

# Everything that Requires Discovery Must Converge: A Counterintuitive Solution to a Class Action Paradox

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## Introduction

THERE HAS BEEN A SEA CHANGE in the law of class certification over the course of the last decade. The move from a pleading-based class certification standard to one based on evidence moves class certification away from the initial pleading stage and often into a nebulous time frame in the middle of discovery. This potentially sets plaintiffs up for an impossible task: they must submit proof of the elements of class certification before gaining full access to the evidence they need to prove their case. Such a double-bind would seem to encourage class counsel to find an insider willing to provide data outside of, and prior to, discovery in order to get a class certified. In the alternative, it sets judges up for an endless series of moved goalposts, as plaintiffs collect discovery for certification, find it wanting, and seek extensions and more extensions.

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This Article proposes a fair solution: moving class certification to the post-discovery phase in which a full evidentiary record exists. This result is virtually assured in securities and antitrust class actions because the pivotal role of expert testimony creates strong overlaps between class certification and *Daubert* motions, and between class certification and summary judgment. Both *Daubert* and summary judgment motions, of course, occur only when a full evidentiary record exists. The recent changes in class certification primarily benefit the defense bar and their clients. However, an even later class certification process allows the court to make the determination on a complete record, which obviates any need for discovery bifurcation, Rule 23(f) appeals, and ill-defined variations on *Daubert* analysis. Further, in some cases it even allows an expensive class notice process to be shifted to defendants. The convergence of these motions at the end of the pretrial process can and should be administered in a way that comports with basic procedural fairness by granting access to the evidence required for plaintiffs to meet their burdens.

Beginning with *Szabo v. Bridgeport*,<sup>1</sup> courts have moved away from a regime in which class certification was decided based on the pleadings and toward one where class certification requires evidentiary showings of increasing complexity.<sup>2</sup> With the change in requirements for class certification, there has been—and must be—a change in the timing of the class certification motion. Practitioners have seen the beginnings of this trend, as a few judges in complex securities and antitrust class actions have adjudicated some combination of summary judgment motions, class certification motions, and *Daubert* motions<sup>3</sup> together. This Article asserts that this trend foreshadows a standard practice of adjudicating these three motions simultaneously, or in immediate succession, following the close of discovery.

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1. 249 F.3d 672 (7th Cir. 2001).

2. *Id.* at 677 (“A motion under Rule 12(b)(6) is unique in requiring the district judge to accept the plaintiff’s allegations; we see no reason to extend that approach to Rule 23, when it does not govern even the other motions authorized by Rule 12(b).”); *see also* *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) (“[I]n ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case,” including “the resolution of expert disputes concerning the import of evidence.”); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 319 (5th Cir. 2005); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) (“[T]he factors spelled out in Rule 23 must be addressed through findings, even if they overlap with issues on the merits.”).

3. The term “*Daubert* motion” is shorthand for a motion to strike or exclude expert testimony under Federal Rule of Evidence 702. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 23.353 (2004). It is a reference to *Daubert v. Merrell Dow Pharmaceuticals.*, 509 U.S. 579 (1993), discussed *infra*.

Section I of this Article reviews the changes in class certification law that drive the change in timing of class certification motions. Section II analyzes the fairness of the change, explores the likely procedural consequences of the shift, and discusses the expected impact on litigation strategy and settlement dynamics.

## I. Background

Decades ago, it was common for a class certification motion to be made at the outset of a case and even decided shortly thereafter. The local rules of some federal district courts even require plaintiffs to move to certify a class within, for example, 90 or 120 days of filing the complaint.<sup>4</sup> Rule 23<sup>5</sup> formerly required that district courts decide class certification “as soon as practicable.”<sup>6</sup> Until the early 2000s, the controlling law on class certification was *Eisen v. Carlisle & Jacquelin*.<sup>7</sup> Under the then-prevailing interpretation of *Eisen*, most district courts did not look at the underlying facts to determine whether the prerequisites of subparagraphs (a)(1)–(4) and (b)(3) of Rule 23 had been met, but rather they decided class certification on the pleadings.<sup>8</sup> Since no factual determinations were necessary, class certification was in large part a pleading motion and often was decided together with Rule 12 motions to dismiss.<sup>9</sup>

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4. See, e.g., W.D.N.Y. L.R. Civ. P. 23(d) (requiring plaintiff to move for class certification “[w]ithin 120 days after the filing of a complaint alleging a class action”); D. Vr. L.R. 23.1(c) (90 days); N.D. IOWA L.R. 23(a) (180 days); W.D. WA. CR 23(i)(3) (180 days).

5. Textual citations to Federal Rules of Civil Procedure or Federal Rules of Evidence herein are often abbreviated to “Rules.” This Article focuses on federal rules primarily because the Class Action Fairness Act of 2005 changed jurisdictional rules to encourage adjudication of class actions in federal courts. See 28 U.S.C. § 1332(d)(2)(A) (2006) (granting federal courts “original jurisdiction of “any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant”). Further, many states’ procedural rules closely follow the Federal Rules. The principles discussed in this Article can be applied to those states as well.

6. See FED. R. CIV. P. 23 advisory committee’s notes on 2003 amendments.

7. 417 U.S. 156 (1974). A host of cases followed *Eisen*. See, e.g., *Philip Morris Inc. v. Nat’l Asbestos Workers Med. Fund*, 214 F.3d 132, 134–35 (2d Cir. 2000); *Vaughns v. Bd. of Educ.*, 574 F. Supp. 1280, 1287 (D. Md. 1983); *Lim v. Citizens Sav. & Loan Ass’n*, 430 F. Supp. 802, 806 (N.D. Cal. 1976).

8. See, e.g., *In re ML-Lee Acquisition Fund II, L.P.*, 848 F. Supp. 527, 555, 562 (D. Del. 1994) (deciding both a motion for class certification and a motion to dismiss for failure to plead fraud with particularity); *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1032 (D. Miss. 1993) (same); *Werner v. Satterlee, Stephens, Burke & Burke*, 797 F. Supp. 1196, 1200 (S.D.N.Y. 1992) (same).

9. See *supra* note 8.

In securities litigation, changes in this pattern largely began with the passage of the Private Securities Litigation Reform Act (“PSLRA”) in 1995.<sup>10</sup> The PSLRA made several significant alterations to the architecture of class action securities cases: it imposed an organizational phase on the case;<sup>11</sup> it imposed a discovery stay until resolution of a motion to dismiss;<sup>12</sup> and it imposed restrictions on class representatives that increased the incentive for defendants to seek discovery of them.<sup>13</sup>

These changes tended to move class certification in securities cases later in the litigation process, out of the pleading phase, and into the discovery phase of the case.

*Eisen* noted that class certification was routine in certain types of cases—among them securities cases.<sup>14</sup> Even after passage of the PSLRA, it was still possible to find courts that would decide class certification motions together with motions to dismiss.<sup>15</sup> However, a new pattern began to emerge: plaintiffs would move for class certification shortly after a decision on the motion to dismiss, defendants would request documents from and take depositions of the class representatives and then either stipulate to or oppose class certification.<sup>16</sup>

*Szabo v. Bridgeport*<sup>17</sup> began the courts’ long march from class certification based on the pleadings to class certification based on an evidentiary showing of each element of Rule 23.<sup>18</sup> Citing *General Telephone Co. v. Falcon*<sup>19</sup> for the proposition that “similarity of claims

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10. See generally Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67; 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

11. See 15 U.S.C. § 78u-4(a)(3)(B) (2011) (providing for a process by which to appoint a lead plaintiff).

12. See *id.* § 78u-4(b)(3)(B).

13. See *id.* § 78u-4(b)(3)(B)(vi) (restricting frequent participation in securities class actions).

14. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

15. See, e.g., *Gutierrez v. Givens*, 989 F. Supp. 1033, 1044–46 (S.D. Cal. 1997); *In re Newbridge Networks Sec. Litig.*, 926 F. Supp. 1163, 1171, 1178 (D.D.C. 1996).

16. See, e.g., Decision and Order at 4, *In re Bausch & Lomb, Inc. Sec. Litig.*, No. 6:01-cv-06190 (W.D.N.Y. Dec. 7, 2004), ECF No. 98 (parties on both sides filed discovery motions between the motion for class certification and the scheduled hearing on class certification); *Freeland v. Iridium World Commc’ns, Ltd.*, 545 F. Supp. 2d 59 (D.D.C. 2008) (defendants attached plaintiffs’ depositions as exhibits to opposition to motion for class certification); *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.)*, No. 21-mc-92 (S.D.N.Y. Dec. 7, 2004), ECF No. 5240 (scheduling class certification briefing to follow class discovery).

17. 249 F.3d 672 (7th Cir. 2001).

18. See *id.*

19. 457 U.S. 147 (1982).

and situations must be demonstrated rather than assumed,”<sup>20</sup> *Szabo* held that the district court failed to look past the pleadings and vacated its class certification order.<sup>21</sup> Following *Szabo*, the Seventh Circuit continued to de-emphasize a pleadings-focused class certification process in *In re Bridgestone/Firestone, Inc.*<sup>22</sup> Not long after, the Second Circuit in *Miles v. Merrill Lynch & Co. (In re Initial Public Offering Securities Litigation)*,<sup>23</sup> required an evidentiary showing of the elements of Rule 23 for certification.<sup>24</sup> The Third Circuit in *Hydrogen Peroxide*<sup>25</sup> stated plainly that each element of Rule 23 must be proven by a preponderance of the evidence.<sup>26</sup> This trend reached its high-water mark with the Fifth Circuit’s decision in *Oscar Private Equity*,<sup>27</sup> in which the court required proof of loss causation at the certification stage, even beyond the extent to which it overlaps with the elements of Rule 23.<sup>28</sup> *Oscar* has since been rejected by a number of other courts<sup>29</sup> and abro-

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20. *Szabo*, 249 F.3d at 677; cf. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (“[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the [class] certification question.”).

21. *See id.* at 674–78 (stating that the propriety of the proposed class depended on the resolution of contested facts).

22. 288 F.3d 1012, 1018–19 (7th Cir. 2002) (declining to certify a class where facts outside the pleadings counseled against commonality of issues).

23. 471 F.3d 24 (2d Cir. 2006), *reh’g denied*, 483 F.3d 70 (2d Cir. 2007).

24. *Id.* at 41–42 (rejecting a “some showing” standard for Rule 23 elements, a “not fatally flawed” standard for expert testimony on class certification, and the idea that “a district judge may not weigh conflicting evidence and determine the existence of a Rule 23 requirement just because that requirement is identical to an issue on the merits”).

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

26. *Id.* at 320 (“Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.”).

27. *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007).

28. *Id.* at 269 (“[L]oss causation must be established at the class certification stage by a preponderance of all admissible evidence.”); *see also In re LDK Solar Sec. Litig.*, 255 F.R.D. 519, 530–31 (N.D. Cal. 2009) (*Oscar* “required the *plaintiff* to *prove*, at the certification stage, that the price impact actually caused a loss in order to attain the benefit of the fraud-on-the-market presumption.”).

29. *See, e.g., Schleicher v. Wendt*, No. 1:02-CV-1332-DFH-TAB, 2009 WL 761157, at \*11–12 (S.D. Ind. Mar. 20, 2009) (rejecting the broad reading of *Oscar*, stating that its requirement “appears to be limited to situations where the stock is in steep decline,” and holding that even this more limited reading does not require proof of loss causation at the class certification stage), *aff’d*, 618 F.3d 679 (7th Cir. 2010); *LDK Solar*, 255 F.R.D. at 530–31 (finding that *Oscar* requires plaintiffs to prove loss causation to certify a class, declining to adopt that requirement); *In re Bos. Sci. Corp. Sec. Litig.*, 604 F. Supp. 2d 275, 287 (D. Mass. 2009) (holding that plaintiffs met their burden for class certification by demonstrating that the market was efficient, thereby showing that the fraud-on-the-market

gated by the Supreme Court in *Halliburton*.<sup>30</sup> However, the Supreme Court recently invoked *Falcon* when it decided *Wal-Mart v. Dukes*,<sup>31</sup> holding that each requirement of Rule 23 must be affirmatively proven.<sup>32</sup> Further, *Dukes* noted that citations to *Eisen* for the contrary position are invalid.<sup>33</sup>

### A. Class Certification, Expert Testimony, and *Daubert*

In both securities and antitrust class actions, expert testimony is a crucial part of class certification.<sup>34</sup> Generally, each side will offer expert testimony to bolster its position—either to certify the class or to oppose certification. More and more, parties are challenging expert testimony by invoking a mechanism originally designed to protect juries from “junk science.”<sup>35</sup>

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theory will provide a viable form of proof, and that defendants’ attempts to disprove loss causation “are more properly addressed on summary judgment or at trial”).

30. See *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011) (holding that it is reversible error to require a plaintiff to show loss causation as a condition of obtaining class certification). For another example of a decision pushing back against the trend of requiring increasing evidentiary showings at class certification see *Messner v. Northshore University HealthSystem*, 669 F.3d 802 (7th Cir. 2012). *Messner* was an antitrust action in which the defendant claimed that a class action could not be maintained because a lack of uniformity in price increases. *Id.* at 810 (arguing that plaintiff’s proposed class included members who were not affected by price increases). The district court agreed and denied class certification on the basis that plaintiffs could not show predominance. *Id.* at 808. The Seventh Circuit reversed, noting that the district court’s requirement of showing uniform price increases for all class members requires too much, requiring not just “a showing of common questions, but . . . a showing of common answers to those questions.” *Id.* at 819. Further, the defendant argued that a class must not be certified because many of the proposed class members suffered no injury. *Id.* at 822–23. The court dismissed this as an argument on the merits, which it found inappropriate to class certification. *Id.* at 823–24. Instead, the court noted “it is unlikely that discovery regarding the merits of a claim will be complete by the time the court is called upon to certify a class,” and expressed concern about “supplanting the jury as the finder of fact.” *Id.* at 823. Finally, the *Messner* court recommended that to avoid potentially overbroad classes, courts should refine the proposed class definitions rather than denying certification entirely. *Id.* at 825.

31. 131 S. Ct. 2541 (2011).

32. *Id.* at 2551 (“Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.”).

33. See *id.* at 2552 n.6 (stating that *Eisen*’s warning against “conduct[ing] a preliminary inquiry into the merits of a suit” was about shifting the cost of notice, not class certification, and that citing it for any other purpose “is the purest dictum and is contradicted by our other cases”).

34. See *infra* Part I.A.2–3.

35. In *Kumho Tire v. Carmichael*, Justice Scalia in his concurring opinion described the gatekeeping function of the district court as the “discretion to choose among *reasonable*

## 1. *Daubert* Challenges to Expert Testimony

Federal Rule of Evidence 702, as interpreted by *Daubert v. Merrell Dow Pharmaceuticals*<sup>36</sup> and its progeny, *General Electric Co. v. Joiner*<sup>37</sup> and *Kumho Tire v. Carmichael*,<sup>38</sup> govern the admissibility of expert testimony.<sup>39</sup> These decisions make the district court a “gatekeeper” for expert witnesses,<sup>40</sup> determining the solidity of the foundation for those experts’ opinions before they are presented to a jury. The inquiry focuses on whether the experts’ methodologies are generally sound and reliable<sup>41</sup> and whether the work done under those methodologies supports the opinions that the expert proposes to present.<sup>42</sup>

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means of excluding expertise that is *fausse* and science that is junky.” 526 U.S. 137, 159 (1999) (Scalia, J., concurring).

36. 509 U.S. 579 (1993). The *Daubert* Court held that using “general acceptance” of methodology as the sole standard for evaluating expert witnesses—originating in *Frye v. United States*, 293 F. 1013, 1014 (D.D.C. 1923)—was superseded by the Federal Rules of Evidence. *Id.* at 589. The Court also supplied factors that a district court could consider, including whether a “theory or technique . . . can be (and has been) tested[,] whether [it] . . . has been subjected to peer review and publication,” whether, in respect to a particular technique, there is a “known or potential rate of error[,]” whether there are “standards controlling the technique’s operation,” and whether the theory or technique enjoys “widespread acceptance within a relevant scientific community.” *Id.* at 593–94.

37. 522 U.S. 136 (1997) (holding that Rule 702 decisions are to be reviewed for abuse of discretion).

38. 526 U.S. at 141 (expanding the scope of *Daubert* “not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge”).

39. See FED. R. EVID. 702.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if

- (1) the testimony is based upon sufficient facts or data,
- (2) the testimony is the product of reliable principles and methods, and
- (3) the witness has applied the principles and methods reliably to the facts of the case.

*Daubert*, *Kumho Tire*, and *Joiner* are collectively referred to as “the *Daubert* trilogy.” See *Truck Ins. Exch. v. MagneTek, Inc.*, 360 F.3d 1206, 1209 (10th Cir. 2004); *Rider v. Sandoz Pharm. Corp.*, 295 F.3d 1194, 1197 (11th Cir. 2002).

40. See *Daubert*, 509 U.S. at 597; *Joiner*, 522 U.S. at 142; *Kumho Tire*, 526 U.S. at 145.

41. See FED. R. EVID. 702(c) (requiring that expert testimony must be “the product of reliable principles and methods”); *Daubert*, 509 U.S. at 590 (“Proposed testimony must be supported by appropriate validation—i.e., ‘good grounds,’ based on what is known. In short, the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability.”).

42. See FED. R. EVID. 702(d) (requiring that an expert witness “has reliably applied the principles and methods to the facts of the case”). *But see Daubert*, 509 U.S. at 595 (“The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.”). The difference between the methodology and the conclusions may lie in the inputs, that is, the facts to which the methodology is applied. See, e.g., *In re Zurn*

As this Article discusses below, expert testimony has played an increasing role in class certification, and motions under Rule 702 have followed closely behind.

## 2. Expert Testimony in Securities Class Actions

The most hotly contested areas of class certification in securities class actions are reliance and loss causation.<sup>43</sup> When public securities are at issue, reliance is generally proved through the fraud-on-the-market presumption offered for securities that trade on an efficient market.<sup>44</sup> The efficiency of the market also plays a part in proving materiality<sup>45</sup> and causation.<sup>46</sup> Defendants increasingly contest the efficiency of the market, even for securities that trade in highly active public markets such as the Nasdaq National Market.<sup>47</sup> Market effi-

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Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 614 (8th Cir. 2011) (holding that an opinion can only be excluded on an attack of the underlying factual basis “if it ‘is so fundamentally unsupported that it can offer no assistance to the jury’” (quoting *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929–30 (8th Cir. 2001))).

43. See, e.g., Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. MICH. J.L. REFORM 323, 324 (2010) (“The elements of loss causation and the fraud-on-the-market presumption of reliance are of particular importance [when certifying a securities fraud class.]”); Jonathan Eisenberg, *Beyond the Basics: Seventy-five Defenses Securities Litigators Need to Know*, 62 BUS. LAW. 1281, 1297 (2007) (“In many cases, the key to defeating class certification is to show that individual issues of reliance defeat the predominance requirement because the fraud-on-the-market theory is not applicable.”).

44. “The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company’s stock is determined by the available material information regarding the company and its business . . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.”

*Basic Inc. v. Levinson*, 485 U.S. 224, 241–42 (1988) (quoting *Peil v. Speiser*, 806 F. 2d 1154, 1160–61 (3d Cir. 1986)).

45. See, e.g., *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989).

46. *Erica P. John Fund, Inc. v. Halliburton*, 131 S. Ct. 2179, 2183 (2011) (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005)).

47. See, e.g., *In re Synchronoss Sec. Litig.*, 705 F. Supp. 2d 367, 398 (D.N.J. 2010) (rejecting defendants’ challenge to plaintiffs’ entitlement to the fraud-on-the-market presumption where the common stock at issue was “registered with the United States Securities and Exchange Commission and traded on the NASDAQ”); *In re NetBank, Inc.*, 259 F.R.D. 656, 670 (N.D. Ga. 2009) (rejecting defendants’ claim, in opposition to plaintiffs’ motion for class certification, that the NASDAQ-listed stock at issue does not trade in an efficient market). To some extent, this effort has been successful. See *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 313 (5th Cir. 2005) (stating that “plaintiffs in suits involving stocks traded on larger securities markets,” such as the NASDAQ National Market, are not exempt “from the burden of making a preliminary showing of market efficiency at the class certification stage”); *In re PolyMedica Corp. Sec. Litig.*, 453 F. Supp. 2d 260, 278 (D. Mass. 2006) (finding the market inefficient even though the stock was traded on the NYSE). *But see In re HealthSouth Corp. Sec. Litig.*, 257 F.R.D. 260, 281 (N.D. Ala. 2009) (“[A]t a

ciency is generally shown by a testifying expert financial economist who performs an event study to demonstrate the informational efficiency of the market for the security.<sup>48</sup> While some defendants' experts contend otherwise,<sup>49</sup> the analysis does not focus on the pricing accuracy of the market but rather on whether it moves rapidly to incorporate new material information.<sup>50</sup> Similarly, loss causation is an inquiry that usually requires the presentation of expert witness testimony—usually by a financial economist. Litigants hotly debated the degree in which loss causation is a necessary component of class certification before the issue was settled in *Halliburton*,<sup>51</sup> but all sides agreed that the analysis is intricately bound up with the testimony of an expert financial economist.<sup>52</sup>

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minimum, there should be a presumption—probably conditional for class determination—that certain markets are developed and efficient for virtually all the securities traded there: The New York and American Stock Exchanges, the Chicago Board Options Exchange and the NASDAQ National Market System.” (quoting *Cammer*, 711 F. Supp. at 1292)).

48. See, e.g., *HealthSouth*, 257 F.R.D. at 281; *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 280 (S.D.N.Y. 2008); *In re DVI Inc. Sec. Litig.*, 249 F.R.D. 196, 210–12 (E.D. Pa. 2008).

49. See, e.g., Brian E. Pastuszynski & Inez H. Friedman-Boyce, *Back to Basic—Challenging the Application of the Efficient Market Hypothesis in Federal Securities Lawsuits* (ALI-ABA Course of Study, Apr. 28–29, 2005), WL SK080 ALI-ABA, 14 n.191 (2005) (noting that in *In re MicroStrategy, Inc. Securities Litigation*, No. Civ. A. 00-473-A (E.D. Va. Apr. 23, 2001), defendant's expert Paul A. Gompers opined “there was no relationship between the price of these [high technology] stocks and publicly available information”).

50. See *Cammer*, 711 F. Supp. at 1286 n.35 (“An efficient market, one which rapidly reflects new information in price, is both open and well developed.”). This standard has been widely adopted. See, e.g., *Stuebler v. Xcelera.com* (*In re Xcelera.com Sec. Litig.*), 430 F.3d 503, 508 (1st Cir. 2005) (“[A]n efficient market rapidly absorbs and reflects new information.”); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 367 (4th Cir. 2004) (“A reasonable investor will rely on the integrity of the market price, however, only if the market is efficient, because in an efficient market, ‘the market price has integrity[;] . . . it adjusts rapidly to reflect all new information.’” (quoting Jonathan R. Macey & Geoffrey P. Miller, *Good Finance, Bad Economics: An Analysis of the Fraud-on-the-Market Theory*, 42 STAN. L. REV. 1059, 1060 (1990))); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 199 (6th Cir. 1990) (adopting *Cammer* court's definition of “efficient market”).

51. See, e.g., *supra* notes 27–30 and accompanying text.

52. “[D]amages are an element of a securities fraud claim which Plaintiffs must prove, and that can be done only by expert testimony.” *Freeland v. Iridium World Commc'ns, Ltd.*, 545 F. Supp. 2d 59, 81 (D.D.C. 2008) (holding that even *individual* bondholders' damages could not be established without expert testimony); see also *In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1261–62 & n.48, 1275–76 (N.D. Okla. 2007) (granting summary judgment for defendants after excluding plaintiffs' expert testimony under *Daubert* “because plaintiffs cannot establish the elements of loss causation and damages” without that testimony, noting that it is “not an uncommon circumstance” for principles of substantive law to be “tightly intertwined” with principles of economics and finance).

*Daubert* motions typically are made as motions in limine.<sup>53</sup> For class certification in securities class actions, however, this presents something of a quandary for the district court. If the court relies on the testimony of an expert for the proposition that the market for a security is efficient, and it subsequently grants class certification, must it then revisit that decision if it later decides pursuant to a *Daubert* motion that the expert opinion is inadmissible?

The court recognized such an overlap in *Freeland v. Iridium*.<sup>54</sup> The defendants in *Freeland* moved for summary judgment based on loss causation and a truth-on-the-market defense.<sup>55</sup> The plaintiffs responded by arguing that loss causation was proved, and truth on the market was disproved, by their testifying expert's opinion.<sup>56</sup> The defendants made a *Daubert* motion to exclude the plaintiffs' expert testimony, and the *Daubert* motion was briefed in tandem with the summary judgment motion.<sup>57</sup> The court decided the defendants' summary judgment and *Daubert* motions together, denying both.<sup>58</sup> The decision as to the admissibility of the expert opinion was inextricably linked to the summary judgment motion—the expert opinion was necessary for the sufficiency of the plaintiffs' claims.<sup>59</sup> If the court had excluded the expert, it would have been required to dismiss the plaintiffs' claims; if it had accepted the testimony, it could then have decided that the plaintiffs' case presented triable issues of fact. The two

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53. See Carol Krafka, Meghan A. Dunn, Molly Treadway Johnson, Joe S. Cecil & Dean Miletich, Federal Judicial Center, *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL. PUB. POL'Y & L. 309, 321 (2002) (finding in a 1998 survey of federal judges that objections to the admissibility of expert testimony most frequently arose in the form of motions in limine, and that such motions increased post-*Daubert*); cf. *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999) (noting that an in limine hearing is not required for every *Daubert* objection, but holding that "when the ruling on admissibility turns on factual issues, . . . at least in the summary judgment context, failure to hold such a hearing may be an abuse of discretion").

54. 545 F. Supp. 2d at 87–89 (deciding cross-motions for summary judgment simultaneously with a concurrently filed motion to exclude plaintiffs' expert testimony).

55. See *id.* at 78–81. The court explained the truth-on-the-market theory: "Under this corollary [to fraud on the market], a misrepresentation is immaterial if the information is already known to the market because the misrepresentation cannot then defraud the market. . . . '[A] defendant may rebut the presumption that its misrepresentations have affected the market price of its stock by showing that the truth of the matter was already known.'" *Id.* at 78 (quoting *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 (2d Cir. 2000)).

56. See *id.* at 78–81.

57. See *id.* at 87.

58. See generally *id.*

59. See *id.* at 80 ("Plaintiffs have provided expert testimony to establish causation, and the evidence in the records is not so clear as to allow the Court as a matter of law to find otherwise.").

motions had to be decided together. Notably, the defendants presented several experts whose admissibility was not inextricably bound up with the viability of the claims, and motions to exclude these experts were not conducted on a parallel track.<sup>60</sup>

### 3. Expert Testimony in Antitrust Class Actions

Certifying an antitrust class likewise requires clearing an economic hurdle. To prevail on an antitrust claim, each member of the class must prove antitrust injury, also known as antitrust impact.<sup>61</sup> Antitrust injury is “injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful”<sup>62</sup> and implicitly includes a requirement for injury-in-fact.<sup>63</sup> Each side’s economics expert testimony is often central to that showing.<sup>64</sup>

Although plaintiffs are not required to prove antitrust injury at the class certification stage, they must demonstrate that they can prove it later through common evidence in order to meet the predominance requirement of Rule 23(b)(3).<sup>65</sup> This generally requires an expert economist to submit a proposed damages methodology.<sup>66</sup> For example, a consumer class alleging antitrust violations can show antitrust injury by demonstrating—through expert witness testi-

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60. See Motorola’s Motion for Summary Judgment on All Claims, *Freeland v. Iridium World Commc’ns, Ltd.*, No. 1:99-cv-1002 (D.D.C. Oct. 26, 2007), ECF No. 204; Motorola’s Motion for Summary Judgment on Claims Directed Against Motorola, *Freeland v. Iridium World Commc’ns, Ltd.*, No. 1:99-cv-1002 (D.D.C. Oct. 26, 2007), ECF No. 205; Motorola’s Motion to Exclude the Damages Testimony of Anthony Saunders, *Freeland v. Iridium World Commc’ns, Ltd.*, No. 1:99-cv-1002 (D.D.C. Oct. 26, 2007), ECF No. 206; Plaintiffs’ Motion to Preclude the Expert Testimony of Donald Langevoort and Theresa Gabaldon, *Freeland v. Iridium World Commc’ns, Ltd.*, No. 1:99-cv-1002 (D.D.C. Feb. 8, 2008), ECF No. 240 (under seal) (on file with author).

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

62. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

63. See *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 106 (2d Cir. 2007).

64. See, e.g., James F. Nieberding & Robin A. Cantor, *Price Dispersion and Class Certification in Antitrust Cases: An Economic Analysis*, 14 J. LEGAL ECON. 61, 62 (2007) (“Generally, the central issue for an economist at the class certification stage is whether or not there is a common formula, model, or other methodology that plaintiffs could use to establish that each class member suffered impact and damages from the alleged anti-competitive act. Indeed, the class certification decision frequently depends on the quality of the expert analyses.”).

65. See *Hydrogen Peroxide*, 552 F.3d at 311; *Ross v. Am. Express Co.* (*In re Currency Conversion Fee Antitrust Litig.*), 264 F.R.D. 100, 115 (S.D.N.Y. 2010) (“To meet the predominance requirement for class certification, the plaintiffs must show that injury-in-fact, or impact, can be proven by evidence common to the class.” (quoting *In re Ethylene Propylene Diene Monomer (“EPDM”) Antitrust Litig.*, 256 F.R.D. 82, 88 (D. Conn. 2009))).

66. See, e.g., *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 303 (5th Cir. 2003).

mony<sup>67</sup>—that the prices paid by the class members were higher than they would have been but for the alleged anticompetitive conduct.<sup>68</sup>

Antitrust plaintiffs seeking to certify a class can sometimes rely on the “general rule” that “an illegal price-fixing scheme presumptively impacts upon all purchasers of a price-fixed product in a conspiratorially affected market.”<sup>69</sup> However, “[a]ntitrust defendants are free to argue, as many of them do, that their cases are exceptional because too many variables enter into setting prices in their industries to permit common proof of impact.”<sup>70</sup> The commonality of antitrust impact is never automatic; in fact, the Supreme Court has specifically rejected the contention that antitrust injury may be presumed even in the case of a *per se* antitrust violation, such as a horizontal price-fixing conspiracy.<sup>71</sup> However, even reliable expert testimony is not always enough—the Third Circuit recently held that a district court must consider expert witness testimony from both sides at the class certification stage.<sup>72</sup>

#### 4. *Daubert* Challenges at Class Certification in Other Areas of the Law

This Article focuses primarily on securities and antitrust class actions. However, where other types of claims require a substantial role from expert witnesses at the class certification stage, the same trends apply. This Article accordingly recommends the same changes to the

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67. See, e.g., *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 143 (S.D.N.Y. 2006) (noting that “[p]laintiffs seeking class certification may carry their burden of establishing that injury is subject to generalized proof by submitting an expert report” positing class-wide injury resulting from an antitrust violation).

68. See *Cordes*, 502 F.3d at 107 (vacating and remanding the district court’s denial of class certification where the district court failed to “determine which expert is correct” as to the question of antitrust injury, specifically injury-in-fact).

69. *In re Alcoholic Beverages Litig.*, 95 F.R.D. 321, 327 (S.D.N.Y. 1982) (internal quotation omitted) (citation omitted); see also *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 455 (3d Cir. 1977) (“If, in this case, a nationwide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime, an individual plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price.”); *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 409 (S.D. Ohio 2007) (“Courts have generally found that when parties succeed in conspiring to fix prices, everyone who purchases the relevant goods or services [is] invariably injured.”).

70. *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 382 (S.D.N.Y. 1996).

71. See *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341 (1990).

72. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 325 (3d Cir. 2008) (“Here, the District Court apparently believed it was barred from resolving disputes between the plaintiffs’ and defendants’ experts. Rule 23 calls for consideration of all relevant evidence and arguments, including relevant expert testimony of the parties.”).

structure of the litigation and predicts the same consequences for those types of claims.

In *American Honda v. Allen*,<sup>73</sup> a consumer class action, the Seventh Circuit declared that a district court is required to perform a full *Daubert* analysis at the class certification stage if the expert's testimony is relevant to establishing any of Rule 23's requirements.<sup>74</sup> Despite having "definite reservations about the reliability" of the plaintiffs' expert report, the district court nonetheless refused to exclude the testimony and certified the class.<sup>75</sup> On appeal under Rule 23(f), the Seventh Circuit vacated the district court's rulings on the *Daubert* and class certification motions, holding that the district court had performed an insufficient *Daubert* analysis. "[W]hen an expert's report or testimony is critical to class certification, . . . a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion."<sup>76</sup>

Before *Dukes v. Wal-Mart Stores, Inc.*<sup>77</sup> (a Title VII pattern-and-practice employment discrimination class action) reached the Supreme Court, the Ninth Circuit affirmed the district court's refusal to exclude expert testimony at the class certification stage.<sup>78</sup> A similar case in the Southern District of New York noted that statistical evidence presented by experts may be necessary to certify even a Title VII class.<sup>79</sup>

Because antitrust impact, loss causation, market efficiency, and other requirements require expert testimony at the class certification stage (usually to prove predominance), attempts to challenge that tes-

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73. *Am. Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010).

74. *Id.* at 815.

75. *Id.* (internal quotations omitted).

76. *Id.* at 815–16; *see also* *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 812–13 (7th Cir. 2012) (upholding *American Honda's* requirement of *Daubert* analysis where expert testimony is "critical" to class certification).

77. 603 F.3d 571 (9th Cir. 2010), *rev'd*, *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011).

78. *Id.* at 594 (noting that bifurcating discovery may be more common in some areas of law than others, because, for example, "the statistical disputes typical to Title VII cases often encompass the basic merits inquiry and need not be proved to raise common questions and demonstrate the appropriateness of class resolution. Plaintiffs pleading fraud-on-the-market, on the other hand, may have to establish an efficient market to even raise common questions or show predominance.").

79. *See Hnot v. Willis Group Holdings, Ltd.*, 241 F.R.D. 204, 210–11 (S.D.N.Y. 2007) ("Plaintiffs in disparate impact cases often rely on statistical evidence to prove the merits of their claim. . . . In such a case, however, the same evidence must be considered to determine whether a plaintiff has satisfied the commonality requirement.").

timony are on the rise.<sup>80</sup> Some courts have started to entertain full *Daubert* challenges at the class certification stage,<sup>81</sup> and this Article predicts that more courts will follow *American Honda*—at least in securities and antitrust class actions—in requiring a full *Daubert* analysis before certifying a class. Other commentators have also begun to identify this trend,<sup>82</sup> and the Supreme Court hinted strongly in *Dukes* that full *Daubert* analysis is indeed appropriate at the class certification stage.<sup>83</sup>

## B. Class Certification and the Dispositive Motions

As this Article has shown, class certification presently implicates both issues of factual proof that require lay evidentiary showings and

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80. Cari K. Dawson, *Combating Class Certification Experts: Potential Strategies for Defendants*, 72 U.S.L.W. 2051, 2051 (Aug. 5, 2003).

81. See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 314–15 & n.13 (3d Cir. 2008) (cautioning that “a district court’s conclusion that an expert’s opinion is admissible does not necessarily dispose of the ultimate question . . . that the requirements of Rule 23 have been met.”); *Miles v. Merrill Lynch & Co.* (*In re Initial Pub. Offering Sec. Litig.*), 471 F.3d 24, 40 (2d Cir. 2006) (“[W]e can no longer continue to advise district courts that . . . an expert’s report will sustain a plaintiff’s burden so long as it is not ‘fatally flawed . . .’”), *reh’g denied*, 483 F.3d 70 (2d Cir. 2007); *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2007 WL 3245438, at \*8 (E.D. La. Nov. 1, 2007) (“In order to consider Plaintiffs’ motion for class certification with the appropriate amount of scrutiny, the Court must first determine whether Plaintiffs’ expert testimony supporting class certification is reliable. Accordingly, a *Daubert*-type review is not premature.”). *But see Dukes*, 603 F.3d at 602 n.22 (“We are not convinced by the dissent’s argument that *Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial.”).

82. See, e.g., Jocelyn Allison, *Support Grows For Daubert Test At Class Cert. Stage*, LAW360, May 5, 2010, <http://www.law360.com/articles/162277> (arguing that the Ninth Circuit in *Dukes* would have followed *American Honda*’s holding that *Daubert* analysis is required for class certification, but declined to do so only because the *Dukes* majority did not believe that it faced that question); L. Elizabeth Chamblee, 31 FLA. ST. U. L. REV. 1041, 1070–71 (2004) (criticizing the courts’ decisions in *In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18 (N.D. Ga. 1997), and *Nichols v. Smithkline Beecham Corp.*, No. CIV.A. 00-6222, 2003 WL 302352 (E.D. Pa. Jan. 29, 2003), for conducting less than full *Daubert* analyses of plaintiffs’ experts in antitrust class certification decisions); Gregory Mitchell, *Good Causes and Bad Science*, 63 VAND. L. REV. EN BANC 133, 133, 144–45 (2010) (arguing that the Supreme Court should require full *Daubert* analysis at the class certification stage to remove unreliable expert opinions early because, since few class actions make it to trial without settling and since *Daubert* motions are usually made shortly before or during trial, any lesser scrutiny “encourages parties to submit unreliable and overreaching expert evidence in support of or in opposition to class certification”).

83. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553–54 (2011) (“The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. *We doubt that is so . . .*” (emphasis added) (citation omitted)). *But see In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 610–14 (8th Cir. 2011) (affirming the district court’s decision to conduct a focused *Daubert* analysis at the class certification stage, rather than a full and conclusive *Daubert* inquiry, due to the tentative, preliminary, and limited nature of the class certification stage).

proof that requires expert opinion. It is often the case that testifying experts cannot complete their work until after the close of fact discovery. Further, under *Miles v. Merrill Lynch* and similar cases, the overlap between questions going to the elements of Rule 23 and questions going to the merits should not dissuade the court from making any factual inquiries as necessary to determine the prerequisites for certification.<sup>84</sup> Therefore, it is entirely possible that the court will have to determine overlapping issues—both to decide whether a class should be certified and whether the case presents a triable question of fact that can be submitted to a jury; or, as the Supreme Court phrased it, “[f]requently that rigorous analysis [of Rule 23 requisites] will entail some overlap with the merits of the plaintiff’s underlying claim.”<sup>85</sup>

### C. *Daubert* and Summary Judgment

*Daubert* motions are now common, and when they successfully remove an expert’s testimony, they create a prime opportunity for a successful summary judgment motion.<sup>86</sup>

Contemporaneously filed *Daubert* motions can help resolve a motion for summary judgment when the motion itself relies on expert evidence.<sup>87</sup> This can be used either offensively or defensively. A summary judgment movant can use a *Daubert* motion to exclude the op-

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84. See *Miles*, 471 F.3d at 41 (“[T]he obligation to make such determinations [that each requirement of Rule 23 has been met] is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement . . .”). Many cases have expert reports due after the close of fact discovery for just this reason. For loss causation in securities cases, plaintiffs’ damages expert needs to relate particular inflation to particular statements, which means showing that the statements were false, thereby necessitating full merits discovery of defendants’ conduct. Because a statement causes inflation when it becomes untrue, securities plaintiffs sometimes need to show when a series of consistent statements become disconnected from reality. See MANUAL FOR COMPLEX LITIGATION, *supra* note 3, § 23.32 (noting that the timing of expert reports can vary by subject matter, exemplified by early reports on claims construction in patent cases and reports after the close of discovery in toxic tort cases); *cf.* FED. R. CIV. P. 26(a)(2)(D)(i) (expert reports must be disclosed “at least 90 days before the date set for trial or for the case to be ready for trial” for the party with the burden of proof and 30 days after that disclosure for the rebutting party).

85. *Dukes*, 131 S. Ct. at 2251 (internal quotations omitted).

86. See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1104 n.623 (2003).

87. See MANUAL FOR COMPLEX LITIGATION, *supra* note 3, § 23.352 (noting that an objection to expert testimony after the close of discovery “facilitates the disposition of summary-judgment motions, to the extent those motions rely in whole or in part on expert evidence”); *Cortes-Irizarry v. Corporacion Insular De Seguros*, 111 F.3d 184, 188 (1st Cir. 1997) (“The *Daubert* regime can play a role during the summary judgment phase of civil litigation. If proffered expert testimony fails to cross *Daubert*’s threshold for admissibility,

posing party's expert testimony, thereby removing the opposing party's defense against the summary judgment motion. Conversely, a party opposing a motion for summary judgment can use *Daubert* to undercut the basis of the summary judgment motion. In rare cases, parties whose expert testimony has been excluded may be given a chance to find a new expert,<sup>88</sup> but losing an expert is often fatal to a party's case.<sup>89</sup>

#### D. The Logical Progression

The next logical step in this progression is that in securities and antitrust class actions, district courts should expect that both summary judgment and class certification will require the conclusion of fact and expert discovery. They should further expect that both class certification and summary judgment will turn in part on the admissibility of expert opinions. District courts should therefore hear class certification, summary judgment, and any related *Daubert* motion together, whether entirely combined or in some sensible order following the completion of discovery. Recently, the Chief Judge of the Eastern District of Michigan, Gerald E. Rosen, took just this approach in the Collins & Aikman securities litigation, in which his scheduling order mandated that parties file class certification and summary judgment motions together following the close of all discovery; *Daubert* motions were due at the same time.<sup>90</sup> Even more recently, Chief Judge Sarah Vance of the Eastern District of Louisiana announced in an antitrust case that class certification would be decided at the close of full discovery.<sup>91</sup> There may be particular legal, factual, or case management con-

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a district court may exclude that evidence from consideration when passing upon a motion for summary judgment.”).

88. See, e.g., *Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 605 (10th Cir. 1997) (holding that the district court abused its discretion when it denied plaintiffs the opportunity to present expert testimony to replace the expert testimony that was excluded on a *Daubert* motion). *Summers* involved unique facts: the plaintiffs' original, excluded experts were doctors that the defendant had referred the plaintiffs to for treatment. See *id.*

89. See, e.g., *Guinn v. AstraZeneca Pharm. LP*, 602 F.3d 1245, 1257 (11th Cir. 2010) (affirming grant of summary judgment for defendants where the district court had properly excluded plaintiffs' expert testimony on causation); *Wells v. SmithKline Beecham Corp.*, 601 F.3d 375, 381 (5th Cir. 2010) (same); *United States v. Nacchio*, 555 F.3d 1234, 1258–59 (10th Cir. 2009) (affirming a grant of summary judgment to the government where a criminal defendant's expert testimony had been properly excluded under *Daubert*).

90. See Order Extending Certain Dates in Scheduling Order, *Epstein v. Heartland Indus. Partners*, No. 06-13555 (E.D. Mich. Aug. 14, 2009), ECF No. 180.

91. See Pretrial Order No. 5 at 2, *In re Pool Prods. Distribution Mkt. Antitrust Litig.*, No. 2:12-md-02328-SSV-JCW (E.D. La. June 4, 2012), ECF No. 93 (holding that

siderations that make some cases appropriate for class certification at some intermediate time.<sup>92</sup> However, this Article asserts that Judge Rosen is ahead of his time, and that this procedure will be typical in the future.

## II. Analysis

If this Article is correct, and these three proceedings (class certification, summary judgment, and *Daubert*) begin to converge at the close of discovery, a handful of questions arise. First, is this a fair and appropriate way to conduct class action litigation? Second, what procedural changes can be expected? Third, what impact will it have on settlement dynamics? This Article will consider these questions respectively in the following sections.

### A. Fairness and Appropriateness of Later Class Certification Determinations

The degree of discovery available should match the standard of proof at each stage. This is a simple matter of justice. If plaintiffs cannot access the evidence that they need to meet their burden, they face a failure of due process,<sup>93</sup> evoking Kafka in the most extreme scenario.<sup>94</sup>

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“[d]iscovery will not be bifurcated between class and merits discovery because of the overlapping nature of the issues presented by the parties’ claims and defenses”); Transcript of Initial Status Conference Proceedings Heard Before the Honorable Sarah S. Vance at 10, *In re Pool Prods. Distribution Mkt. Antitrust Litig.*, No. 2:12-md-02328-SSV-JCW (E.D. La. May 30, 2012), ECF No. 86 (explaining that class certification will be decided after the close of discovery).

92. See *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 823 (7th Cir. 2012) (“[I]t is unlikely that discovery regarding the merits of a claim will be complete by the time the court is called upon to certify a class.”). Where, as in *Messner*, the court is inclined to determine certification prior to the close of full discovery, the court should expect correspondingly less complete work from expert witnesses. See *id.*

93. The Ninth Circuit long ago held that, since some class allegations must be supported by evidence, to deny plaintiffs a chance to conduct discovery in those instances is an abuse of discretion. See *Kamm v. California City Development Co.*, 509 F.2d 205, 210 (9th Cir. 1975) (“The propriety of a class action cannot be determined in some cases without discovery, as, for example, where discovery is necessary to determine the existence of a class or set of subclasses. To deny discovery in a case of that nature would be an abuse of discretion.”) (footnote omitted). It is no great logical leap to say that allowing plaintiffs some of the discovery they need for their class allegations—but not all of it—raises similar concerns about justice.

94. Cf. FRANZ KAFKA, *THE TRIAL* (1968). In *The Trial*, protagonist Josef K. finds himself the subject of an opaque proceeding in which he is unable to determine the substance of the charges against him or the procedures by which to defend himself. *Id.*

Moving for class certification on the pleadings gave plaintiffs certain advantages. First, it allowed for early certification. The old “as soon as practicable” standard<sup>95</sup> encouraged deciding class certification on the pleadings, thereby maximizing plaintiffs’ control, but it also allowed the opportunity for defendants to move to de-certify the class once full discovery had taken place. Under the old regime, the defendants were the movants after full discovery, thereby bearing the burden of changing the court’s mind.

From a plaintiff’s perspective, however, a timeline in which class certification is decided along with summary judgment and *Daubert* challenges does not necessarily impose an unreasonable burden. It is certainly preferable to splitting discovery into two phases—with all the fighting<sup>96</sup> that bifurcation entails. It is in a defendant’s interest to create a mismatch between what plaintiffs must show and their access to the economic evidence with which to show it. Briefing class certification after full discovery allows the experts to complete their work instead of merely mapping methodology for future application to facts unknown at the time the methodology is outlined.

Defendants’ best strategy is to convince courts that plaintiffs’ experts’ work must be complete with a strong factual underpinning, leaving nothing to speculation or future expansion, while still holding back facts and data that plaintiffs’ experts would need in order to complete their work. The plaintiffs’ burden to make out the elements of Rule 23 does not change. But there is a substantial difference between showing that a model can be constructed<sup>97</sup> and showing that it already has been constructed with all the data collected and utilized. Plaintiffs faced with the latter will almost inevitably run into wrinkles and limitations that require further data or modifications. Separation of class from merits discovery has always primarily benefitted defendants, but fortunately for plaintiffs, the development of class certification law makes the artificiality of this separation readily apparent. In

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95. The requirement that a court determine class certification “as soon as practicable” was changed to “at an early practicable time” in the 2003 amendments to Rule 23. See FED. R. CIV. P. 23 advisory committee’s note on 2003 amendments.

96. See *infra* Part II.B.4.

97. See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311–12 (3d Cir. 2008) (holding that plaintiffs’ burden at certification is to demonstrate that the elements are “capable of proof at trial though evidence [that is] common to the class” (emphasis added)); *In re Brand Name Prescription Drug Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1994 WL 663590, at \*5 (N.D. Ill. 1994) (holding that plaintiffs must show “realistic methodologies” for proving class damages).

many cases, as this Article has shown,<sup>98</sup> the line between “class” and “merits” discovery is too hazy to make a principled distinction.

A system in which the evidentiary standard that plaintiffs must meet is well-matched to the tools available to meet it satisfies the basic concern for procedural justice.<sup>99</sup> A regime in which well-pled allegations are sufficient for certification presents plaintiffs with their best chance to certify a class. However, even if the evidentiary requirement that plaintiffs must meet is high, basic procedural fairness is preserved if plaintiffs are allowed full discovery to meet it.

There is also a slight difference in a judge’s role in assessing expert evidence that counsels combining the summary judgment and *Daubert* inquiries with the class certification inquiry. *Daubert* and its progeny make the court a gatekeeper for the jury, as trier of fact, screening jurors from opinions that are insufficiently supported by evidence or reasonable methodology.<sup>100</sup> When deciding a motion for summary judgment, the court need not decide which expert is correct. Instead, it need only first decide (under *Daubert*) whether each expert’s opinion should be admitted into evidence, and following that determination, whether there are issues of which a reasonable jury could only make one determination. The prerequisites for certification under Rule 23, however, are preliminary factual determinations by a judge and are not binding on the ultimate merits.<sup>101</sup> When neces-

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98. See *supra* Part I.A.2–4 (illustrating the growing overlap between class and merits issues).

99. Rule 12(b)(6) motions to dismiss and Rule 56 motions for summary judgment provide certain mechanisms to fit the motion to the stage of discovery, but Rule 23 does not. See *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 823 (7th Cir. 2012) (“[T]he procedural protections available for such early judicial evaluations of the merits—such as the assumption under Rule 12(b)(6) that allegations in the complaint are true and the Rule 56 requirement to give the non-moving party the benefit of conflicting evidence—are not available under Rule 23.”); *Baltodano v. Merck, Sharp & Dohme (I.A.) Corp.*, 637 F.3d 38, 41 (1st Cir. 2011) (cautioning that “where a plaintiff’s case depends on his ‘ability to secure evidence within the possession of defendants, courts should not render summary judgment because of gaps in a plaintiff’s proof without first determining that plaintiff has had a fair chance to obtain necessary and available evidence from the other party’” (quoting *Carmona v. Toledo*, 215 F.3d 124, 133 (1st Cir. 2000))).

100. See *Kumho Tire Co. v. Carmichael*, 536 U.S. 137, 145 (1998); *General Electric Co. v. Joiner*, 522 U.S. 136, 142 (1997); *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 597 (1993).

101. See *Hydrogen Peroxide*, 552 F.3d at 320 n.22 (“[Some] circuits’ use of the term ‘findings’ in this context should not be confused with binding findings on the merits. The judge’s consideration of merits issues at the class certification stage pertains only to that stage; the ultimate factfinder, whether judge or jury, must still reach its own determination on these issues.” (quoting *Brown v. Am. Honda (In re New Motor Vehicles Canadian Exp. Antitrust Litig.)*, 522 F.3d 6, 24 (1st Cir. 2008))); *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.)*, 471 F.3d 24, 39 (2d Cir. 2006) (“A trial judge’s finding on a

sary for these determinations, the court must resolve a battle of the experts.<sup>102</sup> However, a judge need not gate-keep her own brain. *Daubert's* inquiry is whether an expert's opinion is fit for admission before a jury, but for judicial findings, any methodological weakness simply affects the weight of the expert testimony.<sup>103</sup>

Further, adjudicating summary judgment and class certification at the same time allows courts to address a single, coherent *Daubert* challenge to expert testimony in support of both. Dealing with separate *Daubert* challenges at class certification and summary judgment is unwieldy. Deciding them together will ease the confusion that some courts have as to whether challenges to expert testimony at the class certification stage should be applied differently from pretrial *Daubert* challenges<sup>104</sup> in some sort of nebulous "*Daubert-lite*" analysis.<sup>105</sup> Instead, courts can perform a full *Daubert* analysis with confidence.<sup>106</sup>

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merits issue for purposes of a Rule 23 requirement no more binds the court to rule for the plaintiff on the ultimate merits of that issue than does a finding that the plaintiff has shown a probability of success for purposes of a preliminary injunction." (emphasis omitted)), *reh'g denied*, 483 F.3d 70 (2d Cir. 2007).

102. See *Hydrogen Peroxide*, 552 F.3d at 324 ("Resolving expert disputes in order to determine whether a class certification requirement has been met is always a task for the court—no matter whether a dispute might appear to implicate the "credibility" of one or more experts, a matter resembling those usually reserved for a trier of fact.").

103. See *In re Zurn Pex Plumbing Prods. Liab.*, 644 F.3d 604, 613 (8th Cir. 2011) ("The main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker."); *United States v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005) ("There is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself."); *cf. Hydrogen Peroxide*, 552 F.3d at 323 (3d Cir. 2008) ("Weighing conflicting expert testimony at the certification stage is not only permissible; it may be integral to the rigorous analysis Rule 23 demands.").

104. See, e.g., *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 602 n.22 (9th Cir. 2010) ("We are not convinced by the dissent's argument that *Daubert* has exactly the same application at the class certification stage as it does to expert testimony relevant at trial."), *rev'd*, *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011). *But see Dukes*, 131 S. Ct. at 2553–54 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. *We doubt that is so . . .*" (emphasis added) (citation omitted)).

105. See *Hovenkotter v. Safeco Ins. Co.*, No. C09-0218JLR, 2010 WL 3984828, at \*4 (W.D. Wash. Oct. 8, 2010) (referring to consideration of the substance of expert evidence to determine its probative value and foundational reliability at the class certification stage as "a sort of '*Daubert-lite*' analysis."); *Zurn Pex Plumbing*, 644 F.3d at 612 (affirming the district court's use of a "tailored" *Daubert* analysis and specifically rejecting a requirement for full *Daubert* analysis at class certification).

106. If the court decides all three motions together, it could determine first that the jury will not see the report, decide summary judgment, and never reach class certification, saving some work and producing a coherent and consistent result.

## B. Procedural Consequences

As class certification, summary judgment, and *Daubert* challenges converge at the end of discovery, this Article predicts a marked increase in preemptive attacks on class certification, an end to both Rule 23(f) appeals and orders bifurcating discovery into “class” and “merits” phases, and the cost of notice increasingly shifting to defendants. This Article begins with a description of the process of deciding a joint class certification, *Daubert*, and summary judgment motion.

### 1. Judicial Economy and the Process of a Triple Decision

A court that chooses to entertain all three motions together has a logical process by which to make its decision.<sup>107</sup> Following the rule of deciding no more than necessary to dispose of a case,<sup>108</sup> a court can begin with summary judgment. If the court can dispose of the summary judgment motion without reviewing the expert testimony, it should do so. If the court grants a defendant’s motion for partial summary judgment (or grants in part a motion for complete summary judgment), it need only decide class certification as to the surviving claims. Deciding motions this way eases the burden on the judiciary by reducing the amount that must be decided. This is especially true when a certifiable class has a weak position on the merits.<sup>109</sup>

Further, if the court dismisses the case on summary judgment, the plaintiffs will be able to appeal that decision,<sup>110</sup> but if the decision was reached without completing the *Daubert* or class certification analyses, the appellate court will not be troubled by those motions.

### 2. Defensive Attacks on Class Action Allegations Before Discovery

As class certification motions have been pushed later and later in the litigation process, defendants have increasingly made preemptive attacks on class certification before plaintiffs even move to certify the class. As class certification shifts to the end of full discovery, these pre-

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107. It is worth noting at this point that although this Article frequently refers to simultaneous briefing and decision on the three motions, briefing or deciding them sequentially fits our analysis just as well, so long as all three are briefed and decided after the close of full discovery.

108. See *United States v. Stein*, 435 F. Supp. 2d 330, 361 (S.D.N.Y. 2006) (“It is a venerable maxim of constitutional construction that courts should decide no more than is necessary.”), *aff’d*, 541 F.3d 130 (2d Cir. 2008).

109. See *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010) (noting that even “a certified class can go down in flames on the merits”).

110. See 28 U.S.C. § 1291 (2011) (permitting appeals of “all final decisions”).

emptive strikes will bring the process full circle—an inversion of the era of early certification and later decertification motions.

An affirmative attack on class allegations might take the form of a Rule 12(b) motion to dismiss, a Rule 12(f) motion to strike, or a Rule 23(d)(1)(D) motion to require that the pleadings be amended.<sup>111</sup> For convenience and clarity, this Article calls it a “motion to deny class certification.” Regardless of how it is styled, if a court allows a defendant’s motion to deny class certification, it should be decided under the same standards for motions to dismiss because such a motion challenges the pleadings and takes place before any significant discovery.<sup>112</sup>

Defendants moving to deny class certification before plaintiffs move to certify is not an especially new concept.<sup>113</sup> However, this phenomenon has been on the rise in recent years as the motion to affirmatively certify a class is pushed further and further back.<sup>114</sup>

As some commentators have noted, Rule 23(c)(1)(A)’s requirement that courts consider issues of class certification “[a]t an early practicable time after a person sues or is sued as a class representative”

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111. See Douglas G. Smith, *The Intersection of Constitutional Law and Civil Procedure: Review of Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit (Part II)*, 104 Nw. U. L. REV. 787, 791 & n.18 (2010).

112. See *Walls v. Wells Fargo Bank, N.A.* (*In re Walls*), 262 B.R. 519, 524 (E.D. Cal. 2001) (“[T]he motion to deny class certification, having been brought prior to any discovery, should be construed according to the same legal standards as a motion to dismiss under Rule 12. That is, may a class be certified under Rule 23, under the facts as alleged in the Amended Complaint?”).

113. See, e.g., *Cook Cnty. Coll. Teachers Union v. Byrd*, 456 F.2d 882, 884–85 (7th Cir. 1972) (“One opposing a class action may move for an order determining that the action may not be maintained as a class suit.”).

114. See, e.g., *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939–40 (9th Cir. 2009) (“Nothing in the plain language of Rule 23(c)(1)(A) either vests plaintiffs with the exclusive right to put the class certification issue before the district court or prohibits a defendant from seeking early resolution of the class certification question.”); *Baum v. Great W. Cities, Inc.*, 703 F.2d 1197, 1210 (10th Cir. 1983) (holding that the district court did not abuse its discretion by striking and dismissing class claims); *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 660 (D. Nev. 2009) (granting motion to deny class certification before discovery where the court held that the proposed class could not be certified as a matter of law); *Thornton v. State Farm Mut. Auto Ins. Co.*, No. 1:06-cv-00018, 2006 WL 3359482, at \*4–5 (N.D. Ohio Nov. 17, 2006) (granting a motion to strike class allegations, declining to allow the plaintiff additional time for class discovery); *Barabin v. Aramark Corp.*, 210 F.R.D. 152, 162 (E.D. Pa. 2002) (finding from the face of the complaint that individual claims would predominate over common issues, declining to certify a 23(b)(3) class); cf. *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 21 (2d Cir. 2003) (reversing a district court’s decision to grant a motion to deny class certification before discovery where the decision was “based on assumptions of fact rather than on findings of fact” where the district court had not permitted plaintiffs to conduct limited discovery).

does not require discovery or even a motion for class certification.<sup>115</sup> When plaintiffs moved for class certification on the pleadings, there was no need for defendants to simultaneously move to deny class allegations, for they could simply oppose the motion to certify. Rather, defendants have historically had the opportunity to move to de-certify a class after the close of full discovery.<sup>116</sup> Like any motion, the expected level of proof is effectively higher after discovery than it is on the pleadings because there is a more developed record from which to support the motion.

Overall, defendants can certainly claim the later and more exacting examination of class certification as a victory. It may not be their ideal—a bifurcation that requires plaintiffs to make a complete factual showing without full access to discovery—but it certainly places defendants in a better position than they had in a pleading-based certification regime because plaintiffs will be required to prove each element of Rule 23 rather than simply allege it.

Unsatisfied with this victory, however, defendants' lawyers are increasingly seeking a second bite at the apple—trying both to defeat certification first on the pleadings and later to fight it on the evidence.<sup>117</sup> As a policy matter, there is little to recommend the practice of having the fight over class certification twice in the same litigation. This practice wastes judicial resources and multiplies the time and

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115. See, e.g., Lisa L. Heller & Jennifer A. Adler, *Using Motions to Dismiss to Challenge Class Allegations*, BLOOMBERG LAW REPORTS, CLASS ACTIONS, Vol 2, No. 6 (“[T]he court may properly address the suitability of the case for class action status on the face of the complaint alone. In fact, the U.S. Supreme Court has even recognized that ‘sometimes [class certification] issues are plain enough from the pleadings . . . .’” (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982))); cf. Falcon, 457 U.S. at 160 (“[S]ometimes it may be necessary for the court to probe beyond the pleadings before coming to rest on the certification question. . . . [A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable.”).

116. See, e.g., Culpepper v. Irwin Mortg. Corp., 491 F.3d 1260, 1263 (11th Cir. 2007) (holding that the trial court did not abuse its discretion by decertifying the class concurrently with its decision on summary judgment); Barnes v. Am. Tobacco Co., 161 F.3d 127, 149, 155 (3d Cir. 1998) (same); FED. R. CIV. P. 23(c)(1)(C) (“An order that grants or denies class certification may be altered or amended before final judgment.”).

117. For instance, in *In re Apple & AT&TM Antitrust Litigation*, defendant AT&T Mobility filed an unsuccessful motion to strike or dismiss class allegations before discovery had begun. See Defendant AT&T Mobility LLC’s Notice of Motion and Motion to Strike or Dismiss the Class Allegations; Supporting Memorandum of Points and Authorities, *In re Apple & AT&TM Antitrust Litig.*, No. 5:07-cv-05152-JW (N.D. Cal. Oct. 30, 2008), ECF No. 148. Defendant later filed a brief opposing the plaintiffs’ motion for class certification. See Defendant AT&T Mobility LLC’s Opposition to Plaintiffs’ Motion for Class Certification, *In re Apple & AT&TM Antitrust Litig.*, No. 5:07-cv-05152-JW (N.D. Cal. Oct. 30, 2008), ECF No. 362.

work of the lawyers, which increases the risk and burden on plaintiffs' counsel, almost always paid on contingency in class cases, while increasing the revenues of defense firms with hourly fee models.

The only laudable function of an early, pleading-based motion to deny class certification is to point out a literal pleading failure, in which the four corners of the complaint defeat the proposed class.<sup>118</sup> Like other pleading motions, such a motion should not permanently defeat a meritorious case, and an opportunity to recast class allegations should be as liberally granted as any other aspect of pleading amendment so that plaintiffs do not plead themselves out of court.<sup>119</sup> Courts that have faced this new beast—this sort of quasi-Rule 9(b) motion<sup>120</sup> against class certification—have generally agreed.<sup>121</sup>

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118. See *Walls v. Wells Fargo Bank, N.A.* (*In re Walls*), 262 B.R. 519, 523 (E.D. Cal. 2001) (“If, as a matter of law, a class cannot be certified in this adversary proceeding, it would be a waste of the parties’ resources and judicial resources to conduct discovery on class certification.”); *Vinole v. Countrywide Home Loans, Inc.*, 246 F.R.D. 637, 639 (S.D. Cal. 2007) (“[A] defense-driven determination of class certification is appropriate when awaiting further discovery will only cause needless delay and expense.” (internal quotations omitted)).

119. See FED. R. CIV. P. 15(a)(2) (“The court should freely give leave [to amend pleadings before trial] when justice so requires.”).

120. While Rule 9(b) does not apply to class allegations, any challenge to class allegations that turns on something other than flatly self-defeating averments is an attempt to graft a higher pleading standard onto the class allegations and generally arises in areas (such as securities or antitrust) that already subject the substantive pleadings to specialized pleading rules.

121. See, e.g., *Chamberlain v. Integracllick, Inc.*, No. 4:10-cv-00477-SPM-WCS, 2011 WL 2118699, at \*5 (N.D. Fla. May 25, 2011) (“[T]he action of striking a pleading should be used sparingly by the courts . . . and should be granted only when the pleading to be stricken has no possible relation to the controversy.” (quoting *Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir. 1953))); *In re Apple & AT&TM Antitrust Litig.*, No. 5:07-cv-05152-JW, slip op. at 4–5 (N.D. Cal. March 4, 2009) (finding that the motion was premature because “[t]he proper vehicle for challenging class certification is through opposition to a motion for class certification on the grounds that it fails to meet the requirements of Rule 23.”); *In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d 609, 615 (N.D. Cal. 2007) (“[D]ismissal of class allegations at the pleading stage should be done rarely[,] and . . . the better course is to deny such a motion because the shape and form of a class action evolves only through the process of discovery.” (internal quotations omitted)); cf. *Williams v. Chesapeake La., Inc.*, No. 10-1906, 2011 WL 1868750, at \*3 (W.D. La. May 13, 2011) (striking class allegations where it found that “[a]ny further motion practice or hearings to determine whether the Rule 23 requirements had been satisfied would be futile”). See also *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir. 1977) (“[T]he better and more advisable practice for a District Court to follow is to afford the litigants an opportunity to present evidence as to whether a class action [is] maintainable.”).

### 3. Rule 23(f): A Historical Curiosity

Rule 23(f) creates a process by which parties can seek an interlocutory appeal from a decision on class certification.<sup>122</sup> The rule was created due to the perception among rule makers that coercive settlement pressure allegedly arose from the high costs of defending a class action and the risk of potentially ruinous liability.<sup>123</sup> This concern was one of timing: they believed that the possibility of certifying a class before the merits had been tested required a safety valve.

However, if certification is done in tandem with summary judgment and expert admissibility, and if the three are done on an evidentiary record, then whatever the heft and pressure implied, certification will only occur in cases where the merits of the claim have been examined. The first concern, litigation costs, is greatly diminished if class certification happens in tandem with summary judgment and *Daubert* motions because presumably discovery has been fully conducted and expert witnesses have been paid. The costs will have already been incurred. Of course, actually trying the case is not without cost, but the cost of discovery—a great concern in *Dura*<sup>124</sup> and *Twombly*<sup>125</sup>—will already be “sunk” and therefore should not be a fac-

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122. See FED. R. CIV. P. 23(f).

123. See FED. R. CIV. P. 23 advisory committee’s note to 1998 Amendments (“An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675 (7th Cir. 2001) (“[An aggregated] claim puts a bet-your-company decision to [a defendant]’s managers and may induce a substantial settlement even if the [plaintiffs]’ position is weak.”). Conversely, rule makers were concerned that a plaintiff might lack the economic incentive to try the case to completion—and therefore never reach an appealable final judgment—if class certification were denied. See FED. R. CIV. P. 23 advisory committee’s note to 1998 Amendments (“An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation.”). This Article asserts that the relatively low costs of trial compared to discovery will mean that plaintiffs who get past summary judgment but are denied class status will generally have a sufficient incentive to get an appealable final judgment on the merits by trying the case.

124. See *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (requiring that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with “a largely groundless claim” be allowed to “take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value” (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975))).

125. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557–59 (2007) (seeking a balance between cautioning against dismissing an antitrust complaint in advance of discovery and requiring a complaint to plead enough to justify the substantial expense of antitrust discovery).

tor in determining whether to allow an interlocutory appeal.<sup>126</sup> Also, the threat of ruinous liability should not be some vague specter at this point because after full discovery, a defendant should be able to evaluate its position and make a fully informed settlement decision. Cases that fail to present a triable issue will be dismissed, and plaintiffs can appeal the dismissal as final. Cases that do present triable issues are meritorious by definition and should go forward to trial. The need for a special interlocutory appeal procedure unique to class certification, at least in the securities and antitrust contexts, will and should become an historic relic of the period of transition from a pleading-based regime to an evidence-based regime.

Where a case presents a particular type of question, the general avenue for interlocutory appeals, 28 U.S.C. § 1292, will remain.<sup>127</sup>

It should be noted that an appeal from an order certifying a class, under Rule 23(f) or another provision, may still occur in cases in which the plaintiffs defeat a defendant's motion for summary judgment. Such a motion would be interlocutory, but it would not disrupt discovery and would come after the case was trial-ready. However, courts should resist this. If the district court finds both the Rule 23 prerequisites and triable issues on the merits, the case should proceed immediately to trial. In the event of a defense verdict, the class certification becomes a very minor concern. If plaintiffs prevail on the merits, reversing class certification, presumably on predominance, would still leave the common issues resolved as to each member of the decertified class. Rule 23(f) provides for a permissive appeal—not an appeal as of right—and the courts of appeal retain the power to decline to hear it. Between the relatively low stakes (the cost of trying the case compared with the costs of the litigation leading up to trial) and the likely attitude of district-level judges toward these appeals, this Article predicts that courts of appeal will become significantly more reluctant to hear Rule 23(f) appeals in these circumstances.

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126. Sunk costs are “[t]hose parts of the costs of an enterprise which cannot be recovered if it ceases operations, even in the long run.” JOHN BLACK, *A DICTIONARY OF ECONOMICS* 452 (2d ed. 2002). Traditional microeconomic theory teaches that sunk costs should have no impact on future decisions because they cannot be recovered. See CAMPBELL R. MCCONNELL & STANLEY L. BRUE, *MICROECONOMICS: PRINCIPLES, PROBLEMS, AND POLICIES* 180–81 (14th ed. 1999) (“In making a new decision, you should ignore all costs that are not affected by the decision. The prior bad decision . . . should not dictate a second decision for which marginal benefit is less than marginal cost.”). Therefore, the costs of discovery already spent should not be a factor for courts of appeals considering whether to permit a 23(f) appeal.

127. See *In re Text Message Antitrust Litig.*, 630 F.3d 622, 624 (7th Cir. 2010) (affirming denial of motion to dismiss on interlocutory appeal).

#### 4. Bifurcation of Discovery into Class and Merits

As previously discussed,<sup>128</sup> courts have been requiring an increasing amount of evidence to certify a class. Courts often limit precertification discovery to issues related to class certification.<sup>129</sup> This practice traces to language in *Eisen*,<sup>130</sup> and it is typically done by issuing an order allowing “class” discovery but staying “merits” discovery until the class has been certified.<sup>131</sup> In deciding whether to bifurcate discovery, district courts have been required to balance the needs of promoting effective case management, preventing potential abuse, and protecting the rights of all parties.<sup>132</sup> Bifurcation has generally been permitted when it promotes “fairness and efficiency.”<sup>133</sup>

Class discovery is supposed to be that which is relevant to the requirements of Rule 23, and merits discovery is supposed to be that which is relevant to the strength or weakness of the claims and defenses.<sup>134</sup> The distinction between what counts as class discovery and what is strictly merits discovery can be hazy.<sup>135</sup> For this reason, it has been the source of countless squabbles between plaintiffs and defend-

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128. See *supra* Part I.A.

129. See MANUAL FOR COMPLEX LITIGATION, *supra* note 3, § 21.14 (“Courts often bifurcate discovery between certification issues and those related to the merits of the allegations.”); *Babbitt v. Albertson’s Inc.*, No. C-92-1883, 1992 WL 605652, at \*2 (N.D. Cal. Dec. 1, 1992) (“In general, at the precertification stage, discovery in a putative class action is limited to certification issues . . .”). But see MANUAL FOR COMPLEX LITIGATION, *supra* note 3, § 11.213 (“Discovery may proceed concurrently if bifurcating class discovery from merits discovery would result in significant duplication of effort and expense to the parties.”).

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

131. See, e.g., *In re SemGroup Energy Partners, L.P.*, No. 08-MD-1989-GKF-FHM, 2010 WL 5376262, at \*2 (N.D. Okla. Dec. 21, 2010) (“[C]ourts often bifurcate discovery between certification issues and those related to the merits of the allegations.” (quoting MANUAL FOR COMPLEX LITIGATION, *supra* note 3, § 21.14 (2004))); *Albertson’s Inc.*, 1992 WL 605652, at \*7 (“Discovery on the merits is usually deferred until it is certain that the case will be allowed to proceed as a class action.”). The Southern District of Texas at one time apparently imposed this stay automatically by local rule. See *Krim v. BancTexas Group*, 99 F.3d 775, 776 (5th Cir. 1996) (noting “Local Rule 10.2(c)’s prohibition on discovery as to the merits of the case” pending a decision on class certification). The rule has since been repealed. See S.D. TEX. L.R. *passim*.

132. See, e.g., *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 258 F.R.D. 167, 172 (D.D.C. 2009).

133. See, e.g., *id.* (internal quotations omitted); *In re Plastics Additives Antitrust Litig.*, No. 03-2038, 2004 WL 2743591, at \*2 (E.D. Pa. Nov. 29, 2004) (citing MANUAL FOR COMPLEX LITIGATION, *supra* note 3, § 11.213) (internal quotations omitted).

134. See MANUAL FOR COMPLEX LITIGATION, *supra* note 3, § 21.14.

135. See *id.* (“There is not always a bright line between the two.”); *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 41 (N.D. Cal. 1990) (denying a stay of discovery to defendants

ants.<sup>136</sup> Plaintiffs object to defendants' motions to stay merits discovery, and if those motions are granted, there is more to fight about. Defendants might insist that certain categories of documents are "merits" documents and therefore irrelevant to class issues; in response, plaintiffs must move to compel the documents on the grounds that the information in the documents is relevant to class certification. Those motions can be difficult to win because defendants unilaterally and opaquely determine which documents are relevant to class certification issues and which are not—producing the former and withholding the latter. This presents plaintiffs with a catch-22: they cannot access the information unless they can demonstrate that it is relevant to class certification, but they cannot demonstrate its relevance unless they know something about its content.

Additional problems could arise if expert witnesses are subjected to *Daubert* challenges at multiple stages of a suit, as could happen in a case that has been bifurcated into "class" and "merits" phases and where expert testimony is vital to each. Imagine that an expert's proposed methodology were subjected to—and survived—a *Daubert* challenge at the class certification stage.<sup>137</sup> It is not inconceivable that full discovery would reveal that there is a more appropriate methodology available to better fit the evidence. Should the expert switch methodologies? The first methodology was already deemed reliable by the district court, and changing could invite another *Daubert* challenge from the opposition. A testifying expert has personal and professional incentives to avoid an adverse *Daubert* ruling<sup>138</sup> and may be motivated to

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who alleged that class certification was unlikely because of the impracticalities of distinguishing "merits" and "class" discovery, as they were "closely linked issues").

136. See, e.g., *In re SemGroup Energy Partners*, 2010 WL 5376262, at \*2 ("[B]ifurcation of discovery may well increase litigation expenses by protracting the completion of discovery, coupled with endless disputes over what is "merit" vers[u]s "class" discovery.") (quoting *In re Hamilton Bancorp. Inc. Sec. Litig.*, No. 01CV0156, 2002 WL 463314, at \*1 (S.D. Fla. Jan. 14, 2002)).

137. To certify an antitrust class action, for example, plaintiffs must present a workable class-wide model that can demonstrate antitrust injury, though the expert has the opportunity to refine the model and fit actual data to it obtained in discovery for trial. See, e.g., *In re TFT-LCD Antitrust Litig.*, 267 F.R.D. 291, 311 (N.D. Cal. 2010) ("Plaintiffs need only advance a plausible methodology to demonstrate that antitrust injury can be proven on a class-wide basis." (quoting *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166, at \*9 (N.D. Cal. June 5, 2006))).

138. This Article has covered the consequences for a party of losing a *Daubert* challenge, but there are also consequences to the expert whose testimony is being challenged, including loss of further employment in that particular case, loss of self-confidence, loss of future employment, and forever thereafter, cross-examination about the challenge to that opinion. See Leonard Bucklin, *The Expert Failed the Daubert Test – The Consequences*, [http://www.bucklin.org/flunk\\_consequences.htm](http://www.bucklin.org/flunk_consequences.htm) (last visited June 24, 2011).

proffer his or her previous methodology even when another methodology is more appropriate. This type of foolish consistency is obviously undesirable if it prevents experts from offering their best testimony.

This should all be a merely historical phenomenon. As class certification has become an evidentiary process, courts have made it clear that plaintiffs must make showings on all the prerequisites of class certification even when they overlap with merits issues.<sup>139</sup> The division between merits and class discovery was always hazy and contested, but once the evidentiary showings for the two overlap—as they will<sup>140</sup> in matters of loss causation, fact of injury, etc.—there is no realistic way to separate the two.

## 5. Shifting the Cost of Class Notice

“The usual rule is that a plaintiff must initially bear the cost of notice to the class.”<sup>141</sup> The Ninth Circuit recently addressed, for the first time, when it is appropriate to shift the cost of class notice to a defendant.<sup>142</sup> It held that the cost of notice to the class may be shifted to the defendants “after plaintiff’s showing of some success on the merits—whether by preliminary injunction, partial summary judgment, or other procedure.”<sup>143</sup> In such circumstances, notice costs can be shifted to defendants “even if the defendant might later be entitled to recover those costs.”<sup>144</sup>

Notice costs vary widely with the method necessary to reach the class. Notice in securities cases is generally possible through very limited publication and direct mail to registered security holders—the

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139. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2251 (2011) (“Frequently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.”); *Miles*, 471 F.3d at 41 (“[T]he obligation to make such determinations [that each requirement of Rule 23 has been met] is not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement . . .”); *Hydrogen Peroxide*, 552 F.3d at 307 (“[T]he court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action.”); Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 HOFSTRA L. REV. 51, 65 (2004) (“[*Eisen*] did not prohibit inquiries at certification that overlapped merits issues when the purpose of the preliminary inquiry was to evaluate compliance with Rule 23.”).

140. See *supra* Part I.A.

141. *Eisen*, 417 U.S. at 178.

142. See *Hunt v. Imperial Merchant Servs., Inc.*, 560 F.3d 1137, 1143 (9th Cir. 2009).

143. *Id.* (quoting 3 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 8:6 (4th ed. 2007)) (internal quotations omitted).

144. *Id.* at 1144.

whole program costs tens or hundreds of thousands of dollars.<sup>145</sup> However, in consumer cases, the cost can vary from almost free to extraordinarily expensive. Some sellers have email or text message contact with every single purchaser,<sup>146</sup> yielding classes in which the actual transmission of a class notice is virtually cost-free. At the other extreme, some buyers of consumer products can only be reached by massive publication campaigns using internet banner advertising and magazine advertising, potentially costing millions.<sup>147</sup>

In *Hunt v. Imperial Merchant Servs., Inc.*,<sup>148</sup> a class action alleging claims under the Fair Debt Collection Practices Act, the district court granted the plaintiff's motion for partial summary judgment, holding that the defendant was liable on the merits.<sup>149</sup> The court then shifted the costs of notifying the class to the defendant.<sup>150</sup> Affirming on appeal, the Ninth Circuit held that once the district court determined

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145. A study by the Federal Judicial Center found that median costs of class notice across four districts ranged from \$36,000 to over \$100,000. THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 48 (1996), available at [http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/\\$file/rule23.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/rule23.pdf/$file/rule23.pdf). The study cautions that "[t]hese data are best viewed as a collection of anecdotes and estimates." *Id.*

146. See, e.g., *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 941 (N.D. Ill. 2011) (rejecting the argument that class notice was inadequate where the defendant sent notice to its current customers included in their monthly bills and by text message, published notice in USA Today, and sent email and postcard notice to its former customers); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355 n.22 (1978) (noting that "a number of courts have required defendants in Rule 23(b)(3) class actions to enclose class notices in their own periodic mailings to class members in order to reduce the expense of sending the notice").

147. See, e.g., *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 203 (D. Me. 2003) (approving settlement in an order noting that "[t]he short-form notice appeared in numerous paid media outlets, including thirteen consumer magazines, two nationally-circulated newspaper supplements and nine newspapers[, and was] broadcast via one hundred fifty-one radio spots"); Order Preliminarily Approving Settlement and Providing for Notice, *McDonough v. Toys "R" Us, Inc.*, No. 2:06-cv-0242-AB (E.D. Pa. Jan. 31, 2011), ECF No. 706 (granting preliminary approval and ordering notice based on a plan including publication on paper and on the internet, direct mail and email notice, as set forth in the Declaration of Jeanne Finnegan, Docket No. 669-3); JAY TIDMARSH, FED. JUDICIAL CTR., MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 84, 96 (1998), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Tidmarsh.pdf/\\$file/Tidmarsh.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Tidmarsh.pdf/$file/Tidmarsh.pdf) (describing settlement in *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, 318 F. Supp. 2d 879 (C.D. Cal. 2004), where "[i]n addition to individual notice, \$2 million was spent on advertising in newspapers, in magazines, and on television"). For an extreme example, see *Ahearn v. Fibreboard Corp.* 162 F.R.D. 505, 528 (E.D. Tex. 1995) (noting that cost of notice exceeded \$22 million).

148. 560 F.3d 1137 (9th Cir. 2009).

149. *Id.* at 1139.

150. *Id.*

that the defendant was liable on the merits, it had the discretion to shift the notice costs to the defendant.<sup>151</sup> *Hunt* cites to three district-level cases from various circuits that shifted notice costs after a determination of liability—one found liability via summary judgment,<sup>152</sup> and two found liability at trial.<sup>153</sup> The *Hunt* court found these decisions to be evidence of “a general principle that ‘interim litigation costs, including class notice costs, may be shifted to defendant after plaintiff’s showing of some success on the merits, whether by preliminary injunction, partial summary judgment, or other procedure.’”<sup>154</sup> At least two district court decisions have followed *Hunt*.<sup>155</sup>

The move to an evidence-based class certification means that district courts will often have the record available at certification to support a shift in the cost of notice. If the court hears both class certification and summary judgment and decides that the case will be tried as a class action and that plaintiffs are likely to prevail, the court may then require the defendants to advance the cost of notifying the class. Such a record is generally not available when class certification is decided before summary judgment because the court cannot pre-judge the liability case when considering only the class certification motion.

### C. Impact on Litigation Strategy and Settlement Dynamics

A study by the Federal Judicial Center asked, “[d]oes the act of certifying a class coerce settlement of frivolous or nearly frivolous claims?”<sup>156</sup> The study acknowledged that the question cannot be answered directly because the specific factors that weighed upon a settlement decision cannot be known from the record.<sup>157</sup> Nonetheless, the study examined several indirect indicators of settlement pressure. It found that a certified class action was twice as likely to settle as an uncertified action with class allegations, but it cautioned against infer-

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151. *Id.* at 1144.

152. *See id.* at 1143; *Macarz v. Transworld Sys.*, 201 F.R.D. 54, 55 (D. Conn. 2001).

153. *See Hunt*, 560 F.3d at 1143; *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 641 F. Supp. 259, 260 (D. Ariz. 1986); *Catlett v. Mo. Highway & Transp. Com.*, 589 F. Supp. 949, 950 (W.D. Mo. 1984).

154. *Hunt*, 560 F.3d at 1143 (quoting 3 WILLIAM B. RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 8:6 (4th ed. 2007)).

155. *See Sullivan v. Kelly Servs. Inc.*, No. C 08-3893 CW, 2011 WL 31534, at \*1–2 (N.D. Cal. Jan. 5, 2011); *Bickel v. Whitley Cnty. Sheriff*, No. 1:08-CV-102, 2010 WL 5564634, at \*1–3 (N.D. Ind. Dec. 27, 2010).

156. *WILLING* *supra* note 145, at 59 (emphasis omitted).

157. *Id.*

ring coercion from that data.<sup>158</sup> The study found that active case management and judicial rulings following a certification decision reduced the likelihood that the certification decision itself coerced settlements “with any frequency.”<sup>159</sup> It also found that the relative timing of certification decisions and settlements did not support an inference of coercion either.<sup>160</sup> Rather, it suggested that the best way to view the relationship between settlement and class certification may be to look at the certification decision as a “‘settlement event,’ that is, an event that would ‘affect substantially the potential value of a settlement,’ ‘clarify uncertainty about the value of the case,’ and ‘let lawyers gauge the approach of the judge.’”<sup>161</sup>

The idea that class certification coerces settlement includes the assumption that a claim is frivolous or nearly so. This sort of argument is often asserted with the unstated assumption that the plaintiffs are wrong on the merits and defendants falsely accused. Let us remove that assumption, however. Congress and the courts have raised and explained pleading requirements such that plaintiffs must meet exacting burdens merely to proceed to discovery so that one might more reasonably assume that cases that survive to discovery are generally meritorious. If defendants indeed violated the law (or engaged in conduct close enough to make them unsure of the outcome before a jury) then they should settle at a figure that takes into account the total potential damages, the cost of defense, and the risk that plaintiffs will lose the case for some reason unrelated to liability—for example, because certification may be lost on predominance grounds. This last risk may be a significant depressive force on the defendant’s settlement offer or even on defendant’s willingness to negotiate. Once certification is accomplished, this depressive pressure is removed, which of course alters defendant’s willingness to talk and the size of its offer. This is not only true for class certification but for each stage of the litigation at which defendants have an opportunity to seriously reduce or eliminate the threat of plaintiffs’ claim for reasons unrelated to liability. As these opportunities pass like the exits on a highway, the defendants get closer to the toll booth, and the risk-discounted value of the toll increases.

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158. *Id.* at 59–60.

159. *Id.* at 61.

160. *Id.* at 61–62.

161. *Id.* at 61 (quoting Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 *IND. L.J.* 497, 504 (1987)).

Relatedly, if a defendant brings a successful motion for summary judgment, but still wants a class-wide release, it can purchase that release by settling at a discount that reflects the plaintiffs' loss at summary judgment. Of course, the parties would still need to certify a settlement class.<sup>162</sup>

Finally, a court that finds our proposed litigation schedule appealing but also wants to encourage settlement does not have to choose one priority over the other. As noted above, a court can decide *Daubert*, class certification, and summary judgment motions one at a time, even if all three are briefed after the close of full discovery.<sup>163</sup> Doing so would increase the number of settlement events and create opportunities for the court to urge the parties to negotiate.

### Conclusion

The shift from a pleading-based class certification standard to one based on evidence moves class certification away from the initial pleading stage of the case and ultimately to the post-discovery phase. This is a win for the defense bar and their clients because it requires plaintiffs to make evidentiary showings subject to *Daubert* scrutiny to certify a class.

However, it is not an unalloyed victory. By letting class certification be pushed back all the way to the end of discovery, rather than ineffectually clinging to early certification, plaintiffs can gain a variety of advantages. The convergence of these three motions at the end of full discovery moots the time-worn concerns that class certification poses some special risk of adding heft to a meritless case and forcing settlement. It puts certification late enough that courts can make the determination once, late, finally, and not subject to any further litigation except trial. It will eliminate tools beloved by defense lawyers in the past, including discovery bifurcation and Rule 23(f) appeals, and it may lead to cost-shifting in class notice in some appropriate instances. Convergence of these motions at the end of the pretrial process can and should be administered in a way that, while exacting of plaintiffs, comports with basic procedural fairness.

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162. *Id.* at 61–62 (noting large number of settlement-only classes certified in districts studied).

163. *See supra* note 107.

