2012). *See generally* Davis, Cramer & May, *supra* note 7.

157 *See* Brown v. Superior Court, 751 P.2d 470, 486–87 (Cal. 1988); Sindell v. Abbott Labs., 607 P.2d 924, 937 (Cal. 1980).

market-share liability, has argued for a general concept of "evidential grouping."[158] According to Geistfeld, evidential grouping involves treating a group of defendants as unitary for evidentiary purposes in determining causation when a plaintiff can show the defendants as a group harmed her—even though the plaintiff cannot show by a preponderance of the evidence *which* of the defendants caused the harm.[159] Evidential grouping can explain various tort doctrines, including not just the controversial doctrine of market-share liability, but also the more settled doctrine of alternative liability.[160]

There is no reason to limit evidential grouping to defendants. Classwide recoveries entail evidential grouping by plaintiffs. The plaintiff class is treated as unitary for evidentiary purposes.

Viewed in this way, Geistfeld's reasoning regarding market-share liability and related doctrines supports classwide recoveries. He argues, for example, for a tort norm designed to minimize error costs.[161] Reasoning from that norm, he contends that it "neither requires nor forecloses proof applied to defendants individually or as a group."[162] In other words, Geistfeld recognizes that neither an individualized approach nor a group approach to adjudication is intrinsically superior. The two approaches simply provide alternative procedural means to litigate rights. Whether we should adopt one or the other depends on the relative advantages and disadvantages. This point suggests that classwide recoveries should also be assessed on the merits and not disregarded as an impermissible deviation from the norm of individual litigation.

Although there are important similarities between classwide recoveries and market-share liability, there is also at least one crucial distinction between the two. A key criticism—perhaps *the* key criticism—of market-share liability does not apply to classwide recoveries. Market-share liability can force a defendant to pay for harm it probably did not cause. A defendant who is responsible for only, say, 25% of the sales in an industry may have to pay 25% of the damages that a

158 *See* Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. PA. L. REV. 447, 447, 453 (2006).

159 *See id.* at 460.

160 *See id.* at 447, 486. Other relevant doctrines address special concurrent causation, such as when each of two fires is sufficient to cause harm or when multiple actors contribute to a toxic tort. *See, e.g.*, Corey v. Havener, 65 N.E. 69 (Mass. 1902) (holding each actor is joint and severally liable if each committed a tortious act that caused harm and it is not possible to ascribe a proportion of the harm to each actor).

161 *See id.* at 462.

162 *Id.*

plaintiff suffered, even though it is more likely than not true that a different manufacturer produced the drug that caused the injury to any given plaintiff. That approach marks a departure from the ordinary legal standard, a departure that explains in part why the doctrine has received some critical reviews.[163]

Even if there is merit to the concern about relaxing the standard for proving causation when it comes to market-share liability, that concern does not apply in the same way to classwide recoveries. A court granting a classwide recovery knows by a preponderance of the evidence that it has identified the correct wrongdoer, that the defendant violated the law, and that the court has accurately calculated the amount of harm the defendant caused. All that the court may remain uncertain about is *which members* of a class suffered harm and which did not. Unlike market-share liability, the defendant is liable only for the injuries that it probably caused. Classwide recoveries thus have many of the advantages of market-share liability but not its main disadvantage.

B. Excessive Liability

As we have seen, classwide recoveries can help to avoid situations where defendants must pay an amount far in excess of the harm they have caused or where a plaintiff class as a group recovers far less than the harm it has suffered. Despite this attractive quality of classwide recoveries, a potential criticism is that they may nevertheless result in excessive liability. This criticism can take two forms, the first involving settlement and the second involving a recovery awarded by a court.

1. Does Facilitating Class Litigation Promote Blackmail?

Forcing a defendant to pay damages it did not cause has been labeled "legalized blackmail," and allowing defendants to keep ill-gotten gains has been called "legalized theft."[164] A potential criticism of classwide recoveries is that they could result in legalized blackmail.[165]

The reasoning behind this potential criticism is that classwide recoveries can facilitate class certification. A class trial, in turn, can expose a defendant to massive liability. That threat—even in a lawsuit with very little merit—could theoretically cause a defendant to settle

---

163 *See, e.g.*, Zipursky, *supra* note 8, at 134–35.

164 *See* Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 843 (1974).

165 *Cf.* Silver, *supra* note 12, at 1388–90 (rejecting the argument about legalized blackmail).

rather than risk bankruptcy, however small its odds of losing.[166] For various reasons, however, the concern about legalized blackmail is not very compelling.

One problem with the legalized blackmail theory is that it has a shaky empirical foundation. Evidence that defendants may settle lawsuits without merit comes largely from the contexts of securities and stockholder lawsuits.[167] Even in that area of the law, the evidence is thin and subject to competing interpretations.[168] Moreover, Congress has already placed various constraints on securities litigation, including imposing an unusually high pleading standard and staying discovery until a ruling on any motion to dismiss.[169] Those measures may well have addressed any problem that existed. As a result, courts and scholars have not offered an adequate empirical basis for the claim that defendants settle frivolous class action lawsuits with any regularity.[170]

Further, as a theoretical matter, it is unlikely that defendants often settle meritless lawsuits for significant sums. The dynamics of class litigation confirm that it is far more likely that large corporate defendants will pay too little—rather than too much—in settling class litigation.[171] The defendants in class actions tend to be large, wealthy corporations. They have the financial and other means to protect their interests. They are not likely to be risk-averse. They would ordinarily not be expected to settle unless they would fare better on average by doing so than by persisting in litigation.[172]

Further, the incentives before the *attorneys* in class litigation make excessive settlements unlikely. Plaintiffs' lawyers generally litigate on a contingent basis, paying the costs of litigation out of pocket and receiving compensation only if, and when, they prevail. They benefit from settling early, even if for a lower amount than they could

---

166 The Supreme Court appeared to act on this perceived risk in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

167 *See, e.g.*, Bone & Evans, *supra* note 147, at 1293–94 & nn.157–58 (discussing very thin empirical record, all of it involving securities and stockholder litigation).

168 *See, e.g.*, Joel Seligman, Commentary, *The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority"*, 108 HARV. L. REV. 438, 452–53 (1994).

169 15 U.S.C. § 78u-4 (2012); *see also* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1200 (2013).

170 The Supreme Court in *Twombly*, for example, simply declared that corporations settle meritless lawsuits without citing to any empirical evidence at all. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007).

171 *See* Davis & Cramer, *supra* note 17, at 372.

172 For an argument along these lines in the antitrust context, see *id.* at 368–74.

obtain through protracted litigation. That gives them the greatest compensation per hour with the least risk and expense. Defense lawyers, in contrast, are paid on an hourly basis. The longer litigation persists—and the more involved it is—the better they are likely to do financially. These dynamics should tend to produce settlements that are relatively unfavorable to plaintiff classes and relatively favorable to class action defendants. Indeed, most of the criticism of class actions has been directed at the concern that plaintiffs' lawyers settle for too small—not too large—a sum.[173] None of this is to suggest that attorneys generally act unethically. To the extent, however, that one takes into account potential agency costs, they undermine the legalized blackmail theory.

Neither evidence nor theory supports the claim that aggregate litigation extorts settlements from defendants with any regularity. It is far more likely that without class certification defendants will get away with legalized theft—providing another reason that a classwide approach to recovery will minimize error costs.[174]

2. *Does Increasing the Size of a Class Increase Potential Liability?*

Another potential argument against classwide recoveries—and allowing classes to include uninjured members—is that doing so may increase a defendant's exposure to potential liability in court. Judge

---

173 *See, e.g.*, Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 470–71 & nn.51–53 (2000). *See generally* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases*: *A Dissent*, 1989 U. ILL. L. REV. 69; Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439 (1996). The failure of proponents of a heightened class certification standard to adequately address these crucial settlement dynamics renders their analyses unpersuasive. *See, e.g.*, Bone & Evans, *supra* note 147.

174 This claim requires some elucidation. To suggest that plaintiffs settle for too little requires a benchmark for an appropriate settlement. A plausible benchmark for a proper reflection of the merits is the expected value of trial. *See generally* Joshua P. Davis, *Applying Litigation Economics to Patent Settlements: Why Reverse Payments Should Be Per Se Illegal*, 41 RUTGERS L.J. 255 (2009) (defending expected value as a measure of justice in settlement); Davis, *supra* note 134, at 85–94, 106–16 (same). Settlement for the expected value of trial produces the same error costs on average as would trial. Davis, *supra* note 134, at 87. A more specific statement of the claim in the text, then, is that without class certification, plaintiffs would likely often settle for less than the expected value of trial. A defense of that standard, however, is beyond the scope of this Article.

Posner implied this point in *PIMCO*.[175] Whether it has any merit depends on how damages are calculated.

No problem should arise if a court awards individual recoveries and is able to distinguish plaintiffs who were harmed from plaintiffs who were not. *PIMCO* appears to have involved that sort of situation. The conduct at issue was defendant's alleged effort to corner the market on ten-year U.S. Treasury notes, driving up prices when investors who had sold short had to close out their contracts.[176] The defendant noted that some class members who sold short might have done so as a hedge and might have benefited on net because they took a more substantial "long" position.[177] This possibility, however, would not necessarily result in excessive liability. The court would ultimately be able to determine which class members had gained and which had lost. A review of class member investments during the relevant period would reveal the relevant information. By obtaining that same information, a defendant should be able to sort out its total potential liability before going to trial or, more realistically, before agreeing to a settlement.

A different situation occurs if the plaintiff class will receive the sum of the individual recoveries of the class members. Assuming it is impossible or impractical to determine which plaintiffs suffered injury and which did not, it seems possible that a larger class could lead to greater exposure to liability. Consider again the employment discrimination hypothetical. Imagine if the class is enlarged from 100 to 110 women, out of which we know 60 women suffered discrimination. Applying the preponderance of the evidence standard, it would remain true that each should recover in full. A larger class would correlate to greater liability as long as more than half the class suffered injury.

There is, however, no similar risk if a court imposes a classwide recovery in the way this Article recommends. If the defendant employer inflicted $10,000 of harm on exactly 60 women, it would be liable for that amount—and only that amount—in damages. The employer would have to pay $600,000 whether the class seeking relief numbers 100 or 110, or, for that matter, 140. If only 60 positions were available to the women, only 60 women could have been improperly denied a promotion. In allocating the funds, the plaintiffs would want to prune any members who could not have suffered harm—or who

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

176 *Id.* at 674–76.

177 *Id.* at 676.

were very unlikely to have been harmed—for fear of unnecessarily diluting the recovery of each class member. The defendant's exposure, however, would not increase with class size.

Classwide recoveries, then, can provide a solution to the risk of excessive liability; they need not contribute to that potential problem.

CONCLUSION

Classwide recoveries have various advantages over individualized recoveries. They allow courts to take advantage of statistics and economics in a way that Oliver Wendell Holmes, Jr. welcomed long ago.[178] It is well past time for us to embrace the future he envisioned. Our courts, however, have not always been open to progress. Indeed, classwide recoveries may have the greatest value in circumstances when the judiciary has at times expressed the greatest resistance to them. Some courts have recently suggested that class certification is appropriate only if plaintiffs can show harm to all or virtually all members of a class. That requirement can be perverse. It is precisely when conduct harms some members of a group, but when it is not possible or practical to identify which ones, that class certification and a classwide recovery may offer numerous advantages over individual litigation. As a matter of policy, in those cases courts should be able to certify classes and award classwide relief.

178 *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

Appendix A

The following is a comparison of the error costs of classwide and individualized approaches to recovery from the perspective of deterrence. Error costs are measured as the difference between the actual and the right result of litigation.

Assumptions

A large group of plaintiffs—say X of them—sue D. All of the plaintiffs are similarly situated. The only issue contested in litigation is which of the plaintiffs suffered harm as a result of D's violation of the law. Each plaintiff that suffered the relevant form of injury is entitled to a judgment of $\$S$. All of the others should recover nothing. Assume that p represents the percentage of the group that D injured. The likelihood that each plaintiff should prevail is therefore p.

Individualized Approach

Applying an ordinary preponderance of the evidence standard, all the plaintiffs will win if p is greater than 50%, but otherwise all of the plaintiffs will lose. The formula that represents the error costs under an individualized approach varies depending on whether p is greater than 50%.

If each plaintiff will win (in other words, if $p > 0.5$), then the error costs depend on the percentage, $(1 - p)$, of the X members of the group that D will have to pay $\$S$ even though it should have no liability to them. (There are no error costs regarding D's payments to plaintiffs who should and do prevail.) The error costs are:

$(1 - p)XS$

Alternatively, if each plaintiff will lose (in other words, if $p \leq 0.5$), then the error costs depend on the percentage, p, of the X members of the group to whom D will pay nothing even though it should have to pay $\$S$ to each of them. (No error costs result from the plaintiffs who should lose receiving nothing.) The error costs are:

pXS

Classwide Approach

Under the classwide approach, D should be liable for pXS. That is precisely what D is required to pay. There are no error costs from the perspective of deterrence.

Comparison

The error costs are greater under an individualized approach by $(1 - p)XS$ if $p > 0.5$ and by pXS if $p \leq 0.5$.

Appendix B

The following is a comparison of the error costs of a classwide and individualized approach to recovery from the perspective of compensation. Error costs are measured as the difference between the actual result and the right result of litigation. The same assumptions apply as in Appendix A.

Individualized Approach

Applying an ordinary preponderance of the evidence standard, all of the plaintiffs will win if p is greater than 50%; otherwise, all of the plaintiffs will lose. The formula that represents the error costs under an individualized approach varies depending on whether p is greater than 50%.

If each plaintiff will win (in other words, if $p > 0.5$), then the error costs depend on the percentage, $(1 - p)$, of the X members of the group who will recover $\$S$ even though they should not receive any compensation. (There are no error costs regarding the plaintiffs who should and do prevail.) The error costs are:

$$(1 - p)XS$$

Alternatively, if each plaintiff will lose (in other words, if $p \leq 0.5$), then the error costs depend on the percentage, p, of the X members of the group who will recover nothing even though they should each receive $\$S$. (No error costs result from the plaintiffs who should lose receiving nothing.) The error costs are:

$$pXS$$

Classwide Approach

With a classwide recovery, the plaintiffs as a group will receive precisely the right total recovery: pXS. Assuming that they share this recovery on a pro rata basis, each plaintiff will receive pS.

Some plaintiffs will receive too little and some too much. More precisely, those plaintiffs who should have lost, $(1 - p)X$, will recover more than they should have by the amount of the pro rata award, pS, and those plaintiffs who should have won, pX, will receive less than they should have by the difference between full recovery and the pro rata award, $S - pS$, or $(1 - p)S$. The following equation captures these error costs:

$$(1 - p)XpS + pX(1 - p)S = 2p(1 - p)XS$$

Comparing Error Costs

When $p > 0.5$, we know the error costs are:

Individualized approach: $(1 - p)XS$

Classwide approach: $2p(1 - p)XS$

Given that p is greater than 0.5, that means that $2p$ is greater than 1, and the classwide approach will always produce higher error costs than the individualized approach from the perspective of compensation to plaintiffs.

When $p = 0.5$, we know the error costs are:

Individualized approach: pXS

Classwide approach: $2p(1 - p)XS$

If p is less than 0.5, $2(1 - p)$ is greater than 1, and the classwide approach will produce higher error costs than the individualized approach from the perspective of compensation to plaintiffs.

It is worth noting that the error costs will be the same when $p = 0.5$, but that rare instance should have little significance.

Appendix C

The following is a comparison of the error costs of a classwide and individualized approach to recovery from the perspective of compensation. Error costs are measured as the square of the difference between the actual result and the right result of litigation. The same assumptions apply as in Appendix A.

Individualized Approach

As discussed above, the formula for error costs under an individualized approach varies depending on whether p is greater than 50%.

If $p > 0.5$, the resulting error costs are measured by the formula above, although the amount of the error, S, is squared: $(1 - p)XS^2$.

If $p \leq 0.5$, then the error costs, measured by squaring the amount of the error above, are pXS^2.

Classwide Approach

With a classwide recovery, the same adjustment must be made, squaring the amount of the error in each case—that is, for those plaintiffs who should lose, the error costs are $(pS)^2$; and for those plaintiffs who should win, the error costs are $((1 - p)S)^2$. The following formula expresses the error costs:

$$(1 - p)X(pS)^2 + pX((1 - p)S)^2 = p(1 - p)XS^2$$

Comparing Error Costs

When $p > 0.5$, we know the error costs are:

Individualized approach: $(1 - p)XS^2$

Classwide approach: $p(1 - p)XS^2$

Given that p is less than or equal to 1, the classwide approach will generally produce lower error costs than the individualized approach from the perspective of compensation to plaintiffs. (The two will be equal when $p = 1$, a trivial case.)

When $p \leq 0.5$, we know the error costs are:

Individualized approach: pXS^2

Classwide approach: $(1 - p)pXS^2$

Given that $(1 - p)$ is less than or equal to 1, the classwide approach will generally produce lower error costs than the individualized approach. (The two will be equal when $p = 0$, a trivial case.)

APPENDIX D

The following is a comparison of the error costs of a classwide approach to recovery and an automatic loss for plaintiffs from the perspective of compensation. Error costs are measured first as the difference between the actual result and the right result of litigation, and second as the square of that difference. The same assumptions apply as in Appendix A.

The Difference Between the Actual and Right Result

We can compare the formulas for error costs under an individualized and classwide approach when the court would rule in favor of defendants:

Individualized approach: pXS

Classwide approach: $2p(1 - p)XS$

Assuming that p is greater than 0.5, $2(1 - p)$ is less than 1, and the classwide approach will produce lower error costs than the individualized approach from the perspective of compensation to plaintiffs.

The Square of the Difference Between the Actual and Right Result

Regarding the square of the difference between the actual result and the right result, the analysis above applies:

Individualized approach: pXS^2

Classwide approach: $(1 - p)pXS^2$

Assuming that p is greater than 0.5, $(1 - p)$ is significantly less than 1, and the classwide approach will produce lower error costs than the individualized approach.

Appendix E

The following is an analysis of the total error costs of classwide and individualized approaches to recovery from the perspectives of deterrence and compensation. Error costs are measured as the difference between the actual result and the right result of litigation. The same assumptions apply as in Appendix A. The analysis varies depending on whether more than half of the plaintiffs in a class suffered the relevant form of injury.

More Than Half of the Class Suffered Injury

If $p > 0.5$, then the analysis is as follows:

Individual Recoveries

For an individual recovery, the error costs from the perspective of deterrence is measured by the formula in Appendix A:

$XS - pXS = (1 - p)XS$.

Similarly, the formula in Appendix B provides the error costs regarding compensation: $(1 - p)XS$.

The sum of these two formulas is $2(1 - p)XS$.

Classwide Recoveries

As for classwide recoveries, as Appendix A establishes, classwide recoveries do not produce error costs from the perspective of deterrence.

Appendix B provides the formula for error costs from the perspective of compensation: $2p(1 - p)XS$.

The total, therefore, is $2p(1 - p)XS$.

Comparison

The total error costs from an individualized approach are $2(1 - p)XS$.

The total error costs from a classwide approach are $2p(1 - p)XS$.

As p is generally less than 1, classwide recoveries produce lower error costs. (The most p can be is 1, in which case the two approaches produce the same error costs.)

Half of the Class or Less Suffered Injury:

If $p \leq 0.5$, then the analysis is as follows:

Individual Recoveries

As established in Appendix A, the error costs from the perspective of deterrence are *pXS*.

Appendix B demonstrates that the error costs in terms of compensation are the same: *pXS*.

The total, then, is *2pXS*.

Classwide Recoveries

Again, classwide recoveries produce no error costs from the perspective of deterrence. In this situation, Appendix B establishes that the error costs from the perspective of compensation are *2p(1 – p)XS*.

The total is *2p(1 – p)XS*.

Comparison

The total error costs from an individualized approach are *2pXS*.

The total error costs from a classwide approach are *(1 – p)2pXS*.

As *p* generally is greater than 0, classwide recoveries produce lower error costs. (The least *p* can be is 0—if no one was injured, which is not a significant situation—in which case the two approaches produce the same error costs.)

The Square of the Difference Between the Actual and Right Result

A classwide approach produces lower error costs than an individualized approach in terms of liability, as demonstrated by Appendix A, and in terms of compensation if error costs are measured by the square of the difference between the actual result and the right result, as demonstrated in Appendix C. The logical combination of these propositions is that a classwide approach produces lower total error costs than does an individualized approach under the squaring method.

University of San Francisco School of Law

University of San Francisco Law Research Paper 2013-24

THE PUZZLE OF CLASS ACTIONS WITH UNINJURED MEMBERS

Joshua P. Davis, Eric L. Cramer, & Caitlin V. May

The Puzzle of Class Actions with Uninjured Members

Joshua P. Davis, Eric L. Cramer,** and Caitlin V. May****

Abstract

A puzzle has developed regarding class action doctrine. A number of recent judicial decisions have reaffirmed that classes may be certified under Federal Rule of Civil Procedure 23(b)(3) even if they contain members who have not suffered cognizable injury. This Article assumes these decisions interpret Rule 23 properly and explores the implications for three doctrines: standing, due process, and the Rules Enabling Act. In doing so, this Article seeks both to clarify the relevant doctrines and to apply them in the class setting.

Although this analysis requires some care, we can briefly summarize the Article's main conclusions. First, as to standing, some courts have suggested that only a named plaintiff needs to have standing to pursue class claims, while others have indicated that all members of a potential class must have standing. The Article attempts to reconcile these apparently conflicting positions, explaining that the precedents make sense if the requirement is that only a named plaintiff must make an individualized showing in support of her claims, while absent class members need merely be in the group that could potentially have viable claims.

Second, as to due process rights, the Article argues that critics of class action doctrine have adopted an overly rigid approach, one incompatible with the flexible cost-benefit analysis integral to the due process standard. Appropriate balancing, this Article contends, suggests that neither the certification of classes containing uninjured members nor the awarding of classwide recoveries to those classes after trial necessarily deprives any litigants of the process they are due.

Finally, the Article contends that, under the Supreme Court's decision in Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, including uninjured members in a certified class can be permissible under the Rules Enabling Act as long as it changes only the means by which claims are litigated and not the parties' substantive rights, even if the class process has a significant effect on those substantive rights.*

* Associate Dean for Faculty Scholarship and Professor, University of San Francisco School of Law.

** Managing Shareholder, Berger & Montague, P.C.

*** J.D., 2013, University of San Francisco School of Law.

May 2014 Vol. 82 No. 3

TABLE OF CONTENTS

INTRODUCTION

Numerous courts have certified plaintiff classes even though the plaintiffs have not been able to use common evidence to show harm to all class members.[1] As a result, the classes the courts certify may include uninjured class members.[2] Indeed, as a matter of practice, in the few antitrust class actions that have gone to trial, courts have asked juries to award damages on an aggregate basis and have not directed

1 *See, e.g.*, Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 815 (7th Cir. 2012) (vacating denial of class certification and holding that certification is proper even where individual questions as to injury are present, so long as they do not predominate over common questions affecting the class as a whole); Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010) (affirming class certification in a consumer fraud case despite the possibility that the class could include people who have not been injured by the defendant's conduct); Kohen v. Pac. Inv. Mgmt. Co. (*PIMCO*), 571 F.3d 672, 677 (7th Cir. 2009) (affirming class certification despite the possibility that a class of treasury note purchasers contained members who were uninjured because they did not actually lose money on their purchase); Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 107–08 (2d Cir. 2007) (finding that common issues may predominate in a case as a whole, even if they do not predominate regarding injury-in-fact, and vacating denial of class certification); Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. 293, 310 (D.D.C. 2007) (finding class certification appropriate even though injury could not be shown as to certain class members).

2 *See, e.g.*, *PIMCO*, 571 F.3d at 677.

them to inquire whether each class member suffered the relevant form of injury.[3]

Two of the authors of this Article have in the past defended the certification of classes containing uninjured members.[4] Indeed, the authors have criticized class certification opinions in the antitrust context for implying that class certification is appropriate only where plaintiffs proffer classwide evidence capable of showing harm to all or nearly all members of the class.[5] The authors have argued, inter alia, that under Federal Rule of Civil Procedure 23(b)(3), common issues need merely predominate; not all issues need to be common.[6] Moreover, they have noted that an "all or nearly all" requirement would be inconsistent with plaintiffs' burden at trial, where courts have not required a showing of injury to all class members to obtain a classwide judgment.[7] The authors have further observed that in antitrust cases, where plaintiffs are often able to compute aggregate classwide damages accurately even where classes contain uninjured members, no party is prejudiced by the presence of such members because the defendant's exposure to damages is unaffected.[8]

Certifying classes containing uninjured members also makes sound policy sense. Judge Richard Posner, for example, recently suggested that class certification centers around efficiency.[9] Based on this

---

3 *See* Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 RUTGERS L.J. 355, 394–95 & n.124 (2009) [hereinafter Davis & Cramer, *Of Vulnerable Monopolists*] (citing and quoting jury instructions in antitrust class actions).

4 *See, e.g.*, Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969, 989–96 (2010) [hereinafter Davis & Cramer, *Antitrust*]; Davis & Cramer, *Of Vulnerable Monopolists*, *supra* note 3, at 391–98.

5 *See, e.g.*, Davis & Cramer, *Antitrust*, *supra* note 4, at 989–1006; Davis & Cramer, *Of Vulnerable Monopolists*, *supra* note 3, at 391–95.

6 *See* Davis & Cramer, *Antitrust*, *supra* note 4, at 1006–08; Davis & Cramer, *Of Vulnerable Monopolists*, *supra* note 3, at 389; *see also* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1196 (2013) ("Rule 23(b)(3), however, does *not* require a plaintiff seeking class certification to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof. What the rule does require is that common questions *predominate* over any questions affecting only individual [class] members." (alterations in original) (internal quotation marks and citation omitted)).

7 *See* Davis & Cramer, *Of Vulnerable Monopolists*, *supra* note 3, at 392–93.

8 *See* Davis & Cramer, *Antitrust*, *supra* note 4, at 990–91; Davis & Cramer, *Of Vulnerable Monopolists*, *supra* note 3, at 393–98; *see also* Joshua P. Davis, *Classwide Recoveries*, 82 GEO. WASH. L. REV. 890 (2014) [hereinafter Davis, *Classwide Recoveries*].

9 *See* Butler v. Sears, Roebuck & Co., 702 F.3d 359, 362 (7th Cir. 2012) ("Predominance is a question of efficiency. Is it more efficient, in terms both of economy of judicial resources and of the expense of litigation to the parties, to decide some issues on a class basis or all issues in separate trials?" (citations omitted)), *cert. granted, vacated, and remanded*, 133 S. Ct. 2768 (2013) (mem.), *reinstated*, 727 F.3d 796 (7th Cir. 2013).

reasoning, as long as litigating on a class basis provides the most efficient means of resolving a large number of disputes, courts should certify a class under Rule 23.[10] This approach, however, could give rise to some doctrinal concerns.

Of these doctrinal concerns, three relevant issues warrant attention. To put the points somewhat tendentiously, a critic might argue that certifying a class that contains uninjured class members violates standing doctrine, the due process rights of class members and defendants, and the Rules Enabling Act.[11] Each of these points should be taken seriously. This Article argues, however, that none of them ultimately proves persuasive.[12] As a result, courts are free to continue to certify classes—even to award damages to classes—that contain members who suffered no legally cognizable harm.

In addressing these issues, a distinction may be of importance. Sometimes class litigation leaves intact all of the individual issues that would be addressed in individual litigation. A court may adjudicate common issues on a classwide basis and then provide a mechanism for resolving issues that pertain to only some individual class members—through review of the issues by a special master, for example, or a series of individual hearings before the judge or even a jury.[13] In contrast, on other occasions, a court may award a single recovery to a class as a whole—what we will call a "classwide recovery"—and then allocate that recovery in some practical way, such as on a pro rata basis.[14] In the discussion below, we will try to clarify when this distinction may alter our analysis.

I. STANDING

Standing doctrine, as it applies to class actions, at first appears to involve an inconsistency. To have standing, a plaintiff must allege a relevant form of injury as a result of the defendant's conduct.[15] Application of this standard in the class setting has led to some seemingly

---

10 *See id.*

11 Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2012).

12 *See infra* Part I (discussing standing doctrine); *infra* Part II (discussing due process); *infra* Part III (discussing the Rules Enabling Act).

13 *See, e.g.*, *Butler*, 702 F.3d at 362 (suggesting that individual hearings to determine damages for each class member would be appropriate).

14 *See, e.g.*, Stewart v. Gen. Motors Corp., 542 F.2d 445, 452–54 (7th Cir. 1976) (discussing how to break down an award of backpay to a class). A court also may preside over a settlement that allocates recoveries in a similar manner. *See id.* (detailing pro rata approach).

15 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Sutton v. St. Jude Med. S.C., Inc., 419 F.3d 568, 570 (6th Cir. 2005) ("The Article III standing requirements apply equally to class actions.").

contradictory pronouncements. On one hand, courts have asserted that the named plaintiffs need to allege only their own standing, not the standing of absent class members.[16] On the other hand, courts have indicated that a class cannot be certified if it contains members who lack standing.[17] Can these assertions be reconciled? If so, how?

The answer lies in the different types of showings that need to be made regarding the named plaintiffs and the absent class members. As to the named plaintiffs, courts require individualized allegations of standing.[18] The standard that applies to absent class members, in contrast, is more forgiving. The absent members of the class need merely be in the category of parties who would have suffered the relevant form of injury if those parties are able to prove their claims.[19] In other words, it cannot be obvious from the outset that some members of the class *could not possibly* have suffered the relevant form of harm as a result of the defendant's conduct.[20]

An example may prove helpful in framing this issue. Consider a claim for employment discrimination. The named plaintiff is an African-American part-time employee. She asserts that her employer failed to promote her because she is African American. More generally, she seeks to represent a class consisting of all African-American employees, alleging that the employer discriminated against all of its

---

16 *See, e.g.*, DG *ex rel.* Stricklin v. Devaughn, 594 F.3d 1188, 1197 (10th Cir. 2010) ("[O]nly named plaintiffs in a class action seeking prospective injunctive relief must demonstrate standing . . . ."); Doe v. Blum, 729 F.2d 186, 190 n.4 (2d Cir. 1984) ("[N]amed plaintiffs 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class . . . .'" (quoting Warth v. Seldin, 422 U.S. 490, 502 (1975))); *see also* 1 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 2:3 (5th ed. 2011) ("These passive members need not make any individual showing of standing because the standing issue focuses on whether the named plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court.").

17 Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010); Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006).

18 *See* Kohen v. Pac. Inv. Mgmt. Co. (*PIMCO*), 571 F.3d 672, 676–78 (7th Cir. 2009) (distinguishing between named and absent class members).

19 *See Denney*, 443 F.3d at 264–66. For a more complete explanation see *infra* notes 25–68 and accompanying text.

20 *See Denney*, 443 F.3d at 264–66. The Fifth Circuit's reasoning in *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014), supports this interpretation, as the court suggested that *Denney* "does not contemplate scrutinizing or weighing any evidence of absent class members' standing or lack of standing during the Rule 23 stage." *Id.* at 801. Rather than reconciling the two approaches discussed in the text, the Fifth Circuit suggested the possibility of rejecting one in favor of the other. *Id.* The court did not resolve the issue, however, because it held that the plaintiffs should prevail on the issue of Article III standing under both approaches. *Id.* at 800–02.

African-American part-time employees on the basis of race. Assume the defendant challenges the named plaintiff's claims and the class allegations, invoking the standing doctrine.

The named plaintiff must make individualized allegations addressing all of the elements of standing, including that the employer's discriminatory conduct deprived her of a promotion.[21] If she makes this showing, she may seek certification of a class including all of the employer's African-American part-time employees who are eligible for a promotion.[22] The named plaintiff need not make individualized allegations for every absent class member.[23] It is in this sense that the standing requirement applies only to the named plaintiff, not to the absent class members.

On the other hand, the named plaintiffs cannot include in the class *full-time* employees. The named plaintiff has alleged discrimination only against part-time employees. Therefore, even if she were to prove her case, the full-time employees would not have suffered a relevant injury. It is in this sense that a class cannot include members who lack standing.[24]

A review of the case law confirms this interpretation. First, note that some cases suggest the need to establish the standing of only the named plaintiffs, not the absent class members. In *Kohen v. Pacific Investment Management Co.* ("*PIMCO*"),[25] the Seventh Circuit held that "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied."[26] *PIMCO* involved allegations that the defendant violated the Commodity Exchange Act[27] by cornering the market for ten-year treasury notes.[28] The class certified by the district court consisted of all persons who purchased a short position in ten-year treasury notes during a specified date range.[29] The defendant challenged the definition of the class on the ground that it included absent class members who lacked standing to sue, because some of those absent class members did not

---

21 *See PIMCO*, 571 F.3d at 676–78.

22 *See Denney*, 443 F.3d at 264–66.

23 *See id.*

24 *See id.*

25 Kohen v. Pac. Inv. Mgmt. Co. (*PIMCO*), 571 F.3d 672 (7th Cir. 2009).

26 *Id.* at 676; *see also* DG *ex rel.* Stricklin v. Devaughn, 594 F.3d 1188, 1197 (10th Cir. 2010) (holding that only named plaintiffs in a class action by foster children against the Department of Human Services must demonstrate standing by establishing they have or will suffer an injury).

27 Commodity Exchange Act, 7 U.S.C. §§ 1–27f (2012).

28 *PIMCO*, 571 F.3d at 674.

29 *Id.* at 676.

actually lose money.[30] For example, some members of the class may have hedged their bets by purchasing both short and long positions and may have ultimately made more money on the long positions than they lost on the short positions.[31]

Judge Posner, writing for the Seventh Circuit, rejected the argument that district courts must determine which class members were injured for certification.[32] A suit can proceed, he reasoned, even if some class representatives later prove to lack injury, so long as at least one named plaintiff has standing.[33] He noted that the inclusion of class members who lack injury "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."[34]

The Seventh Circuit thus indicated that the standing requirement applies only to named plaintiffs, at least in any strong form.[35] All members of a proposed class need not establish that they suffered harm to support class certification. *PIMCO*, however, did not answer the more difficult question: what if a proposed class includes members who could not possibly have suffered the relevant form of harm? Judge Posner did not address how to proceed, for example, if plaintiffs proposed a class that comprised members who did not buy ten-year treasury notes at all.[36]

The analysis of some courts suggests that a class should include members only if they could have meritorious claims based on the class allegations. Otherwise, absent members of a proposed class may lack standing in a way that poses a problem for class certification. *Denney v. Deutsche Bank AG*[37] is illustrative in this regard.

---

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 676–77.

34 *Id.* at 677.

35 *Id*. at 677–78. The Fifth Circuit in *In re Deepwater Horizon* recently characterized this approach as "the *Kohen* test," in reference to the *PIMCO* case. *In re* Deepwater Horizon, 739 F.3d 790, 801 (5th Cir. 2014).

36 At one point, Judge Posner does reference this issue, stating: "A related point is that a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant . . . ." *PIMCO*, 571 F.3d at 677. Judge Posner, however, does not address what qualifies as "a great many" or how to analyze the issue generally. For the most part, he discusses the issue as it relates to an overbroad class definition. *See id.* at 678.

37 Denney v. Deutsche Bank AG, 443 F.3d 253 (2d Cir. 2006).

Denney involved allegations under the Racketeer Influenced and Corrupt Organizations Act ("RICO")[38] by taxpayers who purchased foreign currency options based on tax strategies purportedly devised by a bank and law firm and then marketed by an accounting firm.[39] The tax strategies allegedly violated the law.[40] The district court certified a class and approved a classwide settlement against the law firm defendants.[41] The primary challenge on appeal was that the class included members who had not suffered injury-in-fact at the time of certification and who therefore lacked standing.[42]

The class in *Denney* was defined as all persons who, during the relevant time period, "consulted with, relied upon, or received oral or written opinions or advice from" the defendants regarding tax strategy that was allegedly negligent.[43] The complaint further alleged that plaintiffs paid excessive fees for this negligent or fraudulent tax advice, had and would continue to incur costs, and forewent legitimate tax savings opportunities.[44] The argument for lack of standing was that the class included two groups whose members had not suffered and were not likely to suffer any injury.[45] Members of the first group employed the tax strategies during the relevant period, but were not audited after filing their tax returns.[46] Members of the second group began but did not complete a tax strategy transaction and did not receive a tax opinion.[47]

The Second Circuit rejected the challenge to class certification, holding that the absent class members met the requirements for standing.[48] The court emphasized that each class member is *not* required to submit individualized evidence of standing.[49] However, "no class may be certified that contains members lacking Article III standing."[50] As the Second Circuit put the matter, the class must be defined "in such a

---

38 Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961–1968 (2012).

39 *Denney*, 443 F.3d at 260.

40 *Id.*

41 *Id.* at 262.

42 *Id.* at 259, 262.

43 *Id.* at 264 n.4.

44 *Id.* at 265.

45 *Id.* at 264.

46 *Id.*

47 *Id.*

48 *See id.* at 265.

49 *Id.* at 263.

50 *Id.* at 264.

way that anyone within it *would* have standing."[51] In other words, the class must include only individuals who could *potentially* have viable claims.

The Second Circuit's conclusion that the unnamed plaintiffs had standing was based on the fact that members who had not been audited still ran the *risk* of being assessed penalties and had taken expensive and time-consuming steps to fix their tax filings.[52] Further, the members who did not complete their tax transactions still took steps in reliance on the advice, which the complaint alleged included the use of time and money.[53] Based on the assertions in the complaint and the class definition, each class member *could* have suffered an injury.[54] Essentially, *Denney* makes clear that unnamed plaintiffs have standing unless the class is defined in a way to include members who could not possibly recover.

In contrast to this understanding of *Denney*, some cases seem to imply that all absent class members must prove standing.[55] Upon analysis, however, these apparently divergent approaches can be reconciled. Take, for example, *Avritt v. Reliastar Life Insurance Co.*,[56] in which the Eighth Circuit seemingly indicated that absent class members lack standing if they are uninjured.[57] *Avritt* involved allegations by purchasers against a seller of fixed deferred retirement annuities.[58] The plaintiffs alleged that the seller engaged in unfair interest crediting practices by systematically crediting higher interest to the most recent deposits and lower interest to older deposits.[59] Accordingly, this led plaintiffs to purchase the annuities on the false assumption that the initial higher rate would continue over time.[60] The district court denied class certification.[61]

On appeal, the court discussed standing in assessing whether plaintiffs met the predominance requirement of Rule 23(b)(3) for their California Unfair Competition Law ("UCL")[62] claim.[63] The

---

51 *Id.* (emphasis added).

52 *Id.* at 265.

53 *Id.*

54 *Id. In re Deepwater Horizon* labeled this approach as "the *Denney* test." *In re* Deepwater Horizon, 739 F.3d 790, 801 (5th Cir. 2014).

55 *See, e.g.*, Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023, 1034 (8th Cir. 2010).

56 Avritt v. Reliastar Life Ins. Co., 615 F.3d 1023 (8th Cir. 2010).

57 *Id.* at 1034.

58 *Id.* at 1026.

59 *Id.*

60 *Id.*

61 *Id.* at 1028–29.

62 CAL. BUS. & PROF. CODE §§ 17200–17209 (West 2008).

court analyzed the statutory standing requirements of the UCL claim based on California Supreme Court case law and noted that those requirements were "inconsistent with the doctrine of standing as applied by federal courts."[64] Although the UCL allows uninjured parties to join a class so long as there is a lone representative with statutory standing, the Eighth Circuit noted that under federal constitutional standing requirements, "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves."[65] Those who could not have been injured would not be able to bring a suit themselves, but those who could have suffered an injury could pursue their case.[66]

The Eighth Circuit, similar to the Second Circuit in *Denney*, expressed concerns about classes including unnamed plaintiffs who *could not* have possibly suffered the relevant form of injury, not absent plaintiffs who *might not* have suffered that *particular* injury.[67] *Avritt* thus confirms the interpretation that absent class members lack standing only if they could not have been injured. Other cases expressing similar concerns come to the same conclusion.[68]

These cases confirm the relevant conclusion for present purposes. Standing doctrine does not prevent a court from certifying a class that contains members who will ultimately turn out not to have meritorious claims. As long as the court cannot determine in advance that the class members *could not* be entitled to recover, a class may include them. To put the same point more simply—without the double negative—a court may certify a class provided that each absent member *may* have suffered the relevant form of harm.

---

63 *Avritt*, 615 F.3d at 1029, 1033.

64 *Avritt*, 615 F.3d at 1033–34.

65 *Id.* at 1034.

66 *Id.*

67 *See id.* at 1033–34.

68 *See, e.g.*, *In re* Light Cigarettes Mktg. Sales Practices Litig., 271 F.R.D. 402, 419–20 (D. Me. 2010) (acknowledging that individualized showings of standing are not necessary for absent class members, but finding, in a suit against cigarette manufacturers for falsely advertising the health risks of light cigarettes, that certain unnamed class members lacked standing because some knew the risks of light cigarettes and therefore could not have been injured); *cf.* Mazza v. Am. Honda Motor Co., 666 F.3d 581, 594–95 (9th Cir. 2012) (holding that members of a class in a consumer protection case have Article III standing when the class is defined in a way to include only those who were exposed to the misleading advertisements); Webb v. Carter's, Inc., 272 F.R.D. 489, 498–500 (C.D. Cal. 2011) (denying certification of a class of purchasers who bought tagless children's clothing that caused skin irritation in some consumers because plaintiffs had not alleged that all of the class members actually developed the irritation, and the class members who were not injured could not possibly have been injured by the product at issue).

II. Due Process Doctrine

In addition to standing issues, certifying a class containing uninjured members has the potential to raise procedural due process concerns from the perspectives of both absent class members and defendants. As a practical matter, class actions must limit the autonomy rights of individual litigants.[69] Not every member of a class can control every decision regarding litigation strategy, including whether to settle and, if so, on what terms. Uninjured class members could, in theory, have different concerns or desires than injured class members. Certifying classes with uninjured members poses a risk, then, to the ideal of affording each litigant her day in court.[70] For this reason, Martin Redish has gone so far as to argue that various common procedures in the class context can violate class members' due process rights.[71]

Allowing class actions to proceed with uninjured members could also clash with the individual due process rights of class members in another way. Courts at times award damages on a class basis, rather than an individual basis—a process that can affect the amount of money that each class member receives.[72] A court granting a classwide recovery may choose not to attempt to tailor the remedy to the individual circumstances of each class member, possibly opting instead in appropriate circumstances to allocate the recovery in some formulaic way, perhaps on a pro rata basis.[73] An argument could be made that such classwide recoveries involving classes with *uninjured* members can deprive injured class members of full compensation, violating their due process rights.

Finally, defendants may also argue that the inclusion of uninjured class members in an action against them would violate *their* due process rights. Presumably, the argument would be that including uninjured plaintiffs in a class could require a defendant to pay damages to parties who lack valid claims.

---

69 *See* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 266 (1992).

70 *See generally id.* (outlining the "day in court" ideal and litigative autonomy in class action suits).

71 Martin H. Redish, Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit 135–37 (2009).

72 *See* Davis, *Classwide Recoveries*, *supra* note 8, at 921–22.

73 *See, e.g.*, Stewart v. Gen. Motors Corp., 542 F.2d 445, 452–54 (7th Cir. 1976) (discussing the pro rata approach in relation to awarding a class backpay).

A. Due Process and Class Member Rights

The concern about class member rights could give rise to the claim that including uninjured members in a class violates some class members' constitutional right to due process. This argument could derive either from the compromise of class member autonomy that generally occurs in class litigation or from the potential loss in compensation to some class members when a court awards a classwide recovery.

The Supreme Court has taken a pragmatic approach to these sorts of issues. Consider, for example, notice in class actions.[74] Due process potentially could have required that every class member receive actual notice to be bound by class litigation.[75] That, however, is not what the Court has concluded. It has ruled instead that class members are entitled only to the best notice practicable.[76] This standard generally can be satisfied if class counsel provides notice by U.S. mail to those class members whose identities and addresses are known and makes reasonable efforts to inform other class members that their rights may be affected by pending litigation.[77]

The failure to require actual notice has implications for both autonomy and compensation. A class member cannot exercise choice in class litigation—she cannot decide whether to opt out of litigation or object to any proposed settlement—if she does not know it is occurring.[78] Further, a class member is unlikely to receive compensation from litigation if she does not know she is eligible for a recovery and the class lawyers do not know how to contact her.[79] The notice standard the Court has imposed, then, implies a pragmatic approach for assessing the process that is required to protect class member autonomy and compensation.

As with due process generally, a class member's rights depend upon a cost-benefit analysis.[80] From this practical perspective, in most

---

74 *See generally* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

75 *See Eisen*, 417 U.S. at 165 (discussing the lower court's ruling that due process required individual notice).

76 *Id.* at 173; *Mullane*, 339 U.S. at 317.

77 *Eisen*, 417 U.S. at 175; *Mullane*, 339 U.S. at 318–19.

78 *Cf.* Juris v. Inamed Corp., 685 F.3d 1294, 1302–10 (11th Cir. 2012) (providing a factual example of how the constructive notice requirements can negatively affect an absent class member).

79 *Cf. id.*

80 *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976); *Eisen*, 417 U.S. 156; *Mullane*, 339 U.S. 306.

class litigation—at least where class members have relatively little at stake and class litigation is likely to be the best way to serve their interests—denying class certification or classwide recoveries based on highly abstract concerns about autonomy and compensation would be inappropriate.[81] The approach that is more consistent with precedent is to consider the realities of class litigation.

1. Autonomy and the Class Device

For several reasons, concerns about class member autonomy would seem not to provide a persuasive reason to limit class actions, at least when class members have small-value claims. First, the class device tends to increase the meaningful choices available to class members. Second, given that class members will not always make a choice, but will often accede to whatever the default is, class litigation can promote autonomy by serving class members' interests—putting in place the result that class members would be apt to choose. Third, the best the courts will likely be able to do is honor the choices and interests of the vast majority of class members, recognizing that compromise of some of the members' autonomy and interests may be inevitable.

a. Meaningful Choice

In the abstract, class certification appears, at times, to restrict the autonomy of class members. After all, unless a potential class mem-

---

[81] *See, e.g.*, Connecticut v. Doehr, 501 U.S. 1, 10–12 (1991); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–14 (1985); *Eldridge*, 424 U.S. at 334–35. Indeed, Martin Redish, a proponent of a strong form of autonomy rights for individual class members—a form of rights that would greatly undermine class litigation—finds much of extant constitutional law unacceptable. REDISH, *supra* note 71, at 135–72.

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), both asbestos cases, are distinguishable and therefore consistent with the argument made here. The individual class members in those cases had substantial claims at stake, so that any compromise to due process threatened a meaningful ability to pursue litigation on an individualized basis. *See Ortiz*, 527 U.S. at 821–29; *Amchem*, 521 U.S. at 597–602. *Amchem* involved relatively large individual claims, but some class members had only been exposed to asbestos and had not had injuries manifest yet. *Amchem*, 521 U.S. at 598, 628–29. These class members would therefore be bound by a settlement that would likely not fully compensate them. *See id. Ortiz* involved a proposed class under Rule 23(b)(1)(B), which does not allow plaintiffs to opt out and instead would bind all class members to a limited fund settlement, including those whose injuries had not yet manifested. *Ortiz*, 527 U.S. at 831–32. In both of these cases, the monetary claims were large, and class members ran the risk of being undercompensated or having their claims extinguished. *See Ortiz*, 527 U.S. at 821–32; *Amchem*, 521 U.S. at 597–602, 628–29. Neither case invoked due process to protect rights that were valuable in theory but worthless in practice.

ber opts out of litigation—assuming the class member has that right—she will be bound by the result in litigation.[82] Furthermore, if there is a class settlement, she can object to its terms, and even appeal, but doing so is likely to have limited influence.[83]

To be sure, class members with large claims, particularly if they are sophisticated litigators, may be capable of opting out of class proceedings and litigating on an individual basis.[84] To that extent, if they do not like classwide recoveries, they may avoid them. Class members with small claims, however, generally will not opt out of a class action or object to how it proceeds.[85] These absent class members are apt to lack the understanding, time, or resources to engage actively in litigation. Inertia reigns. One might conclude that class actions in effect deprive these class members of their rights.

As a practical matter, however, class litigation is likely to expand—not contract—a potential class member's options. Excessive fastidiousness in protecting class members' autonomy can render the class device ineffective and narrow class members' real choices. Consider, for example, opt-out and opt-in classes. As noted above, the reality is that the majority of absent class members will neither opt in nor opt out, but will rather accept whichever is the default. In part for this reason, Martin Redish argues that an opt-in class is more respectful of class members' rights than an opt-out class.[86] A class member should be included in a class, he reasons, only after so electing.[87]

---

82 *See* Note, *Conflicts in Class Actions and Protection of Absent Class Members*, 91 YALE L.J. 590, 594–95 (1982).

83 *See generally, e.g.*, Officers for Justice v. Civil Serv. Comm'n of S.F., 688 F.2d 615 (9th Cir. 1982).

84 For a discussion of a recent wave of opt-out settlements in securities litigation, see Kevin M. LaCroix, *Opt-Outs: A Worrisome Trend in Securities Class Action Litigation*, INSIGHTS (OakBridge Ins. Servs., Bloomfield, Conn.), Apr. 2007, at 1–6, *available at* http://www.rt-specialty.com/rtproexec/insights/Insights_VolumeIIIssue3.pdf. For a publication recommending consideration of opting out of antitrust class actions for businesses with more than $10 million in purchases, see James A. Morsch & Jason S. Dubner, *Don't Throw Away That Class Action Notice: Opting Out of Antitrust Class Litigation*, CORPORATE COUNSEL, Dec. 2003, at A5–A6, *available at* http://www.butlerrubin.com/wp-content/uploads/Dont-Throw-Away-That-Class-Action-Notice-Opting-Out-of-Antitrust-Class-Litigation-Corporate-Counsel-December-2003-1.pdf. *See also* REDISH, *supra* note 71, at 131 (noting likely inverse correlation between the size of a claim of a class member and the member's willingness to consent to participation in a class action).

85 *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1533, 1545–57 (2004) (studying the opt out and objection rates of class members across different types of litigation).

86 REDISH, *supra* note 71, at 137, 147–48, 173–75.

87 *Id.*

This opt-in approach, however, could actually restrict class member autonomy. An opt-in procedure would be fatal to many class actions. Too few potential class members might act to create the economies of scale necessary for effective litigation.[88] The procedure would cause some proposed class actions to fail and, as a consequence, discourage others.[89] The opt-in class, then, would deprive potential class members of a meaningful choice whether to participate in class litigation. The result would be that these potential class members would have only *two* options: to pursue litigation individually or not to pursue it at all.

An opt-out class, in contrast, may well permit class litigation to proceed.[90] If so, it gives potential class members *three* choices: to participate in class litigation,[91] to opt out and initiate individual litigation, or to opt out and not sue. In this way, an opt-out class has the potential to provide class members more options than an opt-in class. Thus, altering the structure of class litigation in an effort to enhance class member autonomy could actually restrict that autonomy.

Of course, individual litigation is often not a meaningful choice. For example, a plaintiff who suffers harm from an antitrust violation of $100—or, realistically, even of $10,000—generally cannot afford to hire the attorneys, experts, and the like that are necessary to prosecute a claim,[92] or at least the sorts of complicated claims so often at issue in class cases.[93] In these circumstances, an opt-out class affords a claimant two choices—participating in the lawsuit or opting out and not suing. An opt-in class leaves the claimant with no meaningful choice at all.[94]

---

88 Janet Cooper Alexander, An Introduction to Class Action Procedure in the United States 9 (2000) (unpublished manuscript), *available at* http://law.duke.edu/grouplit/papers/classactionalexander.pdf.

89 *See* Eisenberg & Miller, *supra* note 85, at 1530–38 (discussing how mass opt-outs can destroy litigation and the negative effects of opt-out campaigns).

90 *Cf.* Alexander, *supra* note 88, at 9 (discussing the incentives not to opt out of a class and how these incentives maintain small-claims classes).

91 In a sense, participation could involve two options: remaining in a class passively or remaining in the class and objecting.

92 *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 923–24 (1998).

93 *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974) ("No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount.").

94 Moreover, class members have some options within a class proceeding. They may object, for instance, if they do not like how class counsel are conducting class litigation. *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 72–73 (2007). The power of this choice should not be exaggerated. The right to object most often will not alter the course of litigation. *See id.* at 72–73,

b. Interest as a Proxy for Choice

As previously noted, many class members will not make a choice at all. The default has great power. Under these circumstances, one way to respect the rights of class members is to anticipate their preferences.[95] To be sure, that is an imperfect means. Still, a notion along these lines explains the veil of ignorance in John Rawls's *A Theory of Justice*, where he suggested a thought experiment in which we contemplate how we would view justice if we did not know our actual circumstances or beliefs.[96] Similarly, just as we may respect the autonomy of people who are terminally ill and unable to communicate their desires—by taking the medical measures they *would have* wanted[97]—we may do the same for class members. In other words, we might attempt to construe class members' likely preferences. A plausible inference is that most victims of legal violations would prefer to obtain some recovery through a class action—and to have the prospect of a class action deter similar illegal conduct in the future[98]—than to have no viable claim at all. An opt-out class honors class members' likely preferences understood in this way.

c. The Many Versus the Few

Finally, it is important to recognize that in some instances a class member may not have a chance to opt out of a class action or to object

---

84–110 (detailing the limitations to objecting, the lack of effect of objections, and the incentives not to object). Most objections are unsuccessful, in part because individual class members rarely have the means or incentive to pursue their objections—including on appeal—given the small amount they have at stake in the litigation. *See id.* That point, however, only emphasizes how constrained class members' choices would be if there were no class action at all. A class member who lacks the means to object to a class action settlement—which can require nothing more than writing a letter to a court—almost certainly would be unable to pursue individual litigation on his or her own.

95 *Cf.* Shapiro, *supra* note 92, at 917–19 (discussing how the class should operate as an aggregate entity, working for the good of the class as a whole rather than the wants of individual members).

96 JOHN RAWLS, A THEORY OF JUSTICE, 193–94 (rev. ed. 1999).

97 *See* Kathy L. Cerminara, *Tracking the Storm: The Far-Reaching Power of the Forces Propelling the* Schiavo *Cases*, 35 STETSON L. REV. 147, 150–57 (2005) (detailing the background of the Schiavo cases, involving a patient in a "persistent vegetative state because of brain damage," and showing how the parties shaped their arguments around what the patient would have wanted if she were able to express her desires).

98 Indeed, the prospect of class litigation may deter illegal conduct and protect potential class members in advance. *See* Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 137–38 (2001). One way to frame the issue about members' preferences is in terms of whether they would want that protection.

to how class counsel are prosecuting it.[99] A class member cannot opt out of or object to a class proceeding if, for example, she does not learn about it, which, as noted above, could occur if she receives constitutionally sufficient constructive notice but not actual notice.[100] Some of these class members may prefer not to participate in the litigation—perhaps out of an ideological opposition to class actions or perhaps out of a desire to exercise control over the litigation.[101] However, it is an odd notion of rights that would privilege the autonomy of this small minority—who may or may not be present in any particular case—over the autonomy and interests of the likely majority of class members. Under these circumstances, the default of excluding someone from a class because she did not opt in can restrict autonomy just as much as including her because she did not opt out.

What seems to animate the argument based on class member autonomy is a highly abstract conception of rights. According to that conception, a system of litigation leaves the rights of victims of legal violations intact as long as they have the formal opportunity to file suit, even if they have no meaningful prospect of doing so.[102] On the other hand—again, according to this highly abstract conception—a system of litigation violates legal rights if it places some practical constraints on litigant autonomy, even if it holds the only realistic prospect for compensation, vindication, or deterrence.[103]

Acting on excessive concern for class members' potential and abstract autonomy rights can cause significant harm to their actual autonomy and interests. We should be careful not to deprive people of meaningful choice, and allow wrongdoers to violate legal rights with

---

99 A class member cannot remove herself, for instance, from a mandatory class under Rule 23(b)(1) or 23(b)(2). Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 178–80 (2003). However, if there is a classwide recovery, the members of the class normally have the right to opt out. *See, e.g.*, Eubanks v. Billington, 110 F.3d 87, 88, 93–94 (D.C. Cir. 1997) (holding that a court has the discretion to grant a class member's request to opt out of a settlement despite the mandatory nature of the class under Rule 23).

100 *See supra* notes 74–81 and accompanying text. Even in that situation, however, the class device would not seem to deprive the class member of any significant choice she otherwise would have had. After all, if she does not learn that her rights may have been violated even when class action attorneys attempt to inform her of pending litigation—perhaps by mail, by email, and through an internet site—she would be very unlikely to discover the potential rights violation on her own. In reality, then, without the class device she would have lost her legal rights without any meaningful opportunity to act on them.

101 *See* REDISH, *supra* note 71, at 131.

102 *See id.* at 135–37.

103 *See id.* (arguing that mandatory class actions, and in most circumstances class opt-out procedures, should be found unconstitutional).

impunity, in the guise of preserving options for people—options they are unlikely to want or to be able to pursue. The risk is that the real beneficiaries of these safeguards will be those who violate the law and escape liability because of the practical difficulties of prosecuting litigation. The Constitution need not be read as this sort of a trap for ordinary citizens.

Nothing about constitutional rights requires courts to interpret them in this rigid way—as requiring judges to harm the very citizens whose rights they are supposed to protect. Indeed, as noted above, the practice in the due process context is the opposite: to be practical, not purely theoretical, in defining rights.[104] None of this is to say that the interests and autonomy of class members are unimportant. They are not. In particular situations, concern for class members should restrict the options that are available as part of a class action.[105] It is simply that an abstract and artificial notion of choice should not bar class action procedures that would in reality benefit the vast majority of class members.

2. The Right to Full Compensation

Another potential objection to the inclusion of uninjured parties in a class is that it can compromise the rights of some class members to a full recovery. After all, as proponents of this objection argue, courts awarding or presiding over classwide recoveries may at times engage, for example, in a pro rata allocation of an overall award—depriving some injured class members of the full measure of compensation they might otherwise have received had uninjured members not been included in the class.[106] This concern has some force. Some class members could in theory receive a larger recovery in individual litigation than in class litigation resulting in a classwide recovery.[107]

On the other hand, courts routinely adjust the amount plaintiffs may recover, or deprive them of any recovery at all, for various policy reasons. They do so in a variety of areas of the law—from the substantive to the procedural, and in the gray areas in between. Countless examples make this point.

---

104 *See supra* Part II.A.

105 *See generally* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

106 *See* Davis, *Classwide Recoveries*, *supra* note 8, at 894, 922–25; *see also, e.g.*, Stewart v. Gen. Motors Corp., 542 F.2d 445, 452–54 (7th Cir. 1976).

107 *See* Davis, *Classwide Recoveries*, *supra* note 8, at 922–25, 945–46.

For instance, consider antitrust litigation. Federal antitrust law speaks in very general terms about creating a private right of action for anyone injured by anticompetitive behavior.[108] A straightforward reading of federal antitrust law could make for great complexity in litigating antitrust disputes.[109] Even if a court concluded that conduct harmed competition and raised prices above competitive levels, it can be difficult to trace the effect of those increased prices down the chain of distribution.[110] The initial purchaser of the good or service at issue may recoup some of its losses by raising its prices to its customers, who, in turn, may do the same.[111]

Faced with the prospect of complex and costly economic analysis, the Supreme Court adjusted who may recover damages under federal antitrust law and how their recovery is calculated.[112] The Court held that only those purchasers who bought goods directly—not indirectly—from violators of the antitrust laws may seek damages[113] and that those "direct purchasers" may recover the full overcharge they pay, even if they pass some of it along to their customers.[114] As a result, under federal antitrust law, direct purchasers may receive compensation that is greater than the harm they suffer while indirect purchasers recover nothing at all, even if they suffered harm.[115]

In addition to antitrust litigation, the adjustment of plaintiffs' recoveries due to policy considerations is also apparent in various procedural and quasi-procedural doctrines. The Court's adjustment to the

---

108 Ill. Brick Co. v. Illinois, 431 U.S. 720, 724 n.1 (1977) (noting federal antitrust law permits recovery by "'[a]ny person who shall be injured in his business or property'" as a result of a violation of federal antitrust law (quoting Clayton Act § 4, 15 U.S.C. § 15 (2012))).

109 *Id.* at 731–32.

110 *Id.* at 732–33 ("The demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands . . . .").

111 *See id.* (discussing the "passing on" of heightened concrete block costs from masonry contractors to general contractors to those purchasing finished buildings).

112 *See id.* at 729–35.

113 *Id.*

114 Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 487–94 (1968).

115 The text oversimplifies. A complete analysis of the correlation between actual harm and damages is full of twists and turns. For a discussion of issues regarding the compensation of actual victims of antitrust violations see Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1 (2013). Note that competitors may bring claims for damages under federal antitrust law. *See* Clayton Act § 4, 15 U.S.C. § 15 (2012) (allowing suits by all those injured by a violation of federal antitrust law). Also note that some states allow indirect purchasers to recover under state law, so these purchasers may not be entirely deprived of an opportunity to recover. *See, e.g.*, California v. ARC Am. Corp., 490 U.S. 93, 101–06 (1989) (holding that states may enact statutes allowing for recovery by indirect purchasers).

pleading standard in *Bell Atlantic Corp. v. Twombly*[116] and *Ashcroft v. Iqbal*,[117] for example, made it harder for plaintiffs to survive a motion to dismiss for failure to state a claim.[118] That means that the Court made a trade off: it increased the number of plaintiffs with meritorious claims who will recover nothing in order to increase the number of defendants with meritorious defenses who will escape liability entirely.[119]

Similar policy considerations inform numerous doctrines that shape awards to plaintiffs.[120] Thus, nothing is particularly unusual about using the class device in a way that benefits some class members—even if it harms others—to promote the good of the class as a whole.[121]

To be sure, courts at times have resisted doctrines that seem to allocate recoveries to promote policy goals.[122] Perhaps the most pertinent example is fluid recovery. In fluid recovery, a court awards compensation to a group that approximates the original group that suffered harm.[123] For example, if a taxicab operator overcharges its customers, a fluid recovery might involve a court ordering the operator to offer discounts to its customers in the future.[124] The members of

---

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

117 Ashcroft v. Iqbal, 556 U.S. 662 (2009).

118 *See id.* at 677–78; *Twombly*, 550 U.S. at 555–57.

119 *See, e.g.*, *Iqbal*, 556 U.S. at 677–78; *Twombly*, 550 U.S. at 555–57.

120 A list would include countless limitations on damages, including, among others, those based on uncertainty, speculativeness, and the economic loss rule.

The cy pres doctrine provides a particularly pertinent example. Numerous federal courts have recognized in class actions that they may allocate any residual recovery that does not reach class members to other worthwhile causes, ordinarily ones related somehow to the underlying litigation. *See* Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 619–20 (2010). Borrowing from a doctrine that developed in the context of trusts, courts use the French phrase *cy pres* when taking this measure. *Id.* at 624. The notion is that it is better to make some productive use of funds than to return ill-gotten gains to wrongdoers. *Id.* at 618–21.

Much like classwide recoveries, cy pres may increase a defendant's liability beyond the cumulative individual recoveries that would occur without the class device and it may alter the recipients of the compensation a defendant pays. *See id.* at 622–23, 633–38 (detailing the rise of cy pres in class actions and its mechanics). Yet courts have not condemned the cy pres doctrine on this basis. *See id.* at 634–39 (discussing how courts have developed the modern theory of cy pres). The cy pres doctrine provides a basis, by analogy, for classwide recoveries in the class context. For an article criticizing cy pres on that basis, see generally *id.*

121 *See* Davis, *Classwide Recoveries*, *supra* note 8, at 912–15.

122 *See, e.g.*, Alan B. Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 OR. L. REV. 993, 993–97 (2012) (discussing tradeoffs in rules generally).

123 *See* 5 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE § 23.46[2][e] (3d ed. 2013).

124 *See, e.g.*, Daar v. Yellow Cab Co., 433 P.2d 732, 746 (Cal. 1967); *see also* 5 MOORE, *supra* note 123, § 23.46[2][e] n.54 (listing cases).

the group receiving compensation—the new customers—are not the same as the members who were originally harmed—the past customers—although there may be some overlap between the two.[125] Instead, there is a kind of identity at the group level.

A distinctive aspect of fluid recovery, at least in many cases, is that it awards a recovery to class members that the court knows *could not possibly have been harmed*.[126] For example, a first-time passenger in a taxicab may receive compensation even though she could not possibly have paid too much on an earlier trip. In part for this reason, federal courts have been skeptical of fluid recovery in general, although they have at times approved its use when it allocates funds only to members of a group who *may* have been injured.[127]

Recovery by plaintiffs who could not possibly have been harmed does *not* generally occur under the direct purchaser rule in antitrust, the civil pleading standards, or, for that matter, classwide recoveries. As to direct purchasers, they must prove that they paid an overcharge, even if the damages measure allows the court to avoid figuring out exactly how much harm, if any, they actually suffered.[128] Similarly, the standards for pleading or proving a claim require each plaintiff to cross some threshold between a weak claim and a strong one, even though some meritless claims will be able to meet that standard and some meritorious ones will not.[129]

The same is true of classwide recoveries. Classes generally are defined to include only those members who have characteristics suggesting that they *may* have been harmed by the conduct at issue, e.g., they were a member of a protected group, potentially eligible for a promotion, and allegedly suffered from illegal discrimination; they bought a product or service at the relevant time from a participant in alleged anticompetitive conduct; or they bought a service or product that was the subject of fraud.[130] Indeed, as discussed above, standing doctrine tends to ensure that all class members *could have been* harmed.[131] To be sure, like fluid recovery, each of these other doc-

---

125 *See* Daar, 433 P.2d at 746; 5 MOORE, *supra* note 123, § 23.46[2][e] n.54.

126 *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 179, 183–84 (2d Cir. 1987) (affirming settlement fund involving fluid recovery without requiring proof by class members of individual causation and injuries).

127 *See id.*

128 *See id.*; 5 MOORE, *supra* note 123, § 23.46[2][e] & n.54.

129 *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–57 (2007).

130 *See supra* Part I.

131 *See supra* Part I.

trines has the potential to allow uninjured plaintiffs to recover. Unlike the suspect use of fluid recovery, however, the other doctrines are designed to benefit only those plaintiffs who could *potentially* have been harmed.

In sum, using a classwide recovery to achieve proper levels of deterrence and compensation should not offend class members' due process rights. That form of recovery is merely a reasonable means of litigating legal rights, just as individual litigation is.

B. Due Process and Defendant Rights

Certifying classes that contain uninjured class members could also compromise the due process rights of defendants. Judge Posner has worried, for example, that such an approach could potentially magnify the exposure of a defendant to damages.[132] This argument, however, loses most—if not all—of its force when the total amount of harm for which a defendant is liable is not affected by the presence of uninjured members in a class.[133]

Consider, for example, an antitrust case in which plaintiffs conduct a multivariate regression analysis to determine the total harm caused by an allegedly anticompetitive practice, such as price fixing. Assume, as may occur, that the regression analysis enables a court to assess with a high degree of confidence the total harm caused by the conduct (e.g., the dollar amount in overcharges paid by the class as a whole), but not with equal confidence the allocation of that harm among class members.[134] Eliminating uninjured members from the class would not affect the total exposure of the defendant to damages. Subtracting a class member with no damages would not decrease that total. Instead, it would simply involve a shift of recoveries from one class member to another (an issue addressed above).[135]

---

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

133 An intriguing recent example of this phenomenon occurred in *In re High-Tech Emp. Antitrust Litig.*, 289 F.R.D. 555 (N.D. Cal. 2013). The court found that the plaintiffs were able to provide a reliable means for calculating damages to the class as a whole but expressed reservations about whether they had shown that the conduct had harmed "all or nearly all" class members. *Id.* at 577–82.

134 *See* Davis, *Classwide Recoveries*, *supra* note 8, at 913–14.

135 *See id.* Actually, as a technical matter, it may be that a regression analysis indicates some class members *benefited* from the allegedly illegal conduct, i.e., *paid less* than they would have without the illegal conduct, and, as a result, eliminating them from the analysis might *increase* the total amount of computed damages and thus increase a defendant's total liability. *See, e.g.*, *PIMCO*, 571 F.3d at 676 (describing the defendant's argument that some class members likely benefitted from his scheme); Davis, *Classwide Recoveries*, *supra* note 8, at 940–41.

A defendant may nonetheless make a more technical argument, to wit, that the inclusion of uninjured class members would result in payment of damages to parties the defendant did not harm, something that should not occur as a matter of principle.[136] As long as the amount of damages is unaffected by the presence of uninjured members in a class, however, this argument remains weak. Again, the due process inquiry should be practical.[137] A defendant suffers little, if any, meaningful harm when it is forced to pay the right amount of damages, though not necessarily all of it to the right parties. In contrast, class members—and society as a whole—may suffer a very real and significant harm if a court refuses to certify a class because plaintiffs cannot show precisely which members suffered the relevant form of injury.[138] Many of them—or all of them—may not be able to pursue their claims at all.[139]

This is particularly likely to be true in cases where damages are small enough that bringing an individual suit is simply not feasible.[140] Many class members would be completely deprived of the benefits of litigation if defendants were allowed to claim that the inclusion of uninjured class members violates their due process rights.[141] Due pro-

---

136 *Compare In re* Deepwater Horizon, 732 F.3d 326, 340–44 (5th Cir. 2013) (suggesting in dicta that a class certified for purposes of settlement cannot compensate uninjured class members), *with id.* at 358–60 (Dennis, J., concurring in part and dissenting in part) (arguing that a class action settlement may include uninjured members based on Article III standing doctrine and the Rules Enabling Act). Judge Dennis would seem to have the better argument, in that outside of the class context parties may settle their claims regardless of whether they have Article III standing; but discussion of that issue is beyond the scope of this Article.

137 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950). The Supreme Court has laid out a balancing test to determine how rigorously due process requirements should be applied in any particular instance, in which three factors are considered: (1) the private interest affected by the prejudgment measure; (2) the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and (3) the interests of the party seeking the prejudgment remedy. Connecticut v. Doehr, 501 U.S. 1, 11 (1991) (adopting the original *Mathews* balancing test for lawsuits between private individuals, in addition to those between private individuals and the government). Essentially, this test reinforces that due process rights depend on a cost-benefit analysis. *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (defining the balancing test for the application of due process requirements to government action depriving a party of a benefit); Eisen v. Carlisle, 417 U.S. 156, 176 (1974) (holding that due process can require that practicable steps be taken to make individual notification to class members, even if such notification would be costly or burdensome); *Mullane*, 339 U.S. at 314–15. For an historical argument that defendants' due process rights in class actions are properly assessed through this sort of cost-benefit analysis see Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 UTAH L. REV. 319.

138 *See supra* notes 82–94 and accompanying text.

139 *See supra* notes 82–94 and accompanying text.

140 *See supra* notes 82–94 and accompanying text.

141 *See supra* notes 82–94 and accompanying text.

cess does not support an outcome that effectively makes plaintiffs lose regardless of the merits.[142]

III. Federal Rules Enabling Act

Another possible objection to certifying classes with uninjured members, and especially awarding damages on a classwide basis, is that doing so would alter the substantive rights of the parties. Courts cannot apply Rule 23 in a way that would change substantive law. The Rules Enabling Act[143] gives the Supreme Court the power to prescribe general rules of procedure for cases in U.S. district courts.[144] However, "such rules may not abridge, enlarge or modify any substantive right."[145] Rule 23 therefore cannot abridge, enlarge, or modify a substantive right.[146]

In response to this objection, a key task is drawing the distinction between substance and procedure. Although the decision whether to certify a class with uninjured members appears to be clearly procedural—as clarified by the Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[147]—the choice between awarding classwide or individual recoveries presents a more subtle problem. To be sure, the Rules Enabling Act should create little or no barrier to awarding classwide damages based on federal substantive law because federal courts may adapt federal substantive rights to procedural realities. On the other hand, cases arising from substantive rights outside of this power are more vexing. This Section suggests that one way to address these cases is to recognize that neither an individualized nor a classwide approach to awarding damages is built into the substantive law. They merely provide competing ways to litigate disputes. Under this view, classwide recoveries do not violate the Rules Enabling Act.

A. Certification of Classes with Uninjured Members

In light of the Supreme Court's recent decision in *Shady Grove*, allowing certification of a class with uninjured members would seem

---

142 *See* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (noting that states have the freedom to regulate the procedure of their courts, "unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

143 Rules Enabling Act, 28 U.S.C. §§ 2071–2077 (2012).

144 *Id.* § 2072(a).

145 *Id.* § 2072(b).

146 Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999).

147 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010).

to be a procedural choice under the Rules Enabling Act.[148] There, the Supreme Court found that rules allowing multiple claims to be litigated together, such as Rule 23, "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights."[149] Instead, these rules alter only the method in which claims are processed.[150] Thus, they do not violate the Rules Enabling Act.[151]

At issue in *Shady Grove* was a New York statute that barred class actions in suits seeking penalties.[152] Despite the statute, the plaintiff sought to pursue its New York state law claims—including seeking penalties—on a class basis in federal court.[153] After the Court determined that Rule 23 conflicted with the New York state law, the issue arose whether Rule 23 violated the Rules Enabling Act.[154] The Court concluded that it did not.[155] After all, the Court reasoned, "[a] class action . . . merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. . . . [I]t leaves the parties' legal rights and duties intact and the rules of decision unchanged."[156]

Even if a class is certified with potentially uninjured members, a court will address the same claims and defenses. It will simply litigate common issues in a common—and therefore more expeditious—manner. If individual issues need to be addressed, the court can adjudicate them on an individual basis. Under *Shady Grove*, the difference in procedure should not present a problem under the Rules Enabling Act.

B. The Choice Between Individual and Classwide Recoveries

Matters become more complicated when the choice of procedures for adjudicating claims may influence the amount of recovery of class members. In this regard, it is important to keep in mind two circumstances. The first involves the setting of the claim—a federal court with the power to interpret federal law. In that setting, the Rules Enabling Act should not prevent a federal court from adapting federal substantive rights to procedural realities. The result is that a

148 *See id.*
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.* at 397–98.
153 *Id.*
154 *Id.* at 398, 404–06.
155 *Id.* at 408.
156 *Id.*

federal court adjudicating a class action based on federal substantive rights may make various decisions—including choosing how to calculate damages—without contravening the Rules Enabling Act. In the end, the Rules Enabling Act is simply not implicated.

A more difficult issue arises when federal courts have little or no power to interpret the substantive law at issue in a case. For example, consider a federal court adjudicating a state law claim. In that situation, the options available to the federal court—including whether to measure and award damages on a class basis—will depend on the scope of what counts as procedural.[157] While the line between substance and procedure remains somewhat vague under *Shady Grove*, that decision provides some basis for concluding that awarding damages to a class as a whole may be procedural, even if it affects which litigants may recover or how much they may recover.[158]

1. Federal Courts May Adapt Federal Substantive Law to Procedural Realities

Although Rule 23 cannot itself modify substantive legal rights, federal courts can do so in interpreting federal substantive law, including to exploit procedural opportunities and adapt to procedural realities.[159] Just as Congress can craft substantive law with procedure in mind,[160] so may federal courts.[161] As federal judges modify the law through a common law process, the Rules Enabling Act should not bar them from considering the procedural ramifications of the substantive standards they devise.

Indeed, federal courts have often taken practical procedural considerations into account in developing substantive rights under federal law. Antitrust is rife with examples. Consider again the rule that, generally speaking, direct purchasers are the only entities in the chain of distribution that may seek damages for violations of federal antitrust law.[162] Consider also the rule that direct purchasers may recover the full overcharge they pay as a result of a violation of federal antitrust law, regardless of whether they are able to pass on some of the

---

157 *See id.* at 408; Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938).

158 *See Shady Grove*, 559 U.S. at 408.

159 *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 472 (1965).

160 *See Shady Grove*, 559 U.S. at 406.

161 *See, e.g.*, *Hanna*, 380 U.S. at 472.

162 Ill. Brick Co. v. Illinois, 431 U.S. 720, 729 (1977) ("[A]n indirect purchaser should not be allowed to use a pass-on theory to recover damages from a defendant unless the defendant would be allowed to use a pass-on defense in a suit by a direct purchaser.").

overcharge to their customers.[163] These rules do not derive from the relevant statutory language or history. They are the product of pragmatic policymaking by the federal courts in light of the cost and difficulty of tracing the effects of antitrust violations, policymaking that specifically considered procedural context.[164]

Similarly, the federal courts have held that the filing of a class action complaint tolls the statute of limitations for the members of the proposed class.[165] One way to understand this rule is as modifying substantive law. At times courts consider a statute of limitations to be substantive.[166] Thus, for federal causes of action at least, one might read the tolling of a statute of limitations as a change in substantive law to adjust it to the class context.[167] If so, similarly adjusting the measure of recovery to adapt it to the class context also seems appropriate.

2. Awarding Classwide Recoveries May Be Procedural

A more problematic situation arises when federal courts cannot adapt substantive rights to a class context, such as cases based on state substantive law. In these situations, the Rules Enabling Act governs and classwide recoveries may be employed only if they do not alter substantive rights.[168] Distinguishing substance from procedure is difficult, but changing the method for calculating the class recovery arguably falls into the procedure category.

True, permitting classwide recoveries could have a profound effect on the outcome of litigation. But so do pleading standards. Yet the Supreme Court has recently made significant changes to pleading requirements, apparently without running afoul of the Rules Enabling Act.[169] Like pleading standards, allowing claims to proceed on a class

---

163 Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489, 494 (1968).

164 *See, e.g.*, *id.* at 492–94 (discussing the difficulty of calculating the impact of monopolistic behavior on a company's pricing policy after the fact, therefore making a pass-on defense an impracticality that would "often require additional long and complicated proceedings").

165 Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552–53, 561 (1974).

166 *See, e.g.*, Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533 (1949) (holding that state law governed whether filing or service of complaint tolled statute of limitations in federal court diversity action); *cf.* Chardon v. Fumero Soto, 462 U.S. 650, 661–62 (1983) (applying state law to decide effect of filing of class action on tolling of statute of limitations).

167 *See, e.g.*, *Am. Pipe & Constr. Co.*, 414 U.S. at 552–55.

168 *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co, 559 U.S. 393, 398 (2010) (limiting the application of *Erie* in the Court's analysis).

169 *See* Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–57 (2007).

basis also profoundly affects litigation.[170] Yet the Supreme Court held in *Shady Grove* that no violation of the Rules Enabling Act occurs when a federal court adjudicates a state claim on a class basis that would have to be litigated on an individual basis in state court.[171] Given this background, there is a good argument that classwide recoveries for classes including uninjured members do not alter substantive legal rights, but rather simply provide an alternative method of adjudicating those rights—indeed, a method that in some circumstances may be more respectful of substantive rights than litigating one individual claim at a time.

Herein lies what is likely the crux in determining whether classwide recoveries violate the Rules Enabling Act. If the incidents of individual litigation are part of the substantive law, then any variation from them can be understood to effect a change in the substantive law. A different perspective, however, is also possible. Individual litigation and classwide litigation may simply be *alternative* procedural options. And neither may itself be part of the substantive law. According to this view, just because classwide adjudication may yield outcomes that are not precisely the same as individual litigation does not mean that the class proceedings violate the Rules Enabling Act. Individual litigation may be the norm in the sense that it occurs with the greatest frequency, but that does not necessarily mean that the Rules Enabling Act mandates imposition of the same requirements for prevailing on a claim and obtaining relief in class litigation as in individual litigation.

In this regard, it is important to note that neither individual nor class proceedings a priori honors substantive legal rights more effectively. Mark Geistfeld has made a point along these lines in discussing market share liability.[172] He claims that a goal of tort law is to minimize error costs, and courts should be flexible about when they pursue this goal on an individual or aggregate basis.[173] The same point might be made in assessing procedure.[174] Just as in tort law, the decision of which procedure to adopt could be based on the merits of each option.[175]

---

170 *See Shady Grove*, 559 U.S. at 455–58 (Ginsburg, J., dissenting).

171 *See id.* at 400–02.

172 *See* Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. PA. L. REV. 447, 453 (2006).

173 *See id.*

174 *See id.* at 462.

175 For further discussion of this point, see Davis, *Classwide Recoveries*, *supra* note 8, at

To invoke another analogy, the massive changes in federal procedure that occurred in 1938 fundamentally altered how parties litigate, and no doubt in many cases altered which parties won and lost.[176] That profound impact, however, did not render the changes substantive. One system of procedure simply displaced another. And the new system—it is hoped—sought to remain true to substantive law in much the same way as the old system.[177] The same may well be true—albeit on a more modest scale—when courts use collective actions to award classwide recoveries.

Thus, *Shady Grove* can be interpreted to support the view that individual and class litigation are simply competing alternatives. As discussed above, the Supreme Court held that the choice whether to allow a case to go forward on a class basis is a procedural one.[178] True, some of its reasoning suggests that class litigation must produce just the same entitlements as individual litigation.[179] On the other hand, the New York law at issue in *Shady Grove* seemed an extreme case of a legislature attempting to build the individual litigation norm into the fabric of the law.[180] Yet the Supreme Court held the contrary approach under Rule 23 to be permissible under the Rules Enabling Act.[181] A broad reading of *Shady Grove* supports the proposition that class and individual litigation should be treated as having equal footing—as alternative means to implement the substantive law as effectively as possible.[182]

Classwide recoveries in some circumstances may provide a more efficient and accurate system for adjudicating substantive rights than individual recoveries. As discussed in another article that is part of this Symposium, classwide recoveries can sometimes produce signifi-

---

897–902, 936–38 (contrasting classwide and individualized recovery approaches and the concerns associated with each).

176 *See generally* Alexander Holtzoff, *A Judge Looks at the Rules After Fifteen Years of Use*, 15 F.R.D. 155 (1953) (analyzing the effect of the Federal Rules adopted in 1938 over the course of their first fifteen years in existence).

177 *See id.* at 173–74 (declaring the Federal Rules a success because they removed the extremely technical barriers of the past while retaining the purpose of the law).

178 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 408 (2010).

179 *See, e.g.*, *id.* (noting joinder rules "neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed").

180 *See id.* at 397–98.

181 *See id.* at 408.

182 Note that the Court has at times indicated that some statutes create legal rights that a party may demand be adjudicated on an individual basis. *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011) (discussing defendant's statutory right to raise certain individualized defenses). That does not mean, however, that all substantive rights have this nature.

cantly lower error costs than individualized litigation.[183] As a result, classwide recoveries may actually honor substantive rights more effectively than an individualized approach.

The fact that classwide recoveries may show greater fidelity to substantive rights than individual litigation does, at least in appropriate cases, provides a strong reason to understand those recoveries as procedural. After all, one might think as a matter of substantive law that a defendant should be held liable, where possible, for only the legally cognizable harm that it causes and for all of the legally cognizable harm that it causes.[184] As discussed in *Classwide Recoveries*, individual litigation at times achieves this aim highly imperfectly.[185] When classwide recoveries provide a more effective means to vindicate substantive rights, it is odd to think of them as changing the substantive law. To the contrary, they seem to realize substantive law more fully. In comparison, it is individual litigation that seems to compromise substantive rights. Any contrary view seems to treat individual procedures as part of the substantive law itself. An assumption that the substantive law instantiates an individualized assessment of claims requires at least some justification, particularly after *Shady Grove*.

This analysis provides a useful context for assessing the Court's analysis in *Wal-Mart Stores, Inc. v. Dukes*.[186] Before the Court was a nationwide class of female Wal-Mart employees alleging sex discrimination.[187] In addition to reversing certification of the class for lack of commonality,[188] the Court raised concerns under the Rules Enabling Act about the Ninth Circuit's recommendation for "Trial by Formula."[189] According to the Court, the Ninth Circuit planned to use sampling to determine the percentage of valid claims and then, without opportunity for Wal-Mart to present individual defenses, to calcu-

---

183 *See* Davis, *Classwide Recoveries*, *supra* note 8, at 916–28 (analyzing error costs across classwide and individual litigation).

184 *See, e.g.*, Benjamin C. Zipursky, *Evidence, Unfairness, and Market-Share Liability: A Comment on Geistfeld*, 156 U. PA. L. REV. PENNUMBRA 126, 134–35 (2007) (arguing that defendants should not be liable for harms they likely did not cause). Use of the phrase "legally cognizable" may seem to beg the key question here, but it is necessary because the law, for various policy reasons, often allows a greater or lesser recovery than the harm a defendant causes. *See, e.g.*, Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 346–47 (2004) (describing how courts have separated what constitutes a legally cognizable harm from the amount awarded in damages in wrongful life actions).

185 *See* Davis, *Classwide Recoveries*, *supra* note 8, at 897–98, 916–21.

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

187 *Id.* at 2549.

188 *Id.* at 2556–57.

189 *Id.* at 2561.

late Wal-Mart's total liability based on extrapolation of the sampling data.[190] Under this approach, Wal-Mart would lose the chance to prove, for example, that individual applicants were denied employment opportunities for lawful reasons, a defense provided by statute.[191] The Court rejected this approach: "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims."[192]

The Court's pronouncement can be interpreted in several ways. First, the Court may have been suggesting that the Rules Enabling Act always requires that a defendant have the right to litigate defenses on an individual basis.[193] Second, it may have been indicating that the federal employment discrimination statute in particular entitles a defendant to litigate defenses individually.[194] These interpretations, however, seem overly broad—at the least mere dicta. After all, according to the Court, the Ninth Circuit did not provide means for adjudicating Wal-Mart's defense that there were lawful reasons for how particular women were treated.[195] Moreover, elsewhere in its opinion, the Court noted that the plaintiffs' expert could not "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart."[196] As the Court pointed out, the plaintiffs' expert "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking."[197] With these considerations, *Dukes* may simply stand for the proposition, then, that the Rules Enabling Act prevents a classwide approach from depriving a defendant of any opportunity to assert its legal defenses. Likewise, it does not necessarily mean the Rules Enabling Act always requires courts to litigate defenses on an individual basis.[198]

---

190 *Id.*

191 *See id.*

192 *Id.* (citations omitted) (quoting 28 U.S.C. § 2072(b) (2012)).

193 *See id.*

194 The Court's discussion of the standard approach to "pattern-or-practice" cases hints at this possibility. *See id.* at 2560–61.

195 *Id.*

196 *Id.* at 2553 (internal quotation marks omitted).

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

198 It is noteworthy that the Court in other cases has assessed claims and defenses on a classwide basis, suggesting the propriety of doing so. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 328–32 (1977); Frontiero v. Richardson, 411 U.S. 677, 682–91 (1973). We are grateful to Sam Issacharoff for making this point at the proceedings of the conference at which this paper

Conclusion

In sum, the presence of uninjured members in a class does not by itself run afoul of Article III, due process, or the Rules Enabling Act. Matters are somewhat more complicated when it comes to awarding a recovery on a classwide basis if a class includes uninjured members. However, we believe that a classwide award even under such circumstances does not necessarily violate standing doctrine, due process rights, or the Rules Enabling Act. Jurisdictions that have certified classes containing uninjured members should be free to continue that practice.

---

was presented. Also noteworthy, in *Dukes*, the lack of a clear sense of the percentage of women harmed could have meant that the presence of uninjured members of the class could have increased Wal-Mart's total exposure to damages. *See supra* notes 8, 134–35 and accompanying text.

University of San Francisco School of Law

University of San Francisco Law Research Paper No. 2010-06

ANTITRUST, CLASS CERTIFICATION, AND THE POLITICS OF PROCEDURE

Joshua P. Davis and Eric L. Cramer

ANTITRUST, CLASS CERTIFICATION, AND THE POLITICS OF PROCEDURE

Joshua P. Davis[*] *and Eric L. Cramer*[**]

INTRODUCTION

In deciding whether to certify classes, courts traditionally refuse to resolve factual issues pertaining to the merits.[1] This approach governs in general and in antitrust cases in particular.[2] However, some courts have recently indicated that a change in the certification standard may be appropriate.[3] They seem to suggest that judges may—perhaps should or even must—find some facts relevant to the merits in ruling on certification.[4]

We have raised concerns elsewhere about this potential procedural innovation.[5] One concern is that its rationale—that it is necessary to prevent corporations from being coerced into settling frivolous actions[6]—lacks an adequate basis in theory or evidence.[7] Another concern is that it could wreak havoc with the orderly administration of litigation, either requiring a premature resolution of merits issues or a belated ruling on certification.[8] Yet another concern is that it effects a change in Federal Rule of Civil Procedure 23 through an improper process; that is, it does not follow the pro-

---

* Professor and Director, Center for Law and Ethics, U.S.F. School of Law. We are grateful for the comments of Steve Bundy, Simona Grassi, Tristin Green, Patrick Hanlon, Geoffrey Hazard, Deborah Hensler, Deborah Hussey Freeland, David Levine, Thom Main, Richard Marcus, Frances McGovern, David F. Sorensen, and the participants in the Bay Area Civil Procedure Forum and the George Mason Law Review's 13th Annual Symposium on Antitrust Law. We thank Chris O'Connell for excellent research assistance.

** Shareholder, Berger & Montague, P.C.

1 The origin of this approach lies in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

2 *See, e.g.*, *In re* Linerboard Antitrust Litig., 305 F.3d 145, 152 (3d Cir. 2002) (requiring not that plaintiffs prove, but only that they "have shown that they *plan to prove* common impact by introducing generalized evidence which will not vary among individual class members" (emphasis added) (quoting *In re* Linerboard Antitrust Litig., 203 F.R.D. 197, 220 (E.D. Pa. 2001))).

3 *See* cases cited *infra* note 4.

4 *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008); *In re* New Motor Vehicles Canadian Export Antitrust Litig. (*Canadian Cars*), 522 F.3d 6, 17 (1st Cir. 2008); Blades v. Monsanto Co., 400 F.3d 562, 567 (8th Cir. 2005).

5 Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists?: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 RUTGERS L.J. (forthcoming 2010) (manuscript at 1), *available at* http://ssrn.com/abstract=1542143.

6 *Hydrogen Peroxide*, 552 F.3d at 310; *Canadian Cars*, 522 F.3d at 26.

7 Davis & Cramer, *supra* note 5 (manuscript at 1).

8 *Id.*

cedures required by the Rules Enabling Act for modifying the Federal Rules, nor does it abide by the protocols for enacting legislation.[9]

After a cursory review of these points, this Article develops two additional criticisms of the potential new class certification standard, ones we have addressed briefly before but not yet fully explored. The first is that resolution of merits facts—particularly in antitrust cases—is apt to exacerbate a judicial tendency to impose requirements at class certification that serve no legitimate purpose.[10] The second is that the potential new standard risks violating the Seventh Amendment.[11]

The first point is predicated on recognition that the decision whether to certify a class in an antitrust case tends to turn on whether plaintiffs have proposed a method of proving class-wide injury, or "common impact," at the class certification stage.[12] The concept of common impact is the subject of considerable confusion among courts and commentators.[13] A source of that confusion is that common impact embodies two related issues: (1) whether the challenged conduct would be expected to have caused harm as a general matter;[14] and (2) whether the challenged conduct would have caused widespread harm to class members or, in its more extreme articulation, whether it would have harmed *all* (or *virtually all*) of them.[15]

The latter issue tends to be the focus of recent class decisions. While the great bulk of courts hold that proof of widespread harm among class members is sufficient to establish common impact, some courts suggest—usually in dicta and without analysis or explication—that for a class to be certified, plaintiffs must propose a way to use common evidence at trial to show that all (or nearly all) of the class members suffered harm.[16]

The combination of requiring a showing that all or nearly all class members were injured with a new emphasis on resolving facts—even facts relevant to the merits—at the class certification stage could be read as creating a wholly new and artificial standard, a standard insufficiently connected to any issue appropriate for consideration at either the class certification

---

9 *Id.*

10 *See infra* Part I.

11 *See infra* Part III.

12 *See, e.g.*, *In re* Linerboard Antitrust Litig., 305 F.3d 145, 151 (3d Cir. 2002); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310-11 (3d Cir. 2008); Blades v. Monsanto Co., 400 F.3d 562, 572 (8th Cir. 2005); *see generally* Davis & Cramer, *supra* note 5 (manuscript at 5).

13 *Compare* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974), *with Hydrogen Peroxide*, 552 F.3d at 311.

14 *Hydrogen Peroxide*, 552 F.3d at 313-14.

15 *Id.*

16 *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 311-12; *In re* New Motor Vehicles Canadian Export Antitrust Litig. (*Canadian Cars*), 522 F.3d 6, 28 (1st Cir. 2008) (appearing to say that common proof is necessary to show that "each member of the class was in fact injured").

stage or at trial.[17] The class certification decision is supposed to focus on the practicality and fairness of litigation and, ultimately, the trial of a case on a class-wide basis. More specifically, to prevail on class certification under Federal Rule of Civil Procedure 23(b)(3), plaintiffs are required to demonstrate, in relevant part, that issues common to the class will predominate over issues specific to individual class members in the litigation and trial of the case.[18] The possible new class certification standard misinterprets this requirement in two ways.

First, the new standard imposes a requirement for class certification that is strangely unmoored to the showing plaintiffs will be asked to make on the merits. A straightforward approach to predominance is to focus on what plaintiffs will need to prove at trial and then to ask whether they can attempt to offer that proof through predominantly common evidence. Yet at trial—and on motions to dismiss or for summary judgment—plaintiffs are not ordinarily required to show that all or some specific percentage of the class members suffered harm. The jury trial instructions adopted by courts generally require plaintiffs to prove only: (1) a violation of the law; (2) that the violation caused harm to plaintiffs, the class in general, or both (but not that it caused harm to all or some set percentage of class members); and (3) the aggregate damages the conduct at issue caused to the class as a whole.[19] At trial, judges, plaintiffs, and defendants show little interest in determining which members of the class were—and which were not—damaged by defendants' anticompetitive conduct.[20] The same is true of much of the case law: it requires a showing that any harm would be widespread among class members, not that all (or virtually all) class members suffered injury.[21] At the class certification stage, then, evidence predominantly common to the class consistent with widespread injury should suffice for class certification.

There is a possible objection to this view that we must consider. Federal Rule of Civil Procedure 23 can alter the process for adjudicating substantive legal rights, but it cannot alter those substantive rights.[22] The objection is that allowing plaintiffs to show only a violation, widespread harm from that violation, and aggregate damages—and not requiring them to

---

17 Notably, while the recent willingness of courts to resolve factual issues at class certification has drawn substantial commentary, little attention has been paid to the suggestion that "common impact" may require proof of injury to all or virtually all class members—perhaps because courts making this suggestion do not seem to realize that they could be altering the legal standard and offer no justification for any change that may take place.

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

19 *See* Special Verdict Form at 1-7, *In re* Scrap Metal Antitrust Litig., No. 1:02cv0844 (N.D. Ohio Feb. 9, 2006) [hereinafter *In re Scrap Metal* Special Verdict Form]; Davis & Cramer, *supra* note 5 (manuscript at 5).

20 *See, e.g.*, *In re* Linerboard Antitrust Litig., 305 F.3d 145, 145 (3d Cir. 2002).

21 *See* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 155, 157-59 (1982).

22 The Rules Enabling Act does not permit the adoption of Federal Rules of Civil Procedure that "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (2006).

show harm to each and every class member—would relax the substantive requirements of an antitrust claim. There are two potential responses to this argument. The first is that allowing an aggregate recovery without showing injury to every class member does not deprive defendants of any substantive rights. As long as plaintiffs demonstrate that their method for proving class-wide damages would not hold a defendant liable for any more harm than it caused to the class as a whole, then plaintiffs carry their burden regarding every element of an antitrust claim for every dollar the class recovers. Put another way, the damages computation will not include any damages for any class member who does not satisfy every element of an antitrust claim. In antitrust cases, standard economic methods can provide an accurate calculation of damages to the class as a whole such that the presence of uninjured members in the class does not affect the total recovery. As a result of the availability of such methods, requiring only widespread injury to the class—and not evidence that all class members were harmed—does not affect defendants' substantive rights. Given these circumstances, plaintiffs' inability to produce evidence capable of proving that all class members suffered antitrust injury should not bar class certification or a class recovery at trial. If any uninjured class members can be identified, they can be carved out of the class. If they cannot be identified, the presence of uninjured members in the class generally will neither expand the class's substantive rights nor expose the defendant to a single dollar of excessive damages.

The second response to this objection is that while Rule 23 cannot alter substantive rights, federal courts are free to adapt substantive antitrust law to procedural realities. The Supreme Court has done so, for example, by generally limiting damages actions brought by purchasers under federal antitrust law only to entities that buy directly from defendant[23] and allowing these direct purchasers to recover the full overcharge they paid, even if they were able to mitigate the harm they suffered.[24] The Court justified both rules as ways to address the pragmatic difficulties of calculating damages in antitrust cases, thereby fostering the policy goal of punishing and deterring antitrust violations.[25] Similarly, the Supreme Court has held that the filing of a class action complaint tolls the statute of limitations for absent class members—even for those that had no actual notice of the filing.[26] According to the Court, this rule is intended to promote "the efficiency and economy of litigation" that is the principal purpose of the class action device.[27] Arguably, each of these rules alters defendants' substantive rights. But, of course, federal courts have the authority to interpret federal antitrust law,

---

23 Ill. Brick Co. v. Illinois, 431 U.S. 720, 729 (1977).

24 Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

25 *Illinois Brick*, 431 U.S. at 731-32, 732 n.12.

26 Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552-53, 561 (1974).

27 *Id.* at 553.

and, as these examples show, they may do so in light of the procedural context in which that substantive law applies. Moreover, as we argue below, defendants suffer no meaningful prejudice from allowing a class to recover without a showing of injury to each and every class member.[28]

The possible new class certification standard interprets the predominance requirement in a second way that is inappropriate. Focus on so-called "common impact" has led some courts to imply that Rule 23(b)(3) requires that common issues must predominate over individual issues as to *each element* of plaintiffs' claim.[29] But this is an odd interpretation of Rule 23. Properly understood, the rule requires that common issues predominate in the litigation *as a whole*, not in regard to each element. And the reality is that if trial addresses common impact at all (and it rarely, if ever, does), it is a minor issue. Class antitrust trials focus almost entirely on whether defendants violated the antitrust laws and, if so, what the total damages are—not whether some small portion of the class did not suffer harm.[30] As a result, a preoccupation with common impact at the class certification stage can lead courts to deny class certification for a supposed lack of predominance even in cases where common issues in fact would predominate at trial.

The exacting attention to common impact recently undertaken by some courts, then, is a distortion of class certification doctrine, an issue that is expensive and time-consuming to litigate and that impedes the certification of some classes for no good reason. And the combination of this potential new focus on common impact with allowing—or requiring—judges to find facts on the merits at class certification compounds the problem. The potential new class certification would dramatically increase the cost in both time and money of resolving the class certification issue without serving any legitimate purpose.

Moreover, the rationale for ratcheting up the class certification standard is troubling. It reflects a heightened concern for the welfare of the very large corporations that are typically defendants in antitrust class actions—again, a concern not adequately grounded in theory or evidence[31]—without a corresponding concern for the welfare of the victims of corporate abuse, victims that tend to be smaller businesses and consumers. The risk is that class certification doctrine is being skewed to serve the interests of a particular class of litigants. In other words, the potential new standard for class certification may in effect be political or ideological in the pejorative sense.

---

28 *See infra* Part II.C.4.

29 *See, e.g.*, *In re* Hydrogen Peroxide, 552 F.3d 305, 313 (3d Cir. 2008) (discussing defendants' expert testimony at class certification addressing whether "Plaintiffs will be able 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" (internal quotation marks omitted)).

30 *Id.*; *see also In re Scrap Metal* Special Verdict Form, *supra* note 19, at 1-7.

31 *See* sources cited *supra* notes 5-6.

A similar point holds true in regard to the Seventh Amendment. Courts to date have not adequately considered the implications of judges finding facts at the class certification stage that will ultimately be resolved by a jury—findings of fact that the parties possess a *constitutional right* to have resolved by a jury. Outside of the politically charged context of class actions, the Supreme Court held in *Beacon Theatres, Inc. v. Westover*[32] and *Dairy Queen, Inc. v. Wood*[33] that judges should await and abide by jury findings in addressing equitable relief that will turn on the same facts as relief at law.[34] We argue that this rule applies to class certification, which is equitable in nature. As a result, if judges are going to interpret Rule 23 to allow or even require them to make findings of fact relevant to the merits, the parties should have the right to postpone the class certification decision until after trial. Judges should then be bound by the findings of the jury in deciding whether to certify a class.

Of course, there are strong reasons not to postpone the class certification decision until after trial. Doing so can give rise to various practical and procedural problems, such as how a class can be bound by a jury trial about which it had no advance notice. But the solution to those problems is to leave the traditional standard for class certification intact. Distorting class certification doctrine—and then delaying the class certification decision to avoid violating the Seventh Amendment—makes little sense.

Indeed, judicial inattention to the constitutional right to a jury in modifying the class certification standard is symptomatic of problems that beset interpretation of the Seventh Amendment in the class action context. In this regard, courts have engaged in what might be called selective formalism. As they modify procedure to the detriment of plaintiffs and to the benefit of large corporate defendants, they show scant concern for the constitutional rights at play.[35] In other words, courts make no rigorous effort to assess whether increasing the burden on plaintiffs at the pleading stage, at summary judgment, and now at class certification is consistent with the Seventh Amendment. Judges who traditionally espouse a rigid, formalist approach to constitutional interpretation—generally of an originalist sort—suddenly are quite pragmatic about procedural changes. As the writings of Professor Suja Thomas reveal, this approach is difficult to explain; under a disciplined originalist interpretation of the Seventh Amendment, the procedural obstacles courts impose on plaintiffs give rise to serious constitutional concerns.[36] Thus, the historian and legal scholar William Nelson has con-

---

32 359 U.S. 500 (1959).

33 369 U.S. 469 (1962).

34 *Beacon Theatres*, 359 U.S. at 510-11; *Dairy Queen*, 369 U.S. at 479.

35 *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 744-51 (5th Cir. 1996).

36 *See, e.g.*, Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1856-73 (2008) [hereinafter Thomas, *Motion to Dismiss*]; Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 158 (2007) [hereinafter Thomas, *Summary Judg-*

cluded—and he considers it a good thing—that the Seventh Amendment has been read not in light of what originalism requires, but instead to promote overall economic vitality, particularly by shielding corporations from what he perceives to be excessive litigation.[37]

On the other hand, the Seventh Amendment has at times been interpreted as a bar to plaintiffs pursuing legal actions on a class basis. When plaintiffs seek to break litigation into phases so as to permit class certification of undoubtedly common issues (such as whether a defendant engaged in a course of conduct that violated the relevant legal standard), some judges become quite rigid regarding the Reexamination Clause of the Seventh Amendment.[38] They hold that the Constitution prevents practical procedural measures that would make partial class certification feasible.[39] As we argue below, this formalist approach is premised on an implausible reading of a key Supreme Court precedent, *Gasoline Products Co. v. Champlin Refining Co.*,[40] and risks a political or ideological attitude toward the Seventh Amendment, one that may ultimately skew its interpretation, once again to the benefit of large corporate defendants.

We conclude that we should guard against developing the law in a way that benefits large corporate defendants without adequate justification. Judges should remain disciplined in applying the class certification standard and the Seventh Amendment. Any proposed change in the certification standard should be based on solid empirical evidence and theoretical analysis, implemented as a result of an appropriate process (a formal change to the rules or new legislation) and crafted in a way that survives scrutiny under the Constitution.

Part I of this Article describes the somewhat confusing standard that some courts have adopted at the class certification stage in antitrust cases and briefly reviews some of the concerns we have raised in the past about this potential innovation. Part II argues that any new class certification

---

ment]; Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 689, 751-53 (2004) [hereinafter Thomas, *Seventh Amendment*]; Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 734 (2003) [hereinafter Thomas, *Constitutionality of Remittitur*].

37 William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653, 1664-66 (2008).

38 *See, e.g.*, *Castano*, 84 F.3d at 751 & n.31 (holding that Seventh Amendment Reexamination Clause would be violated by bifurcating trial between class and non-class issues); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302-03 (7th Cir. 1995) (same); *cf.* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 424-25 (5th Cir. 1998) (relying on interpretation of Reexamination Clause in light of *Gasoline Products* to affirm denial of class certification in employment discrimination action). *But see* Allison v. Citgo Petroleum Corp., No. 96-30489, 1998 U.S. App. LEXIS 24651, at *1-2 (5th Cir. Oct. 2, 1998) (denying panel rehearing and rehearing en banc, but appearing not to rely on the panel's original reasoning regarding the Seventh Amendment for affirming the denial of class certification).

39 *See* cases cited *supra* note 38.

40 283 U.S. 494 (1931).

standard that the courts impose is likely to exacerbate the inappropriate emphasis some courts place on "common impact" in adjudicating class certification motions in antitrust cases. Finally, Part III addresses the selective formalism that some courts demonstrate in applying the Seventh Amendment to various procedural innovations, including the potential new antitrust class certification standard.

I. CONCERNS ABOUT INNOVATION IN THE CERTIFICATION STANDARD

A. *The Old Standard: It Ain't Broke*

Before the recent spate of federal appellate court decisions suggesting a possible change in the class certification standard, the requirements under Rule 23 were reasonably well settled. The Supreme Court in *Eisen v. Carlisle & Jacquelin*[41] had held that a trial court should not undertake a "preliminary inquiry into the merits" in deciding whether to certify a class.[42] Taken literally, this holding precludes a court from considering any material other than the complaint—with the allegations taken as true—in addressing class certification. But courts have not taken *Eisen* literally. Most notably, in *General Telephone Co. of the Southwest v. Falcon*,[43] the Supreme Court authorized trial courts to "probe behind the pleadings"[44] in undertaking a "rigorous analysis"[45] of the issues relevant to certification. Notwithstanding *Falcon*, courts understood that *Eisen* barred them from deciding ultimate merits facts in addressing class certification.[46] Courts could assess the evidence available in a case, but only, for example, to determine whether plaintiffs had *proposed* a plausible or colorable method of proving their case using predominantly common evidence.[47]

B. *A Possibly Confusing New Standard?*

A significant flaw with the possible new class certification standard is that it displaces a workable and well-understood legal standard with one that is very difficult to interpret or apply. For example, *In re Hydrogen*

---

41 417 U.S. 156 (1974).

42 *Id.* at 177.

43 457 U.S. 147 (1982).

44 *Id.* at 160.

45 *Id.* at 161.

46 *See, e.g.*, *In re* PolyMedica Corp. Sec. Litig., 432 F.3d 1, 17 (1st Cir. 2005) ("Exercising its broad discretion . . . the district court must evaluate the plaintiff's evidence . . . critically without allowing the defendant to turn the class-certification proceeding into an unwieldy trial on the merits." (emphasis omitted)).

47 *In re* Linerboard Antitrust Litig., 305 F.3d 145, 152 (3d Cir. 2002).

Peroxide Antitrust Litigation[48] suggested courts must assess the evidence—even evidence pertaining to the merits—in deciding whether plaintiffs have satisfied each prong of Rule 23 by a preponderance of the evidence.[49] Yet the court failed to articulate precisely what this standard entails, even in regard to the requirement of predominance that was the focus of its attention.

The *Hydrodgen Peroxide* court's reticence is understandable given the difficulty of framing the standard it adopted. One plausible reading of the predominance requirement under *Hydrogen Peroxide* is something along the following lines: plaintiffs must show by a preponderance of the evidence that they will be able to prove the elements of their claims predominantly through common evidence by a preponderance of the evidence.[50] This articulation is clumsy—it verges on incoherence—but it is hard to avoid such awkwardness given the reasoning of *Hydrogen Peroxide*. The repeated use of the phrase "preponderance of the evidence," for example, may seem redundant, but it is not. This class certification standard derives from plaintiffs' ultimate burden at trial, and each separately involves a preponderance of the evidence standard.

Indeed, if we were to eliminate the apparent redundancy, one might read the court to require plaintiffs to prove the elements of their claims by a preponderance of the evidence predominantly through common evidence at the class certification stage. In other words, plaintiffs would have to prove their claims on a class-wide basis to a judge in order to have the opportunity to prove their claims on a class-wide basis to a jury. That courts might impose such a standard is conceivable. For that reason, we discuss in Part III why doing so would likely violate the Seventh Amendment.[51] However, the *Hydrogen Peroxide* court denied that it was requiring plaintiffs to prove their case on the merits to the judge in order to get a class certified.[52] But while the court took pains to say what plaintiffs need not show, it did not give meaningful guidance as to what plaintiffs must show.

The resulting standard is likely to be confusing and costly. Judges and litigants will be unsure about the burden plaintiffs must satisfy to prevail under Rule 23. Plaintiffs' attorneys will be tempted to prove the merits—or come very close to doing so—to avoid the danger that courts will conclude they have not gone far enough. As in *Hydrogen Peroxide*, judges may deny that Rule 23 imposes such a heavy burden. But if they cannot define in a

---

48 552 F.3d 305 (3d Cir. 2008).

49 *Id.* at 307.

50 *See id.*

51 *See infra* Part III.

52 *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 311-12 ("Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to determine that the element of antitrust impact is capable of proof at trial through evidence that is common to the class . . . .").

useful way what the class certification burden actually is, that denial will not help clarify the standard.

C. *Inadequate Basis in Theory and Evidence*

Hydrogen Peroxide and similar cases, then, appear to increase the burden on plaintiffs at the class certification stage, even if it is unclear by how much. The imposition of a new, confusing standard is all the more troubling because it attempts to solve a problem that probably does not exist. In *Hydrogen Peroxide*, the Third Circuit offered only one policy justification for its new approach: class certification forces defendants to settle cases that lack merit.[53] For this proposition, it relied on the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*.[54] Neither court, however, provided a persuasive basis for this proposition. This is understandable, as there is no such basis.[55]

1. No Evidence of "Blackmail"

The supposed pressure to settle even meritless cases that class certification places on defendants is characterized as "legal blackmail."[56] One problem with the legal blackmail theory is that it lacks any empirical basis, at least in the antitrust setting.[57] The only evidence of defendants settling meritless lawsuits comes from the securities and stockholder contexts,[58] and this evidence is inapposite (and of questionable strength which we will not discuss here). Thus, courts and scholars offer no empirical evidence that defendants settle frivolous antitrust lawsuits with any regularity.[59]

---

53 *Id*. at 310; *see also In re* New Motor Vehicles Canadian Export Antitrust Litig. (*Canadian Cars*), 522 F.3d 6, 26 (1st Cir. 2008) (reasoning that rigor in the class certification analysis is especially important "when a case implicates the sort of factors that we have deemed important in the Rule 23(f) calculus, namely, when the granting of class status 'raises the stakes of litigation so substantially that the defendant likely will feel irresistible pressure to settle'" (quoting Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 293 (1st Cir. 2000))).

54 550 U.S. 544 (2007); *Hydrogen Peroxide*, 552 F.3d at 310.

55 For a careful critique rejecting the argument about legal blackmail, see Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1389-90 (2003).

56 *See, e.g.*, *id.* at 1357-58; Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 843 (1974).

57 *See* Silver, *supra* note 55, at 1359-60.

58 *See, e.g.*, Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1293-94, 1294 nn.157-58 (2002) (discussing the very thin empirical record, all of it involving securities and stockholder litigation).

59 For a discussion of successful private antitrust cases with strong indicia of success, see Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2008). The underlying data for the study is summarized in Robert Lande &

Even if this were not the case, courts already have taken a series of actions in response to the perceived problem of legal blackmail. They have imposed a more stringent summary judgment standard on plaintiffs,[60] as well as a heightened pleading standard.[61] Some study of whether these measures suffice to cure the problem of legal blackmail—if in fact there is a problem—is appropriate before introducing yet another obstacle to plaintiffs pursuing an antitrust class action.

2. Theory: Legalized Theft Is More Likely than Legalized Blackmail

An understanding of the dynamics of class litigation confirms that a heightened class certification standard is a solution to a problem that likely does not exist. Indeed, in addition to a lack of evidence that class certification in antitrust suits places pressure on defendants to settle, the dynamics of class litigation explain why it is far more likely that large corporate defendants will pay too little—rather than too much—when they do settle antitrust class action lawsuits.

First, defendants in antitrust cases tend to be powerful financial institutions. After all, plaintiffs bring antitrust claims against entities with market power—entities capable of distorting market forces for their own gain. It is odd to think of entities with such market power as particularly vulnerable in litigation or settlement negotiations. They have the financial and other means to protect their interests.

Second, pre-judgment interest is generally not available in antitrust cases.[62] That means defendants are the beneficiaries, in effect, of interest-free loans. The longer litigation endures, the longer they will enjoy the benefits of a return on the money they have taken from plaintiffs in violation of their rights—and the longer plaintiffs will suffer from not having access to that capital. Indeed, that disparity places pressure on plaintiffs, rather than defendants, to agree to settle early and on less favorable terms and empowers defendants to delay settlement unless and until they receive an offer to their liking.

Joshua Davis, Benefits from Antitrust Private Antitrust Enforcement: Forty Individual Case Studies (Mar. 1, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1105523. For a related argument that the deterrence effect of private antitrust litigation with strong indicia of merit is greater than the deterrence effect of criminal enforcement of the antitrust laws by the Department of Justice, see Robert H. Lande & Joshua P. Davis, Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws (Mar. 5, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1565693.

60 Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

61 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

62 *See* Fishman v. Estate of Wirtz, 807 F.2d 520, 584 (7th Cir. 1986) (Easterbrook, J., dissenting) (criticizing the failure to award pre-judgment interest in antitrust cases).

Third, moving beyond the interests of the parties themselves, the incentives of the *attorneys* in class litigation make excessive settlements unlikely. We do not mean to impugn anyone's ethics; no doubt many lawyers pursue the interests of their clients selflessly. But some counsel, at times, deliberately place their own welfare above that of their clients, and the perception of other attorneys is skewed at the margins. So, agency costs matter.

Plaintiffs' lawyers generally litigate on a contingency fee basis, paying the costs of litigation out of pocket and receiving compensation only if and when they prevail. These lawyers benefit from settling cases early, even if it is for an amount lower than the amount they could obtain through protracted litigation. This gives them the greatest compensation per hour with the least risk and expense. Defense lawyers, in contrast, are paid on an hourly basis. The longer litigation persists—and the more involved it is—the better they are likely to do financially. These dynamics redound to the detriment of plaintiff classes and to the benefit of class action defendants. Indeed, most of the criticism of class actions is directed at the concern that plaintiffs' lawyers settle for too small—not too large—a sum.[63]

The likely effect of a heightened class certification standard, then, is that large corporate defendants will pay too little to settle antitrust litigation. Antitrust violations will then become—or remain—financially worthwhile. Indeed, this dynamic tends to find confirmation in the fact that antitrust damages appear insufficient to deter large corporations from violating the antitrust laws,[64] despite the availability of nominal treble damages.[65] Therefore, the concern of the courts should be legalized theft perpetrated by defendants on plaintiffs, not, as previously discussed, legalized blackmail perpetrated by plaintiffs on defendants.

3. Asymmetry: Inadequate Concern for "False Negatives"

Even if courts do not recognize the general risk that class litigation will settle for too little, raising the class certification standard in all cases to protect defendants makes little sense. The dynamics of settlement vary from case to case. Perhaps in some cases, plaintiffs (or plaintiffs' lawyers) have a

---

63 *See, e.g.*, Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 470-72, 470 nn.51-53 (2000); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1111-12 (1996); Susan P. Koniak, *Feasting While the Widow Weeps*: Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1053-54 (1995). Failure to adequately deal with these fundamental dynamics by proponents of a merits inquiry—and the heightened standard—at class certification renders their analysis unpersuasive. *See, e.g.*, Bone & Evans, *supra* note 58, at 1285-86.

64 Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329, 329 (2004).

65 Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 140 (1993).

bargaining advantage over large corporate defendants. A heightened standard for class certification would at most make sense in those cases.

But in other cases—likely in most cases—defendants have a bargaining advantage over plaintiffs. In such cases, a heightened standard for class certification is inappropriate. To the contrary, a lower standard than that which ordinarily applies would be in order, at least under the logic of *Hydrogen Peroxide* (and *Twombly*).[66] Otherwise, plaintiffs will settle for an amount that is small compared to the strength of their position at trial.[67]

Without this sort of corrective, the danger is that litigation will produce too many of what might be called "false negatives"—cases in which an antitrust violation occurred, but whose outcome does not reflect that reality. Indeed, the danger lies not only in cases that are brought and obtain less relief for the class than they should. The greater consequence lies in the cases that plaintiffs will never bring at all.

Antitrust class actions require significant commitments from plaintiffs' law firms. These cases often involve millions of dollars in hard costs, additional millions of dollars in attorney time, and years of battle.[68] As a result, plaintiffs' lawyers often refuse to take meritorious cases for a host of reasons, many of them having little to do with the merits. If the potential recovery is too small—perhaps less than $20 million—or the difficulty of getting the class certified too great, the victims of an antitrust violation are unlikely to find a lawyer willing to file their case on a contingency fee basis (victims are rarely able to pay court costs and an hourly rate out of pocket). The consequence is that much illegal activity goes unpunished. A heightened class certification standard would only exacerbate this problem, especially if it were to result in a dramatic increase in the costs of getting a class certified.

D. *A Poor Procedural Fit*

Depending on how the new class certification standard is interpreted, it also fits poorly into ordinary litigation procedure. A judge is supposed to

---

66 *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008).

67 This claim requires some elucidation. A plausible benchmark for a proper reflection of the merits is the expected value of trial. *See generally* Joshua Davis, *Expected Value Arbitration*, 57 OKLA. L. REV. 47, 85-94, 106-16 (2004) (defending expected value as a measure of justice in settlement); Joshua P. Davis, *Applying Litigation Economics to Patent Settlements: Why Reverse Payments Should Be* Per Se *Illegal*, 41 RUTGERS L.J. (forthcoming 2010) (manuscript at 27-33), *available at* http://ssrn.com/abstract=1489090 (same). A defense of this standard, however, is beyond the scope of this Article.

68 Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 50 ARIZ. L. REV. 1009, 1009-14 (2008).

rule on class certification "at an early practicable time."[69] That admonition is difficult to reconcile with any judicial effort to delve into the merits. The more a class certification hearing resembles a trial on the merits, the later in the proceeding it should occur—likely no earlier than a reasonable time after the close of discovery.[70] Indeed, as we discuss in Part III, if judges are going to resolve elements of plaintiffs' claims in the process of certifying the class, the Seventh Amendment may even require the judge to wait until after the jury trial before deciding whether to do so.

At a minimum, plaintiffs should have some formal protection from having to move for class certification before they have an opportunity for discovery, just as Rule 56(f) allows them to challenge a motion for summary judgment as premature.[71] Even with that protection in place, however, the result may be a class certification decision that occurs later in litigation than makes practical sense. But the solution to that problem is to return to the traditional class certification standard, not to force plaintiffs to make a motion before they have an adequate opportunity to prepare to do so.

E. *An Improper Means of Changing a Federal Rule*

A final preliminary point is that if a dramatic innovation is to be made in the class certification standard, the right approach is to follow the process for altering the Federal Rules of Civil Procedure under the Rules Enabling Act or for enacting legislation. The Advisory Committee of Civil Rules has initiated changes to Rule 23 on several occasions. Despite calls for change to the substantive class certification standard under Rule 23, the Rules Committee left that standard intact.[72] And courts should not circumvent the required means of amending the rules of federal procedure.

---

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

70 *See, e.g.*, *In re* New Motor Vehicles Canadian Export Antitrust Litig. (*Canadian Cars*), 522 F.3d 6, 26-27 (1st Cir. 2008) (imposing a heightened class certification standard and noting that "it is not uncommon to defer final decision on certifications pending completion of relevant discovery").

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

72 The Third Circuit in *Hydrogen Peroxide* conceded this point. *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008) (acknowledging that amendments to Rule 23 did "not alter the substantive standards for class certification"). Indeed, if *Hydrogen Peroxide* is read as altering the class certification standard in the Third Circuit, the decision would then have failed to abide by precedents by which it recognized it was bound. *See* Davis & Cramer, *supra* note 5 (manuscript at 12). As *Hydrogen Peroxide* itself acknowledged, one panel in the Third Circuit cannot reverse the holding of another. *Hydrogen Peroxide*, 552 F.3d at 318 n.18. For that reason, *Hydrogen Peroxide* can be read as setting a new class certification standard only to the extent that it was able to distinguish cases like *Linerboard* successfully, and it is questionable authority for the claim that there has been a significant change in the class certification standard in the Third Circuit.

II. POLITICS AND RULE 23: THE IMPORTANCE AND IRRELEVANCE OF CLASS-WIDE IMPACT

A. *Common Impact as the Crux of Certification in Antitrust Cases*

The crux of the decision whether to certify a class in an antitrust case under Federal Rule of Civil Procedure 23(b)(3) is usually the requirement of predominance of common issues.[73] Two background points are necessary to any understanding of this issue: one involves the elements of an antitrust claim, and the other involves the class certification standard.

To prevail on an antitrust claim at trial, a plaintiff must prove three elements: an antitrust violation, causation, and impact (or fact of damage).[74] 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) injury (or impact) resulting from the violation;[75] and (3) computation of damages.[76] To certify a class seeking damages under Rule 23(b)(3), a plaintiff must show that a class-wide trial would be sensible and thus that, looking at the case as a whole, issues common to the class would predominate over issues specific to individual class members.[77]

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.[78] This kind of analysis explains 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."[79] And, not surprisingly, because the predominant issues in antitrust cases tend to be common to the class, for at least two decades courts have routinely certified classes in antitrust cases in which direct purchasers

---

73 *See, e.g.*, *Canadian Cars*, 522 F.3d at 20.

74 Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 105 (2d Cir. 2007).

75 *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 87 (D. Conn. 2009) ("The injury and causation element has also been referred to as 'antitrust injury' and 'causation or impact.'" (quoting *Cordes*, 502 F.3d at 105)).

76 *See* Lumco Indus., Inc. v. Jeld-Wen, Inc., 171 F.R.D. 168, 172 (E.D. Pa. 1997) ("First, Plaintiffs must prove that Defendants violated the antitrust laws. Second, Plaintiffs must prove the fact of damage, or the impact, of Defendants' unlawful activity. Third, Plaintiffs must prove the amount of damages sustained by said activity."); *see also Hydrogen Peroxide*, 552 F.3d at 311; *Cordes*, 502 F.3d at 104-05.

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

78 *EPDM*, 256 F.R.D. at 87-95.

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

seek damages—perhaps more regularly than in any other field of substantive law.[80]

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 typically analyzed, antitrust impact incorporates "causation" as part of the analysis; thus, the issue is whether defendants' conduct caused class members the requisite type of harm.[81] In antitrust class actions brought by purchasers of a product directly from the entity charged with the violation, plaintiffs typically allege that they suffered damage in the form of payment of artificially inflated prices or overcharges.[82] Significantly, in federal antitrust cases brought by direct purchasers, courts allow plaintiffs to prove that they were injured simply by showing that they overpaid for a product or service due to an antitrust violation (i.e., that they were "overcharged").[83] As Judge Easterbrook has put it, "[t]he monopoly overcharge is the excess price at the initial sale . . . ."[84] Moreover, there is no requirement that the plaintiff or class member know about—or rely upon—any of defendants' anticompetitive conduct to suffer antitrust injury.

These rules greatly simplify the "common impact" showing because proving impact does not require any information about an individual plaintiff or class member other than that it overpaid for the product or service at issue.[85] Paying an overcharge caused by the alleged anticompetitive conduct

---

80 *See In re* Mercedes-Benz Antitrust Litig., 213 F.R.D. 180, 187 (D.N.J. 2003) ("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.'" (citations omitted) (quoting *In re* Glassine & Greaseproof Paper Antitrust Litig., 88 F.R.D. 302, 306 (E.D. Pa. 1980))); Bank v. Elec. Payment Servs., Inc., No. Civ.A. 95-614-SLR, 1997 WL 811552, at *21 (D. Del. Dec. 30, 1997) (proof of a course of conduct "to restrain trade is generally considered a common question that predominates over other issues"); 6 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 18:25 (4th ed. 2002) ("[C]ommon liability issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues.").

81 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"; that is, whether the injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Cordes*, 502 F.3d at 106 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)) (internal quotation marks omitted).

82 *See* Ill. 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] . . . .").

83 *Id.*

84 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 able to mitigate its effect, is irrelevant as a matter of law to the determination of fact of injury (or the amount of damages). Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

85 *See Illinois Brick*, 431 U.S. at 731-33 (discussing the so-called direct purchaser rule that is designed to simplify analysis). *See generally* Joshua P. Davis & David F. Sorensen, *Chimerical Class*

on a single purchase suffices to show—as a legal and factual matter—impact or "fact of damage."[86]

Critically important for our discussion, this concept is distinct from the *quantum* of damages suffered by an individual class member or by the class as a whole. 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, including the modeling of a counter-factual world absent the challenged conduct.[87] As a result of those concerns, 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, once plaintiffs have satisfied the element of fact of damage and thereby established liability, courts have relaxed the burdens associated with *quantifying* damages.[88] Courts have traditionally held that even where the amount of damages "is not susceptible to classwide [sic] proof, that is not enough to defeat class certification."[89]

The price of admission, however, to the relaxed burden relating to quantum of damages, is that a plaintiff must show that it suffered "fact of damage" or some antitrust injury flowing from defendants' conduct.[90] Because of this relaxed burden on damages, and also because proof of the antitrust violation (e.g., an agreement to fix prices or unilateral efforts to monopolize markets) tends to be overwhelmingly common, defendants tend to emphasize the issue of impact on class members in challenging class certification.[91] It is no coincidence that the central focus of *Hydrogen Peroxide* is on plaintiffs' ability to prove impact on a predominantly class-wide basis.[92]

Conflicts in Federal Antitrust Litigation: The Fox Guarding the Chicken House in Valley Drug, 39 U.S.F. L. REV. 141, 144-52 (2004).

86 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. CIV. A. 96-CV-728, 1998 WL 135703, at *5 (E.D. Pa. Mar. 20, 1998) (also equating "impact" and "fact of damage").

87 *See In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 309 (E.D. Mich. 2001).

88 *See, e.g.*, Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 265-66 (1946).

89 *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 103 (D. Conn. 2009).

90 *Cardizem*, 200 F.R.D. at 307.

91 *See, e.g.*, *id.* at 308.

92 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311-12 (3d Cir. 2008) ("[T]he 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.").

Defendants generally argue that the evidence necessary to show this single element of plaintiffs' claims—impact—will vary by class member. The form that 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 the violation caused each (or most) of them to pay higher prices. 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; or that purchasers in certain regions, categories, or areas were unaffected by or even benefited from the challenged conduct. Defendants conclude that the variability in harm across the class will give rise to individual issues that could predominate at a class trial.

In addition to refuting defendants on the specifics of these kinds of arguments, plaintiffs typically counter with a form of the "rising tide lifts all boats" metaphor, making the argument that the baseline from which prices were set is higher due to the anticompetitive conduct as reflected in an observed "pric[ing] structure."[93] Plaintiffs tend to argue that because of this structure, variances in prices paid by class members are irrelevant to the question of common impact.[94] Class members may have differential bargaining power and pay different prices, but because the baseline is higher, all of them pay inflated prices due to the challenged conduct, and thus recourse to individualized proof that class members were impacted by the conduct is unnecessary.[95]

Under the prevailing class certification standard, plaintiffs tend to win this battle the vast majority of the time.[96] And it is unclear at this point

---

93 *See, e.g.*, Bogosian v. Gulf Oil Corp., 561 F.2d 434, 455 (3d Cir. 1977).

94 *Id.*

95 *Id.* ("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."); *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 89 (D. Conn. 2009) (noting that the variation in prices paid by, or bargaining power of, class members is not an impediment to a finding of common impact where there is a standardized pricing structure or the conspiracy affects the "base" price from which negotiations begin); *In re* Urethane Antitrust Litig., 251 F.R.D. 629, 638 (D. Kan. 2008) ("This evidence of a standardized pricing structure, which (in light of the alleged conspiracy) presumably establishes an artificially inflated baseline from which any individualized negotiations would proceed, provides generalized proof of class-wide impact."); *see also In re* Potash Antitrust Litig., 159 F.R.D. 682, 695 (D. Minn. 1995) ("[B]ecause the gravamen of a price-fixing claim is that the price in a given market is artificially high, there is a presumption that an illegal price-fixing scheme impacts upon all purchasers of a price-fixed product . . . .").

96 *See, e.g.*, *Urethane*, 251 F.R.D. at 635 ("The appropriate analysis [of common impact] begins with a recognition that defendants seeking to defeat class certification in horizontal price-fixing cases such as this one face an uphill battle. . . . [I]t is widely recognized that the very nature of horizontal

whether *Hydrogen Peroxide* or other recent, similar opinions materially alter the common impact analysis. The Third Circuit in *Hydrogen Peroxide*, 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."[97] 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 generally inflated and that class members made some purchases at the higher price, despite variance in prices paid.[98]

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.[99] 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."[100] 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 of widespread overcharges to the class.[101] 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."[102] Accordingly, it remains to be seen what effect, if any, *Hydrogen Peroxide* will have on how courts analyze and apply the common impact requirement.[103]

To the extent that there is a new standard taking hold, it flows from the confluence of two factors: (1) a possible new impetus to resolve merits questions at the class certification stage; and (2) a possible new application,

---

price-fixing claims are particularly well suited to class-wide treatment because of the predominance of common questions."); Cohen v. Chilcott, 522 F. Supp. 2d 105, 116 (D.D.C. 2007) ("Antitrust actions involving allegations of price-fixing have frequently been found to meet the predominance requirement in class certification analyses.").

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

98 *Id.* at 325-26.

99 *Id.* at 326.

100 *Id.*

101 *Id.*

102 *Id.* at 325 n.26.

103 Notably, the first two district courts to take up class certification in antitrust cases following *Hydrogen Peroxide* granted class certification (albeit only after holding hearings during which expert testimony was taken, and even then, only after the courts waded into the merits of the expert opinions). *See* Behrend v. Comcast Corp., 264 F.R.D. 150, 191 (E.D. Pa. 2010); McDonough v. Toys "R" Us, Inc., 638 F. Supp. 2d 461, 491 (E.D. Pa. 2009).

commonly urged by defendants, of a stringent requirement that plaintiffs must demonstrate with predominantly common evidence harm to all (or nearly all) class members. These departures from past practice, together, would have the potential to create a new world in which plaintiffs are required to prove "merits" facts at the class certification stage that, paradoxically, *would almost certainly never come up at trial*. How can it be that defendants hold out judicial decisions like *Hydrogen Peroxide*, which ask the district courts in considering class certification to focus on the conduct of *trial*, as imposing a stringent requirement that has nothing whatsoever to do with trial? We attempt below both to explain that apparent paradox and to suggest its fundamental flaw.

Part of the problem relates to imprecision in the language used to describe plaintiffs' burden at the class certification stage regarding the element of impact—language in dicta that does not appear to have been intended to alter the law.[104] The decisions effecting a possible change do not acknowledge that courts have traditionally held that plaintiffs at the class certification stage need show only that predominantly class-wide evidence is available to demonstrate that injury is "widespread" among class members—not that "all" class members were injured.[105] Even so, some of these recent decisions, including *Hydrogen Peroxide*, have been read broadly—and likely inaccurately—by defendants as articulating a sweeping requirement that plaintiffs must produce class-wide evidence capable of establishing that all—or, depending on the formulation, virtually all—class members suffered harm from the anti-competitive conduct at issue.[106] As we show below, the traditional statement of the law as requiring evidence of only widespread harm is entirely appropriate both as a characterization of the predominance test for class certification purposes, and as an implicit reflection of the requirements for proving impact on the class at trial. Indeed, if a stringent "all or nearly all" requirement were to take root, it would be inconsistent both with the underlying principles of class certification doctrine and the underlying substantive antitrust law.

B. *Predominance Should Depend on Plaintiffs' Burden at Trial*

The ordinary way to frame the predominance requirement for class certification is in terms of plaintiffs' burden at trial. The elements of the claim that plaintiffs will have to prove at trial provide the ultimate guidance

---

104 *Hydrogen Peroxide*, 552 F.3d at 311; *see also In re* New Motor Vehicles Canadian Export Antitrust Litig. (*Canadian Cars*), 522 F.3d 6, 28 (1st Cir. 2008) (appearing to say that common proof showing "each member of the class was in fact injured" may be necessary).

105 *See, e.g.*, *Hydrogen Peroxide*, 522 F.3d at 311.

106 *See Comcast*, 264 F.R.D. at 183.

for the inquiry into whether a class should be certified.[107] Rule 23(b)(3) explicitly 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 particular to individual class members.[108] The rule provides that the predominance and superiority inquiries relate mainly to questions of the efficiency and practicality of trying the case on a class-wide basis.[109] The focus of the predominance requirement, as the Third Circuit explained in *Hydrogen Peroxide*, is to "consider how a trial on the merits would be conducted if a class were certified."[110] The *Hydrogen Peroxide* court repeatedly makes the point that the predominance inquiry should turn on how plaintiffs will prove their case *at trial*.[111] So important was this proposition that the Third Circuit in *Hydrogen Peroxide* 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."[112]

In short, the proper focus of the common impact analysis at the class certification stage is on the legal requirements on the merits and a prediction about the nature of the proof used to meet these substantive legal requirements at trial.

C. *Predominance Should Not Require Harm to All Class Members*

1. Antitrust Class Trials Do Not Address Harm to All Class Members

Because the predominance inquiry is supposed to focus on a prediction about issues that will be litigated on the merits at trial, requiring common proof that *all* class members were injured makes sense only if plaintiffs must satisfy that same test at trial. Oddly, *Hydrogen Peroxide* largely fails

---

107 *See Hydrogen Peroxide*, 522 F.3d at 311.

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

109 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." *Id.*

110 *Hydrogen Peroxide*, 522 F.3d at 311 n.8 (quoting Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205, 218 (5th Cir. 2003)) (internal quotation marks omitted).

111 *Id.* ("Rule 23(b)(3) requires the court to 'consider how a trial on the merits would be conducted if a class were certified'" (quoting *Sandwich Chef*, 319 F.3d at 218)); *id.* at 317 (stating that the court may, at the class certification stage, "'consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take'" (quoting Eisen v. Carlysle & Jacquelin, 417 U.S. 156, 166 (1974))); *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" (quoting FED. R. CIV. P. 23 advisory committee's note) (first internal quotation marks omitted)).

112 *Id.* at 312, 319 (internal quotation marks omitted).

to heed its own direction to focus on the trial, never explicitly setting out precisely *how* the issues on which its decision turned would or could affect the ultimate outcome of the case.[113] In fact, antitrust class trials do not, in general, address the share of the class members harmed (or unharmed) by the challenged conduct.[114]

Rather, at the trials of the vast majority of antitrust conspiracy or monopolization cases, proof tends to focus on whether defendants engaged in conduct that violated the antitrust laws.[115] And those issues—"did the defendants conspire or monopolize; that is, did they do what plaintiffs said they did?" and "did that conduct harm competition generally?"—will invariably be the same for all members of the class.[116] Plaintiffs also typically present generalized causation evidence, showing that the challenged conduct caused harm to competition and higher prices generally.[117] And, finally, plaintiffs present evidence of aggregate damages to the class as a whole or a common formula from which damages could be computed.[118] 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 on those in the class that they *can* prove were injured.[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.

Defendants, for their part, spend the bulk of trial denying that they engaged in the challenged conduct in the first place or contesting whether it was anticompetitive.[120] They then typically offer a categorical assertion that no plaintiff or class member paid any overcharge at all—either because prices never went up or because any increases in price resulted from factors other than the challenged conduct.[121]

Jury instructions that describe and summarize the positions of the parties in antitrust class trials reflect defendants' blanket denials.[122] Assuming

---

113 *Id.* at 311.

114 *See, e.g.*, *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 256 F.R.D. 82, 90 (D. Conn. 2009).

115 *Id.*

116 *Id.*

117 *See, e.g.*, Bogosian v. Gulf Oil Corp., 561 F.2d 434, 455 (3d Cir. 1977).

118 *See, e.g.*, *id.* at 456.

119 *See, e.g.*, *EPDM*, 256 F.R.D. at 89-90.

120 *See, e.g.*, *In re* High Pressure Laminates Antitrust Litig., No. 00 MDL 1368(CLB), 2006 WL 1317023, at *4 (S.D.N.Y. May 15, 2006).

121 *See, e.g.*, *id.*

122 *See, e.g.*, Transcript of Record at 2315, *In re* High Pressure Laminates Antitrust Litig., No. 00 MDL 1368(CLB) (S.D.N.Y. May 23, 2006) [hereinafter *In re High Pressure Laminates* Transcript] (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., No. 05-340-SLR (D. Del. Nov. 25, 2008) [hereinafter *In re Tricor* Final Jury Instructions] ("Defendants deny that they have a monopoly, and

that plaintiffs' damages analysis does not seek recovery for those who were not overcharged, it is not clear why defendants would dwell on the non-injured class members.[123] Defense counsel have little reason at trial to care about the claims of those class members whom plaintiffs concede *were not harmed* (or about whom plaintiffs have no proof of harm) where the presence of those class members is not adding to the aggregate damages plaintiffs seek.[124] Accordingly, there is no reason that individual issues pertaining to the non-injured minority—even if legally relevant—would predominate at a class trial.

Thus, as long as the non-injured class members do not affect the damages exposure of defendants, defendants would have no legitimate reason to bring up the fact that some small share of class members were not injured—and typically defendants do not do so.[125] Indeed, the presence of uninjured members in the class is actually *a benefit* to defendants because those class members' claims are typically extinguished through the entry of a final judgment in a class action brought under Rule 23(b)(3). By including class members in the case that do not increase overall damages, defendants expand the pool of extinguished claims without additional cost to them.[126]

2. Plaintiffs Generally Need Not Show Harm to Every Class Member

There is a very good reason that class antitrust trials do not dwell on issues pertaining to the precise share of class members harmed by the challenged conduct: the jury instructions and verdict forms do not require such proof. Indeed, a sampling of the jury instructions and verdict forms in some of the few antitrust class actions that have progressed sufficiently far to address the issue does not reveal a requirement that *all* class members were harmed. As to impact, they ordinarily ask only whether the antitrust viola-

---

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."); Jury Instructions at 39, *In re* Vitamins Antitrust Litig., 236 F. Supp. 2d 67 (D.D.C. 2003) (No. 99-197 (TFH)) [hereinafter *In re Vitamins* Jury Instructions] (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 choline chloride producers. [Defendant] also contends that factors other than the alleged agreements—for example, changes in the cost of raw materials—had significant independent impact on the price").

123 *See infra* Part II.C.4.

124 *See id.*

125 *See In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 309 (E.D. Mich. 2001).

126 And, of course, the uninjured class members lose no meaningful rights, as, by hypothesis, they suffered no injury and are entitled to no damages. For a discussion of this issue see *infra* Part II.B.4.

tion caused harm to "the plaintiffs," "the class," or "class members."[127] One verdict form requires a finding of injury to the "named plaintiffs"[128] and asks whether "in addition to causing injury to the named plaintiffs, [defendants' conduct] caused the other members of the plaintiff class . . . to suffer injury to their business or property."[129] When it comes to trial, therefore, courts leave it up to juries to decide, presumably within some reasonable band, how "widespread" injury must be among the class in order to have a reasonable basis to find that the "the class" was injured by the challenged conduct. Courts have not, however, required plaintiffs to prove that *all* members of the class suffered harm at a class trial. A far more generalized showing is sufficient.

Further, if there were a legal requirement that all or virtually all class members were injured, one would expect defendants to file dispositive motions before trial, or motions for judgment as a matter of law during or after trial, asserting that the class action should be dismissed because plaintiffs failed to plead or produce evidence showing harm to every single class member. One will search in vain, however, for a court that has dismissed an antitrust class action at the pleadings stage for failure to plead that all class members were injured. One will similarly not find a court that has entered summary judgment for a defendant based on plaintiffs' failure to create a genuine issue of material fact on the "all or nearly all" issue or that has directed a verdict for defendants because plaintiffs were lacking in this regard. Indeed, questions regarding what share of the class was harmed or unharmed have not even come up as part of the litigation of the merits of antitrust class actions.

Given that the predominance question is about whether plaintiffs will be able to prove their case *at trial* with mainly common evidence, requiring plaintiffs to demonstrate at the class certification stage the availability of

---

127 *See, e.g.*, *In re High Pressure Laminates* Transcript, *supra* note 122, at 2333 (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* Final Jury Instructions, *supra* note 122, at 45-46 ("The Direct Purchaser Plaintiffs allege that due to defendants' anticompetitive conduct, prices for fenofibrate products were above what they would have been had defendants not impeded competition by generic fenofibrate products. Direct Purchaser Plaintiffs allege that, as a result, 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."); Verdict Sheet, *La. Wholesale Drug Co. v. Sanofi-Aventis U.S., L.L.C.*, 07 Civ. 7343 (HB) (S.D.N.Y. Nov. 21, 2008) [hereinafter *Sanofi-Aventis* Verdict Sheet] ("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* Jury Instructions, *supra* note 122, at 51 ("If you find that there was a violation of the antitrust laws that caused an overcharge to plaintiffs and class members, you must then consider the amount of that overcharge.").

128 *In re Scrap Metal* Special Verdict Form, *supra* note 19, at 5.

129 *Id.* at 6.

evidence that will not be pertinent to the merits at trial is illogical. If there is no substantive legal obligation for plaintiffs to show harm to each class member at trial, then there should be no similar requirement at the class certification stage. Nor is it satisfactory to suggest that this issue does not come up on the merits because the court that certified the class has already resolved it. After all, cases like *Hydrogen Peroxide* suggest that the court may consider merits issues in deciding whether to certify a class,[130] not that the judge may decide merits issues in a way that is binding on the case. As discussed below, any other approach would violate the Seventh Amendment right to a trial by jury.[131] Accordingly, the mere fact that a court has found, at the class certification stage, that plaintiffs will be able to produce common evidence at trial that nearly all class members were harmed by the challenged conduct does not absolve plaintiffs of actually making that showing at trial, *even if* such a showing were required to obtain a class judgment.

3. Courts Have Ruled Widespread Injury Suffices

Of course, the simple fact that common impact is rarely raised in adjudicating the merits of antitrust class actions does not necessarily mean that plaintiffs are not required to prove impact as to all class members to obtain a class judgment at trial. Jury instructions can be improperly or inartfully drafted.[132] Moreover, defendants and their highly skilled counsel may simply be making a strategic decision—or perhaps even a mistake—in failing to file dispositive motions seeking dismissal of antitrust class actions for failure to prove harm to all class members, or failing to otherwise press this issue at trial or on appeal. But it is hard to see why defendants would never perceive a strategic advantage in making a dispositive motion if they thought doing so had any merit. And, in our view, the major defense firms in this country need not put their malpractice carriers on notice for this oversight. In fact, the overwhelming majority of courts that have actually considered the question require only that plaintiffs use predominantly class-wide evidence to show *widespread* injury to the class, not that plaintiffs show that *all or virtually all* class members suffered harm.[133]

---

130 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316-20 (3d Cir. 2008).

131 *See infra* Part III.

132 *See generally* Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979) (describing the results of an empirical study of comprehension issues with jury instructions).

133 *See, e.g.*, *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."); *In re* Urethane Antitrust Litig., 251 F.R.D. 629, 638 (D. Kan. 2008) (stating that generalized injury demonstrates class-wide impact); Meijer, Inc. v. Warner Chilcott Holdings, Co., 246 F.R.D. 293, 310 (D.D.C. 2007) (finding widespread

Because defendants rarely, if ever, raise the issue post-class certification, the judicial opinions directly addressing the issue of what plaintiffs are required to prove about the share of the class that suffered harm are rendered almost exclusively at the class certification stage.[134] Consider Judge Posner's recent observation in affirming a grant of class certification in a non-antitrust case that has relevance here:

> 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 . . . .[135]

Posner was simply reaffirming the overwhelming weight of authority supporting the proposition that common proof of widespread harm is sufficient for class certification purposes.[136]

One interpretation of the cases allowing plaintiffs to produce common evidence showing only "widespread harm" at the class certification stage is that these courts are assuming that, at trial, plaintiffs will be able either to identify and then remove the uninjured parties[137] or to prove harm to those outlier entities with a small amount of individualized evidence that would be unlikely to overwhelm the trial.[138] In other words, it is possible that these courts are implicitly assuming that plaintiffs must show harm to each class member at trial, but nonetheless finding that that will be possible with predominantly, but not exclusively, common evidence.

Yet some class certification opinions appear to go further than stating a mere class certification requirement, implying that even at trial plaintiffs would not need to prove impact as to each and every class member as long as they can establish widespread harm. For instance, the court in *In re Live Concert Antitrust Litigation*[139] observed that even where "*Defendants might ultimately demonstrate on the merits that some class members were not harmed* . . . this does not preclude class certification."[140] Fairly read, *Live Concert* and other similar decisions contemplate a certified class including

---

injury sufficient for class certification purposes); *In re* Rubber Chems. Antitrust Litig., 232 F.R.D. 346, 352 (N.D. Cal. 2005) (same); J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., 225 F.R.D. 208, 219 (S.D. Ohio 2003) (same).

134 *See, e.g.*, *Cardizem*, 200 F.R.D. at 321.

135 Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009) (citations omitted).

136 *See* cases cited *supra* note 133.

137 *See, e.g.*, *Meijer*, 246 F.R.D. at 310 n.17 (stating that if the evidence ultimately suggests that some class members were not injured, "the Court can accommodate by amending the class definition to exclude such putative class members").

138 *See, e.g.*, *In re* NASDAQ Mkt.-Makers Antitrust Litig., 169 F.R.D. 493, 523-24 (S.D.N.Y. 1996).

139 247 F.R.D. 98 (C.D. Cal. 2007).

140 *Id.* at 141 (emphasis added).

members that defendants "ultimately demonstrate on the merits" were not injured.[141]

Furthermore, the courts that have invoked some version of the "common proof that all class members are harmed" formulation have historically not meant it literally. For instance, the Third Circuit in *Bogosian v. Gulf Oil Corp.*[142] stated that fact of damage could be established with common evidence "so long as the common proof adequately demonstrates some damage to each individual."[143] Yet *Bogosian* allowed that, even if as to some class members "the free market price would be no lower than the conspiratorially affected price," class certification would still be appropriate.[144] A similar contrast exists in the Third Circuit's decision in *In re Linerboard Antitrust Litigation*.[145] Upholding class certification in that case, the court at times appeared to accept that plaintiffs had to produce common evidence that all class members were injured,[146] but elsewhere in the opinion recognized the existence of unharmed class members constituting "limited exceptions relating to purchasers whose contracts were tied to a factor independent of the price of linerboard."[147] Notably, district courts in the Third Circuit have consistently rejected the idea that satisfying predominance requires common proof that all are harmed.[148]

To be clear, by rejecting the "all or nearly all" requirement, we are *not* suggesting that plaintiffs should be absolved of the need to show at class certification that common issues will predominate at trial. Plaintiffs must establish that individualized questions regarding proof of impact will not overwhelm the trial. Our point is that a defendant should not be able to de-

---

141 *See, e.g.*, *In re* Wellbutrin SR Direct Purchaser Antitrust Litig., No. 04-5525, 2008 WL 1946848, at *10 (E.D. Pa. May 2, 2008) ("If, at some later stage in the proceedings, it becomes apparent that certain [plaintiffs] were not injured . . . , the Court retains the authority to remove those members from the class."); *In re* Nw. 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."); *NASDAQ Mkt.-Makers*, 169 F.R.D. at 523 ("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."); *In re* Sugar Indus. Antitrust Litig., 73 F.R.D. 322, 347 (E.D. Pa. 1976) ("The fact that a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones." (quoting Blackie v. Barrack, 524 F.2d 891, 907 n.22 (9th Cir. 1975)) (internal quotation marks omitted)).

142 561 F.2d 434 (3d Cir. 1977).

143 *Id.* at 454.

144 *Id.* at 455.

145 305 F.3d 145 (3d Cir. 2002).

146 *Id.* at 155 ("[W]e reject the contention that plaintiffs did not demonstrate that sufficient proof was available, for use at trial, to prove antitrust impact common to all the members of the class.").

147 *Id.* at 158.

148 *See, e.g.*, *In re* Wellbutrin SR Direct Purchaser Antitrust Litig., No. 04-5525, 2008 WL 1946848, at *10 (E.D. Pa. May 2, 2008).

feat class certification simply by asserting that plaintiffs' impact evidence is either inapplicable to some class members or indeed reveals that a few class members were unaffected by the challenged conduct. Nonetheless, where a defendant can show that proving impact at trial would be *entirely or mainly* individualized and that such proof would overwhelm the trial, a class trial—or at least one that did not bifurcate proof of the violation from other aspects of plaintiffs' claims—might very well be inefficient.

If plaintiffs in an antitrust case, for example, were pursuing damages in the form of "lost profits" and thus were potentially required to engage in a class member-by-class member analysis to assess both harm to individual class members and to the class in the aggregate, it becomes harder to see how predominance could be satisfied. In *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[149] the Third Circuit rejected class certification in a securities class action, but not because some individual issues existed or a handful of class members were not injured.[150] Instead, the court in *Newton* found class certification inappropriate because the court would be required to examine, on a "trade by trade basis,"[151] "millions of trades to ascertain whether or not there was injury,"[152] which was "a mind-boggling undertaking."[153] This is very different from imposing a requirement that courts deny class certification where plaintiffs are able to show widespread harm with common evidence but cannot show harm to each and every class member.

In sum, at the class certification stage, courts typically refuse to impose a requirement that plaintiffs produce class-wide evidence capable of showing injury to all class members. Common proof of widespread harm is sufficient.

4. Aggregate Damages Do Not Compromise Defendants' Substantive Rights

A possible defense of the more stringent reading of the predominance requirement is that it is necessary to avoid altering substantive rights as part of the class procedure. The Federal Rules of Civil Procedure cannot do this under the Rules Enabling Act.[154] And there is some superficial appeal to this argument. After all, in the absence of the "all" requirement at trial, the class could recover even though some of its members do not have a valid claim. However, this objection to our argument does not withstand scrutiny.

---

149 259 F.3d 154 (3d Cir. 2001).

150 *Id.* at 192-93.

151 *Id.* at 187 (quoting *In re* Merrill Lynch Sec. Litig., 191 F.R.D. 391, 396 (D.N.J. 1999) (the *Newton v. Merrill Lynch* district court opinion)) (internal quotation marks omitted).

152 *Id.*

153 *Id.* at 191 (quoting *Merrill Lynch*, 191 F.R.D. at 398) (internal quotation marks omitted).

154 The Rules Enabling Act provides that rules of civil procedure may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (2006).

First, allowing an aggregate recovery to a class that includes some uninjured members can be understood as procedural rather than substantive. This is so because defendants' substantive rights are not compromised as long as the calculation of aggregate damages to the class is not affected by the presence of uninjured class members. More specifically, where defendants' exposure to damages would not be increased by class members that fail to satisfy all of the necessary elements of an antitrust claim, defendants' substantive rights would not be changed by certifying classes that include some minority of members for which there is no common proof of harm or for which the available proof actually shows no harm. Consider in this regard the Supreme Court's holding that, for policy reasons, the filing of a class action complaint tolls the statute of limitations for absent class members until there is a ruling on class certification.[155] The tolling of the statute of limitations might be considered procedural, and the Supreme Court in *American Pipe & Construction Co. v. Utah*[156] implied as much.[157] Yet tolling the statute of limitations can allow thousands—even millions—of plaintiffs to recover in an action who otherwise would not be able to do so. Given that, allowing an aggregate recovery by the class without proof that each member was harmed is not necessarily substantive.

Alternatively, one might treat the rule from *American Pipe* tolling the statute of limitations as substantive[158] and argue that the same is true for allowing a class to recover without proof of harm to every class member. Even if so, federal courts have not exceeded their legitimate powers by adapting federal antitrust law to the class context. True, Rule 23 cannot alter substantive rights.[159] But federal courts can and often do.[160] And in interpreting and developing federal antitrust law, courts can take procedural realities into account. Thus, for example, the Supreme Court took a pragmatic view of the challenges of proving damages from an antitrust claim when it held that the purchasers who may seek damages under federal antitrust law are generally those that purchase directly from the defendants[161] and that direct purchasers may recover the full overcharge that they pay as a result of an antitrust violation even if they are able to pass some of that

---

155 Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552-53, 561 (1974).

156 414 U.S. 538 (1974).

157 *See id.* at 558 n.29 (noting that "judicial tolling of the statute of limitations does not abridge or modify a substantive right afforded by the antitrust acts").

158 Rules pertaining to the statute of limitations are often treated as substantive, particularly for *Erie* purposes. *See, e.g.*, Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533-34 (1949) (holding that state law governed whether filing or service of complaint tolled statute of limitations in federal court diversity action); *cf.* Chardon v. Fumero Soto, 462 U.S. 650, 661-62 (1983) (applying state law to decide effect of filing of class action on tolling of statute of limitations).

159 28 U.S.C. § 2072(b) (2006) (stating that the Federal Rules of Civil Procedure may not change substantive rights).

160 *See, e.g.*, cases cited *supra* note 158.

161 Ill. Brick Co. v. Illinois, 431 U.S. 720, 728-29 (1977).

overcharge along to their customers.[162] The rule in *American Pipe* can be understood similarly—as adjusting substantive federal antitrust law to serve the efficiency and economy that Rule 23 is designed to achieve.[163] So federal courts have the power to alter federal antitrust law to make it work well in the class context.

Thus, little depends on whether, as a technical matter, the interpretation of federal antitrust law that we are championing is labeled substantive or procedural. And that is as it should be. The reality is that Rule 23 changes how courts adjudicate cases in a host of ways. Courts generally have been practical in addressing this reality.[164] An overly refined and theoretical discussion of the permissibility of including uninjured parties in a class is therefore inappropriate. The key question should be more practical: would defendants suffer meaningful prejudice if plaintiffs in a class action need not prove harm to each and every class member to support an aggregate recovery? The answer is that defendants would not.

The reason for this is that plaintiffs in antitrust cases can often accurately prove aggregate damages to the class as a whole without resorting to individualized evidence that might allow identification of which specific class members suffered harm and by how much. Courts in antitrust class actions have repeatedly found that "the use of an aggregate approach to measure class-wide damage is appropriate."[165] *In re NASDAQ Market-Makers Antitrust Litigation*,[166] for instance, approved use of an aggregate damages calculation in a highly complicated horizontal price-fixing conspiracy, which involved a class of more than one million members.[167] The court stated that such collective damages analyses "have been widely used in antitrust, securities and other class actions."[168] In its extended discussion of aggregate damages,[169] the *NASDAQ* court explained that such an approach is not only permissible, but it has "obvious case management advantages," including eliminating the need for proof of individual damages at trial.[170] Further, in the antitrust class action *Louisiana Wholesale Drug Co., Inc. v. Sanofi-Aventis*,[171] as to damages, the jury was simply instructed to "[s]tate the dollar amount that the Plaintiffs class was overcharged."[172]

---

162 Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

163 Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 561 (1974).

164 *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1447-48 (2010) (holding that federal court may certify class in a case involving a state claim that would not be subject to class certification in state court).

165 *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 324 (E.D. Mich. 2001).

166 169 F.R.D. 493 (S.D.N.Y. 1996).

167 *Id.* at 523.

168 *Id.* at 525.

169 *Id.* at 524-26.

170 *Id.* at 525.

171 No. 07 Civ. 7343(HB), 2009 WL 2708110 (S.D.N.Y. Aug. 28, 2009).

172 *Sanofi-Aventis* Verdict Sheet, *supra* note 127.

Economists can use straightforward, standard methodologies to compute damages to an entire class accurately—without first assessing the potentially unique circumstances of individual class members. For instance, an economist can employ a "before and after" damages model to compute the aggregate damages to the entire class without examining data from individual class members. The first step would be to draw upon market-wide data (or, typically, transactional data from defendants' own files) to compute average actual prices that the class as a whole paid during the period in which the challenged conduct was occurring. To assess the "but for" prices (i.e., the prices that would have been paid absent the challenged conduct), an expert could use, for instance, average prices paid by the class during the period before the challenged conduct began. Computing the average overcharge to the class, then, would involve subtracting the average "but for" price from the average actual price. Thus, damages to the class as a whole would simply be the total volume of purchases multiplied by the average overcharge.[173] Using average prices in a "before and after" model such as this is standard practice in antitrust cases.[174] Economists' use of statistical techniques, such as multivariate regression analysis, to determine whether the challenged conduct can be linked to price increases is simply a sophisticated means of determining what the prices would have been absent the challenged conduct.[175]

Two points are important regarding this standard approach to proving aggregate damages with class-wide evidence in antitrust class actions. First, the total damages are unaffected by the possible presence of individual class members that the model finds did not pay overcharges. Assume, for instance, that a comparison of the actual and "but for" prices under plaintiffs' model for five out of one hundred class members reveals that these class members would have paid the same amount for the product without the antitrust violation (i.e., they were not overcharged). The presence of these entities in the class will not affect the total class damages. They would cause the total average overcharge to the class to go down exactly enough to offset the inclusion of their additional purchase volumes in the computation.

---

173 *See generally* AM. BAR ASS'N, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES 171-208 (William H. Page ed., 1996).

174 *See, e.g.*, *In re* Live Concert Antitrust Litig., 247 F.R.D. 98, 145 (C.D. Cal. 2007) (noting that "before-and-after methodology has been accepted by numerous courts" and that the "yardstick" approach is also "widely upheld by courts" in computing class-wide damages in antitrust cases); *In re* Dynamic Random Access Memory Antitrust Litig., No. M 02-1486 PJH, 2006 WL 1530166, at *9 (N.D. Cal. June 5, 2006) (noting that the yardstick methodology has been "upheld by numerous courts"); Nichols v. SmithKline Beecham Corp., No. CIV.A. 00-6222, 2003 WL 302352, at *8 (E.D. Pa. Jan. 29, 2003) (holding that before-and-after methodology is generally accepted for computing impact and damages on a class-wide basis in antitrust cases).

175 *See, e.g.*, *Live Concert*, 247 F.R.D. at 145 ("Regression analysis is a well-recognized tool in determining antitrust damages.").

A second key point regarding aggregate damages computations in the antitrust field is that, assuming they accurately reflect the market effects of the challenged conduct, they necessarily include damages *only for those entities that have satisfied all elements of their antitrust claims*. This is so because in direct purchaser antitrust actions, the mere payment of artificially high prices is sufficient to establish injury in fact.[176] Those entities that do not pay any overcharges, by definition, are not injured and do not add to the overall damages. Accordingly, where a damages analysis accurately computes the aggregate overcharge to the class, it necessarily reflects only injuries suffered by class members that have satisfied all elements of their antitrust claims. Individualized analysis could potentially eliminate uninjured class members, but it would not reduce the total liability of defendants.

Defendants' tendency to focus at the class certification stage on the ability of plaintiffs' evidence to show harm to all class members sometimes leads to bizarre arguments. In a recent case, defendants criticized one of plaintiffs' expert economists at the class certification stage "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."[177] In effect, defendants in this case were criticizing plaintiffs' damages analysis *not* for inaccurately assessing aggregate damages to the class, but rather simply because the aggregate damages analysis—even if correct as to the class as a whole—would not, by itself, establish that all class members were injured. But defendants should have no reason to care about the presence of uninjured members in the class as long as their presence does not augment defendants' total liability. The only apparent reason that defendants would raise this issue is not because it has any relevance to a class trial but rather in the hope of obtaining a denial of class certification as an end in itself, a decision that would drastically reduce their exposure to any damages at all.

As long as all of the aggregate damages computed are associated with class members that can satisfy all elements of their antitrust claims and the total damages caused by defendants are not inflated by the presence of class members who cannot prove injury, defendants' substantive rights are not compromised by the inclusion of uninjured members in the class. This proposition remains true even if some of the total damages were allocated, in a post-verdict claims process, to class members who suffered no injury. What should be essential—and sufficient—from a defendant's perspective

---

176 *See supra* notes 74-77 and accompanying text.

177 Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l., Ltd., 262 F.R.D. 58, 69 (D. Mass. 2008) (second emphasis added).

is that it is liable only for the harm that it has caused to class members that can satisfy all elements of their antitrust claims.[178]

To see this, let us consider a hypothetical (albeit typical) fact pattern in an antitrust class action and what plaintiffs are able to prove by a preponderance of the evidence on a common basis. Assume that plaintiffs can show that defendants' conduct violated the antitrust laws, that the conduct generally caused prices to be higher than they otherwise would have been, that those who were harmed are contained within the class, and that defendants are liable for a calculable amount of damages in the aggregate. Moreover, because merely paying an overcharge satisfies a class member's burden of proving fact of damage,[179] each dollar of damages included in the aggregate overcharge computation is associated with class members that meet all elements of their claims. In sum, plaintiffs can use class-wide evidence to prove a violation, causation, and fact of damage for every dollar that is part of the aggregate damages analysis. In this situation, what precisely is the nature of the right, if any, of which defendants are deprived by the presence of uninjured members in the class?

One possibility is that defendants might be found liable for a larger award than is appropriate. But that contention ignores a crucial fact. By hypothesis, plaintiffs are able to prove by a preponderance of the evidence the aggregate damages that the class suffered. Indeed, defendants are not paying a single dollar due to the presence of any entity in the class that has not satisfied all elements of its antitrust claim. As a result, there is no exaggeration of damages.

Another possibility is that defendants would be deprived of the opportunity to challenge any recovery that could flow to unharmed class members in a claims process. But it is hard to see why that should matter. Assuming that the aggregate damages accurately reflect the collective harm to those members of the class who satisfy all elements of their claims, the method by which the class ultimately splits up the damages award should be of little moment to defendants. In an antitrust class action adjudicated nearly forty years ago, *In re Coordinated Pretrial Proceedings in Antibiotic*

---

178 If for some reason there were an 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 in dollars. 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." *In re High Pressure Laminates* Transcript, *supra* note 122, at 2333-34. Here, too, there is no a priori reason why this means of assessing damages would be affected by the presence in the class of non-injured plaintiffs. A key issue at trial under this method would be the total volume of purchases on which to assess the overcharge damages. But that issue would not be affected by the presence in the class of uninjured class members—if, for instance, some class members did not buy any of the product on which there was an overcharge.

179 *See supra* text accompanying notes 81-83.

Antitrust Actions,[180] the court grappled with a similar issue.[181] Defendants objected to the court's proposal to allow plaintiffs to present damages to the class at issue in an aggregate fashion. The court contemplated that

> if and when the defendants' liability and the damages suffered by the class had been established and judgment in an appropriate amount entered, a second round of notice might be used to alert class members to the existence of the damage fund and to elicit claims against the fund from the members of the class.[182]

Defendants objected to this process on various grounds, including that it wrongly created "a 'pot of gold' which the plaintiffs and their counsel are somehow not entitled to receive."[183] The court rejected this argument and noted, "If we assume that a price-fixing conspiracy is proven at trial . . . the defendants will certainly have no right to the 'pot of gold' created by their illegal activities."[184] If the aggregate damages assessment is correct, then defendants have no legitimate interests in the distribution of the aggregate award among class members.[185]

For the same reasons, courts typically do not permit defendants to intervene in post-verdict claims processes where the damages amount reflects the aggregate harm to the class as a whole and the only remaining issue is how to allocate funds between class members. For instance, in *Six (6) Mexican Workers v. Arizona Citrus Growers*,[186] the Ninth Circuit held that "[w]here the only question is how to distribute the damages, the interests affected are not the defendant's but rather those of the silent class members."[187]

The ability to compute aggregate damages to only those entities in a class that satisfy all elements of their claims solely with class-wide evi-

---

180 333 F. Supp. 278 (S.D.N.Y. 1971).

181 *Id.* at 287.

182 *Id.*

183 *Id.*

184 *Id.*

185 Indeed, allowing plaintiffs to recover for the aggregate damages of the whole class and only for the aggregate damages of the whole class could limit a defendant's liability. It might be, for example, that a small percentage (say 10 percent) of the class was uninjured, but it is unclear which members were harmed. Each member may be able to satisfy the preponderance of the evidence in showing its injury. The defendant might then be found liable to the whole class for some estimated overcharge when it should be liable only for 90 percent of the class purchases. More generally, the preponderance of the evidence standard does not always minimize error costs when there are recurring wrongs. For an excellent discussion of this point, see Saul Levmore, *Probabilistic Recoveries, Restitution, and Recurring Wrongs*, 19 J. LEGAL STUD. 691 (1990). A discussion of the implications of this insight for aggregate recoveries in class actions is beyond the scope of this Article.

186 904 F.2d 1301 (9th Cir. 1990).

187 *Id.* at 1307; *see also, e.g.*, Boeing Co. v. Van Gemert, 444 U.S. 472, 481 (1980) (stating that defendant has no legitimate interest in how lump sum damages award is distributed among class members).

dence sets antitrust—and in particular antitrust class actions brought by direct purchasers—apart from other sorts of claims. Consider the issue of individual reliance in fraud. A defendant makes a materially misleading statement—that, for example, a drink contains saccharin and has no calories, when it really contains sugar and is a high-calorie drink—and it is unclear which purchasers relied to their detriment on the statement. Assume many—but not all—buyers would have preferred to avoid the calories. It may be difficult to ascertain not only which plaintiffs were harmed, but also what the aggregate harm is. The failure of one buyer to rely to its detriment on the misstatement—if a sale would have occurred in any event, for instance, because the purchaser preferred sugar over the promised saccharin—does not imply increased harm to another. In contrast, in our antitrust case, by assumption an individualized inquiry will not alter the amount of aggregate damages. An analysis of the total overcharges paid for a product, for example, will not vary depending on the identity of the entities that bought the product.[188] The antitrust setting, then, is unlike many others.

An issue along these lines arose in *McLaughlin v. American Tobacco Co.*,[189] where plaintiffs proposed to compute aggregate damages to a class they knew would include members who were uninjured or who otherwise could not satisfy all of the elements of their RICO claims.[190] The case involved "light" cigarettes that were asserted to be, but were not, really healthier than "full-flavored" cigarettes.[191] Plaintiffs claimed that as a result of the misleading statements, increased demand caused the "light" cigarettes to be more expensive than they otherwise would have been.[192] Plaintiffs sought to avoid the problem of including people in the class who did not have valid claims because, for example, they did not rely on the misstatement.[193] They did so by estimating the share of the class that had valid claims and then computing the aggregate damages based on that estimate.[194] The Second Circuit rejected that approach, stating that "it offends both the Rules Enabling Act and the Due Process Clause."[195]

Important for present purposes are *the reasons* that the Second Circuit offered for rejecting the use of aggregate damages in a case involving a proposed class that would contain multiple uninjured members. The central problem, according to the court, was that plaintiffs' aggregate damages approach was "likely to result in an astronomical damages figure that *does*

---

188 Our point is not that class certification would necessarily be inappropriate in fraud cases involving issues of individual reliance. It is instead that difficulties that arise in that and other settings are not implicated in the antitrust context.

189 522 F.3d 215 (2d Cir. 2008).

190 *Id.* at 230.

191 *Id.* at 220 (internal quotation marks omitted).

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

193 *Id.* at 222-26.

194 *Id.* at 231.

195 *McLaughlin*, 522 F.3d at 231.

not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants."[196] *McLaughlin* concluded that the "disconnect" between the aggregate damages figure and the "harm actually caused by defendants" would effectively alter the underlying substantive rights in contravention of the Rules Enabling Act.[197]

Antitrust is different. A class member need not know about the challenged anticompetitive conduct—let alone rely upon such conduct to its detriment—to satisfy an antitrust claim.[198] Instead, merely buying a product at an artificially inflated price is sufficient to prove impact.[199] As a result, as explained above, it is possible to use class-wide data reflecting averages of actual and estimated "but for" prices—oftentimes drawn from defendants' own records—to arrive at an accurate account of total damages to the class as a whole, entirely unaffected by the presence of multiple uninjured class members.[200] In antitrust, unharmed class members do not create a "disconnect" between defendants' liability and the harm actually caused. In short, there is no legitimate substantive objection to entering judgment for a class in an antitrust case for an aggregate sum—even if the class includes multiple members for whom there is either no proof of their having been injured, or for whom the evidence shows a lack of injury.

A final possible objection worth considering here is that taken to its logical extreme, our argument could imply that even a class composed mainly of uninjured class members could be properly certified and sustained at trial. We think that our argument does not require that conclusion. Absent common proof of widespread harm to the class, problems could arise with various prongs of the Rule 23 analysis other than predominance. The named plaintiffs, for example, might not be typical of the class they seek to represent and thus fail to satisfy the "typicality" prong of Rule 23(a)(3). An expression of this limitation can be found in the jury instructions from *In re Scrap Metal Antitrust Litigation*.[201] In that case, the court instructed the jury that if they found that one of the named plaintiffs was harmed, then it "must consider whether the class members also suffered the

---

196 *Id.* (emphasis added).

197 *Id.* Note that we are not accepting that *McLaughlin* was rightly decided, just that its reasoning confirms our argument.

198 *See* Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa., 815 F.2d 270, 276 (3d Cir. 1987) (finding that payment of an unfair price alone satisfies an antitrust claim).

199 *See id.* ("[T]he payment of overcharges . . . is unquestionably an antitrust injury . . . ."); Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 633 (7th Cir. 2002) ("The monopoly overcharge is the excess price at the initial sale . . . .").

200 *Cf. In re* Live Concert Antitrust Litig., 247 F.R.D. 98, 140-41 (noting that demonstrating certain class members are uninjured does not preclude class certification); *supra* Part II.C.1-4.

201 No. 1:02 CV 0844, 2006 WL 2850453 (N.D. Ohio Sept. 30, 2006).

same type of injury from the same conduct."[202] The court continued: "All plaintiffs must prove is that the named plaintiffs were injured and that the injury they suffered is representative of injury suffered by the other members of the class."[203] Accordingly, in *Scrap Metal*, while the court did not require the jury to find that "all" class members were injured, it nonetheless asked the jury to determine whether "class members" generally suffered the same type of harm as the class representatives.[204] The element of typicality—and perhaps other Rule 23 elements as well—may require that harm to an antitrust class is at least widespread among its members.

In sum, a requirement at class certification that plaintiffs show they are capable of using common evidence to show that the conduct at issue harmed all (or virtually all) class members is artificial. It imposes an obstacle to class certification that lacks the requisite relationship to plaintiffs' burden at trial. In that way, it is inconsistent with the logic of class certification doctrine—a logic recognized by the very opinions, including *Hydrogen Peroxide*, that could be construed as ratcheting up the class certification standard.

5. The Rights of Class Members Are Not Harmed

A final potential objection to permitting classes to be certified with substantial numbers of non-injured entities is that it could violate the rights of the class members themselves. Either the uninjured members could have their claims unfairly extinguished, or if non-injured members are allocated some of the class award, the share belonging to the injured members could be diluted. To the extent that there is a real problem here, it can be solved by ensuring that the class award is accurately and efficiently allocated to members of the class. If the evidence reveals that certain class members suffered no harm, they either would not be allowed to recover or would be permitted only a nominal recovery.

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 (or would recover only a nominal amount) under plaintiffs' theory. There are, however, three reasons to be skeptical of this objection.

The first reason for skepticism is that these are entities for which plaintiffs have no evidence of any injury and thus it is unlikely that the entities would be giving up claims with any value. The second reason to ques-

---

202 Jury Instructions at 40, *In re* Scrap Metal Antitrust Litig., No. 1:02cv0844 (N.D. Ohio Feb. 8, 2006).

203 *Id.*

204 *Id.* at 40-41.

tion 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—notice that must describe plaintiffs' allegations and theories, defendants' defenses, and other particulars about the action.[205] If there is a settlement, the notice must describe, among other things, plaintiffs' plan of allocation.[206] Importantly, the notice must also 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.[207] Thus, non-injured class members would have an opportunity to opt out of the class before they are bound by any resulting judgment.

Finally, the practical reality of a denial of class certification in most cases is that the uninjured and injured class members alike will not 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 a professed concern for the rights of those uninjured members of the class who choose not to opt out or of those injured members whose claims might be somewhat diluted. Acting on that concern would likely deprive both groups of any recompense and allow the defendant to keep its ill-gotten gains.[208] Recognizing this very phenomenon, the district court judge in *In re New Motor Vehicles Canadian Export Antitrust Litigation*[209] wryly observed that "[i]f the plaintiffs have an adequate model to award aggregate damages, the defendants' concern that some class members may be over-compensated at the expense of other class members seems a little suspect. Under the guise of fairness, the defendants' real objective is to avoid recovery by anyone."[210]

D. *Common Issues May Predominate at Trial, Even If They Do Not Predominate Regarding Impact*

Another point is important in regard to a possible new, heightened class certification standard. Even if plaintiffs did have to show that all class members were harmed for common evidence to predominate regarding impact or fact of damage, this would not preclude the possibility that common issues would predominate at trial. Courts—including the Third Circuit in *Hydrogen Peroxide*—have mistakenly implied that common issues need

---

205 *See* FED. R. CIV. P. 23(c)(2).

206 *See* FED. R. CIV. P. 23(c)(2)(B).

207 *See* FED. R. CIV. P. 23(c)(2)(B)(v).

208 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 85.

209 235 F.R.D. 127 (D. Me. 2006), *vacated in part*, 522 F.3d 6 (1st Cir. 2008).

210 *Id.* at 143 n.55.

to predominate in regard to each element of a claim.[211] But that is not what Rule 23 requires. The proper question is whether common issues predominate in the trial as a whole. And impact, or fact of damage, tends to play only a minor role in class action trials.

Rule 23(b)(3) asks whether "questions of law or fact common to class members predominate over any questions affecting only individual members . . . ."[212] It does *not* require a finding that individual issues are nonexistent, or even that common issues must predominate as to *each element* of plaintiffs' claim.[213] Fairly read, the Rule requires only that common issues of law or fact would predominate *with respect to the case as a whole*.[214] Following this very reasoning, the Second Circuit in *Cordes & Co. Financial Services, Inc. v. A.G. Edwards & Sons, Inc.*[215] reversed a denial of class certification.[216] The *Cordes* court 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."[217] Thus, 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 trial. Take the following example. Plaintiffs demonstrate that proving an antitrust violation (including all of the elements of that violation) would be entirely common to the class. Plaintiffs further show 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 circumstances, even if plaintiffs would not be able to show through common proof that all or virtually all of the

---

211 *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008) ("Issues common to the class must predominate over individual issues . . . ." (quoting *In re* Prudential Ins. Co. Am. Sales Practice Litig., 148 F.3d 283, 313-14 (3d Cir. 1998)) (internal quotation marks omitted)).

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

213 *See id.*

214 *Cf. Hydrogen Peroxide*, 552 F.3d at 309 n.6 ("Class relief is peculiarly appropriate when the issues involved are common to the class as a whole and when they turn on questions of law applicable in the same manner to each member of the class." (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 155 (1982)) (internal quotation marks omitted)).

215 502 F.3d 91 (2d Cir. 2007).

216 *Id.* at 108-09.

217 *Id.* at 108.

members of the proposed class suffered economic injury caused by the alleged conspiracy, common issues still might predominate at trial.[218]

In the antitrust context, the nature of direct purchaser monopolization and conspiracy cases is 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—for example, on the questions, "Did defendants conspire to fix prices?" or "Did defendant foreclose competition and, if so, how?" Moreover, even questions relating to the effects of the challenged conduct tend to turn on whether the conduct as a whole had anticompetitive effects such as, for example, "Did prices generally rise (or output generally fall) due to the challenged conduct?" 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. After canvassing the relevant cases, *Newberg on Class Actions* notes that in antitrust actions, "common liability issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues."[219]

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.

E. *Judicial Finding of Merits Facts Exacerbates the Harm of Imposing the Wrong Class Certification Standard*

Allowing judges to make findings of fact on the merits at the class certification stage exacerbates the harm of the misreading of Rule 23 discussed above. Not only do plaintiffs then bear a burden that should not be required of them, they are also forced to carry that burden over a higher standard than the one traditionally applied at the class certification stage.

Consider the possible showing that a court might require of plaintiffs. It might obligate plaintiffs to establish through common evidence that all class members suffered some injury as a result of an antitrust violation. Plaintiffs might then argue—with support from an expert economist—that

---

218 *See id.* 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." (footnote omitted)).

219 *See* CONTE & NEWBERG, *supra* note 80, § 18:25 & n.4.

defendants engaged in a price-fixing conspiracy that increased the amount that all purchasers paid for a good or service. Assume that plausible statistical analysis and economic argument support plaintiffs' position. Further assume that plaintiffs suggest how they can attempt to prove their case at trial using evidence common to the class. But defendants offer their own expert who contests some of the reasoning of plaintiffs' expert. If defendants are right, some class members may not have been harmed by any illegal conspiracy.

Under past case law, it would seem clear that plaintiffs have met their relevant burden.[220] Plaintiffs have made a plausible case that they can attempt to prove impact at trial using common evidence. Historically, this would be enough.[221] But, depending on how loose language in some recent cases is read, a court could deny that common issues predominate. As noted above, the precise new standard—if there is one—is quite vague, maybe even incoherent.[222] Attempting to apply it, a court could potentially consider plaintiffs' evidence and defendants' evidence, and conclude that plaintiffs have not shown by a preponderance of the evidence that they will be able to prove common impact at trial by a preponderance of the evidence (or that plaintiffs have not met whatever standard the court puts in place, once they clarify the mess they seem to have created).

If a court so rules, that would compound the error of requiring plaintiffs to show impact on all class members. It would ratchet up the standard at the class certification stage and require a showing that we argue plaintiffs should not have to make at all. The result is a corresponding increase in the odds of a court denying certification of a class that meets all of the requirements of Rule 23, properly understood.

F. *The Ideological Spin of Errors Regarding the Class Certification Standard*

The result under the new possible standard is that classes will be difficult to certify in a way that makes little sense under the principles of Rule 23. Moreover, the catalyst for this possible change is troubling. It derives from a concern—as noted above, an unjustified concern—about the vulnerability of large corporate defendants. Little, then, is left to support the potential new class certification standard. Whatever the motivations or intentions of the courts suggesting the change, we are left with only a naked preference for large corporate defendants over the individual consumers and small businesses that bring antitrust claims. The risk is that, in effect, a potential heightened class certification standard will introduce an ideologi-

---

220 *See, e.g.*, *In re* Linerboard Antitrust Litig., 305 F.3d 145, 152 (3d Cir. 2002).

221 *Id.*

222 *See supra* Part I.B.

cal consideration foreign to the procedural context. It may cause, in short, a political distortion of procedure.

III. POLITICS AND THE SEVENTH AMENDMENT: NEGLECT AND MISUSE

As discussed above, under some interpretations of the class certification standard, judges may or must find facts relevant to the merits in deciding whether to certify a class.[223] In an extreme version of this view, to conclude that plaintiffs have shown by a preponderance of the evidence that impact is capable of proof on a class-wide basis, the judge should decide whether plaintiffs have in fact shown impact on a class-wide basis.

To be sure, that is not how courts generally frame the issue. The Third Circuit in *Hydrogen Peroxide* took pains to disavow that possibility.[224] But, then again, courts have failed to explain with any clarity what standard they are applying at the class certification stage in antitrust suits. And it is very challenging—it approaches the proverbial difficulty of counting how many angels can fit on the head of a pin—to understand what it means to show by a preponderance of the evidence that plaintiffs will be able to prove impact by a preponderance of the evidence. Legal standards can be sliced only so thin before they collapse. So there is a risk that judges will actually force plaintiffs to prove impact by a preponderance of the evidence to get a class certified, and, if they do, there is a corresponding risk that the class certification standard will violate the Seventh Amendment.

A. *Applying* Beacon Theatres *and* Dairy Queen *to Class Certification*

The Supreme Court has set forth the proper procedure for when the same facts are relevant to rights at law—to be determined by a jury—and rights in equity—to be determined by a judge. As the Supreme Court held

---

223 *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008) ("[T]he court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action."); *In re* New Motor Vehicles Canadian Export Antitrust Litig. (*Canadian Cars*), 522 F.3d 6, 17 (1st Cir. 2008) ("[W]eighing whether to certify a plaintiff class may inevitably overlap with some critical assessment regarding the merits of the case.").

224 *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 311-12 ("Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, 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 . . . ."); *see also* Blades v. Monsanto, 400 F.3d 562, 567 (8th Cir. 2005) ("The closer any [Rule 23] dispute at the class certification stage comes to the heart of the claim, the more cautious the court should be in ensuring that it must be resolved in order to determine the nature of the evidence the plaintiff would require.").

in *Beacon Theatres, Inc. v. Westover* and *Dairy Queen, Inc. v. Wood*, the jury is to make its findings first.[225] The judge should address the equitable issues afterward, abiding by the jury's factual determinations.[226]

There are two obvious alternatives to the procedure prescribed by *Beacon Theatres* and *Dairy Queen*. The Supreme Court in *Beacon Theatres* contemplated one of these possibilities. The judge could resolve the equitable issues first, and the jury could then be bound by the judge's factual findings.[227] But that would violate the right to a trial by jury.[228] The judge, rather than the jury, would be resolving key factual issues.

Another possibility—one rejected at least implicitly by the Court in *Beacon Theatres* and *Dairy Queen*—would be for the judge to make any necessary factual findings in deciding the equitable claims first but for those findings not to bind the jury.[229] This is the approach that the district court adopted in *McDonough v. Toys "R" Us, Inc.*,[230] the first lower court to decide a class action motion that was bound by *Hydrogen Peroxide*.[231] In an attempt to be faithful to its reading of Third Circuit law, it found facts in deciding to certify the class and then held that the jury would resolve the same factual issues to the extent that they were relevant to a trial on the merits.[232] Unfortunately, such an approach deprives the parties of the ordinary benefits of facts found by a jury, causing just the kind of harm that the Seventh Amendment was designed to prevent.[233]

Permitting a judge to find facts that later will be addressed again by a jury in effect requires plaintiffs to prevail on the same facts twice. This places plaintiffs at a terrible strategic disadvantage. A victory at the class certification stage forces plaintiffs to prove the same facts again to a different fact-finder. But an unfavorable decision at the class certification stage will generally be fatal to plaintiffs' case—it would sound the proverbial

---

225 Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959).

226 Courts have taken *Beacon Theatres* and *Dairy Queen* quite seriously, at least outside of the class certification context. *See, e.g.*, Shum v. Intel Corp., 499 F.3d 1272, 1276-79 (Fed. Cir. 2007) (holding that claims at law must be tried to a jury before court hears equitable claim); Attrezzi, LLC v. Maytag Corp., 436 F.3d 32, 36, 43 n.5 (1st Cir. 2006) (same).

227 *Beacon Theatres*, 359 U.S. at 510-11.

228 *See id.* (noting a need to preserve a constitutional right to a jury when exercising judicial discretion).

229 *See, e.g.*, *id.* (finding that the right to a jury trial cannot be lost through prior judicial decisions on equitable claims).

230 638 F. Supp. 2d 461 (E.D. Pa. 2009).

231 McDonough v. Toys "R" Us, Inc., No. 06-0242 (E.D. Pa. Oct. 15, 2009) (ruling that judge's findings of fact and conclusions of law at class certification would have no precedential or collateral estoppel effect at trial).

232 *Id.*

233 *See* U.S. CONST. amend. VII ("[T]he right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States . . . .").

"death knell"[234]—because few proposed antitrust class actions involve large enough claims to warrant individual prosecution.[235] This means that at the very least, most named plaintiffs and potential absent class members are deprived of any meaningful opportunity for legal recourse, even if a few class members have enough at stake to pursue their claims individually. In effect, the judge would be pre-screening the merits in deciding whether to allow a jury to decide the merits on a class-wide basis. A right to have a jury hear a case rather than a judge, but only after winning before a judge, is not much of a right at all. It is unsurprising, then, that this approach is not permissible under *Beacon Theatres* and *Dairy Queen*.

Indeed, the rule against a judge finding facts on the merits for equitable purposes that a jury will ultimately decide at law finds a corollary in the Reexamination Clause of the Seventh Amendment. The Reexamination Clause prevents a second judge or jury from revisiting the findings of an earlier jury.[236] It thus bars courts from depriving parties of the right to a jury trial by forcing them to succeed in litigating the same issue twice. The holdings from *Beacon Theatres* and *Dairy Queen* perform essentially the same function. One might say that they recognize, implicit in the right to a trial by jury, a ban on *preexamination*—preventing, in particular, a judge from deciding merits issues before a jury has the opportunity to do so. The need for such a rule is particularly acute in class actions, where the judge's finding as a practical matter will prove dispositive for most or all class members.

Federal Rule of Civil Procedure 23 is essentially equitable.[237] Its origins lie in equity.[238] The fact that the equitable standard has been codified—and modified—in the Federal Rules does not transform its equitable nature, just as interlocutory injunctive relief remains equitable despite its codification in Federal Rule of Civil Procedure 65.[239] As a result, the holdings of *Beacon Theatres* and *Dairy Queen* apply to class certification. The Seventh Amendment thus requires judges to await findings on the merits by the jury before deciding on class certification if the standard for making that equitable determination is going to be transformed so that it requires a resolution of merits facts.

---

234 *See, e.g.*, Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001) (recognizing that denying class certification "may sound the 'death knell' of the litigation on the part of plaintiffs").

235 *See id.* (discussing the "extraordinary nature" of class actions and how many suits cannot overcome a failed class certification).

236 *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) ("[A] judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries.").

237 *See* FED. R. CIV. P. 23 advisory committee's note.

238 *See, e.g.*, *id.*; Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 392 n.318 (2003).

239 *See* FED. R. CIV. P. 65 advisory committee's note.

True, the Court in *Beacon Theatres* suggested that it was conceivably permissible for judges to find facts in deciding equitable relief, but "only under the most imperative circumstances."[240] As discussed above, there is no compelling reason to allow the judge to make factual findings on the merits at class certification.[241]

Nor is the argument persuasive that judges are permitted to find facts relevant to the merits in other settings. This is so for at least two reasons. First, in most contexts, courts are scrupulous about *not* deciding merits facts in contending with issues that arise before trial. When they take the merits into account, they either accept plaintiff's allegations as true, or they undertake a very limited inquiry, asking only if the claims are obviously without merit[242] or, at most, have a likelihood or substantial probability of succeeding.[243] Second, even if courts in rare instances do decide merits facts before trial, their inattention to the Seventh Amendment in those contexts does not provide an adequate basis for ignoring its significance in general.[244] Constitutional rights do not generally disappear simply because judges and parties at times overlook them.

As to the first point, when courts address the facts before trial—including regarding subject matter jurisdiction, personal jurisdiction, or interlocutory injunctive relief—they generally do not resolve factual issues on the merits. In resolving subject matter jurisdiction, for example, courts do not decide whether there is federal question jurisdiction by actually deciding whether plaintiff should win on the merits of a claim arising under federal law.[245] They ask, in one formulation, only whether the federal claim is "obviously without merit."[246] Indeed, a claim can be so weak that it falls prey to a motion to dismiss for failure to state a claim and still have sufficient merit—that is, not be so "plainly unsubstantial"—to allow for federal question jurisdiction.[247]

Likewise, in deciding personal jurisdiction—and more specifically, specific jurisdiction—the merits sometimes matter.[248] The kind of analysis

---

240 Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959).

241 *See supra* Part I.

242 *See* Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-06 (1933).

243 *See* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 375 (2008); DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 187 (2d ed. 1993). *See generally* Joshua P. Davis, *Taking Uncertainty Seriously: Revising Injunction Doctrine*, 34 RUTGERS L.J. 363 (2003).

244 Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 448-49 (1996) (Scalia, J., dissenting) (rejecting the view that judicial inattention to the right to a jury trial under the Seventh Amendment in a particular context provides a reason to ignore the issue when it is raised).

245 *See Levering*, 289 U.S. at 105-06.

246 *Id.* at 105.

247 *Id.*

248 *See, e.g.*, Nissim Corp. v. ClearPlay, Inc., 351 F. Supp. 2d 1343, 1351 n.5 (S.D. Fla. 2004) (noting that "[a] determination on the merits . . . will also establish whether the Court has personal jurisdiction").

that courts apply depends in part on the kind of claim that a plaintiff brings, a phenomenon that Professor Geoffrey Hazard has aptly labeled "arbitrary particularization."[249] Yet courts do not decide claims on the merits to determine the issue of personal jurisdiction.[250] They ask only about the nature of the claim that plaintiff has alleged.[251]

A similar point holds true for interlocutory injunctive relief. The merits affect whether a judge will grant an injunction before trial.[252] But the judge does not decide the facts relevant to the merits.[253] The judge assesses instead the odds of plaintiff prevailing at trial, as well as the irreparable harm both plaintiff and defendant will suffer if the court errs in its decision to grant a preliminary injunction.[254] That inquiry delves deeper into the merits than that which courts generally undertake regarding subject matter jurisdiction or personal jurisdiction, but it still stops well shy of the kind of determination that is reserved for the jury.[255]

And, of course, at the pleading stage, a judge must take all nonconclusory allegations as true in deciding whether to dismiss a claim.[256] Similarly, at summary judgment, the court asks only whether plaintiff has raised genuine issues of material fact warranting a trial, not whether plaintiff should win by a preponderance of the evidence[257] (or whatever burden of proof that applies in the case).[258]

Finally, even if there are a handful of counterexamples—situations in which courts at times decide facts relevant to the merits before a jury

---

249 Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 283.

250 *See* ISI Brands, Inc. v. KCC Int'l, Inc., 458 F. Supp. 2d 81, 84 (E.D.N.Y. 2006) (examining personal jurisdiction through the nature of the claim arising from the complaint and supporting documents).

251 *See id.*

252 *See* Acoolla v. Angelone, 186 F. Supp. 2d 670, 671 (W.D. Va. 2002) (stating one factor that courts look at in granting preliminary injunctions is "the likelihood that plaintiff will eventually succeed on the merits").

253 *Id.*

254 *See generally* Davis, *supra* note 243, at 378-81. There is some controversy over whether the standard that plaintiff must meet constitutes a fixed threshold or whether it varies depending on the relative irreparable harm that plaintiff and defendant would suffer from an erroneous decision. At one point, the sliding scale approach seemed predominant. *See id.* at 367-68. But the Supreme Court has recently indicated that a more rigid approach with an irreducible threshold may be the appropriate standard. *See* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 375 (2008).

255 *See Natural Resources*, 129 S. Ct. at 375 (requiring a showing of "likely" irreparable harm, but not mandating a complete determination of the merits).

256 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009).

257 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

258 *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252-53 (1986) (discussing varying standards of proof).

trial[259]—that does not necessarily provide a basis for ignoring the Seventh Amendment when it comes to the class certification standard.[260] The fact that courts—and perhaps parties—have overlooked a potential Seventh Amendment issue in the past provides a weak basis for doing so in the future. We may be unwilling to upset well-settled doctrines, but that does not mean we should casually dismiss a constitutional challenge to new ones.[261]

Nonetheless, there is a meaningful risk that courts will not take the Seventh Amendment issue seriously in the class certification context. There is a troubling trend not to inquire into the entailments of the Seventh Amendment in any rigorous way, but merely to accept past practice—even if it may well be unconstitutional—as a sufficient basis for paying little heed to the Seventh Amendment when litigants raise the issue.[262] Indeed, the Supreme Court has upheld one procedure after another that allows a

---

259 Richard Marcus offers the example of the co-conspirator exception to the hearsay rule. *See* Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification* 78 GEO. WASH. L. REV. (forthcoming 2010) (manuscript at 59) (on file with the George Mason Law Review). A judge assesses whether there is a conspiracy under the preponderance of the evidence standard to determine if the statement of a co-conspirator can be admitted into evidence to prove the conspiracy to a jury. *Id.* He suggests that this example establishes that there is not a Seventh Amendment problem. *Id.* But the example is not that persuasive. The life of the Seventh Amendment has been experience, not logic. If Seventh Amendment law were subject to general principles—as Marcus's argument assumes—then it would make no sense, for example, for the Supreme Court to conclude—as it has—that remittitur is constitutional but additur is not. Dimick v. Schiedt, 293 U.S. 474, 487 (1935). The fact that Marcus has identified one, rare, longstanding practice of courts finding facts that a jury may later address on the merits does not prove that courts may always take that measure without violating the Seventh Amendment (this is true even if the co-conspirator exception did not exist in the common law in 1791 and is not permitted for that reason under the Seventh Amendment). Indeed, it is difficult to reconcile Marcus's position with *Beacon Theatres* and *Dairy Queen*. After all, if a judge may decide issues properly before her as long as her decision does not preclude a jury's resolution of factual issues on claims at law—a possible reading of Marcus's co-conspirator example—then *Beacon Theatres* and *Dairy Queen* were wrongly decided.

260 The doctrine of desuetude applies only to statutes and, apparently, is the law only in West Virginia. *See* Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006).

261 As Justice Scalia put the matter in his dissent in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996):

> Today the Court overrules a longstanding and well-reasoned line of precedent that has for years prohibited federal appellate courts from reviewing refusals by district courts to set aside civil jury awards as contrary to the weight of the evidence. One reason is given for overruling these cases: that the Courts of Appeals have, for some time now, decided to ignore them. Such unreasoned capitulation to the nullification of what was long regarded as a core component of the Bill of Rights—the Seventh Amendment's prohibition on appellate reexamination of civil jury awards—is wrong. It is not for us, much less for the Courts of Appeals, to decide that the Seventh Amendment's restriction on federal-court review of jury findings has outlived its usefulness.

Id. at 448-49 (Scalia, J., dissenting).

262 *See, e.g.*, *id.* (discussing a trend of courts of appeals ignoring important Seventh Amendment protections).

judge to remove cases from the jury, often with little consideration of the Seventh Amendment.[263]

This pattern is disturbing, even more so when one considers the few instances in which judges *have* read the Seventh Amendment as constraining practice. Federal appellate courts, for example, have shown an uncharacteristically acute concern about the Seventh Amendment—and have even used it in a somewhat tortured way—as a basis for denying class certification.[264] But when it comes to plaintiffs' argument that the Seventh Amendment limits the burden that courts may place on plaintiffs before they can get to trial—on a motion to dismiss, at summary judgment, and now, perhaps, at the class certification stage—courts generally brush the issue aside. The specter is that the federal judiciary—perhaps subconsciously—is taking a political approach to the right to a jury trial.[265]

If so, the new class certification standard would take such politics to a new apogee—for in other settings the courts have not yet said that judges may actually *find facts* before a jury does, but merely that they may come ever closer to doing so. To understand this point, it is useful to examine the broader context of academic analysis and recent federal court decisions implicating the Seventh Amendment.

B. *Neglect: Pleading and Summary Judgment*

The recent trend in the history of procedure—particularly in class actions—is a ratcheting up of standards that plaintiffs must meet to get their case before a jury. Notable movements along these lines are the apparently heightened standards that the Supreme Court imposed, at least in certain

---

263 Thomas, *Motion to Dismiss*, *supra* note 36, at 139, 142 (citing Thomas, *Seventh Amendment*, *supra* note 36, at 695-702). Thomas claims that the Supreme Court has upheld "every new procedure that it has considered by which a court removes cases from the determination of a jury before, during, or after trial." *Id.* at 142.

264 Castano v. Am. Tobacco Co., 84 F.3d 734, 750-52 (5th Cir. 1996) (holding that the Seventh Amendment's Reexamination Clause would be violated by bifurcating trial between class and non-class issues); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302-03 (7th Cir. 1995) (same); *cf.* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 424 (5th Cir. 1998) (relying on interpretation of the Reexamination Clause in light of *Gasoline Products* to affirm denial of class certification in employment discrimination action).

265 This pattern seems to find further confirmation in that the only procedures that courts seem to strike down under the Seventh Amendment are ones that could benefit plaintiffs: additur, a doctrine that appears to benefit plaintiffs (by forcing a defendant to accept a higher verdict or face a new jury trial) and was held unconstitutional in *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935); and the phasing of trials to allow for class certification. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 738 (1996) (discussing plaintiffs' phasing of trials); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1302-03 (7th Cir. 1995). The Supreme Court's requirement in *Beacon Theatres* and *Dairy Queen* that a judge await and abide by a jury's factual findings regarding legal claims before resolving equitable claims based on the same facts does not appear to provide any systematic benefit to plaintiffs or defendants.

kinds of antitrust cases, on pleading in *Twombly*[266] and on summary judgment in *Matsushita Electric Industrial Co. v. Zenith Radio Corp*.[267]

Making it more difficult for plaintiffs to reach a jury naturally implicates the Seventh Amendment.[268] At some point, this difficulty allows judges to arrogate to themselves the power to assess the merits of the parties' positions. The right to a trial by jury is not meaningful unless there is a check on when judges may restrict access to a jury.[269]

Concerns about the constitutionality of recent procedural changes find support in the scholarship of Professor Suja Thomas. Thomas has undertaken a thorough analysis of the common law at the time of the Seventh Amendment's adoption and has reached startling results.[270] She concludes that various procedural mechanisms in their current form—including the pleading standard under *Twombly*,[271] summary judgment,[272] and remittitur[273]—are unconstitutional. Thomas contends that none of these mechanisms has a counterpart in what she deems the relevant practice in the relevant period—the English common law of 1791.[274]

Thomas's work is unlikely to prove influential among judges for at least two reasons. First, at a practical level, it would require them to upset established practices. Regardless of the merit of her positions, courts will resist revisiting the constitutionality of procedures they employ every day, even if any assessment they have made of whether the procedures violate the Seventh Amendment was only implicit. Second, at a more theoretical level, not all judges subscribe to Thomas's interpretive methodology. While the Supreme Court has taken an originalist approach to identifying the requirements of the Seventh Amendment in some instances,[275] it has looked instead to the underlying purposes of the right to a trial by jury in others.[276]

---

266 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-55 (2007).

267 475 U.S. 574, 585-86 (1986).

268 *See* U.S. CONST. amend. VII (providing a right of trial by jury that shall not be bifurcated).

269 *See supra* Part III.A (discussing judicial discretion and potential adverse effects on one's constitutional right to a jury).

270 *See, e.g.*, Thomas, *Motion to Dismiss*, *supra* note 36, at 1855 (finding that recent procedural changes in motions to dismiss are unconstitutional).

271 *Id.*

272 Thomas, *Summary Judgment*, *supra* note 36, at 144.

273 Thomas, *Constitutionality of Remittitur*, *supra* note 36, at 735-36.

274 Although Thomas takes a predominantly originalist approach to the Seventh Amendment, she considers not only corresponding historical procedures, but also the principles underlying the English common law. *See, e.g.*, Thomas, *Summary Judgment*, *supra* note 36, at 139-40 (discussing both the procedures under English common law and its "core principles or 'substance'").

275 *See, e.g.*, Dimick v. Schiedt, 293 U.S. 474, 487 (1935).

276 *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 434-36 (1996) (taking a practical approach to whether the Seventh Amendment is violated when an appellate court reviews a federal court's denial of a motion to set aside a jury's verdict as excessive). *But see id.* at 443-46 (Stevens, J., dissenting) (adopting an originalist approach to interpretation of the Seventh Amendment); *id.* at 451-58 (Scalia, J., dissenting) (taking an originalist approach to interpreting the Seventh Amendment).

Nevertheless, it is noteworthy that the Court's treatment of the possibility of the Seventh Amendment conflicting with modern procedural innovations is threadbare. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*[277] is representative in this regard. *Tellabs* involved an interpretation of the Private Securities Litigation Reform Act of 1995 ("PSLRA").[278] At issue was how high a burden the PSLRA had placed on plaintiffs at the pleading stage of litigation.[279] In formulating the standard, the Seventh Circuit took into account the risk of improperly usurping the role of the jury—and the requirements of the Seventh Amendment.[280] On appeal, the Supreme Court casually dismissed these issues.[281] It suggested that Congress might establish any pleading requirements it wants for federal statutory claims,[282] a view that suggests no limiting principle.

The reasoning of the Court seemed, in part, to be that the greater power includes the lesser—that Congress need not create substantive rights and therefore that it can set the terms for pleading the substantive rights it creates.[283] For the Seventh Amendment to have any meaning, that sort of reasoning cannot suffice. Legislatures have the power to change most substantive legal rights. Yet the Seventh Amendment imposes restrictions on how those rights may be adjudicated in federal court. The power to eliminate a right therefore cannot be tantamount to authority to control the role of the jury in assessing those rights. Otherwise, little, if anything, is left of the Seventh Amendment.

The *Tellabs* Court also noted that it had allowed heightened pleading standards in the past, just as it had allowed courts to assess the reliability of expert testimony, to grant judgment as a matter of law, and to rule on summary judgment.[284] But uncritical deference to prevailing practice is no substitute for constitutional analysis. As Justice Scalia noted regarding the Seventh Amendment in a different context, the fact that the courts have ignored the requirements of the Constitution in the past does not support "unreasoned capitulation to the nullification of what was long regarded as a core component of the Bill of Rights."[285]

Yet the originalists did not come to plaintiffs' rescue regarding the pleading standard under the PSLRA. They did not undertake the sort of rigorous analysis that Professor Thomas's work suggests is appropriate in

---

277 551 U.S. 308 (2007).

278 *Id.* at 312.

279 *Id.*

280 *Id.* at 326.

281 *Id.* at 326-29.

282 *Id.* at 327.

283 *Tellabs*, 551 U.S. at 327 ("Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be proved to prevail on the merits.").

284 *Id.* at 327 n.8.

285 Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 448-49 (1996) (Scalia, J., dissenting).

this context—and that she concludes can render a heightened pleading standard unconstitutional. Justice Thomas merely joined the majority opinion,[286] and Justice Scalia, in concurring, called for a *higher* pleading standard than the majority imposed without discussing the Seventh Amendment at all.[287]

C. *Misuse: Phased Litigation and the Reexamination Clause*

The short shrift that courts generally give to the Seventh Amendment in the context of procedural innovation has a notable exception. Some federal appellate courts read the Reexamination Clause as barring phased jury trials and, consequently, as preventing certification of particular issues for class treatment when that would otherwise be possible.[288]

This invocation of the Seventh Amendment is striking for numerous reasons. First, it reflects a particularly rigid application of the Reexamination Clause. As noted above, courts are rarely so inflexible about the constitutionality of procedural innovation.[289] Second, plaintiffs are the only parties apparently prejudiced by the supposed violation of the Reexamination Clause in this context, as they might be required to prove the same facts twice. Thus, courts have precluded plaintiffs from trading the benefits of a class action against giving defendants a strategic advantage. In this way, courts act on an argument that defendants arguably do not have any standing to raise. Third, issue preclusion (collateral estoppel) would seem sufficient to address any concerns about the Reexamination Clause. Finally, the federal courts' application of the Seventh Amendment is founded on a misreading of a key precedent, *Gasoline Products.*[290] This Supreme Court decision actually addressed the Jury Trial Clause, not the Reexamination Clause.[291]

The upshot is that some federal courts read the Seventh Amendment in a very aggressive way to limit the options available to plaintiffs pursuing class certification. But what is sauce for the goose is sauce for the gander. If courts are going to read the Reexamination Clause as in some cases preventing bifurcation and class certification, they should not casually dismiss the argument that a novel class certification standard violates the Seventh Amendment right to a trial by jury.

---

286 *Tellabs*, 551 U.S. at 312.

287 *Id.* at 329-33 (Scalia, J., dissenting).

288 *See* cases cited *supra* note 38.

289 *See supra* Part III.B.

290 Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494 (1931).

291 *Id.* at 498.

1. Reading the Reexamination Clause as Limiting Phased Trials

a. Rhone-Poulenc

The Seventh Circuit invoked the Reexamination Clause of the Seventh Amendment in reversing a grant of class certification in *In re Rhone-Poulenc Rorer Inc.*[292] The case involved claims by hemophiliacs that they had been infected by AIDS as a result of receiving tainted blood.[293] The trial court judge certified a class for purposes of determining common issues—in particular, whether defendants were negligent in exposing hemophiliacs to AIDS—and then planned to have additional issues tried to separate juries.[294]

In reversing the certification decision, Judge Posner made several relevant points. First, he relied on the Reexamination Clause of the Seventh Amendment, reasoning that in bifurcating litigation a court "must carve at the joint."[295] He worried, for example, that the first jury might determine that a defendant was negligent—say, by failing to screen for donors likely to be infected by AIDS—and that a second jury might revisit that determination in assessing comparative negligence or proximate causation.[296] Specifically, Judge Posner pointed out that the first jury's finding of negligence might conflict with a later jury's conclusion that defendant's failure to take precautions was not a proximate cause of plaintiffs' injuries.[297] Similarly, although he did not put a fine point on the issue, presumably the first jury might find the defendant negligent, but a later jury—in assessing comparative negligence—might conclude that the defendant was not negligent.[298] For the view that the Reexamination Clause of the Seventh Amendment bars this kind of overlap between the responsibilities of juries, Judge Posner relied on *Gasoline Products* and other cases interpreting that Supreme Court decision.[299]

The Seventh Amendment was particularly important to Judge Posner's opinion. After all, at the time Rule 23 did not allow for interlocutory appeals.[300] The threat of a constitutional violation provided the basis for an extraordinary measure—granting a writ of mandamus regarding the class certification decision before a final judgment on the merits.[301] Indeed, for

---

292 51 F.3d 1293 (7th Cir. 1995).
293 *Id.* at 1294.
294 *Id.* at 1296-97.
295 *Id.* at 1302.
296 *Id.* at 1303.
297 *Id.*
298 *Rhone-Poulenc*, 51 F.3d at 1303.
299 *Id.*
300 *Id.* at 1294.
301 *Id.* at 1294-95.

the proposition that a violation of the Seventh Amendment supports granting a writ of mandamus, he cited, *inter alia*, *Beacon Theatres* and *Dairy Queen*,[302] the very cases that otherwise tend to be ignored in the class certification context.[303]

Finally, Judge Posner based his decision in part on the theoretical possibility that class certification would otherwise force a settlement and result in a form of blackmail.[304] Judge Posner did not pay similar attention to the risk that hemophiliacs with AIDS—some of whom were likely uninsured—might feel similar pressure to settle for funds they desperately needed to pay their medical bills.

b. Castano

Castano v. American Tobacco Co.[305] is similar in various regards to *Rhone-Poulenc*. In *Castano*, the trial court certified a national class of plaintiffs who had purchased and smoked cigarettes, claiming that tobacco companies had "fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature."[306] According to the trial court's order, the issues that would be tried on a class basis included defendants' "core liability," including defendants' course of conduct and whether defendants acted negligently and fraudulently.[307] Individual issues would then be addressed in a later phase.[308]

The Fifth Circuit, much like the Seventh Circuit in *Rhone-Poulenc*, reversed the class certification order.[309] In so doing, it too relied in part on the Seventh Amendment Reexamination Clause, citing a line of precedent deriving ultimately from *Gasoline Products* for the proposition that a case cannot be bifurcated and tried before separate juries unless the issues in the separate phases are "distinct and separable."[310] The Fifth Circuit noted that a second jury might revisit the findings of the class jury—for example, rejecting an initial finding of defendants' negligence in addressing the individualized issue of comparative fault.[311]

---

302 *Id.* at 1303.

303 *See supra* Part III.A.

304 *Rhone-Poulenc*, 51 F.3d at 1298.

305 84 F.3d 734 (5th Cir. 1996).

306 *Id.* at 737.

307 *Id.* at 738 (internal quotation marks omitted).

308 *Id.*

309 *Id.* at 737.

310 *Id.* at 750-51 (quoting Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir. 1978) (relying on *Gasoline Products*)).

311 *Castano*, 84 F.3d at 751.

Further, the Fifth Circuit in *Castano* cited to *Rhone-Poulenc*, among other sources, for the proposition that class certification "creates insurmountable pressure on defendants to settle . . . ."[312] In other words, the *Castano* court's reasoning was affected by its concern about so-called legalized blackmail.[313] And, again, like Judge Posner, the Fifth Circuit paid relatively little attention to the risk that plaintiffs might be at a terrible strategic disadvantage without class certification—potentially unable to seek legal redress.

2. Harming Plaintiffs to Protect Them

The reading of the Reexamination Clause in *Rhone-Poulenc* and *Castano* is dubious in part because, in effect, it harmed plaintiffs to protect them. Consider the specter the Fifth Circuit raised in *Castano*—that

> a second jury will rehear evidence of the defendant's conduct. There is a risk that in apportioning fault, the second jury could reevaluate the defendant's fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff. In such a situation, the second jury would be impermissibly reconsidering the findings of a first jury.[314]

In other words, the Fifth Circuit feared that a plaintiff might have to prevail twice in a bifurcated trial—once in establishing defendant's liability and a second time in evaluating the relative fault of plaintiff and defendant. The second jury might not abide by the first jury's determination that defendant was at fault. Similarly, as noted above, the concern that the *Rhone-Poulenc* court raised was that a first jury might find defendants liable for the infected blood and a second jury might take that result away by finding a lack of proximate cause.[315]

Accepting the analysis of the Fifth and Seventh Circuits at face value,[316] it is strange to use the potential harm to plaintiffs in *denying* them the relief they seek. After all, plaintiffs may waive the right to a trial by jury.[317] Why, then, should they be unable to make a partial waiver, accepting that they will have to establish part of their claim on a class basis and then face the prospect of possibly having to prove the same facts again when a later jury assesses overlapping issues? And why should defendants be able to raise the potential harm to *plaintiffs* in seeking to resist class cer-

---

312 *Id.* at 746.

313 *See supra* Part I.C.1.

314 *Castano*, 84 F.3d at 751.

315 *In re* Rhone-Poulenc Rohrer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995).

316 As discussed below, these concerns seem overstated. A second jury could be instructed to accept the findings of this first jury.

317 JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 508 (4th ed. 2005).

tification—and, in many instances, to deprive plaintiffs of *any* meaningful opportunity to recover at all?

Courts have shown appropriate skepticism about defendants' arguments of this sort in a different context. The issue arises when defendants claim that class certification should be denied to protect the interests of some class members.[318] Judges have scrutinized defendants' contentions along these lines. Indeed, one court aptly compared defendants to foxes guarding a chicken house.[319] The danger is that an effort to protect class members may actually harm them.

The same point applies to the argument about the Reexamination Clause in *Rhone-Poulenc* and *Castano*. Plaintiffs are the ones taking on the risk of having to prevail on the same factual issue twice, and defendants appear to suffer no meaningful harm. Thus, plaintiffs should be able accept this burden if they feel that certification of a class—even on only a limited number of issues—is worth the cost.

3. Issue Preclusion Protects Against Reexamination

An alternative solution to denying class certification based on the Reexamination Clause would simply be to instruct the second jury to accept the facts found by the first jury. Our court system uses this mechanism regularly. The doctrine of issue preclusion (or collateral estoppel) binds one court to follow the findings of another.[320] Often that means a later jury must be instructed to accept the factual findings of an earlier jury. Courts have not found a violation of the Reexamination Clause of the Seventh Amendment in that context.[321] There is, therefore, little reason why such a problem should arise when a court bifurcates litigation to allow some issues to be tried on a class-wide basis.

Of course, the life of the law has not just been logic, but experience. However much sense it makes to allow courts to empanel juries that might address overlapping issues, if a Supreme Court precedent bars them from doing so, they have no choice. Lower courts must abide Supreme Court precedents. The crucial issue, then, is whether the courts in *Rhone-Poulenc*, *Castano*, and other cases[322] were bound by *Gasoline Products* to deny class

---

318 Davis & Sorensen, *supra* note 85, at 142.

319 *See id.* at 141 (quoting Eggleston v. Chi. Journeymen Plumbers' Local 130, 657 F.2d 890, 895 (7th Cir. 1981)).

320 *See generally* DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 46-60 (2001).

321 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333-37 (1979) (holding that non-mutual issue preclusion does not violate the Seventh Amendment).

322 *See* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 424 (5th Cir. 1998) (relying on interpretation of Reexamination Clause in light of *Gasoline Products* to affirm denial of class certification in employment discrimination action). *But see* Allison v. Citgo Petroleum Corp., No. 96-30489, 1998 U.S.

certification. It turns out they were not. Indeed, contrary to conventional wisdom, *Gasoline Products* did not involve the Reexamination Clause of the Seventh Amendment at all.

4. The Misreading of *Gasoline Products*

This point raises the final flaw in the interpretation of the Reexamination Clause in *Rhone-Poulenc*, *Castano*, and similar cases: it traces back to a misreading of an old Supreme Court decision, *Gasoline Products*.[323] That case is best read not as turning on the Reexamination Clause, but as depending on the first clause of the Seventh Amendment, the Jury Trial Clause. The risk in *Gasoline Products* was that there would be a *gap* between jury findings—not an *overlap*—requiring the judge to supply findings that the Constitution reserves for the jury.[324] And the remedy was another trial of a claim as a whole, not merely of the measure of damages, resulting in a second jury revisiting the issues resolved by the first jury.[325] This outcome is the opposite of what one would expect if the Reexamination Clause were the Supreme Court's concern. In the end, then, the argument that dividing trials into phases to allow partial class certification would violate the Reexamination Clause has much weaker footing in Supreme Court precedent than the argument that a heightened class certification standard violates the Jury Trial Clause.

To see this, a careful reading of *Gasoline Products* is necessary. The plaintiff in that case sued to recover royalties under a licensing agreement.[326] The defendant counterclaimed, alleging that the plaintiff had failed to perform the contract that gave rise to the royalties.[327] After trial, a jury awarded recovery to the plaintiff, set off by an award to the defendant on the counterclaim.[328] On appeal, the First Circuit affirmed the rulings of the trial court on all issues except the jury instruction on the measure of damages on the counterclaim.[329] The First Circuit remanded for a further hearing only as to the defendant's damages.[330] The plaintiff petitioned to the Su-

---

App. LEXIS 24651, at *1-2 (5th Cir. Oct. 2, 1998) (denying panel rehearing and rehearing en banc, but appearing not to rely on the panel's original reasoning for affirming the denial of class certification).

323 Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494 (1931).

324 *Id.* at 499-500.

325 *Id.* at 501.

326 *Id.* at 495.

327 *Id.*

328 *Id.* at 496.

329 *Gasoline Products*, 283 U.S. at 496.

330 *Id.*

preme Court, which granted certiorari to decide whether remand of only the issue of damages on the counterclaim violated the Seventh Amendment.[331]

The plaintiff argued that "the rules of the common law in force when the Amendment was adopted" mandated that "there could be no new trial of a part only of the issues of fact"; thus, "a resubmission to the jury of the issue of damages alone is a denial of the *trial by jury* which the Amendment guarantees."[332] In other words, the plaintiff sought application of the common law rule that remand of any portion of a jury verdict required remand of the entire jury verdict. The defendant's counterclaim, according to the plaintiff, had to be tried again.[333]

The Court framed the relevant point in dispute as "whether the issue of damages is so distinct and independent of the others, arising on the counterclaim, that it can be separately tried."[334] The jury's verdict, the Court recognized, established the existence of a contract and its breach by the plaintiff.[335] The Court worried, however, that it was "impossible from an inspection of the present record to say precisely what were the dates of formation and breach of the contract found by the jury, or its terms."[336] The problem was that the trial court judge, in providing this necessary information to a second jury, could not be certain what the first jury had concluded.[337] As the Supreme Court explained at length, conflicting evidence existed on the dates of formation and breach of the contract, as well as its terms.[338] And the form of the initial verdict did not reveal the jury's findings on these issues.[339] For this reason, the Court concluded:

> Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is *so distinct and separable* from the others that a trial of it alone may be had without injustice. Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial.[340]

The Court therefore required a new trial of all issues on the counterclaim.[341]

---

331 Gasoline Prods. Co., v. Champlin Ref. Co., 282 U.S. 824, 824 (1930) ("The petition for writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, limited to the question whether the United States Circuit Court of Appeals erred in limiting the new trial to the question of damages.").

332 *Gasoline Products*, 283 U.S. at 497 (emphasis added).

333 *Id.*

334 *Id.* at 499.

335 *Id.* at 500.

336 *Id.* at 499.

337 *Id.* at 499-500.

338 *Gasoline Products*, 283 U.S. at 499-500.

339 *Id.*

340 *Id.* at 500-01 (emphasis added) (citations omitted).

341 *Id.* at 501.

It is the Court's use of the phrase "distinct and separable" that has made mischief, causing lower federal courts to misinterpret *Gasoline Products*.[342] Judges and scholars have interpreted the case to mean that the Reexamination Clause allows for separate juries in a single case to decide only those factual issues that are "distinct and separable."[343] Careful consideration of *Gasoline Products*, however, reveals that it is best interpreted as not involving application of the Reexamination Clause of the Seventh Amendment at all. Rather, it implicated only the plaintiff's right to a jury's findings on all issues of fact.

The first important point in support of this argument is that the Court never referred specifically to the Reexamination Clause of the Seventh Amendment. To be sure, the Court, at the outset of its opinion, quoted the Seventh Amendment in full.[344] But this is equally consistent with a view of the case as involving the Jury Trial Clause as it is with an understanding of the opinion as addressing the Reexamination Clause.

Similarly revealing is how the Court characterized the issue raised by the plaintiff: "Petitioner contends that the withdrawal from consideration of the jury, upon the new trial, of the issue of liability on the contract set up in the counterclaim, is *a denial of its constitutional right to a trial by jury*."[345] The Court framed the issue as involving the right to a jury trial, not the proscription on reexamination of a jury's findings.[346] The Court's focus, then, was on the right to a trial by jury. Of course, it could be that the Court was alluding obliquely to the right to a jury's findings free from reexamination. If so, the Court was being very coy. It could easily have referred to the Reexamination Clause specifically.

Moreover, there was no question that a second jury would reexamine the findings of the first jury in *Gasoline Products*. The choices before the Court were holding a new trial regarding the whole case, holding a new trial regarding the entirety of the defendant's counterclaim, or holding a new trial regarding only the defendant's damages on its counterclaim.[347] The First Circuit remanded only the issue of the damages suffered by the defen-

---

342 *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 424 (5th Cir. 1998) (quoting *Gasoline Products*, 283 U.S. at 500) (internal quotation marks omitted) (citing *Gasoline Products* for "distinct and separable" standard under Reexamination Clause of Seventh Amendment); Castano v. Am. Tobacco Co., 84 F.3d 734, 750 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995).

343 *See, e.g.*, *Allison*, 151 F.3d at 424.

344 *Gasoline Products*, 283 U.S. at 497.

345 *Id.* (emphasis added).

346 Again, later in the same paragraph, the Court framed petitioner's argument similarly: "It is argued that as, by the rules of the common law in force when the Amendment was adopted, there could be no new trial of a part only of the issues of fact, a resubmission to the jury of the issue of damages alone is *a denial of the trial by jury* which the Amendment guarantees." *Id.* (emphasis added).

347 *Id.* at 496.

dant.[348] The Supreme Court's reversal meant that the plaintiff's liability had to be tried again as well. The Court acknowledged that this issue had been properly decided.[349] In remanding the entirety of the defendant's counterclaim for a new trial, then, the Court *required* one jury to reexamine the proper factual findings of another jury; it did not *bar* one jury from reexamining another jury's proper factual findings. The Reexamination Clause proscribes—it does not require—reexamination of facts tried by a jury. It is odd, then, to infer that the Court relied on the Reexamination Clause. In short, reexamination of the first jury's findings was not at issue because it was inevitable.

The real problem, as the Court explained, was that to award damages, the new jury would have to be "advised" of the terms of the contract and the dates of its formation and breach.[350] After all, without that direction, the second jury would just have to hazard a guess about crucial facts in assessing the defendant's damages.

Thus, the First Circuit's remand of only damages would have required the judge to make the factual findings necessary to instruct the second jury about the terms of the contract and the nature of the breach. Doing so, however, would be inconsistent with the Court's observation that "of vital significance in trial by jury is that issues of fact be submitted for determination . . . by the jury . . . ."[351] Remanding only the defendant's damages would have deprived the plaintiff of any meaningful jury findings on the nature of its liability. The judge, in essence, would be usurping the fact-finding role of the jury.[352] The "confusion and uncertainty," to which the Court referred, would have resulted from the vagueness of the initial jury's findings on the plaintiff's liability.[353] The denial of a fair trial would have followed from depriving the plaintiff of findings of fact from *any* jury on the precise nature of its liability.

To state the same point differently, the Reexamination Clause prevents a second decision-maker, whether a judge or jury, from making findings of fact that *overlap* with and displace the findings of an initial jury. This, however, could not be prevented in *Gasoline Products*. The nature of the plaintiff's liability had to be decided again. The Court, then, did not resolve

---

348 *Id.* at 497.

349 *Id.* at 498-99.

350 *Gasoline Products*, 283 U.S. at 499.

351 *Id.* at 498.

352 True, the court would have been reexamining issues addressed by the first jury. But, as noted above, once the first jury returned a general verdict on the plaintiff's liability and assessed the resulting damages based on an erroneous jury instruction, reexamination of the first jury's findings by either the judge or jury was inevitable. The requirement that a second jury, rather than the judge, reexamine the issues pertaining to liability results from the right to a trial by jury guaranteed by the first clause of the Seventh Amendment, not from its Reexamination Clause. Of course, the court was constrained in that it could not find the plaintiff not liable at all and claim to be abiding by the initial verdict.

353 *Gasoline Products*, 283 U.S. at 499.

when this sort of overlap is impermissible. Thus, *Gasoline Products* was not about an impermissible overlap, the concern of the Reexamination Clause.

What could be avoided in *Gasoline Products* was having a trial judge fill in the *gap* in the first jury's findings of fact. If the judge were to do so, he would have deprived the parties of the right under the Seventh Amendment to a jury determination of all factual issues.[354] The Jury Trial Clause prevents a judge from filling such a gap by making his own findings—in *Gasoline Products*, about the terms of the contract and the dates of its formation and breach.

The invocation of the Reexamination Clause in cases like *Rhone-Poulenc* and *Castano*, then, is inappropriate. It reflects a strained reading of the Seventh Amendment and *Gasoline Products* as a basis for denying class certification. Also significant is that the courts that engaged in that strained reading acknowledged that they were motivated, at least in part, by their concern that certification of a class might harm corporate defendants by putting undue pressure on them to settle litigation.[355]

D. *Political Judging*

1. The Problem of Selective Formalism

The bottom line, then, is that at least some judges appear to interpret the Seventh Amendment with a slant. When it comes to increasing the burden for plaintiffs—at the pleading stage, at summary judgment, and now, perhaps, at class certification—courts undertake no careful effort to determine the requirements of the Seventh Amendment.[356] If they address that constitutional issue at all, they imply that their neglect of it in the past provides a sufficient basis to continue to ignore it.[357] That is a shabby way to deal with a constitutional right.

Yet some federal courts at times take the Seventh Amendment quite seriously. And when they do so, they adopt an uncharacteristically formalist attitude—uncharacteristic in regard to the Seventh Amendment in general

---

354 Note that reexamination of the first jury's findings could have been prevented had the trial court used special interrogatories rather than a general jury verdict. The trial court then could have advised a second jury of the terms of the contract and the date of its formation and breach without any guesswork. The findings of the first jury on plaintiff's liability would have been preserved, without a violation of plaintiff's right to a trial by jury on all issues of fact.

355 *See supra* Part II.F.

356 *See supra* Part III.B.

357 *Id.*

and, in the case of Judge Posner, in regard to his overall jurisprudence[358]—in invoking the Reexamination Clause to deny class certification.[359] This is deeply concerning as it suggests an instrumental use of the Seventh Amendment.

And there is a deeper inconsistency. Some of the Justices who have shown the most solicitude for placing ever greater burdens on plaintiffs have an avowed commitment to formalism and, particularly, to originalism.[360] There are various reasons why originalism may attract adherents. The most commonly offered justification is that it may impose discipline on judges who, according to originalists, lack the democratic pedigree to make the kind of value judgments that would otherwise be necessary in interpreting the Constitution.[361]

Whatever the strength of this argument in general, it has particular force in the context of constitutional provisions like the Seventh Amendment that do not speak in broad moral terms,[362] but rather seem to enact the "common law."[363] The Court at times commits to an originalist approach to the Seventh Amendment—in terms of when parties have the right to a trial by jury[364] and, to a lesser extent, in terms of the nature of that right.[365] At least for those Justices with an originalist bent, departure from that commitment in applying the Seventh Amendment involves selective formalism.

Consider in this light Professor William Nelson's article, *Summary Judgment and the Progressive Constitution*.[366] Nelson is a first rate historian. It therefore carries particular weight when he concludes "that a modern judge who is committed to interpreting the Seventh Amendment as its drafters and ratifiers would have applied it should deem summary judgment

---

358 Judge Posner's commitment to pragmatism is a theme of many of his works, including RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990).

359 *See supra* Part III.C.1-2.

360 *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 39-40 (Amy Gutmann ed., 1997).

361 *Id.*; ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 1-2 (1991).

362 *See, e.g.*, Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 360, at 115, 119.

363 U.S. CONST. amend. VII. Note that there is an ambiguity as to whether the understanding of the "common law" should be fixed at the time of the enactment of the Bill of Rights or should be understood as changing as the common law develops. A problem with the latter approach—allowing the meaning of the "common law" to develop over time—is that it is not clear how the Seventh Amendment would have any meaning. If judges were to eliminate juries entirely through the "common law" process, would that then be constitutional?

364 Thomas, *Summary Judgment*, *supra* note 36, at 146 n.25.

365 *Compare* Dimick v. Schiedt, 293 U.S. 474, 487 (1935) (adopting originalist approach to meaning of Seventh Amendment), *with* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 438-39 (1996) (taking non-originalist approach to requirements of Seventh Amendment).

366 Nelson, *supra* note 37.

and the *Twombly* motion to dismiss unconstitutional."[367] This conclusion gains even more force from the fact that he nonetheless believes that summary judgment and *Twombly are constitutional*.[368] His historical point is a concession to Thomas that *if* one takes an originalist approach, the current summary judgment and pleading standards would be unconstitutional.[369]

Yet the originalists have not rallied to Thomas's cause. Nor have they offered any explanation for why they have not done so. The risk is that they are engaging in selective formalism, which is not really formalism at all. Putting aside formalist practice—and originalism in particular—without an adequate explanation undermines any force behind its traditional defense. Originalism then becomes not a constraint on judicial decision making, but a tool that empowers judges to set aside laws whenever a Justice—or a majority of Justices—prefers the values that people held in the eighteenth century to the values that people hold today.

Recent federal court decisions interpreting the Seventh Amendment smack of selective formalism. Justices who rely on originalism in some circumstances casually dismiss or ignore it when it would protect the rights of plaintiffs.[370] Conversely, judges who generally take a very pragmatic view adopt a formalist attitude when the Reexamination Clause impedes class certification.[371] A pattern emerges that looks a lot like political judging in the pejorative sense of that term—adjusting the law depending on a judge's sympathies for a party or class of parties.

2. A Non-Originalist Reading of the Seventh Amendment

But not all Justices or judges are originalists. Indeed, there are good reasons to question originalism.[372] Even so, some principled theory of the Seventh Amendment is necessary to render it meaningful. The Seventh Amendment has little force if we simply say that times change, and so do values, such that the Federal Rules Advisory Committee, the Supreme Court, and judges may impose and develop any procedures they want. Why, then, have the Seventh Amendment at all?

Under a non-originalist approach, matters become a bit messier in regard to the heightened pleading and summary judgment standards the Court

---

367 *Id.* at 1658.

368 *Id.* at 1664.

369 *Id.* at 1665-66.

370 As discussed above, *Tellabs* epitomizes this tendency. *See supra* notes 277-87 and accompanying text.

371 Judge Posner's opinion in *Rhone-Poulenc* is representative.

372 The literature on this topic is massive. For some of the most compelling arguments against originalism, see RONALD DWORKIN, JUSTICE IN ROBES 117-39 (2006); RONALD DWORKIN, A MATTER OF PRINCIPLE 33-71 (1985); CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 109-35 (2001).

has imposed in recent decades. Consider again the views of Professor Nelson. He suggests that the jury trial right is fundamentally about "ensur[ing] that central authorities in a state, provincial, or national capital could not impose their will on local communities."[373] This value, according to Nelson, is antiquated.[374] As he puts the matter,

> [m]ost of us have no unique local culture to preserve, and even when we do (think, for example, of New Yorkers wishing to preserve their theater district or residents of Dallas committed to their megachurch), it does not occur to us that the jury is the appropriate instrument for preserving it.[375]

To summarize Nelson's view, since the Seventh Amendment is about localism, and localism, especially as protected by the jury, is outdated, a heightened standard at pleading or summary judgment is not unconstitutional.

Nelson's position gives rise to at least two problems. First, he has essentially read the Seventh Amendment out of the Constitution. He seems comfortable with that. As he notes, the protection the Constitution provides against impairment of contracts has been reduced to all but naught.[376] But eliminating a constitutional right should be a measure of last resort. The Court has not yet been willing to go so far in regard to the Seventh Amendment.

The second problem with Nelson's interpretation is that there are other values that the right to a trial by jury can be understood to embody. Even Nelson's own point is compound. Juries not only allowed the local to trump the regional or the national, but they also empowered ordinary citizens to trump government officials in general and judges in particular.[377]

The populism that animates the Seventh Amendment is very much alive and relevant today. Many Americans—if given the opportunity to be fully informed and to reflect[378]—might conclude that the jury trial's protec-

---

373 Nelson, *supra* note 37, at 1656.

374 *Id.* at 1658.

375 *Id.* at 1663-64.

376 *Id.* at 1662.

377 *Id.* at 1655-56 (noting that Seventh Amendment authorized citizens as the ultimate source of law and not officials—"not Parliament, not the Privy Council, not the provincial legislature, and surely not the judiciary").

378 This point is important. If judges should serve in part as democratic representatives—as Nelson's argument essentially implies—a key question is why they are better situated than other democratic representatives in this regard. In other words, the issue becomes one of institutional competence and legitimacy. The best analysis along these lines is Christopher Eisgruber's Constitutional Self-Government. *See* EISGRUBER, *supra* note 372. As Eisgruber points out, part of the reason that judges—and, for that matter, juries—are appropriate decision-makers on behalf of the polity is that they have the time and opportunity to consider matters with care and in context. *Id.* at 50-51, 109-35 (also justifying the Supreme Court as a democratically representative institution). The literature on judges playing a role as democratic representatives in constitutional interpretation is large and growing. *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993) (arguing that courts integrate the will of the People

tion of populism should be preserved, as the Seventh Amendment requires. It is not at all clear that we have "progressed" beyond the requirements of the Seventh Amendment. Thus, the large corporate defendants that are the primary beneficiaries of—and catalysts for—erecting ever higher procedural barriers between plaintiffs and juries may find themselves directly at odds with a constitutionally enshrined value that retains its vitality.

This is not the context for developing a non-originalist interpretation of the Seventh Amendment. Nor is it our argument that the pleading or summary judgment standards the Supreme Court has recently imposed are unconstitutional. As a practical matter, unless and until there is a significant shift in the membership of the Court, that issue is resolved. The conclusion is simply too surprising—and judges and commentators are too settled in their commitments and expectations—for a shift in case law to occur of that significance.

But the same is not true for the nebulous and potentially radical new class certification standard that may find some purchase in the language of some recent federal appellate court opinions. Whatever the new class certification standard is—if there is a new standard—it has not yet become entrenched. It also goes much further than heightened standards for pleading or summary judgment, allowing a judge to find merits facts that the jury would then have to address again. In other words, under some interpretations of recent case law, at class certification courts may not merely scrutinize allegations or evidence for plausibility, but they may apply the burden of proof themselves to facts on the merits.[379] And the policy basis for the new class certification standard—again, if there is one—is unusually weak: it distorts a device designed to promote procedural efficiency to undertake substantive analysis; it addresses a problem that probably does not exist (and, if it does, that may well be remedied by the aforementioned heightened pleading and summary judgment standards); and it creates all sorts of procedural difficulties. Given these circumstances, the courts should be open to performing a rigorous analysis under the Seventh Amendment. The

---

into constitutional interpretation at key moments); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998) (same); RONALD DWORKIN, LAW'S EMPIRE (1986) (recognizing constitutional law as ultimately an interpretation of society's deep commitments); BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (arguing that the Supreme Court largely follows public opinion in rendering its decisions); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004) (addressing the historical role played by citizens in interpreting the Constitution).

379 Some of the language from *Hydrogen Peroxide* and *Canadian Cars* can be read in this way. *Hydrogen Peroxide*, for example, indicated both that the preponderance of the evidence standard applies to all required showings for class certification and that "the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits." *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008).

most extreme reading of the recent class certification decisions, we submit, would not survive that scrutiny.

CONCLUSION

Courts fiddling with and appearing to raise the class certification standard in antitrust cases have generally offered one policy justification for doing so: certification of a class puts undue pressure on defendants to settle. But those same courts have failed to offer any satisfying empirical or theoretical basis for that claim. And they have not balanced their concern for the potential vulnerability of large corporations with similar attention to the possible vulnerability of victims of antitrust violations. What is left, then, as the catalyst for potential change in the class certification standard is a naked preference for large market players over the less powerful market participants they may exploit. At the same time, possible changes to the class certification standard are difficult to reconcile with the internal logic of Rule 23 and the Seventh Amendment. For these reasons, what we may be seeing playing out is a form of politics that has no proper place in the development of class action procedure.

University of San Francisco School of Law

University of San Francisco Law Research Paper No. 2011-01

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

Joshua P. Davis & Eric L. Cramer

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

By Joshua P. Davis[*] and Eric L. Cramer[**]

Some courts appear to have begun to revise the standard for granting class certification, including in antitrust cases. 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. If courts are ratcheting up the standard at class certification by forcing plaintiffs to make a showing on the merits, then it seems an unfortunate development for various reasons. First, the rationale for the change is unsubstantiated and implausible. Neither theory nor evidence supports the claim that corporations settle meritless class actions with any frequency, particularly in antitrust. Second, a heightened certification standard fits poorly in the existing procedural framework, potentially forcing a decision on the merits prematurely and possibly violating the Seventh Amendment. Third, such a standard may distort other aspects of the class certification decision. In particular, it may encourage courts to put undue emphasis on methods of proving class-wide injury, or "common impact," at class certification. Fourth, the new standard would involve a back-door change to the procedural rules. Rule 23 does not contemplate that judges will rule on merits issues at class certification. If some modification of the class certification process 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, including careful deliberation, empirical study, and a formal amendment to the Federal Rules of Civil Procedure.

[*] Professor and Director, Center for Law and Ethics, U.S.F. School of Law.
[**] Shareholder, Berger & Montague, P.C.

Introduction

I. A Possible Trend Toward Resolving Merits Issues at Class Certification.
   A. The Traditional Standard.
   B. A Possible Break with Tradition.

II. A Dubious Policy Argument: Vulnerable Monopolists?
   A. Excessive Concern for Corporate Defendants.
      i. Baseless Empirical Claims: No Data.
      ii. Agency Costs: Defendants Probably Do Too Well.
   B. Inadequate Concern for Class Members.

III. A Poor Process for Gauging the Merits.
   A. An Unnecessary Addition to Summary Judgment.
   B. A Premature Evaluation of the Merits: Delay Certification?
      i. Early Determination Should Not Be on the Merits.
      ii. The Equivalent of Rule 56(f)?
      iii. Await Trial?
   C. A Violation of the Right to Trial by a Jury.

IV. A Distortion of the Predominance Requirement.

V. Irregular Amendments to the Procedural Rules.
   A. Procedural Deficiencies.
   B. Substantive Deficiencies.

VI. Conclusion: A Bad Solution to an Implausible Problem.

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]

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 a four 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 Fed. R. Civ. P. 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

---

[1] *See, e.g.*, *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 269 (5th Cir. 2007); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).

[2] *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008).

[3] *See, e.g.*, *Oscar Private Equity*, 487 F.3d at 269; *Szabo*, 249 F.3d at 674.

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

[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 (2007), for the claim that certification causes defendants to settle weak claims).

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 some local federal rules *must occur*—relatively early in litigation.[8] If judges are going to rule on merits issues at class certification in much 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 similar 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 in 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 use to which courts may put it. They may not only resolve contested facts at an early stage in the case, but they may distort other aspects of the class certification standard in the process. In particular, they may put undue emphasis on the requirement of proving injury, or impact, at class certification.

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

---

[6] *See* Fed. R. Civ. P. 56.
[7] *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).
[8] *See* Fed. R. Civ. P. 23(c)(1)(A) (noting class certification decision should occur "at an early practicable time"); Local Rule 23.1 (W.D. Pa. effective Jan. 1, 2008) (imposing a default deadline for filing motion for class certification of 90 days after filing of complaint); Local Rule 23.1(B) (N.D. Ga.) (same).
[9] *See* Fed. R. Civ. P. 56(f).
[10] *See, e.g., Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959).
[11] *Dairy Queen v. Wood*, 369 U.S. 469, 479 (1962).

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 thus that, 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, in antitrust cases, predominance is often 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 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

---

[12] *See 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); *see also In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig*., 256 F.R.D. 82, 86-87 (D. Conn. 2009) ("[t]he 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 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., 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); *cf. Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) (Posner, J.) [hereinafter *PIMCO*] ("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. . . .") (citation omitted).

[16] *See, e.g., Hydrogen Peroxide*, 552 F.3d at 322-25; *Cordes*, 502 F.3d at 104-109; *see also New Motor Vehicles Canadian Export Antitrust Litig*., 522 F.3d 6, 26 (1st Cir. 2008) ("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 on the viability of that theory and the existence of facts necessary for the theory to succeed").

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 so because antitrust trials generally focus on proof of the underlying violation—for example, on 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 tend not to turn on individual impact, but rather on whether the conduct as a whole had anticompetitive effects such as, *e.g.*, "Did prices generally rise (or output generally fall) due to the challenged conduct?" It would therefore be unusual if proving impact on class members from artificially inflated prices would be the 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.

This 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 would 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

[17] *See* Fed. R. Civ. P. Advisory Committee's Notes ("It is only where . . . predominance exists that economies can be achieved by means of the class-action device.").
[18] *See id*. (noting "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.").
[19] *See, e.g., Hydrogen Peroxide*, 552 F.3d at 322-25.

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 of, 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 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: it addresses a problem that probably does not exist; it distorts the class certification process in a manner that will not work well; it often accompanies and appears to encourage other misapplications of certification doctrine; and it changes 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 Essay sets forth only an initial set of concerns with 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

[20] *See, e.g., Eisen v. Carlisle*, 417 U.S. 156, 177-178 (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*.

support necessary to do so. Indeed, its major point is that greater deliberation should occur before such a significant change is contemplated.

I. 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 argue that they can prove impact through common

---

[22] *See, e.g, Hydrogen Peroxide*, 552 F.3d at 310.
[23] *See* Fed. R. Civ. P. 23(a) & 23(b).
[24] *See* Fed. R. Civ. P. 23(a).
[25] *Hydrogen Peroxide*, 552 F.3d at 311.
[26] *See, e.g., id*. at 321-25.

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 the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such "as 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

---

[27] *See, e.g., McDonough v. Toys "R" Us, Inc.*, 2009 WL 2055168 at * 13 fn. 9, *21 (E.D. Pa. July 15, 2009) (it was sufficient to establish predominance that plaintiffs had merely "demonstrated how common evidence could prove that the conspiracies caused supra-competitive prices"); *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 55 (D.N.J. 2009) ("Plaintiffs are not required to conclusively demonstrate the merit of their claims in order to obtain certification as a class. . . . Rather, 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.*, 2009 U.S. Dist. LEXIS 67555 at * 45 (S.D.N.Y. Aug. 4, 2009) ("successful employment of a methodology and demonstration that the analysts' reports did indeed cause plaintiffs' loss is unnecessary at the class certification stage" because plaintiffs "need only prove by the preponderance of the evidence that loss causation can be proven on a class-wide basis").

[28] Significantly, in federal antitrust cases brought by direct purchasers, courts allow plaintiffs to prove they were injured simply by showing they overpaid for a product or service due to an antitrust violation, *i.e.*, that they were "overcharged." 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 were 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 (1977) (so-called direct purchaser rule designed to simplify analysis); s*ee also 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 (2004).

[29] 417 U.S. 156, 177-178 (1974).

[30] Even proponents of modifying the class certification standard have acknowledged this point. *See* Steig D. Olson, *"Chipping Away": The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 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

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 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.

---

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 . . . ."), and 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 (1997) (admitting *Eisen* made a "sharp distinction between preliminary merits rulings and class action rulings")).

[31] *Id*. at 178.

[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)).

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 *Hydrogen Peroxide*. 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."[33] 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 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;[34] and those common issues need merely predominate in the case *as a whole*, not necessarily regarding the *specific element of impact*.[35])

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."[36] 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."[37] And the Third Circuit further suggested that these rules apply to expert testimony.[38]

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.[39] 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.[40]

---

[33] *Hydrogen Peroxide*, 552 F.3d at 311-12.
[34] *See* Fed. R. Civ. P. 23(b) (requiring that common issues predominate).
[35] *Id*. (requiring predominance of common issues in regard to question of law or fact in general, not specifically for each element).
[36] *Hydrogen Peroxide*, 552 F.3d at 307.
[37] *Id*.
[38] *Id*.
[39] *See* Olson, *supra* note 31, at 935, n. 5 (2009) (noting ambiguity in court's opinion in *Hydrogen Peroxide*).
[40] *Id*. at 311-12.

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 Peroxide* as an anomalous and potentially misleading opinion, one that did not effect 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.[41] And past panels in the Third Circuit—including in *Linerboard*[42] and *Bogosian*[43]—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[44] and now courts have made a similar suggestion in antitrust cases.[45] 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.

II. 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.[46] 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.[47]

---

[41] *Id*. at 318, n. 18.
[42] *See, e.g.*, *Linerboard*, 305 F.3d at 152 (quoting *Linerboard*, 203 F.R.D. at 220).
[43] *Bogosian v. Gulf Oil Corp*., 561 F.2d 434, 455 (3d Cir. 1977).
[44] *See, e.g.*, *Oscar Private Equity*, 487 F.3d at 269; *In re Initial Pub. Offering*, 471 F.3d 24; *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004); *Szabo*, 249 F.3d 672.
[45] *Hydrogen Peroxide*, 522 F.3d at 307; *Cordes*, 502 F.3d at 108 ("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.") (quoting *In re Initial Pub. Offering*, 471 F.3d at 41).
[46] *See, e.g.*, *Hydrogen Peroxide*, 552 F.3d at 310.
[47] *See id*. (relying on the unsubstantiated assertion in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), for the claim that certification causes defendants to settle weak claims).

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.[48]

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.[49] 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 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.[50]

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.

i. Baseless Empirical Claims: No Data.

---

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

[49] Due to the expenses involved, the undesirability of suing one's supplier, and other considerations, absent the class procedure, most class members would be effectively foreclosed from pursuing their claims. *In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244, 252 (S.D. Tex. 1978); *In re Glassine & Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302, 307 (E.D. Pa. 1980); *see also DuPont Glore Forgan, Inc. v. Am. Tel. & Tel. Co.*, 69 F.R.D. 481, 487 (S.D.N.Y. 1975) (Monsanto, a named plaintiff with a $4,130,000 claim, would forego its claim if required to proceed in complex litigation on an individual basis).

[50] 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) (antitrust class actions help enforce the antitrust laws and deter violations); *In re Carbon Black Antitrust Litig.*, 2005 WL 102966, at *9 (D. Mass., Jan. 18, 2005) ("[c]ourts have noted that class actions are a particularly appropriate mechanism for achieving [antitrust] enforcement"); *In re Bulk Extruded Graphite Antitrust Litig.*, 2006 WL 891362, at *4 (D.N.J. April 4, 2006) ("the antitrust class action is an important component in the federal scheme for deterring anti-competitive behavior").

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.[51] Moreover, many private antitrust cases recover sums far too large to be explained away based on litigation costs.[52]

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 *Twombly*. That decision, however, relied on *ipse dixit*.

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,[53] and that these high costs cause defendants to settle even "anemic" cases before a court rules on summary judgment.[54]

To be sure, the *Twombly* Court cited to some sources to establish that antitrust cases involve high discovery costs,[55] 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.[56] 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.[57] Without meaning any insult to Judge Easterbrook, it is striking the Court did not cite the opposing view (in the very next article in the very same symposium issue of the Boston University Law Review) of Judge Weinstein—a *trial* court judge—that courts generally can prevent abusive discovery, and that concerns about discovery abuse may just be a "scare tactic"

---

[51] *See generally Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (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.").

[52] *See gener*ally 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).

[53] *Twombly*, 127 S. Ct. at 558-60.

[54] *Id*. at 559-60.

[55] *Id*. at 558-59.

[56] *Id*. at 559 & n. 6 (quoting Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638-39 (1989)).

[57] Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638-39 (1989).

among other "exaggerations designed to close the courthouse doors to those thought to be unworthy."[58]

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,[59] 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.[60] 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.

ii. 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.[61] 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[62]—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 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.[63] In light of these incentives, it is not at all

---

[58] Jack B.Weinstein, Comment, *What Discovery Abuse? A Comment on John Setear's The Barrister and the Bomb*, 69 B.U. L. REV. 649, 653-54 (1989).
[59] *Id*.
[60] *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 (1998).
[61] *See* Polinsky & Rubinfeld, *supra* note 48.
[62] *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1984).
[63] There is a substantial literature addressing this dynamic. *See, e.g*., Rhonda Wasserman, *Dueling Class Actions*, 80 B.U.L. REV. 461, 471 & nn. 51-53 (2000), and the sources cited therein. Failure adequately to

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.[64]

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 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.

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—than 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

---

address this dynamic is a serious—likely fatal—flaw in the otherwise thought-provoking article Robert Bone and David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251 (2002). That flaw is compounded by the Bone and Evans' reliance on a very thin empirical record, all of it involving securities and stockholder litigation. *See id.* at 1293-94 & nn. 157-58.

[64] 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 two out of three appellate judges. And plaintiffs—and the lawyers who represent them—are also likely to be averse to risk, a consideration that one would expect to figure in the settlement discussions.

must balance the costs and benefits of allowing plaintiffs to pursue their claims collectively rather than on an individual basis. Of course, it is difficult to characterize—much less quantify—these costs and benefits. And the class certification standard has a fair amount of formalism built into it—the requirement of numerosity, for example, is usual associated with a minimum fixed number varying from 20 to 40 class members, even though how large a group must be before individual actions become unwieldy no doubt 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 a kind of cost-benefit analysis, requiring a judge to decide whether collective litigation or individual litigation makes most sense.

The reality in some cases, however, is that denial of class certification will be dispositive. The alternative to a collective action is often 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—can be a great cost. 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 seem generally to have been inattentive to the latter concern.

III. 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 "plausible" claim.[65] 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.[66] 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.

[65] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
[66] Note also motions to dismiss and *Daubert* motions.

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. 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.[67] After all, it would be unfair for a court to rule 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?

i. "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

[67] 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 different economists* (three each for the plaintiffs and defendants). 256 F.R.D. at 90-103.

certify a class "[a]s soon as practicable after the commencement of a class action." After recent changes, the rule now requires the court to make that determination "at an early practicable time." 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.[68] 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."[69] 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 Western District of Pennsylvania's imposition of a default deadline of 90 days after the filing of a complaint for plaintiffs to move for certification.[70]

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 are generally 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 a defendant's 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 90 days of filing a complaint—simply makes no sense under a heightened certification standard.

ii. 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 *en lieu* of (or in addition to) opposing a motion for summary judgment on the merits may explain why it cannot present facts in support of its position. 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 assessing not merely whether a plaintiff has sufficient evidence to go to trial, but the court 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

[68] 2003 Advisory Committee's Notes.
[69] *Id.*
[70] Local Rule 23.1 (W.D. Pa. effective Jan. 1, 2008); *see also, e.g.*, Local Rule 23.1(B) (N.D. Ga.) (imposing default deadline for filing motion for class certification of 90 days after filing of complaint).

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 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 for unfairness to the process, but could reward defendants for—and encourage—gamesmanship and delaying tactics.

iii. 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).[71] 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 a trial. Until summary judgment, the parties cannot be reasonably required to have developed the evidence to support their arguments. And before trial, they cannot be reasonably 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.

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 unclear 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

[71] *See, e.g.*, *EPDM*, 256 F.R.D. 82 (hearing and deciding class certification after merits expert reports were submitted).

example, to develop evidence relevant to merits and class certification at the same time and to rely on a single set of expert reports.[72] 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."[73] 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 claims.[74] Plaintiffs have a right to a trial by jury in federal antitrust cases.[75] 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.[76] 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

[72] 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. So addressing class certification and summary judgment at the same time might hold the potential for some real gain in efficiency.
[73] *Eisen*, 417 U.S. at 178.
[74] *Dairy Queen*, 369 U.S. at 479.
[75] *Beacon Theatres*, 359 U.S. at 504.
[76] *See, e.g.*, Advisory Committee Notes to Original Rule 23; Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 KAN. L. REV. 347, 407 n. 318 (2003).

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.

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 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.[77] 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.

Nor is this merely a technical concern. A new class certification standard has the potential to require plaintiffs to prevail, in effect, on the same issues multiple times—once before a judge at class certification and a second time before a jury at trial (and perhaps even more than once before the judge, if court addresses summary judgment *de novo*). This is true, at least, if the judge does not treat finding of facts during class certification as binding on the parties, whether at trial or perhaps even at summary judgment.[78] The right to try a case before a jury only if one first prevails on the merits before a judge is not much of a right at all.

IV. A Distortion of the Predominance Requirement.

[77] *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (Posner, J.); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998). This argument is strained, at best. Among other failings, it relies on a misreading of a key decision by the U.S. Supreme Court, *Gasoline Products*, which is best understood as addressing the Right to Jury Clause, not the Reexamination Clause at all. But a discussion of that issue is beyond the scope of this Article.

[78] *See, e.g., McDonough v. Toys "R" Us, Inc.*, Civil Action No. 06-0242 (E.D. Pa. Oct. 15, 2009) (ruling that findings at class certification "do not have any effect on the merits. . . , are not the law of the case with respect to any issue other than class certification. . . , and shall have no precedential effect when the Court considers dispostive motions, such as motions for summary judgment, in these cases.").

Resolving contested facts at the class stage would likely exaggerate the role proving antitrust injury, or "impact," plays in antitrust class action jurisprudence. It is no coincidence that the central focus of *Hypodermic Products* is on plaintiffs' ability to prove impact on a predominantly class-wide basis.[79] 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*. 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 an 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*.[80] Plaintiffs'

[79] *Hydrogen Peroxide*, 552 F.3d at 311 ("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.").

[80] This argument is meant to address cases like in *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—for instance, if plaintiffs were pursuing damages in the form of "lost profits."

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 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 (what 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.[81] 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 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?"[82] 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.[83] Paying an overcharge on at least one transaction during the class period caused by the alleged anticompetitive conduct suffices to show—as a legal and factual matter—impact or the "fact of damage."[84] This concept

[81] *Hydrogen Peroxide*, 552 F.3d at 311; *see also Cordes*, 502 F.3d at 105.

[82] 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 meant to prevent and flows from that which makes the defendants' conduct unlawful. *Cordes*, 502 F.3d at 106.

[83] *See Illinois Brick*, 431 U.S. at 729 ("the overcharged direct purchaser . . . is the party 'injured in his business or property' within the meaning of [the Clayton Act]").

[84] The terns "impact," "antitrust injury," and "fact of damage" are often used interchangeably in antitrust cases. *See In re: Ins. Brokerage Antitrust Litig.*, 2009 WL 2855855, at *20 (3d Cir. Sept. 8, 2009) (". . . the element of antitrust injury – that is, fact of damages. . ."); *Linerboard*, 203 F.R.D. at 214 (equating

is distinct from the *quantum* of damages suffered by an individual class member or by the class as a whole.[85] 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."[86] 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.[87] The focus of the predominance requirement, as the Third Circuit explained in *Hydrogen Peroxide*, is to "'consider how a trial on the merits would be conducted if a class were certified.'"[88]

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 so 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. And those issues—*i.e.*, "did the defendants conspire or monopolize, *i.e.*, did they do what plaintiffs said they did?" and "did that conduct harm 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

---

"impact" and "fact of damage"); *In re Plastic Cutlery Antitrust Litig.*, 1998 WL 135703, at *5 (E.D. Pa. Mar. 20, 1998) (equating "impact" and "injury").

[85] 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 (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.

[86] *EPDM*, 256 F.R.D. at 103 (citing cases).

[87] 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, *inter alia*: "…(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."

[88] *Hydrogen Peroxide*, 522 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)).

cases alleging . . . violations of the antitrust laws."[89] 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.[90]

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 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 and thus recourse to individualized proof that class members were impacted by the conduct is unnecessary.[91]

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 court, for instance, did "not question plaintiffs' general proposition, which the District Court accepted, that a conspiracy to

---

[89] *Amchem Prods.*, 521 U.S. at 625.

[90] *See* 6 Alba Conte & Herbert Newberg, Newberg on Class Actions, § 18:25 & n.4 (4th ed. 2002) ("common liability issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues") (citations omitted); *Marian Bank v. Elec. Payment Servs. Inc.*, 1997 WL 811552, *21 (D. Del. 1997) (proof of a course of conduct to restrain trade "is generally considered a common question that predominates over other issues") (citation omitted); *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 187 (D.N.J. 2003) ("Antitrust defendants resisting class certification routinely argue that the complexity of their particular industry make 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.'") (citations omitted).

[91] *See, e.g.*, *Bogosian*, 561 F.2d at 455 ("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, nothwithstanding that there would be variations among all dealers as to the extent of their damage."); *EPDM*, 256 F.R.D. at 89 (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).

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."[92] 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 generally inflated and that class members made some purchases at the higher price, despite variance in prices paid.[93] 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."[94] 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, "The current record suggests it may be possible to overcome some obstacles to class certification by shortening the class period or by fashioning sub-classes."[95] Accordingly, it remains to be seen the 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, Professor Ordover (an economist), of his assignment in opposing class certification as reported in *Hydrogen Peroxide*: To determine "'whether, assuming a conspiracy of the kind described in the Complaint, the Plaintiffs will be able 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.'"[96]

---

[92] *Hydrogen Peroxide*, 552 F.3d at 325.
[93] *Id*. at 325-26 (quoting *Bogosian*, 561 F.2d at 455).
[94] *Id*. at 326.
[95] *Id*. at 325, n.26.
[96] *Id*. at 313.

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* class members were injured in fact, only that they will proffer evidence capable of showing class members were impacted.[97] Moreover, Professor Ordover's statement implies that plaintiffs must show that they will *ultimately* be able to prove impact with common evidence. But 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*.[98] 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."[99]

Given that the focus must be the trial—and, more specifically, the evidence and theories presented at trial—whether a jury might ultimately reject a plaintiff's mode of proof *after* the class-wide trial has been completed is of no moment. What matters is that 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 plaintiffs will not be able to take that theory to a jury, then class-wide issues should predominate in the litigation."[100]

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

---

[97] 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*, 2009 WL 2055168 at * 13 (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.").

[98] *Id*. at 311, n. 8 (Rule 23(b)(3) requires consideration of "how a trial on the merits would be conducted if a class were certified") (quotation omitted); *id*. at 317 (court may at the class stage "consider the substantive elements of the plaintiffs' case in order to envision the form that a trial of those issues would take") (quotation omitted); *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").

[99] *Id*. at 312, 319.

[100] Olson, *supra* note 30 at 949.

members predominate over any questions affecting only individual members." 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."[101] 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. Take the following example. 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 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 Prof. 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," common issues still might predominate at trial.[102] 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—for example, on 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 tend to turn on whether the conduct as a whole had anticompetitive effects such as, *e.g.*, "Did prices generally rise (or output generally fall) due to the challenged conduct?" 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. As Newberg on Class actions has noted after canvassing the relevant cases, in antitrust actions "common liability issues such as conspiracy or monopolization have, almost invariably, been held to predominate over individual issues."[103]

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

---

[101] 502 F.3d at 108.

[102] *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.").

[103] *See* 6 Alba Conte & Herbert Newberg, Newberg on Class Actions, § 18:25 & n.4 (4th ed. 2002).

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.

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." 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 unduly artificial 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, and defendants 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.[104]

Whichever way the relevant formulation is put ("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 will be asked to resolve complicated methodological questions about what share of the class, if any, is not covered by plaintiffs' evidence of impact. Whereas, at trial, issues relating to members of the class who did not suffer overcharges may never come up, let alone be

[104] *See PIMCO*, 571 F.3d at 677-78; *In re Wellbutrin SR Direct Purchaser Antitrust Litigation*, No. 04-5525, 2008 U.S. District LEXIS 36719 at **41-42 (E.D. Pa. May 2, 2008) ("'[e]ven if it could be shown that some individual class members were not injured, class certification, nonetheless, is appropriate where the antitrust violation has caused widespread injury to the class'"); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 321 (E.D. Mich. 2001) ("courts 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"); *In re Northwest Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174, 223 (E.D. Mich. 2002) ("the '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"); *NASDAQ Mkt.-Makers*, 169 F.R.D. at 523 ("[e]ven 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) (widespread injury sufficient).

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.'"[105]

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 as 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.[106] 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 whether it was anticompetitive. Defendants would then categorically assert that no plaintiff or class member paid any overcharges at all—either 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.[107] 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

---

[105] *Hydrogen Peroxide*, 522 F.3d at 311, n.8 (quoting *Sandwich Chef* , 319 F.3d at 218).

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

[107] *See, e.g., In re High Pressure Laminates Antitrust Litig*., 00 MD 1368 (CLB), Jury Instructions, May 23, 2006. Tr. at 2315-16 (court 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"); *In re Tricor Direct Purchaser Antitrust Litig*., Civ. No. 05-340-SLR (Consolidated), Final Jury Instructions, November 25, 2008. Tr. at 14 ("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."); *In re Vitamins Antitrust Litig.*, MDL No. 1285 (D.D.C.). Tr. at 1354 (court 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").

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 Fed. R. Civ. P. 23(a)(1), 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 such class members would not bar class certification or entry of a class judgment.[108] 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 in 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."[109]

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."[110] When it comes to trial, therefore, courts leave it

---

[108] 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*, 502 F.3d 91 at 100-101 (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).

[109] *See PIMCO*, 571 F.3d at 677-78.

[110] *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, November 25, 2008, pp. 45-46 ("The Direct Purchaser Plaintiffs allege that due to defendants' anticompetitive conduct, prices for fenofibrate products were above what they would have been had defendants not impeded competition by generic fenofibrate products. Direct Purchaser Plaintiffs allege that, as a result, 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.,*

up to juries to decide, presumably within some 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, courts do 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."[111] 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."[112] 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 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.[113] If done correctly, the use

---

L.L.C., et al., 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.").

[111] *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. at 321-24. In *NASDAQ Mkt.-Makers*, 169 F.R.D. at 523, 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." 169 F.R.D. at 525 (citing cases). In its extended discussion of aggregate damages (*id.* at 524-26), 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.

[112] *Louisiana Wholesale Drug Co. Inc. v. Sanofi-Aventis U.S., L.L.C., et al.*, 07-Civ-7343 (HB), Verdict Sheet, p. 2.

[113] 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

of class-wide averages would implicitly account for the fact that 40% of the class paid no overcharges. And, 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. Recognizing this very phenomenon, the district court judge in *In re New Motor Vehicles Canadian Export Antitrust Litig*., observed: "If the plaintiffs have an adequate model to award aggregate damages, the defendants' concern that some class members may be overcompensated at the expense of other class members seems a little suspect. Under the guise of fairness, the defendants' real objective is to avoid recovery by anyone."[114]

If for some reason there was an 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 in dollars. 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[.]"[115] 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 subject to being 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. This problem can be solved by courts' 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, not allowing them any recovery, or perhaps permitting only a nominal recovery.

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.

---

harmed or how many class members were harmed. *See, e.g., Natchitoches Parish Hospital Service District v. Tyco International, Ltd*., 2009 WL 2914313, *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.

[114] 235 F.R.D. 127, 143 n. 55 (D. Me. 2006), *rev'd in part, vacated in part and remanded*, 522 F.3d 6 (1st Cir. 2008).

[115] *In re High Pressure Laminates Antitrust Litig*., 00 MD 1368 (CLB), Trial Transcript, May 23, 2006. Tr. at 77-78.

The first is that these are entities for which plaintiffs have no admissible evidence that they suffered any injury, and thus it is at least 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 can no longer recover and the defendant gets to keep all of its allegedly ill-gotten gains.[116]

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: first, by requiring plaintiffs to *prove* impact with common evidence rather merely to show 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, third, 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* regarding impact will be common, even if it does not prove harm for many class members.

V. 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. That holding would seem to apply with greatest force to the resolution of disputed factual issues, a decision that, as a matter of constitutional law, in antitrust claims for damages 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

[116] For a discussion of a similar misuse of concerns about class conflicts to deny class certification to the detriment of all class members see 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 (2004).

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 put in place in part for reasons of procedural fairness. It attempts to put in place a group of decisionmakers who are to some degree representative of different perspectives. And it gives all stakeholders some opportunity—however imperfect—to voice their concerns and to promote their interests. The judicial changes to class certification, in contrast, 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 to think to 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 on unsubstantiated and improbable factual assertions and 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.

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.[117] Now the process is more elaborate.[118] First, an Advisory Committee proposes changes after public meetings.[119] Next, the Advisory Committee considers the comments it has received and suggested modifications to its proposal.[120] The Committee then sends its recommendations to the Judicial Conference, which, if further approved, sends them along to the United States Supreme Court.[121] Any changes the Court adopts become final unless Congress rejects them within seventh months after receiving them.[122] The process takes a total of about three years in

[117] RICHARD L. MARCUS, MARTIN H. REDISH, AND EDWARD F. SHEMAN, CIVIL PROCEDURE: A MODERN APPROACH 197 (5th ed. 2009).
[118] For an overview of the process see generally Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L. 901 (2002).
[119] *Id.* (citing 28 U.S.C. § 2073(c)).
[120] *Id.*
[121] *Id.*
[122] *Id.*

general.[123] There is now a greater element of participatory democracy than in the original adoption of the rules.[124]

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 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.'"[125] To be sure, the *Twombly* Court arguably modified the pleading standard without following proper procedure. But the Court's reluctance in *Twombly* 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.[126] 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 would arise about maintaining some sort of symmetry. If a court in effect should increase 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 acknowledge the new asymmetry—much less to justify it—may reflect 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."[127] They have before them the facts only of a single case. They are not well designed to amass empirical information to make the

---

[123] *Id.*

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

[125] *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 515 (2002) (quoting *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993)).

[126] Similarly, under the *Erie* doctrine, courts are more reluctant to conclude a Federal Rule of Civil Procedure is "substantive" than they are to make the same judgment about that 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.

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

factual judgments that inform rulemaking.[128] 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 rely on such "rough guesses"[129] 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, some of which may not be obvious. 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 constitutional problems when judges decide issues that should await resolution by a jury. These issues are grave and warrant sustained attention. They are no mere afterthoughts to be dismissed casually. But they may not receive the careful consideration they deserve, particularly 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.

VI. 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 to protect 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 with care before any departure from settled law. The most appropriate forum—and perhaps the one required under law—for considering such a change is likely to be the Civil Rules Advisory Committee as part of the formal process for amending the Federal Rules of Civil Procedure, not federal judges acting on an *ad hoc* basis.

[128] *Id.*
[129] *Id.*