

Review of the Merits in Class Action Certification

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Abstract: This article explores the extent (if any) to which a court should inquire into the merits of a case when deciding on motions to certify a class. The Article examines three stylized rules: strong-form rules which preclude inquiry into the merits and require the court to take the well-pleaded allegations of the complaint as true for purposes of the class certification motion; weak-form rules which permit the court to inquire into merits issues that are convenient or useful in connection with the analysis of Rule 23's certification requirements; and super-weak rules which permit or require the court to inquire into the class's ultimate chances of success on the merits. The Article evaluates these rules along the following dimensions of public policy: fidelity to law; accuracy in adjudication; fairness with respect to the preclusive effect of judgments; fairness with respect to settlements; and judicial efficiency. The Article concludes that weak-form rules dominate over the others along most policy dimensions.

In *Eisen v. Carlisle & Jacquelin*,² the Supreme Court declared that federal courts may not “conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”³ This proscription – sometimes known

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² 417 U.S. 156 (1974).

³ *Id.* at 177.

as the “*Eisen*” rule – has become a pillar of class action practice, both under Federal Rule of Civil Procedure 23 and under state-court class action procedures.⁴ The rule can have a crucial influence on whether a case is certified as a class action – and, given the importance of certification, on the success or failure of the litigation.⁵

This Article analyzes the proper scope of a court’s inquiry into the merits when ruling on motions to certify a class. Part I of the Article distinguishes three approaches to this question: strong-form rules that prohibit inquiries into the merits and require the court to accept as true the well-pleaded allegations in the complaint; weak-form rules that permit reasonable inquiries into the merits as relevant to certification; and super-weak rules which permit or require the court to investigate the class’s chances of success in the litigation. Parts II-VI compare these rules with respect to the values of fidelity to law, accuracy in adjudication, fairness with respect to the preclusive effect of judgments, fairness in settlements, and judicial economy. Part VII argues that weak form rules are superior to the alternative approaches.

I. The Faces of *Eisen*

The rule that the trial court should not inquire into the merits at the time it decides the motion to certify a class is simple to state but difficult to apply. The key terms – “merits” and “inquiry” – have no clear meaning in the law. The facts of *Eisen* provide

⁴ For state court endorsements of the *Eisen* principle, see, e.g., *Arkansas State Bd. of Educ. v. Magnolia Sch. Dist. No. 14*, 298 Ark. 603, 769 S.W.2d 419 (1989); *Ex parte Holland*, 692 So. 2d 811, 821-22 (Ala. 1997).

⁵ On the importance of certification, see, e.g., *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (“the class certification turns a \$200,000 dispute . . . into a \$200 million dispute. Such a claim . . . may induce a substantial settlement even if the customers’ position is weak”); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001) (certification is often the “defining moment” in class actions); *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (certification can create “insurmountable” settlement pressure on defendants); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995) (describing settlement pressure from certification); *In re “Agent Orange” Prod. Liab.*

little help. Because the case concerned notice costs and not certification, the rule is pure *dictum*.⁶ Later cases have only compounded the problems.⁷

This Part investigates possible approaches to the question of the preliminary merits review on certification. It classifies *Eisen* rules into three stylized variants. The purpose is to identify types of rule that can then be compared and contrasted along various dimensions of public policy.

The following hypothetical case illustrates contexts in which *Eisen* rules may apply. Plaintiff's counsel brings a putative opt-out class action against the manufacturer of a product alleging violations of a consumer protection statute. Certification is governed by a class action rule identical to Federal Rule 23. The consumer protection statute states that the measure of damages is the difference between what the plaintiff paid for the product and what the product would be worth if the defendant's representations were true. The statute is ambiguous on whether individual reliance can be presumed where the statements complained of are contained in defendant's uniform printed materials.

Defendant resists certification on the following grounds: (1) plaintiff has failed to demonstrate that the class is so numerous that joinder of all members is impracticable; (2) the issues common to the class do not predominate over the individual issues because the measure of damages requires a determination of how much each class member paid for

Litig., 818 F.2d 145, 151 (2d Cir. 1987) (\$180,000,000 settlement described as "nuisance value" given defendants' liability exposure).

⁶ See Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 376 (1996).

⁷ Trial court decisions interpreting *Eisen* exhibit little coherence. Some courts even recite inconsistent formulations of the rule as boilerplate in a single decision. See, e.g., *In re: Buspirone Patent Litigation; In re: Buspirone Antitrust Litigation*, 2002 U.S. Dist. LEXIS 15867 (S.D.N.Y. 2002) (listing formulations of the rule). Federal courts of appeals have begun to address the subject developed under

the product; (3) the representative plaintiff's claims are not typical of the class because the products in question were manufactured at different plants using different technologies; (4) the common questions do not predominate because individual reliance is an element of the action for damages; (5) predominance is lacking because many class members made claims under the express warranty; and (6) certification should be denied because the class's claims are frivolous.

What limitations (if any) does *Eisen* impose on the scope of the court's inquiry and analysis? The questions on which issue is joined involve distinctly different judicial inquiries.

The issue of numerosity is substantially unrelated to the merits. The relevant inquiries are factors such as the number of members of the class, their places of residence,⁸ and the ease of locating them and joining them in an individual action.⁹ One matter that may bear on numerosity – for example, the average size of class claims¹⁰ – does potentially implicate the merits (the stronger the claims, the larger the expected recovery per class member). But by and large the inquiry is not merits-based.

The second issue – whether the determination of individual damages defeats predominance – requires that the court at least *look* to the merits. The predominance analysis requires a weighing of the common and individual issues and a comparison between them. But such an inquiry, while it does look to the merits, need not involve even a preliminary assessment of any substantive issue. Because the statute is clear on

F.R.C.P. 23(f), effective in 1998, which permits discretionary appeals from orders granting or refusing class certification. As yet, however, the appellate jurisprudence remains sparse.

⁸ See, e.g., *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 95 F.R.D. 168, 175 (D.Del. 1982).

⁹ See, e.g., *Patrykus v. Gomilla*, 121 F.R.D. 357 (N.D. Ill. 1988).

¹⁰ See, e.g., *Esler v. Northrop Corp.*, 86 F.R.D. 20, 34 (W.D. Mo. 1979) (numerosity is more easily satisfied when the “individual claims are for small amounts of damages”).

the measure of damages, the court merely needs to analyze whether the common questions will predominate (e.g., take up more of the court's and the litigants' time and efforts).

The third issue is whether typicality is defeated because the allegedly defective products were manufactured at different plants. The court cannot properly evaluate this argument without investigating whether the claims of class members who purchased products made in one factory are different than the claims of class members who purchased products made in the other factory. At least some inquiry into the merits appears to be required to reach an informed judgment about this question.

The fourth issue turns on an interpretation of the consumer protection statute. It is evident that the court cannot intelligently evaluate whether individual questions of reliance defeat predominance without knowing whether class members will have to prove reliance. But this is also a key matter in dispute on the merits. If the court concludes preliminarily that the statute requires individual reliance, this may defeat certification, but it will also be a conclusion which, if it holds up at trial, reduces the strength of the plaintiff's claims. Conversely, if the court concludes preliminarily that individual reliance is not an element of the statute, the court may conclude that the common issues predominate. But if this conclusion holds up at trial, it will also strengthen the class's case on the merits because class members will not have to establish individual reliance in order to obtain relief. As to this issue, therefore, the central focus of the certification inquiry directly overlaps a crucial merits determination.

The fifth issue, going to waiver of claims, may involve both factual and legal inquiries. Factually, the plaintiff's counsel may contest the defendant's argument that

numerous class members have made claims under the warranty; legally, counsel may argue that a claim under the warranty does not foreclose a subsequent lawsuit under the consumer protection statute. Each of these issues is tied up in the merits. But the scope of preliminary inquiry differs. As to the legal issues, the court need only consider the briefs and arguments of the parties (supplemented if necessary by the court's own research). As to the factual question, the court could consider documentary evidence or witness testimony and may allow adversarial testing (for example, depositions or cross-examination).

The final issue is distinctive in that it does not bear on any specific issue of class certification. In arguing that the class claims are frivolous, the defendant is inviting the court to use class certification as a preliminary screen to filter out bad cases. The scope of preliminary inquiry needed to address this issue will necessarily be broader than the inquiries needed for other issues because here the matter in question is the ultimate issue for resolution in the lawsuit.

With this example in mind, we can attempt to make sense of possible rules. Some issues are not in dispute. Courts agree that the *Eisen* rule applies only to the *merits*. Thus, in the example above, *Eisen* would not preclude investigation into numerosity because this inquiry has no substantial relationship to the merits.¹¹ It is also clear that the *Eisen* rule does not preclude a careful analysis of the pleadings so long as the court makes no judgments about the substantive claims. Finally, it is clear that the ultimate burden of proof on certification rests on the party seeking class treatment – nearly always the

¹¹ For examples of courts looking beyond the pleadings in assessing whether the numerosity requirement is met, see, e.g., *Sheinhartz v. Saturn Transportation System, Inc.*, 2002 U.S. Dist. LEXIS 6198 (D.Minn. 2002); *Potter v. Citicorp and Citibank, NA*, 2002 U.S. Dist. LEXIS 11596 (D.V.I. 2002); *Verdow v. Sutkowy*, 209 F.R.D. 309 (N.D.N.Y. 2002).

plaintiff.¹² Beyond these areas of agreement, however, the case law offers a menu of interpretations.

A. Strong-Form Rules

The most common formulation holds that a court ruling on a motion to certify the class may not go beyond the face of the pleadings with respect to any issues relating to the merits, but must instead accept as true the well-pleaded allegations in the complaint.¹³ This strong-form rule involves a number of subsidiary questions as to which courts may express different opinions:

(a) Can there be inquiry beyond the pleadings if the matter in dispute goes to the merits of the *named plaintiff's* case, but not to the merits of the class case as a whole? This situation often arises when the defendant challenges the representative plaintiff's adequacy or typicality.¹⁴ In *Cheney v. Cyberguard Corp.*,¹⁵ the defendant argued that the named plaintiffs were inadequate because they provided testimony that was demonstrably false.¹⁶ The court rejected the argument, citing the principle that "any inquiry concerning . . . credibility is an impermissible examination of the merits."¹⁷ Here, the court applied a strong-form rule to bar inquiry into the named plaintiff's case. In other cases, however,

¹² See note x, *infra*.

¹³ See, e.g., *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999); *In re: Buspirone Patent Litigation*; *In re: Buspirone Antitrust Litigation*, 2002 U.S. Dist. LEXIS 15867 (S.D.N.Y. 2002); *In re Vitamins Antitrust Litigation*, 209 F.R.D. 251 (D.D.C. 2002).

¹⁴ See, e.g., *Lagner v. Brown*, 1996 WL 709757 (S.D.N.Y. 1996) (court refused to consider a challenge to the named plaintiff's typicality on strong-form grounds); *Wilson v. Pennsylvania State Police Department*, 1995 U.S. Dist. LEXIS 9981 (E.D. Pa. 1995).

¹⁵ 211 F.R.D. 478 (S.D. Fla. 2002).

¹⁶ *Id.* at 490.

¹⁷ *Id.*

courts do not apply a strong-form rule strictly when the merits issues relate only to the individual plaintiff.¹⁸

(b) What should the court do with respect to *defenses*? In the example above, this issue would be raised by the defendant's argument that class members who returned the express warranty waived their rights to obtain relief under other legal theories, thereby creating individual defenses that defeat predominance. Some courts refuse certification if the defendant's pleadings raise affirmative defenses which, if true, would negate an element required for certification.¹⁹ Other courts apply a strong-form rule in a pro plaintiff way even for defenses, holding that to take cognizance of the defenses would delve impermissibly into the merits.²⁰ Still others deal with this problem through interpretations of Rule 23: they hold that it is not necessary to look beyond the pleadings because the affirmative defenses, even if proved, would not defeat certification.²¹

(c) The scope of a strong-form rule also depends on the detail that courts will require in pleadings. Merely alleging that Rule 23 is satisfied is not sufficient.²² Neither are pleadings that refer to the elements of Rule 23 in purely conclusory fashion.²³ The pleadings must set forth "an adequate statement of the basic facts."²⁴ But they need not

¹⁸ See, e.g., *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113 (S.D.N.Y. 2001) (recognizing that inquiries into the merits are prohibited under *Eisen*, but still inquiring into defendant's claim that the representative plaintiffs were not adequate because they lacked credibility).

¹⁹ See *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998). For an analysis calling for an across-the-board application of *Eisen* to affirmative defenses, see Priya Laroia, *Individualized Affirmative Defenses Bar Class Certification--Per Se*, 2003 University of Chicago Legal Forum 805, 810 (2003).

²⁰ See *In re Data Access Sys. Securities Litig.*, 103 F.R.D. 130, 139-40 (D.N.J. 1984) ("[E]ven if [defendants] can prove non-reliance as an affirmative defense, this goes to the merits of the case and cannot be considered by the court on a certification motion.")

²¹ See, e.g., *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000).

²² *In re American Medical Sys.*, 75 F.3d. 1069, 1079 (6th Cir. 1996).

²³ *In re American Medical Sys.*, 75 F.3d. 1069, 1079 (6th Cir. 1996).

²⁴ *In re American Medical Sys.*, 75 F.3d. 1069, 1079 (6th Cir. 1996).

contain the sort of detail that is required, for example, for allegations of common law fraud.²⁵

(d) Courts adopting a strong-form rule sometimes justify inquiries beyond the pleadings on the ground that they do not involve the “merits.” In *Lehocky v. Tidel Technologies, Inc.*,²⁶ the court faced the question whether a fraud-on-the-market presumption obviated the need to prove reliance for each class member – an issue going to certification. The court took evidence on this question on the ground that the fraud-on-the-market analysis was not an inquiry into the “merits.”²⁷ By manipulating the concept of the “merits” the court was able to remain formally in compliance with a strong-form rule while still considering evidence relevant to certification.

(e) Courts that endorse a strong-form rule typically permit the trial judge to go beyond the pleadings to “understand” the case.²⁸ The court’s job is to “envision” the form a trial will take.”²⁹ This approach, drawing on the *Manual on Complex Litigation*,³⁰ attempts to reconcile the notion that *Eisen* precludes going beyond the pleadings with the practical necessity of doing so if judicial rulings on matters such as predominance are to be meaningful.³¹ Even if the court engages in a “thorough” examination of the relevant

²⁵ See F.R.C.P. 9 (fraud must be pleaded with particularity).

²⁶ ___ F.Supp.2d ___ (S.D. Tex. 2004).

²⁷ ___ F.Supp.2d ___, ___ n. 16 (S.D. Tex. 2004). The merits would be implicated, said the court, only if the defendant sought to *rebut* the presumption with respect to a given class member.

²⁸ This formulation is from *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996). See also *Sheinhartz v. Saturn Transportation System, Inc.*, 2002 U.S. Dist. LEXIS 6198 (D.Minn. 2002); *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 530 (N.D. Ill. 1998).

²⁹ *Clay v. American Tobacco Co.*, 188 F.R.D. 483, 489 (S.D. Ill. 1999).

³⁰ See *Manual for Complex Litigation* § 30.11, at 214 (3d ed. 1995).

³¹ The Advisory Committee on Civil Rules seemed to adopt this position in its report on the 2003 amendments to Rule 23, opining that “[a]lthough an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually be presented at trial. In this sense it is appropriate to conduct controlled discovery into the ‘merits,’ limited to those aspects relevant to making the certification decision on an informed basis.” Advisory Committee on the Federal Rules of Civil Procedure, Report to the Standing Committee on Rules of Practice and Procedure, May 20, 2002, 98.

evidence,³² however, its task is only to predict how the trial will proceed, not to resolve contested issues of fact or law.

(f) A rule against probing behind the pleadings will not prevent preliminary inquiries if the pleadings are patently frivolous.³³ In *Martin v. American Medical Systems, Inc.*,³⁴ the representative plaintiff alleged that *all* recipients of the defendant's penile implant devices had experienced problems with the product. The court looked behind the pleadings and concluded that many recipients had not experienced problems. Because such class members were not harmed, the plaintiff was neither typical of the class nor capable of providing adequate representation. It appears clear that the judge found the allegation that all devices had malfunctioned to be patently incredible and rejected it on this ground.

Similarly, courts employing a strong-form rule may look beyond the pleadings when an issue of law bearing on certification is conclusively established by controlling precedent. *McBride v. Reliastar Mortg. Corp.*³⁵ was a putative class action under the Real Estate Settlement Procedures Act (RESPA). The plaintiff alleged that the common issues predominated because the defendant's practice of paying mortgage brokers for order flow violated the statutory rights of all class members. Refusing to certify the class, the court observed that merely paying for order flow was not enough to state a cause of action under RESPA; individualized proof was required. The court, in other words, refused to accept the plaintiff's characterization of the case and instead conducted its own analysis of governing law.

³² See, e.g., *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 140 (3d Cir. 1998).

³³ See *Bovee v. Coopers & Lybrand*, 216 F.R.D. 596 (S.D. Ohio 2003) (“A court need not accept a facially frivolous claim that stock was traded on an efficient market.”)

³⁴ 1995 U.S. Dist. LEXIS 22169 (S.D. Ind. 1995).

(g) The application of a strong-form rule may vary depending on whether the issue is one of fact or law. As to *factual* inquiries, the rule is typically applied in a straightforward way. In the example above, defendant alleges that the plaintiff would not be an adequate or typical representative of class members who purchased goods manufactured at other plants. The plaintiff alleges that all of the defendant's products wherever manufactured were subject to the defect. For purposes of the motion for class certification, a court employing a strong form rule would accept as true the allegation that all products were subject to the defect regardless of place of manufacture.

Application of a strong-form rule to questions of *law* is more problematic. In *Rosen v. Fidelity Fixed Income Trust*,³⁶ the defendant issued three registration statements. The representative plaintiff alleged that she purchased her shares in reliance on one of the statements. This raised a certification issue: was the representative plaintiff typical of the class when some class members had purchased shares as to which a different registration statement was in effect? The defendant asserted that the representative plaintiff could not claim injury stemming from misstatements in another registration statement. Plaintiff's counsel responded that a party could recover for misstatements in a different registration statement when the underlying securities were identical. The court avoided this issue by reference to *Eisen*. Whether a party who has been misled by one registration statement has standing to recover for other registration statements was a merits issue foreclosed to the court in ruling on class certification. Thus, typicality was not defeated: "[t]o the extent that Plaintiff may pursue her [securities law] claims against each of the three

³⁵ 1999 U.S. Dist. LEXIS 21654 (N.D. Ga. 1999).

³⁶ 169 F.R.D. 295 (E.D.Pa. 1995).

registration statements, her claims are typical of class.”³⁷ Other courts do not apply a strong-form rule to purely legal questions. In *Gibbs Products Corp. v. Cigna Corp.*,³⁸ a question at certification was whether the class was entitled to a presumption of reliance in a RICO mail fraud claim. If the court had applied the facial validity standard to this issue it would have accepted the plaintiff’s interpretation of RICO. Instead, the court inquired into the merits and held that a presumption of reliance was not allowed.³⁹

2. Weak-Form Rules

Weak-form rules provide permit inquiries into the merits if they bear an appropriate relationship to an the issue of certification.⁴⁰ In the hypothetical case described above, for example, it might be desirable for the trial court to inquire into the defendant’s claim that different technologies of production at different plants defeated certification. But it might not be necessary for the court to inquire into the related issue of whether the technologies were equally prone to producing the alleged defect.

Weak-form rules are finding increasing acceptance. Two court of appeals decisions from 2001 are particularly noteworthy. In *Szabo v. Bridgeport Machines, Inc.*,⁴¹ Judge Easterbrook denounced strong-form rules as having “nothing to recommend [them].”⁴² The trial court must instead make “whatever factual and legal inquires are necessary.”⁴³ If such an inquiry involved the merits, so be it. In *Newton v. Merrill Lynch*,

³⁷ Id at 299.

³⁸ 196 F.R.D. (M.D. Fla. 2000).

³⁹ Id. at 438-39.

⁴⁰ See, e.g., *In re Unioil Securities Litigation*, 107 F.R.D. 615, 618 (C.D. Cal. 1985) (court is at liberty “to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case.”)

⁴¹ 249 F.3d 672 (7th Cir. 2001).

⁴² Id.at 675.

⁴³ Id. at 676.

Pierce, Fenner, & Smith, Inc.,⁴⁴ the plaintiffs produced expert testimony on predominance purporting to demonstrate that economic loss for each class member could be determined with a simple formula. Because this testimony claimed to provide a potentially viable measure of class-wide damages, it had an obvious bearing on the merits. Observing that “a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action,”⁴⁵ Judge Scirica evaluated and rejected the testimony as both unpersuasive and inadequate to establish compliance with Rule 23(b)(3).

Weak-form rules implicate two subsidiary questions: (a) when is an inquiry into the merits excessive? and (b) how preliminary must the preliminary inquiry be?

(a) Some courts employing a weak-form rule declare that the court should not make *unnecessary* inquiries into the merits.⁴⁶ If strictly applied, a necessity standard would allow inquiries into the merits only if a court could not otherwise make a reasoned decision on a certification question. Yet strict necessity may not always be required. Some courts indicate that *Eisen* merely requires that the trial court exercise “caution” in evaluating the merits.⁴⁷ The suggestion may be that while courts should not willfully reach out to decide merits issues, neither should they avoid inquiries that would be convenient

⁴⁴ 259 F.3d 154 (3rd Cir. 2001).

⁴⁵ 259 F.3d at 168.

⁴⁶ See, e.g., *Fisher v. Virginia Electric & Power Co.*, 217 F.R.D. 201 (E.D. Va. 2003) (“the Court will inquire no further into the merits than is necessary to determine the likely contours of this action should it proceed on a representative basis”); *In re Domestic Air Transportation Antitrust Litig.*, 137 F.R.D. 677, 684 (N.D. Ga. 2001); *Rhodes v. Cracker Barrel Old Country Store, Inc.*, 213 F.R.D. 619 (N.D. Ga. 2003). In some cases a necessity standard is implied. See, e.g., *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) (“going beyond the pleadings is *necessary*, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues”) (emphasis supplied); *Huff v. N.D. Cass Co.*, 485 F.2d 710, 714 (5th Cir. 1973) (en banc) (“[i]t is *inescapable* that in some cases there will be overlap between the demands of [Rule 23] and the question of whether plaintiff can succeed on the merits”) (emphasis supplied).

⁴⁷ *Weisfeld v. Sun Chemical Corp.*, 84 Fed. Appx. 257 (3d Cir. 2004), citing *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166-68 (3d Cir. 2001).

and useful to the resolution of the certification motion even if the court might be able to make a reasoned decision without this information.

(b) There will be delicate questions as to how preliminary the preliminary inquiry must be. Courts tend to provide upper and lower bounds: the hearing on class certification should not amount to a “mini-trial”⁴⁸ but the court must at least survey the factual scene on a “kind of sketchy relief map.”⁴⁹ These admonitions leave room for investigation of merits issues so long as the investigation does not become protracted or complex. In exercising this discretion, the court will need to determine issues such as how extensive the hearing will be, what evidence will be considered, and what safeguards on reliability of evidence will be imposed.

Courts employing a weak-form rule may consider not only the *intensity* of inquiry but also the *directness of connection* between the matters inquired into at certification and the merits at trial. In some cases, the results of the court’s inquiry at certification, while related to the merits, will only be indirectly related to the trial outcome. For example, the court may ask whether a securities market was sufficiently efficient to qualify for a fraud-on-the-market presumption. The results of this ruling, if they hold up through trial, will impact the expected outcome.⁵⁰ But a ruling that the market is efficient for purposes of the fraud-on-the-market presumption does not establish liability or damages. Compare this with cases where the evidence on certification has a direct bearing on the merits. In *Bovee v. Coopers & Lybrand*,⁵¹ for example, the defendant argued that representative

⁴⁸ See, e.g., *In re: Buspirone Patent Litigation; In re: Buspirone Antitrust Litigation*, 2002 U.S. Dist. LEXIS 15867 (S.D.N.Y. 2002).

⁴⁹ *Professional Adjusting Systems of America, Inc. v. General Adjustment Bureau, Inc.*, 64 F.R.D. 35, 38 (S.D.N.Y. 1974).

⁵⁰ If the market is found to be efficient, plaintiffs will enjoy a presumption of reliance and may find it easier to establish causation and damages

⁵¹ 216 F.R.D. 596 (S.D. Ohio 2003).

plaintiffs were inadequate because they had purchased securities after the defendant's truthful disclosures had cured the market. The court declined to address the question because the certification issue could be resolved with other facts not so deeply intertwined with the merits.⁵²

3. Super-Weak Rules

Super-weak rules allow or encourage the court at certification to evaluate the plaintiff's probability of success *per se* (we will refer to this value as *p*).⁵³ The sixth issue in the hypothetical case discussed above illustrates this question: the defendant argues that certification should be denied because the plaintiff's claims are frivolous. *Rhone-Poulenc*,⁵⁴ the leading case, used such an approach.⁵⁵ Judge Posner refused to certify a nationwide class of hemophiliacs who claimed that they had contracted AIDS through tainted transfusions, in part because he viewed *p* as exceptionally low. Super-weak rules open all substantive matters for review at certification subject only to the court's discretion to limit the preliminary inquiry in the interests of efficiency and expedition.

II. Fidelity to Law

⁵² Specifically, the court found that the representative plaintiffs had purchased before the alleged cure.

⁵³ Several commentators have recently recommended adoption of super-weak rules. Bartlett H. McGuire advocates a "substantial possibility of success" standard for review of the substantive merits at certification. 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 (1996). Robert Bone and David S. Evans propose a super-weak form rule under which the district court would be required to investigate the merits at certification and permitted to certify a class only if he or she concluded that the underlying claims met a "likelihood of success" standard. Robert Bone and David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke Law Journal 1251 (2002). A super-weak form rule is recommended for tort class actions in Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 Colum. L. Rev. 299, 312-15 (1980). Similarly, George Priest argues that for mass tort actions, if the trial court determines that the substantive case is "without merit," class certification should be denied. George L. Priest, *Procedural versus Substantive Controls of Mass Tort Class Actions*, 26 Journal of Legal Studies 521, 571 (1997).

⁵⁴ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995).

⁵⁵ *See also Alexander v. Q.T.S. Corp.*, 1999 U.S. Dist. LEXIS 16169 (N.D. Ill. 1999) (after citing *Eisen* for the proposition that the court could not delve into the merits on certification, the court examined the merits and observed that the plaintiffs had presented "sufficient evidence" to establish that the claims were not insubstantial).

A starting place for comparison is the extent to which these variants are supportable under existing law.

Strong-form rules have been recited and applied by numerous state and federal courts in the years since *Eisen*. Yet while support for strong-form rules may be wide, it is not deep. Judges typically invoke strong-form rules as a shortcut on the path to certification. They rarely consider whether such rules are correct interpretations of *Eisen* or Rule 23. In fact, strong-form rules cannot be justified on principles of fidelity to law. They find no grounding in the text of Rule 23 and are inconsistent with its purposes. It would be bizarre to conclude that the framers of Rule 23 would have set forth a careful set of prerequisites for class certification only to deny trial courts the ability to apply those prerequisites in a factually-based and reasoned manner.

Nor can strong-form rules be justified as mandated by *Eisen* itself. *Eisen* does not prohibit inquiries into the merits for purposes of determining whether a class is properly certifiable. The opinion rejected only preliminary inquiries into the merits that were unrelated to the criteria of Rule 23 – i.e., that had no proper relevance to certification. Even taking *Eisen*'s language at face value, it does not mandate a strong-form rule.

Strong-form rules, moreover, cannot be reconciled with later Supreme Court cases. *General Telephone Co. of the Southwest v. Falcon*⁵⁶ admonished trial courts to conduct a “rigorous inquiry” at certification⁵⁷ -- an instruction flatly inconsistent with the hands-off approach to the merits demanded under a strong-form rule. *Basic Inc. v.*

⁵⁶ *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982).

⁵⁷ On the relationship between *Falcon* and *Eisen*, see, e.g., Robert Bone and David S. Evans, Class Certification and the Substantive Merits, 51 Duke Law Journal 1251, 1267-68 (2002); Priya Laroia, Individualized Affirmative Defenses Bar Class Certification--Per Se, 2003 University of Chicago Legal Forum 805, 810 (2003) (recognizing that a “a tension exists between *Eisen* and *Falcon*); *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984).

*Levinson*⁵⁸ substituted a substantive presumption of reliance for the blinders on judicial vision that a strong-form rule imposes.⁵⁹ The fraud-on-the-market presumption in *Basic* cannot be intelligently administered without at least a preliminary look at the merits-related issue of whether the relevant market is efficient.

Although strong-form rules continue to attract support in the lower federal courts,⁶⁰ the trend is against them.⁶¹ Even courts paying lip service to a strong-form rules may undermine them by tone and nuance, cautioning that they should not be “talismantically” invoked to “artificially limit” a trial court’s reasoned determination on certification.⁶² Strong-form rules, in short, have little justification under governing law aside from the fact that they have been uncritically accepted for so long.

Super-weak rules have even less foundation. They find no authorization in the specific provisions of Rule 23. Perhaps a super-weak rule could be justified as based on an additional, non-statutory prerequisite for certification.⁶³ But unlike other non-statutory certification requirements,⁶⁴ a prerequisite that the class meet some threshold probability of success on the merits cannot plausibly be justified as necessary for the effective administration of the requirements that are explicitly found in the rule. Super-weak rules

⁵⁸ 485 U.S. 224, 243 (1988).

⁵⁹ See, e.g., *In re Seagate Technology II Securities Litigation*, 843 F. Supp. 1341 (N.D. Cal. 1994) (concluding that *Basic* cannot be reconciled with *Eisen*).

⁶⁰ See, e.g., *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999).

⁶¹ See, e.g., *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001); 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, 374 (1996).

⁶² *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984); *Cheney v. Cyberguard Corp.*, 213 F.R.D. 484 (S.D.Fla. 2003).

⁶³ See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Columbia Law Review 1343, 1439 (1995).

⁶⁴ Non-statutory requirements have been recognized in addition to the explicit requirements for certification under Rules 23(a) and (b) – for example, the requirements that there be a reasonably definite class, see, e.g., *National Organization for Women, Inc. v. Scheidler*, 172 F.R.D. 351 (N.D. Ill. 1997), or in a

are also inconsistent with any reasonable interpretation of *Eisen* itself.⁶⁵ The very defect complained of in *Eisen* was the fact that the district court had investigated *p*.⁶⁶ Only one lower federal court – the Seventh Circuit – has endorsed a super-weak rule,⁶⁷ and even this decision has been questioned by later authority in the circuit.⁶⁸

In contrast to strong-form and super-weak rules, weak-form rules are easy to justify under existing law. The court applying a weak-form rule is simply engaged in the normal and expected judicial task of marshalling relevant evidence and applying the law to the facts. In fact, any reasonable interpretation of Rule 23 mandates a weak-form rule, since the framers of the rule must have intended to equip trial courts with the resources to make an informed and reasoned decision.

Weak-form rules are consistent with *Eisen*. As noted, that opinion merely repudiated the practice of inquiring into *p*. It did not prohibit inquiries at certification that overlapped merits issues when the purpose of the preliminary inquiry was to evaluate compliance with Rule 23. Indeed, the Court indicated that preliminary inquiries into the merits are often necessary to determine “whether the requirements of Rule 23 are met.”⁶⁹ Weak-form rules are consistent with the “rigorous scrutiny” demanded by the Supreme Court’s later decision in *Falcon*.⁷⁰ They authorize trial courts to inquire into the merits

(b)(2) case, that the class is sufficiently cohesive as to make classwide adjudication appropriate. *See, e.g., Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), *cert. denied*, ___ U.S. ___ (1999).

⁶⁵ *See In re Copley Pharmaceuticals, Inc.*, 161 F.R.D. 456, 461 (D. Wyo. 1995) (interpreting *Rhone-Poulenc* as inconsistent with *Eisen*).

⁶⁶ *Eisen*, 417 U.S. at 179, quoting *Miller v. Mackey International*, 452 F.2d 424 (5th Cir. 1971). *But see* George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 *Journal of Legal Studies* 521, 571 (1997) (suggesting that *Eisen* “does not directly preclude this second, negative review: the determination that if the underlying substantive claim is without merit, class certification should be denied.”)

⁶⁷ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

⁶⁸ *See Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) (Easterbrook, J.) (“[t]he success of the 1966 amendments (which are still in force) depends on . . . judicial willingness to certify classes that have weak claims as well as strong ones.”).

⁶⁹ *Eisen*, 417 U.S. at 179, quoting *Miller v. Mackey International*, 452 F.2d 424 (5th Cir. 1971).

⁷⁰ *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982)

whenever doing so is convenient or useful to resolve a certification question. Weak-form rules are also indicated by the Court's decision in *Basic*.⁷¹ A trial court cannot realistically inquire into the efficiency of the market without preliminarily examining a question which is deeply interwoven with the merits. Consistent with these cases, the recent trend in the lower federal courts has been to endorse weak-form rules.⁷²

III. Accuracy in Adjudication

The *Eisen* Court objected to preliminary inquiries on the ground that the lack of trial-type procedures would result in inaccurate decisions.⁷³ Two possible errors are relevant: (a) error in certification; and (b) error at trial.⁷⁴

A. Error in Certification

Strong-form rules create significant dangers of certification error.⁷⁵ There is no doubt that merits issues can be relevant to certification.⁷⁶ Obviously a court is more

⁷¹ *Basic, Inc. v. Levinson*, 485 U.S. 224, 243 (1988).

⁷² See cases cited at note xx, *supra*.

⁷³ See *Eisen*, 417 U.S. at 177-78; *In re: Buspirone Patent Litigation*; *In re: Buspirone Antitrust Litigation*, 2002 U.S. Dist. LEXIS 15867 (S.D.N.Y. 2002) (reaching the merits might "subject some parties to adverse merits rulings without the benefit of the rules and procedural safeguards that traditionally apply in civil trials"); *Farm Bureau Mut. Ins. Co. v. Farm Bureau Policy Holders & Members*, 323 Ark. 706, 918 S.W.2d 129 (Ark. 1996).

⁷⁴ For general discussion about the value of adequacy in litigation, see Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. Legal Stud. 307 (1994).

⁷⁵ Consistently with the analysis in this paper, Bone and Evans conclude that courts are more likely to commit error in certification decisions under *Eisen* than under a rule that permits a court to make a preliminary inquiry into the merits at the certification stage. See Robert Bone and David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke Law Journal 1251, 1313-14 (2002). Their model depends on the proposition that in an *Eisen* regime, class action attorneys will be more likely to file frivolous lawsuits, which are not effectively screened due to the *Eisen* rule and which therefore generate a rate of erroneous certification grants under *Eisen* that is higher than the rate of erroneous certification denials under a regime allowing preliminary inquiry. The Bone-Evans model depends on the premise that strong-form jurisdictions will attract a significant number of frivolous lawsuits. As yet there is no empirical verification of this proposition. The Bone-Evans model also ignores the costs in review-of-the-merits jurisdictions associated with the possibility that non-frivolous class actions will not be brought because of the possibility of erroneous refusals to certify. More fundamentally, the Bone-Evans model does not account for another reason why errors in certification are more likely under a strong-form rule than under a rule permitting preliminary inquiry. Because the merits are often relevant to certification, a court that is permitted to inquire into them at the certification is more likely to reach a correct result than a court that is barred from such an inquiry.

likely to make a correct decision on certification if it is allowed to look into the relevant facts and circumstances than if it is limited to accepting the truth of the facts presented in pleadings of a biased litigant.⁷⁷

The impact of super-weak rules depends in part on whether *p* is a criterion or factor for certification under Rule 23. If *p* is *not* a certification factor, judicial inquiry into *p* may increase error at certification because the court will consider a potentially confounding question. On the other hand, inquiry into *p* may to some extent also improve accuracy in the certification decision to the extent that *p* correlates with a specific Rule 23 factor.

If *p* is a certification factor, then a preliminary inquiry into *p* will improve accuracy of decisions, provided the court correctly assesses *p*. There are reasons to believe courts will often assess *p* correctly. The trial judge will usually be experienced at assessing litigation outcomes.⁷⁸ The judge, moreover, has discretion over how the preliminary inquiry should be conducted. Where the facts or law are clear, the judge may be able to reach a reliable result in fairly short order. Where the issues are murkier, the judge may

⁷⁶ See *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982) (class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (same).

⁷⁷ See, e.g., *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975) (“[t]he court is bound to take the substantive allegations of the complaint as true, thus necessarily making the class order speculative in the sense that the plaintiff may be altogether unable to prove his allegations.”) Although the court may revise a certification order found to be erroneous, see FRCP 23(c)(1)(C) (“[a]n order [certifying a class] may be altered or amended before final judgment”), this is no reason to allow error at the outset. Later correction of erroneous certification grants will not avoid the interim costs incurred by the parties (including notice costs) during the period in which the class was certified. As a practical matter, moreover, cases are rarely decertified. Reliance on later review of certification orders as an answer to the error problem can encourage sloppy analysis at the front end. See *Southwestern Refining Col, Inc. v. Bernal*, 22 S.W.3d 425 (Tex. 2000) (rejecting a to reject a “certify now, revise later” approach to certification); *Henry Schein, Inc. v. Stromboe*, 2002 WL 31426407 (Tex. 2002) (holding that certification may only be based on “actual, not presumed” conformance with the class action rule).

⁷⁸ Motions for preliminary injunctions are an example. The court in such cases is not only permitted, but in fact required to look into the merits in such cases in order to weigh the parties' respective probabilities of success.

require a more intensive process before “coming to rest.”⁷⁹ Judges will not always assess p correctly, however. P is not a narrow issue that can be addressed in a focused pre-trial inquiry. In consequence, the lack of trial-type procedures at certification might impair accuracy in the court’s assessment.⁸⁰ Even if p is a factor at certification, therefore, there appears to be a non-trivial risk that a trial court will incorrectly assess p and accordingly decide the certification erroneously.

Weak-form rules are clearly superior to strong-form rules as far as certification error is concerned. It could hardly be otherwise because weak-form rules permit inquiry into relevant issues foreclosed to the court under strong-form rules. The comparison with super-weak rules is more complicated. If p is a factor at certification, the weak-form rule could be inferior to the super-weak rule as regards the probability of error at certification because the weak-form rule would then prohibit the trial court from considering relevant information. On the other hand, because the inquiry under a weak-form rule is more focused than under a super-weak rule, the increased certification error resulting from the failure to consider p would have to be weighed against the greater probability of correctly analyzing the factors that are considered. If p is not a factor at certification, the weak-form rule is strictly superior to the super-weak rule. The weak-form rule focuses the court’s attention on the factors relevant to certification and does not direct the court’s attention to a potentially confounding inquiry.

B. Error at Trial

⁷⁹ The phrase is from *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982).

⁸⁰ Important documents or witnesses may be unavailable, for example. Even if such evidence is available, the court may exclude it in the interests of expediting the certification inquiry. Witness testimony may not be properly evaluated for credibility. The relevant assessment rule may also play a role: if the court is required to place a thumb on the scale when reviewing the plaintiff’s evidence, the result will be to increase the probability of erroneous certifications.

Turning to error at trial, consider first the application of a strong-form rule. Because the court gives no consideration to the merits under a strong-form rule, the certification decision should have no effect on the accuracy of trial outcomes. Whether or not it is certified, the litigation progresses like any other case with the facts and law determined in the ordinary course.

Super-weak rules have an ambiguous effect on trial accuracy. As we have seen, the court's preliminary inquiry into p may or may not be accurate. An accurate assessment of p may improve the accuracy of trial. Because the court has an early exposure to the case, the judge will be familiar with the facts and law and will likely make better rulings. The judge's preliminary rulings may also facilitate more accurate settlements. An inaccurate assessment of p creates a significant risk of error at trial, however.⁸¹ Many judges will avoid placing inappropriate weight on the results of the preliminary investigation and will be open to changing their views as trial progresses. But some judges may feel that changing their previously-announced views would reflect negatively on their abilities. Other judges might experience a cognitive bias created when an initial view of the case, although erroneous, becomes fixed in their minds.⁸² If the judge for whatever reason is unduly attached to her erroneous estimate of p , the effect may be to alter the trial outcome unless the merits are clear. This is the scenario that

⁸¹ See Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 401 (1996) (recognizing that "preliminary assessments could be very troublesome--and misleading--if they were based on inadequate information and therefore unreliable" but arguing that the concern is not as great as commonly supposed because of safeguards that can be incorporated into the preliminary hearing).

⁸² Similarly, where the parties reach a settlement of the case, the judge will have to evaluate the proposal for fairness, adequacy, and reasonableness. If the judge has been erroneously preconditioned to maintain a certain attitude towards the litigation, this may influence how the judge assesses the settlement, resulting in the possibility of error harmful to absent class members.

troubled the Court in *Eisen* when it warned that tentative findings might “color” subsequent proceedings.⁸³

The weak-form rule is likely to be less effective at achieving accuracy at trial than the strong-form rule, although the effect is ambiguous. When the court examines a merits issue relevant to certification, this may introduce the possibility of bias at trial with respect to that issue. However, because the inquiry under a weak form rule is focused on particular issues, the court is likely to make a correct determination at certification, and thus the chance of subsequent bias that distorts outcomes at trial will be low. Moreover, bias with respect to a particular issue may not translate into distortions in outcome because many other issues as to which the court does not have a bias will contribute to the result. At the same time, the weak-form rule directs the court’s attention to merits issues at an early stage of the litigation and thus may assist the court in making better decisions later on.

Weak-form rules may or may not be superior to super-weak rules as regards accuracy at trial. If the court accurately assesses p , a super-weak rule will be superior to a weak-form rule because the latter excludes consideration of p and an accurate assessment of p should improve trial accuracy. If the court erroneously assesses p , the weak-form rule will usually be superior to the super-weak rule because of the danger that the court in a super-weak regime will not correct the error at trial.⁸⁴

IV. Fairness with Respect to the Preclusive Effect of Judgments

⁸³ *Eisen*, 417 U.S. at 178.

⁸⁴ The court might also make an error in its assessment of the merits under a weak-form rule. However, we have seen that because of the inquiry is more focused in weak-form rules, the possibility of error is considerably lower than the possibility that a court applying a super-weak rule will make an error as to p . For the same reason, if the court does make an error on the merits under a weak-form rule, this is less likely to skew the outcome as compared with a strong-form rule, where the issues presented on certification are the ultimate issues in the case.

The *Eisen* Court was also concerned that preliminary inquiries into the merits would inflict “substantial prejudice” on defendants⁸⁵ by skew the playing field in plaintiffs’ favor with respect to the preclusive effect of judgments. Prior to 1966, potential plaintiff in “spurious” class action could wait in the wings and await developments in the case before deciding whether to participate.⁸⁶ They could intervene when the outcome was or was likely to be favorable and remain outside the case when the outcome was or was likely to be unfavorable.⁸⁷ Rule 23(c)(1) was designed in part to discourage such “one-way intervention” by bringing parties into the case at the earliest practicable time.⁸⁸ Mutuality of estoppel would thus be enhanced.⁸⁹ But preliminary inquiry might reintroduce one-way intervention in a new guise because it would allow absent plaintiffs to be bound by favorable judgments and to avoid unfavorable ones. This

⁸⁵ *Eisen*, 417 U.S. at 178.

⁸⁶ See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974) (“If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment.”).

⁸⁷ See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974) (a “ recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests”); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 759 (3d Cir. 1974) (“[m]any commentators objected that one-way intervention had the effect of giving collateral estoppel effect to the judgment of liability in a case where the estoppel was not mutual. This was thought to be unfair to the defendant”).

Opposition to one-way intervention was not universal. One of the most influential articles on class action practice under old Rule 23 supported one-way intervention, notwithstanding the perception that it was “not cricket” to allow class members to “place their bets after the race was over.” Harry Kalven Jr. and Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 *University of Chicago Law Review* 684, 715 (1940-41) (Kalven and Rosenfield are not responsible for the mixed sports metaphor, which is due to combining quotes from different sentences). Their support of one-way intervention was due, in part, to their belief that the Constitution would not permit otherwise unrelated parties who had not joined the action to be bound by the preclusive effect of a judgment.

⁸⁸ See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974) (“The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments”); *Chrapliwy v. Uniroyal, Inc.*, 71 F.R.D. 461 (N.D. Ind. 1976) (1966 amendment intended to prevent “sideline sitting” by class members); *Sarasota Oil Co. v. Greyhound Leasing & Financial Corp.*, 483 F.2d 450 (10th Cir. 1973); *Biechele v. Norfolk & W. R. Co.*, 309 F. Supp. 354 (D. Ohio 1969) (revisions were intended to prevent one-way intervention).

⁸⁹ *Katz v. Carte Blanche Corp.*, 496 F.2d 759 (3d Cir. 1974).

is the concern that led the *Eisen* Court to declare that preliminary inquiries into the merits were “directly contrary” to Rule 23(c)(1).⁹⁰

This section compares different *Eisen* rules with respect to the preclusive effect of judgments. Two situations are relevant: cherry-picking cases where a plaintiffs obtain a litigation advantage over the defendant through informed use of opt-out rights and cherry-dropping cases where the non-mutuality of estoppel is a function of certification itself and does not depend on the volitional act of any class members.

A. Cherry-Picking: Unfairness Due to Informed Exercise of Opt-Out Rights

The following model illustrates the problem of cherry-picking. Call an absent class member P and the defendant D. Cases have merit when p is at least 5% and lack merit when p is less than 5%. When cases have merit, p is either low or high. At certification, the court applies a strong-form, weak-form, or super-weak rule. Under the strong-form rule the court certifies the class without inquiring into p . Under the super-weak rule the court investigates p and certifies it finds the case to have merit and refuses to certify if it finds the case to lack merit. In either event the court issues an opinion that discloses its assessment of p . The class wins at trial when the court preliminarily assesses p as high and loses at trial when the court preliminarily assesses p as low. Under the weak-form rule, the court investigates the merits only insofar as they relate to a specific certification requirement under Rule 23.

⁹⁰ See *Eisen*, 417 U.S. at 178. Although the Court indicated that preliminary inquiries were “directly contrary” to Rule 23(c)(1), it could not have meant that such inquiries violated an express prohibition of the rule. The word “practicable” gives trial courts a significant degree of discretion to manage the timing of decisions, including the power in appropriate cases to consider merits issues prior to certification. *Curtin v. United Airlines, Inc.*, 348 U.S. App. D.C. 309, 275 F.3d 88, 95 (D.C. Cir. 2001), citing *Cowen v. Bank United of Texas*, 70 F.3d 937, 941 (7th Cir. 1995). This discretion has been enhanced under newly-amended Rule 23(c)(1), which requires only that the certification decision be made at an “early practicable time.”

Suppose a strong-form rule is in effect. Because the court is prohibited from inquiring into the merits at certification, P has no information about the court's views. Because P don't get an advance peek at the probable outcome, she enjoys no strategic advantage. Mutuality of estoppel is maintained.

Suppose now that a super-weak rule is in effect. The trial court certifies a (b)(3) class after assessing p and concluding that the case has merit. The court issues an opinion explaining its decision and disclosing the court's estimate of p . If the court concludes that p is high P remains in the litigation and takes advantage of the anticipated good outcome. If the court concludes that p is low P opts out and avoids the preclusive effect of the anticipated bad outcome.⁹¹ Because the opt-out decision is made on the basis of valuable information, P arguably enjoys an unfair strategic advantage.⁹²

However, the likelihood of prejudice to D from the operation of a super-weak rule is smaller than first appears. Consider the case where P opts out of a class when the court finds that p is low. This scenario will result in harm to D only if the following conditions or events occur. P must be someone who would not otherwise opt out. The court must conclude that the case has merit but p is low. The court must also conclude that the action is otherwise certifiable. The outcome of the litigation must be unfavorable for P.⁹³ The court's opinion about p must be communicated to P who must correctly analyze the opinion, decide to opt out, and actually exclude herself. P must then participate in a

⁹¹ See *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 275 (4th Cir. 1980) (the specific concern of the *Eisen* court was "to protect the party opposing the class against a no-risk specific testing of the merits of the claims by a class representative.")

⁹² *Eisen, supra*, 147 U.S. at 177 (preliminary inquiries would permit the representative plaintiff 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.")

⁹³ If there were no correlation between the results of the preliminary inquiry and the ultimate judgment or settlement, then the class member would gain no information from the court's pre-certification investigation.

separate lawsuit against D that results in an outcome more favorable to P than the outcome would have been if she had not opted out.

Some of these conditions appear plausible. For example, because only a small percentage of class members opt out of the typical case,⁹⁴ it is likely P would be someone who would not otherwise opt out. Similarly, it is plausible to assume that the court's preliminary assessment of p will align with the final outcome. Other conditions are less plausible. It would be unusual for the trial court to make preliminary findings that p is low and also certify the class.⁹⁵ When p is low, this will usually be for reasons that also counsel against certification under Rule 23's specific requirements; and when p is high, this will usually support certification.⁹⁶ The dynamics of litigation also promote this alignment: class attorneys are unlikely to support certification with information that reduces D's liability and defense attorneys are equally unlikely to resist certification with information favorable to P. To the extent courts use certification as a preliminary merits screen, moreover, the effect will further increase the alignment between assessments of the merits and certification.

It is also doubtful that after opting out P would be able to participate in a different lawsuit and obtain an outcome more favorable than what P would obtain in the first action. Such a lawsuit would typically be uneconomic unless P joined another class

⁹⁴ See Theodore Eisenberg and Geoffrey P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, ___ *Vanderbilt Law Review* ___ (forthcoming).

⁹⁵ But not impossible. Imagine, for example, that under the plaintiff's theory of the case, damages would have to be individually determined for each class member, whereas under the defendant's theory of the case, no class member would be entitled to any damages at all. The court might conclude that the defendant has the better of the argument about the merits, but might then use this conclusion to support certification because it eliminates the individual issue of proving damages.

⁹⁶ For example, in a securities fraud case, it is in the class's interest at trial for the court to conclude that a fraud-on-the-market presumption is available, since this will potentially eliminate the otherwise—applicable requirements of proving individual reliance, damages, and loss-causation. But availability of a fraud-on-the-market presumption is also crucial to certification. Conversely, if a court refuses to recognize

action. But the smaller size⁹⁷ and lower probability of success⁹⁸ that would characterize such alternative litigation would pose an obstacle to any attorney representing such a class.⁹⁹ To be successful, moreover, the second lawsuit must be certified if it is a class action¹⁰⁰ and must generate a better outcome for P than the first case would have generated.¹⁰¹

Also implausible is the premise that P would grasp the full implications of the preliminary inquiry and take appropriate action in response. There is no requirement that the judge issue an opinion signaling her views of *p*. If issued, the opinion would not be provided to P. P would receive instead a notice of certification coupled with information about how she can opt out. Even if the notice describes the trial court's preliminary assessment of *p*,¹⁰² it is unlikely to convey the clear message that P is better off opting

a fraud-on-the-market presumption, this will be unfavorable to the class on the merits and also reduce the chance the case will be certified.

⁹⁷ If the alternative class is composed of people who opted out of the first case, the class size is likely to be significantly reduced.

⁹⁸ Any attorney contemplating whether to represent the opt-out class would need to consider carefully the fact that the trial court in the original action has expressed a negative view of the merits. Even if the second action is filed in a different jurisdiction, the unfavorable judicial opinion is likely to reduce the settlement value of the new case.

⁹⁹ The counsel in the first-filed class action would be in an uncomfortable position representing a class of persons who opted out of the counsel's other case. He cannot be expected to come forward as champion of the opt-out class.

¹⁰⁰ The case was certified in the first jurisdiction, but only after the trial court reached an unfavorable view of the class's chance on the merits. Class counsel in the second case hopes to persuade the court that the case can be certified even under a preliminary view of the merits more favorable to the class. But counsel may not succeed at persuading the second tribunal to accept a view of the merits more favorable to the class. Moreover, because the decision to certify (or not certify) a class is within the discretion of the trial court, the outcome of a certification dispute can never be confidently predicted in advance.

¹⁰¹ The probability of a favorable outcome is reduced by the fact that the trial court in the first action reached an unfavorable view of the class's chances on the merits. Although such a review would probably not constrain the power of a different trial judge or jury to reach a contrary conclusion, it nevertheless stands as a warning signal that an attorney for the class would ignore at her peril.

¹⁰² Nothing in Rule 23(c)(2)(B), governing notice in (b)(3) cases, requires that any information about the court's certification decision be provided to the class.

out.¹⁰³ Few Ps would be able to make an independent evaluation of the pros and cons of opting out and take appropriate action in response.

Consider now the case where P otherwise *would* have opted out but decides *not* to opt out because the preliminary inquiry discloses the court's view that *p* is *high*. D now faces a class case with another member. D will suffer prejudice only if a number of conditions and events occur, however. P must be someone who would otherwise opt out of the class. The court must make a preliminary finding that *p* is high and must also conclude the action otherwise satisfies Rules 23(a) and (b). The preliminary assessment of *p* must be communicated to and understood P and must result in her deciding not to opt out. The ultimate outcome must favor P. And P must impose greater costs on D by remaining in the case than she would impose by opting out.

The assumptions of this scenario are in some respects more plausible than the assumptions of the preceding one. It is likely, for example, that if the court certifies the case it will also make preliminary merits findings that *p* is high. Similarly, because P would otherwise opt out, it can be inferred that she is interested enough in the case to read the class action notice and make a reasoned decision about what to do. It is also plausible to assume that D will be worse off if P stays in the case than if she opts out.¹⁰⁴

¹⁰³ None of the parties responsible for notice has an incentive to convey such information. Once the class has been certified with a preliminary assessment unfavorable to the class on the merits, the defendant has an interest in keeping as many class members in the forum as possible in hopes of obtaining a favorable judgment or settlement binding on all who do not opt out. The plaintiff's attorney also has an interest in discouraging opt outs. He or she represents the class in the certified case, and accordingly stands to lose fees if large numbers of class members defect. As for the trial judge who oversees the certification notice, there is also little to be gained other than headache if large numbers of class members opt out. The case will still remain on the judge's docket, and opt-outs can cause problems if competing class actions are commenced in other jurisdictions.

¹⁰⁴ This is so because many plaintiffs who would have opted out would fail to pursue their claims in any other forum. The effect is not unambiguous, however. Some plaintiffs would have participated in litigation against the defendant in an alternative forum if they opted out of the first case. For alternative litigation to occur, it would be necessary for the opt-out class member to be represented by counsel. While counsel in the original litigation is unlikely to be available to represent plaintiffs in such a case, there is some

Other assumptions are less plausible, however. Most importantly, the scenario assumes that P would otherwise opt out. But class members rarely opt out. Moreover, P might not change her mind even if she understood the trial court's preliminary inquiry. Some people opt out because they don't like litigation, don't want to sue D, or just don't want to be bothered.

Weak-form rules present an intermediate case. Because they disclose the trial court's preliminary assessment of issues relevant to certification, they do offer some information that P could use to advantage when deciding whether to opt out. The risk of cherry-picking is therefore higher than in the case of strong-form rules where such information is prohibited. However, the risk of cherry-picking is significantly lower than the case of super-weak rules. Because the preliminary inquiry under a weak-form rule relates only to a specific issue in the case, the trial court's opinion on certification will not provide an estimate of p . The opinion would require sophisticated analysis before its impact on p could be understood, a task beyond the means of most class members. The trial court's preliminary view of the merits, moreover, is much less likely to align with the ultimate outcome than is its opinion as to p under a super-weak rule. The merits issues addressed under a weak-form rule will only be a subset of matters relevant to the ultimate outcome at trial, and often a small subset at that. The results of the preliminary assessment under a weak-form rule are also less likely to influence the trial court's subsequent conduct in the case. Because the issues addressed under a weak-form rule are

probability that another attorney would come forward to represent the plaintiff in an alternative forum. In the scenario we are considering, the judge in the first litigation issues a preliminary assessment of the merits favorable to the class. Given this premise, it is likely that the merits are reasonably favorable for the class in alternative forums as well. With a relatively stronger case, counsel is more likely to come forward to represent class members who do opt out. As to such plaintiffs, the defendant will be worse off from the party's decision to remain in the initial litigation only if the added costs or litigation and expected judgment in

narrow, they are unlikely to exercise as much sway on the trial judge's mind; and the presence of many other issues provides cover for the trial court to change her opinion without admitting error in the initial decision.

2. Cherry-Dropping: Automatic Benefit

The preceding scenarios assume that P actively decides whether to opt out or stay in a case. But active decision-making is not necessary for P to obtain a benefit analogous to one-way intervention. This effect can be illustrated if we add to the model set forth above the assumption that P remains entirely passive in the litigation.

Under a strong-form rule, certification has no relationship to the merits. Accordingly, there should be no correlation between the two. The certification decision itself therefore confers no systematic advantage on either party with respect to the preclusive effect of judgments.

Consider now the situation under a super-weak rule. If the court concludes on preliminary inquiry that the case is not meritorious, it will not certify the class and P will automatically avoid the preclusive effect of the adverse judgment. If the court concludes that the case is meritorious, it will certify the class and declare p as low or high. If the probabilities of these events were equal, P would not enjoy any systematic advantage over D in a certified case. But the probabilities are not equal. If the court certifies the case, it is more likely to conclude that p is high than that p is low. Since the class wins at trial when the court concludes that p is high, P will obtain the advantage of the favorable outcome by remaining passive. The result is an approximation of one-way intervention. The cherries of favorable treatment drop from the tree without having to be picked; the

the initial litigation with that party remaining in the case exceed the added costs of litigation and expected judgment that would be incurred in the alternative proceeding if the party opted out.

certification decision itself does the work. Because this effect does not depend on opt-out rights, moreover, it could exist for mandatory as well as opt-out classes.

Again, however, the harm to D under the super-weak rule turns out to be less serious than first appears. Consider first the situation where the court certifies the case and the class wins at trial. P obtains the preclusive effect of a favorable judgment -- arguably an unfair result for D. However, for D to be prejudiced by certification, a number of events or conditions have to be true. Some of these are plausible. It is reasonable to assume that P will not opt out and that the court will conclude that p is high in a certified case. It is also reasonable to suppose that the class will win at trial when the court concludes that p is high. Other events or conditions are less plausible, however. For D to be prejudiced as a result of the preliminary inquiry, it is usually necessary that the case would not otherwise be certified. But because strong-form rules require the court to accept as true the class action allegations in the complaint, the case will ordinarily be certified under a strong-form rule. Thus, when p is high, the preliminary inquiry will usually only confirm a result that the court would reach in any event. Hence D will usually suffer no harm.¹⁰⁵

Consider now the case where the trial court *denies* certification after a preliminary review of p in a case where P would lose if the case had proceeded to a judgment as a class action. The effect of the preliminary inquiry would be to deny D the benefit of a judgment that binds P to the unfavorable outcome. D appears to be prejudiced.

Some parts of the scenario are plausible. Where the class loses at trial, it is likely that p is low. Where p is low, the trial court is likely to find it to be low at the

preliminary inquiry. And if the trial court finds p to be so low that the case lacks merit, the court will refuse to certify the class. It also appears plausible that in the absence of a preliminary inquiry the court *would* certify the class, since it would then have to take as true the class action allegations in the complaint.

However, for this scenario to come to pass, it will be necessary for the court to conclude at the preliminary inquiry that the case lacks merit. Putting aside settlement incentives (for the moment), it would be in neither party's interest to bring this fact to the court's attention at certification. P's attorney has two reasons to suppress the information. If the court knows that the case lacks merit, it is likely to refuse certification and thus deny P's attorney the class action she seeks. Even if the court certifies the class, its advance knowledge that the case lacks merit might prejudice its subsequent conduct of the trial, leading to a greater probability of a bad outcome for P. D does have an incentive to inform the court that the case lacks merit -- eventually. But we are here assuming that D wants the case to be certified so that it can thereafter hold class members to an unfavorable judgment. D would delay informing the court until after certification, since informing the court beforehand merely reduces the probability of a result (certification) that D desires. Unless the court conducts an independent investigation, the weakness of the class claims is unlikely to come to its attention at certification. It is therefore unlikely that certification will be denied as a result of the preliminary inquiry.

Suppose, however, that the court does become aware that the case lacks merit, either because the court is pro-active in seeking information or because D dislikes the increased risk incident to certification more than it likes the possibility of binding class

¹⁰⁵ See *Fisher v. Virginia Elec. and Power Co.*, 217 F.R.D. 201 (E.D. Va. 2003) ("Eschewing a preliminary inquiry into the merits and accepting the allegations in the complaint as true, however, accords the

members to an unfavorable judgment. The court might then refuse to certify the class even though in the absence of a preliminary investigation it would grant certification. But even here D would not necessarily suffer material harm from the loss of a preclusive decree. Preclusion is valuable to D only if P would participate in other litigation in the event certification is denied. Such follow-on litigation would face serious obstacles.¹⁰⁶ The preclusive effect of a decree in a certified class would provide no benefit to D if no follow-on litigation would be brought.

Weak-form rules are again an intermediate case. The inquiry authorized in a weak-form rule will, to some extent, align trial outcomes with the results of the court's preliminary investigation. Thus, unlike the case with strong-form rules, some cherry-dropping effect is possible. But the prejudice to D will be less under a weak-form rule than under a super-weak rule. The reason is that the alignment between trial outcomes and preliminary investigation is not as strong. As we have seen, under a weak-form rule the trial court examines only merits issues insofar as they are convenient or useful to the analysis of specific Rule 23 prerequisites. Even if they stand up through trial, the court's evaluation of those questions will not necessarily determine outcomes because other issues not relevant to the merits may swamp them out. The trial court, moreover, is less likely to adopt a biased view of the case at the preliminary inquiry under a weak-form rule, and thus should be more willing than under a super-weak rule to adjust her views as the trial progresses. Because certification is not as strongly predictive of trial victory for

same benefits to the plaintiff with even less deference to the defendant's position.")

¹⁰⁶ Although because certification of the first case has been denied, class counsel will be available to bring the second suit, the first court's opinion finding that the class claims are weak on the merits would be a significant deterrent. The attorney may also need to consider the possible effects of the first decision denying class certification. See *In re Bridgestone/Firestone, Tires Prods. Liab. Litig.*, 333 F.3d 763 (7th Cir. 2003) (ordering injunction against state court certification of class claims where federal court had previously denied certification of identical claims).

the class, cherry-dropping is less of a problem for weak-form rules than it is for super-weak rules.

V. Settlement Effects

We now compare *Eisen* rules with respect to their effects on settlement. Class certification can convert a small case into one with potentially devastating consequences,¹⁰⁷ thus imposing significant settlement pressures on D.¹⁰⁸ Refusal to certify a class can have equally devastating consequences for P since it converts viable class litigation into a negative value individual case. Which rule is most likely to shield the parties from unfair settlement pressures?

Consider the following extension on the model previously developed. Call P's damages d . P's expected outcome at trial is $p \times d$. A settlement is fair if it is no more than twice or less than half $p \times d$ and unfair otherwise. All Ps are identically situated and the requirements for certification are otherwise satisfied. P sues D and moves to certify a class of 1,000 persons. D is able to satisfy a judgment up to \$75,000,000 without financial distress. Any judgment over \$75,000,000 will cause financial distress. D is averse to the risk of financial distress and will pay up to ten times the expected judgment at trial to avoid it. D is risk-neutral about judgments that do not cause financial distress. If P wins on her individual claims, she gets \$100,000; if she loses, she gets nothing. For simplicity and without loss of generality, assume that D will offer its full reservation price in settlement without adjustment for litigation costs and that P will accept the offer.

¹⁰⁷ See, e.g., Robert Bone and David S. Evans, Class Certification and the Substantive Merits, 51 Duke Law Journal 1251 (2002); cases cited in note x, supra.

¹⁰⁸ How overwhelming these pressures are is a matter of current debate. For a debunking view, see Charles Silver, We're Scared to Death: Class Certification and Blackmail, 28 N.Y.U. Law Rev. 1357 (2003).

Both P and D correctly assess p at 1% and d at \$100,000 and the court also correctly assesses p at 1% if a preliminary inquiry is undertaken.

In such circumstances, if a strong-form rule is in effect, the court will not conduct a preliminary inquiry into p and will certify the class because all other prerequisites of Rule 23 are satisfied. Once the class is certified, D's maximum exposure is \$100,000,000 and its expected liability at trial is \$1,000,000. Because D is averse to the risk of financial distress posed by the potential exposure to a \$100,000,000 judgment, D will pay \$10,000,000 or \$10,000 per class member to settle the case. Because this is more than twice $p \times d$, the settlement is unfair. This is the "blackmail" settlement that proponents of super-weak rules dislike – a payment far in excess of the actual liability exposure made in a weak case only because the defendant fears the low-probability outcome.¹⁰⁹

The super-weak rule addresses this danger. With such a rule in effect, the court would conduct a preliminary inquiry into p at certification and refuse to certify the class upon finding that the case lacks merit. D's maximum exposure on P's individual claim is \$100,000. Because D is risk-neutral as to this outcome, it will pay only its expected judgment $p \times d$ to settle P's case, or \$1,000. Even if all Ps brought individual lawsuits, D would still be risk-neutral because no one suit would expose it to a risk of financial distress; thus D would pay a total of only \$1,000,000 to settle all the cases. So long as no class action is filed in another jurisdiction after the court denies certification, the super-weak rule eliminates the unfair settlement as far as D is concerned.

¹⁰⁹ See, e.g. Bartlett H. McGuire, The Death Knell for *Eisen*: Why the Class Action Analysis Should Include an Assessment of the Merits, 168 F.R.D. 366, 373 (1996) (preliminary assessment of the merits would "preclude certification of the weakest class action claims, where the pressures to settle are particularly unfair").

But while the super-weak rule handles one problem of unfairness, it does so by creating another. The class claims have some probability of success, albeit a low one (if the claims were completely frivolous, even a risk-averse defendant would not pay to settle them because there would be no reason to fear a bad outcome at trial.) A settlement of P's claim would be fair if it is at least \$500 (half of $p \times d$). But with the super-weak rule in effect P will obtain much less. D would pay an amount equal to its expected liability to all Ps who bring individual cases in the event that certification is denied. D expects that few such cases will be brought given that each P can expect to recover only \$1,000 in an individual lawsuit. The conditions are present for a settlement class which provides only such relief as may be needed to justify a fee for P's attorney.¹¹⁰ The result would be a settlement below \$500 per P. This is a blackmail settlement in reverse: class claims are sold out for pennies on the dollars. The super-weak rule does not eliminate the unfairness but only shifts its incidence.

Other problems become apparent when we allow for party error about p . It will be rare for P and D to know p with certainty. It will often be the case, instead, that they are mutually optimistic – P thinks p is higher than D thinks it is. In fact, given the conditions of the model, disagreement about p would be implied if P moves for class certification.¹¹¹

Suppose D incorrectly believes p is 1% and P correctly believes p is 5%. Under a strong-form rule, the court will certify the class and D will pay \$10,000,000 to settle the class claims. This settlement is fair: each class member receives \$10,000 which is only twice $p \times d$ (\$5,000).

¹¹⁰ Providing the parties can get this settlement past a reviewing court.

The result is different under a super-weak rule. Suppose that after conducting the preliminary inquiry the court is equally likely to agree with D or P. If the court agrees with P, the case will be certified and the court will issue a ruling accurately assessing p at 5%. After reviewing the ruling, D would adjust its assessment of p to 5%. D now estimates its expected judgment at trial as \$5,000 per P or \$5,000,000 overall. Facing possible financial distress from a class-wide judgment, D will settle for ten times the expected judgment at trial, or \$50,000,000. The settlement is unfair.

The court might agree with D that p is only 1%. If the court agrees with D, the case will not be certified and D will pay Ps who sue individually \$1,000 to settle their individual cases. This is a good outcome for D although unfair for P. Even so, D's expected settlement cost under the super-weak rule is more than \$25,000,000 ($50\% \times \$50,000,000 + 50\% \times$ the expected costs of individual cases that would be litigated if the case is not certified). D's expected settlement cost of $> \$25,000$ per class member is unfair because it is more than five times greater than $p \times d$.

The possibility of *judicial* error in assessing p exacerbates problems of fairness in settlement under a super-weak rule. Suppose in the example above that P evaluates p at 5% and D evaluates p at 1%. The result under a strong-form regime is the same as before: because the court takes no account of the merits, the case will be certified and D will pay \$10,000,000 in settlement.

Under a super-weak regime, the outcome depends on the nature of the error. Suppose that the true value of p is 1% but the court erroneously assesses p at 5%. Because the court (erroneously) concludes that the class claims have merit, it certifies the class.

¹¹¹ If both parties know that p is 1% and know that the other knows this, and they also know that the court will correctly analyze p in the preliminary inquiry, then P would never bother to seek certification.

Assume further that the court is conditioned into an overly favorable view of the class's case as a result of the mistaken preliminary inquiry, and that in consequence p becomes 5%. D reviews the decision on class certification which discloses the court's preliminary assessment of p . D estimates that because the court is now conditioned into a favorable view of the class's case, the value of p is 5%. Because D is averse to the risk of the maximum possible judgment of \$100,000,000, D pays ten times the expected judgment at trial or \$50,000,000 in settlement. The unfairness of the settlement for D is magnified as a result of the super-weak rule: D pays each class member fifty times $p \times d$.

Suppose that the true value of p is 5% but the court erroneously assesses p at 1%. The court will refuse to certify the class. Ps have to sue individually or recover nothing. Because their individual claims are small, few of them are likely to sue. Moreover, the likelihood they will sue is further reduced by the court's mistake at certification. Since the court issues an opinion disclosing its (erroneous) estimate of p – an opinion that will be available to any court adjudicating the individual suits – Ps will need to adjust downward their estimates of p . Instead of receiving \$50,000,000 – the amount D would pay to settle the class case if the court correctly estimated p – or even \$10,000,000 – the fair settlement if the court correctly estimated p – Ps receive only a few thousand dollars in the aggregate, a outcome even more unfair than the situation where the court correctly estimates p at 1%.

Judicial error under a super-weak rule can thus result in settlements that are unfair to either P or D. As between them, however, P is more likely to suffer harm. The reason is that because the preliminary inquiry into p occurs early in the litigation, D will be able control the information available to the court. D's advantage would be even greater if the court adopted the recommendation of some commentators that p should be determined

through test-case litigation.¹¹² In such litigation the stakes for D would be far greater than the stakes for any P. For this reason, D will tend to expend greater resources than Ps and will have an incentive to offer generous settlements to make test cases “go away” if they have bad facts. The predictable result is that test case litigation will generate estimates of p that are below the true value of that parameter.

Weak-form rules appear to offer a better mix of settlement effects than either of the alternatives. Unlike strong-form rules, they do not require the trial court to accept the plaintiff’s allegations as true. In consequence, they will sometimes work to prevent certification of cases when the defendant’s aversion to the risk of a ruinous judgment forces an unfair settlement. On the other hand, weak-form rules are less likely than super-weak rules to have other adverse settlement effects. They do not preclude certification of low-probability, non-frivolous cases. Thus they are less likely to force class counsel to settle out claims for much less than their expected value at trial in order to avoid the lack of any recovery at all that would follow from denial of certification. Moreover, weak-form rules, unlike super-weak rules, do not interact pathologically with party or judicial error.¹¹³

VI. Judicial Economy

¹¹² See Geoffrey Hazard, Class Certification Based on the Merits of the Claims, 69 Tennessee Law Review 1 (2001) (proposing that a sample of “typical” claims be tried prior to final certification in order to provide information about the value of the class claims). The Seventh Circuit, in *Rhone-Poulenc*, did something like this when it examined the results of individual cases already completed in order to assess the value of p . See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (based on the fact that defendants had won 12 of 13 individual cases the court concluded that there was a “great likelihood” that the class claims “lacked legal merit”). Judge Parker of the Eastern District of Texas proposed a similar procedure for assessing the value of asbestos cases, although for purposes of deciding the case on the merits rather than class certification. See *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 653 (E.D. Tex. 1990). However, the idea was rejected by the Fifth Circuit. See *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990).

¹¹³ If, for example, D erroneously estimates p as low, the results of the preliminary inquiry under a weak-form rule will not necessarily cause D to revise its estimate of p upward by a significant amount because the court’s opinion will not reveal much information about p . The problem of unfair settlements will not be magnified as under a super-weak regime. Similarly, judicial error will be less of a problem under a weak-form rule. Courts will be less prone to make errors about the specific issues relevant to certification. And if error occurs, it will be less likely to cause error at trial and thus will have a smaller effect on D’s estimate of p .

A final consideration in the design of an *Eisen* rule is its effect on judicial economy.¹¹⁴ A strong-form rule conserves judicial and party resources because it obviates any need for the court to inquire into the merits at certification. The fact that a strong-form rule achieves this kind of economy is hardly an argument in its favor. The same sort of economy could be achieved any time issues are excluded from a case. If a court in an antitrust case simply declared, without evidence, that the defendant possessed power in the relevant market, this would certainly simplify the trial of the case, but it would do so at a high and inappropriate cost since the existence of market power is one of the principal matters at issue in the litigation. When an inquiry into the merits is necessary or appropriate to resolve an important issue for certification, the summary adjudication made possible by a strong-form rule requires greater justification than the fact that it will save resources for the court and the parties.¹¹⁵

The efficiency effects of super-weak rules are ambiguous. Because *p* is the ultimate issue in the litigation, the preliminary inquiry must be extensive enough to yield an informed decision. If the result of that inquiry is an accurate conclusion that the case lacks merit, the court will refuse to certify the class. The denial of certification conserves on judicial resources in the class case, since the expected outcome is that the class would lose at any event at trial. But the denial of certification also permits Ps to sue

¹¹⁴ See Robert Bone and David S. Evans, Class Certification and the Substantive Merits, 51 Duke Law Journal 1251, 1316-18 (2002) (analyzing “process costs” of rules on certification and the substantive merits).

¹¹⁵ In other cases, moreover, a strong-form rule can foster diseconomy rather than economies of litigation. Consider a case where the judge, from prior experience with the subject matter of a case, knows that she is likely to grant a motion to dismiss for failure to state a claim. The arguments that would be fatal to the claim on the motion to dismiss are also brought forward by the defendant as objections to certifying the class. It would make little sense, in this scenario, for the court to apply a strong-form rule to avoid reaching the merits, certify the class and only then reach the and either dismiss the case or decertify the class. *Cf. Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 275 n.11 (4th Cir. 1980) (observing the potential waste of judicial resources inherent in deferred denial of class certification based on adverse merits determinations, but viewing such a waste as real only if the court could have decided the merits earlier).

individually. If, as often will be the case, such suits are not pursued, the super-weak rule will conserve resources. But if Ps sue individually, notwithstanding the court's preliminary assessment that the case lacks merit, the burden on the court could increase because issues that could be handled on a common basis in class litigation must now be litigated separately in each individual case.

If after initial inquiry the court concludes that the case has merit, the super-weak rule could increase the burden on the court and the parties to the extent that overlapping issues will have to be retried at the merits phase. Intelligent litigation management can reduce the overlap.¹¹⁶ But inevitably some inefficiency will result: there will be duplication in discovery, multiple depositions, and extra judicial hearings. On the other hand, the preliminary inquiry may conserve on resources if it extent that results in more informed judicial decisions during the trial phase. Even more important, the court's preliminary assessment of *p* may induce the parties to adopt more realistic bargaining positions and thus facilitate earlier settlements.

The efficiency implications of the weak form rule are also ambiguous. Because they do authorize preliminary inquiries into the merits, weak-form rules are more burdensome at the front end than strong-form rules. But because the inquiry is focused on merits issues that specifically relate to the certification requirements of Rule 23, weak-form rules entail a less onerous inquiry than would be implied by super-weak rules. As in the case of super-weak rules, moreover, preliminary inquiries under a weak-form rule might have efficiency-enhancing effects to the extent that they focus the trial court's attention on the case at an early point in the litigation and induce better trial and pretrial

management. Preliminary merits rulings under weak-form rules may also facilitate earlier settlements, although the settlement effect for weak-form rules is likely to be less pronounced than for super-weak rules where the court's preliminary assessment of *p* addresses the ultimate question in the lawsuit. Similarly, the potential inefficiencies of the preliminary inquiry under a weak-form rule can be mitigated if the parties and the trial court organize the inquiry in such a way that the efforts of the court and the parties are not duplicated at trial.

VII. Why a Weak-Form Rule is Best

We can now draw the strands of normative analysis together in order to develop an overall assessment of which rule offers the best combination of social policy benefits.

Strong-form rules have little to recommend them and should be abandoned.¹¹⁷ They cannot be justified as plausible interpretations of Rule 23 and are in fact inconsistent with Rule 23 insofar as they bar courts from inquiring into relevant matters.

Strong-form rules impair the accuracy of certification decisions by excluding relevant information. They may increase the accuracy of trial outcomes by preventing the court from making mistakes at certification that “color” subsequent proceedings. But this effect is ambiguous because early exposure to merits issues may improve rather than impair trial outcomes. Even if trial outcomes are improved, on balance, the increase in accuracy at trial provided by a strong-form rule would have to be weighed against the loss of accuracy at certification. Given the widely-recognized importance of certification

¹¹⁶ See Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366, 400 (1996) (arguing that much of the work of the preliminary investigation into the substantive merits could be reused at trial).

¹¹⁷ This view is shared by other recent commentators. See Bartlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 F.R.D. 366 (1996) (advocating jettisoning strong-form rule in its entirety); Robert Bone and David S. Evans, *Class Certification and the Substantive Merits*, 51 *Duke Law Journal* 1251 (2002) (same).

for the success or failure of class litigation, it is unlikely that the increase in trial accuracy which a strong-form rule might accomplish could justify the significant decrease in accuracy at certification.

Strong-form rules find limited support in the concern for fairness to defendants, since if rigorously applied they prevent class members from taking advantage of favorable outcomes while avoiding the binding effects of unfavorable ones. But a number of events or conditions have to coincide before cherry-picking or cherry-dropping will result in harm to defendants. Moreover, while defendants benefit from the leveling of the playing field with respect to the preclusive effect of judgments, they suffer collateral harm from the increased settlement pressure that follows when the court accepts as true the well-pleaded allegations in the complaint. Nor can strong-form rules be justified as means for conserving litigation resources. To the extent they reduce the burden on the parties and the courts, they do so only by removing relevant considerations from the court's analysis. This is not a good justification for judicial economy.

Super-weak rules are equally undesirable and should not be adopted. They have no basis in the text or history of Rule 23. Because they permit or require trial courts to inquire into an issue that is not an explicit certification factor under Rule 23, they may introduce a confounding issue that results in erroneous certification decisions. They present a substantial risk of "coloring" the trial with potentially erroneous findings. Fairness to the defendant with respect to the preclusive effect of judgments is also a concern under super-weak rules. These rules provide significant information that may give plaintiffs an unfair advantage in making opt-out decisions. They also align the certification decision with the ultimate result at trial, resulting in an automatic "cherry-

dropping” benefit to class members. Although defendants will only occasionally experience significant harm from these scenarios, the risk of unfairness to defendants that troubled the Court in *Eisen* is not insubstantial.

Super-weak rules address the problem of unfair settlements of weak cases. But they do so only by introducing other problems. Denial of certification of non-frivolous but weak cases has devastating settlement consequences for class members. Moreover, problems of unfair settlements are exacerbated under a super-weak regime when party or judicial error is introduced. Super-weak rules likewise appear less attractive from the standpoint of judicial efficiency. Because they require the court to conduct an inquiry into the ultimate issue at trial, the certification stage can be anticipated to be costly for the parties and time-consuming for the court. This fact in itself would not be troubling if the results of the preliminary inquiry could be utilized at later stages of the case or in individual litigation of cases after certification is denied. But often the efforts will be wasted.

Weak-form rules are superior along most of the relevant policy dimensions. Such rules easy to justify in the language of Rule 23 and finds increasing support in the lower federal courts and the views of some commentators.¹¹⁸ Weak-form rules provide greater accuracy in the certification decision than either a strong-form rule or a super-weak rule. As to accuracy at trial, weak-form rules are likely to be superior to super-weak rules (because of the risk that error in assessing *p* will color subsequent proceedings and result in

¹¹⁸ Bone and Evans endorse a weak-form rule as one possible approach, although for different reasons than those set forth in this Article. *See* Robert Bone and David S. Evans, Class Certification and the Substantive Merits, 51 Duke Law Journal 1251, 1278 (2002) (offering the principle that the “trial judge [should] review the evidence and determine whether the legal and factual issues on which the parties rely to support (or oppose) commonality, typicality, predominance and other Rule 23 certification requirements are in fact viable”). Their arguments in favor of weak-form rules are, however, different from the arguments

erroneous outcomes). Weak-form rules have strengths and weaknesses, with respect to error at trial, as compared with strong-form rules.

Weak-form rules are subject, to some extent, to the problems of cherry-picking and cherry-dropping discussed earlier in this paper. But because the preliminary inquiry is restricted to narrow issues, these problems are less severe for weak-form rules than for super-weak rules. As applied to weak-form rules, at least, the poltergeist of one-way intervention conjured in *Eisen* has few material manifestations.

Weak-form rules provide some protections to defendants against the risk of unfair settlements. Because there is a strong expected alignment between the preliminary findings on the merits and a court's propensity to certify the class, negative findings on merits issues will often prevent certification. Thus, if the class cases are extremely weak, the result even under a weak-form rule may be denial of certification. In this respect, weak-form rules are arguably superior to strong-form rules that offer no protection against certification of doubtful cases. Super-weak rules appear to offer still greater protections in this regard, but they do so at unacceptable costs in other respects.

Weak-form rules are more demanding of judicial and party resources than strong-form rules that preclude all preliminary inquiry into the merits. But as noted above, some of the work at the initial inquiry stage could be recycled. Weak-form rules appear to achieve greater litigation efficiency than super-weak rules which require the trial court to investigate the ultimate issue of the plaintiff's probability of success.

Conclusion

The strong-form interpretation of *Eisen* – under which trial court may not conduct a reasoned inquiry into merits issues as they relate to class certification – cannot be

justified under any plausible analysis of public policy. It should be abandoned – and soon. But super-weak rules which permit or even require the court to inquire into the plaintiff's ultimate probability of success at trial are also ill-advised. They are not defensible as interpretations of Rule 23 and are objectionable from the standpoint of the relevant social policies. The weak-form interpretation, which permits the trial court to investigate the merits provided that doing so is convenient and useful to analyzing the certification requirements of Rule 23, provides the best mix of social policy benefits and is most consistent with the language and spirit of Rule 23.