"claims" as a class action. In an instant, the defendants' potential exposure increased by six orders of magnitude. That increased risk had value, and the defendants settled for over $200 million dollars, a huge amount in the mid-1980s.[5]

The aggregation itself, however, was on shaky ground. The only way to certify a class was to ignore accepted choice of law principles by using non-existent "national consensus" law. Being before Rule 23 was amended to permit interlocutory appeals of class certification orders,[6] the ruling was only belatedly disapproved on appeal.[7] The damage, however, had been done, and the defendants could not go back and reclaim what the aggregation had forced them to give away in settlement. As it was, the only way the *Agent Orange* defendants were willing to settle was to purchase "peace" by including the potential claims of many thousands of persons who may have been exposed, but who had not yet been injured. Thus, the so-called "futures problem" emerged in aggregate litigation. Where a person has yet to suffer any injury, it is questionable whether there is even a justiciable claim—particularly in federal court.[8] It is certainly almost impossible to give effective notice to uninjured people who have no reason to pay attention to litigation they have no reason to believe involves them.

Given the passage of time, inevitably some of the *Agent Orange* "future" claims matured—at least arguably. Actually injured now, these persons objected to being bound by a settlement in which they had no part. They were successful, and more than a decade after the fact the *Agent Orange* settlement was overturned for its pervasive lack of procedural due process as to future claimants.[9] The defendants, the ones who had paid over $200 million dollars for peace, got neither peace nor their money back.[10]

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More Searching Fact-Based Scrutiny of Proposed Class Actions Reaches Securities and Antitrust Actions

by Brian D. Boyle & Julia A. Berman

Blackmail settlements,"[1] "*in terrorem* power"[2] in the hands of class counsel—these are the consequences of improvident class certification decisions, according to courts that have despaired at lax enforcement of Rule 23 prerequisites. These labels stem from the knowledge that the decision to certify immediately ups the ante in class litigation, placing "hydraulic" pressure on defendants to resolve even unmeritorious claims before trial.[3] Indeed, a Federal Judicial Center study found that settlements resulted in nearly 90% of cases in which the courts had certified a class.[4]

Over the last twenty years, courts in product liability and mass tort actions have begun to check inappropriate use of the class device by scrutinizing the evidence relevant to the purported class claims to determine whether it is of "classwide" dimension—that is, whether it tends to advance or rebut the claims of all putative class members simultaneously.[5] Until recently, however, evidence-focused review of proposed classes in the antitrust and securities realms has been the exception, rather than the rule. That has changed over the past couple of years. Recent decisions in the Second, Fifth and Eighth Circuits exemplify the new approach, exploring the quantum of proof that plaintiffs seeking certification should be required to muster on factual elements crucial to class treatment. Thus, these decisions can offer important insights for class actions generally.

I. Common Groundwork

The legal standard for class certification is the same across legal disciplines; regardless of the content of a plaintiff's complaint, every purported class must meet the requirements of Rule 23. As a practical matter, however, the courts' application of Rule 23 has varied widely with the subject-matter of the complaint, with securities and antitrust classes being given considerably less scrutiny than others.[6]

In *Eisen v. Carlisle & Jacquelin*[7], the Court held that "nothing in the language or history of Rule 23…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." However, in two subsequent decisions, *Coopers & Lybrand v. Livesay*[8] and *Gen. Tel. Co. of the Sw. v. Falcon*,[9] the Court indicated that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." The Court in *Falcon* further instructed trial courts to conduct a "rigorous" analysis to ensure that the putative class satisfied Rule 23's requirements.[10] While a close look at these cases reveals that they need not conflict with each other at all, it is easy to see how these apparently conflicting directives could have resulted in inconsistent applications by the lower courts.

More Searching Fact-Based Scrutiny Reaches Securities And Antitrust Actions

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Title VII suit alleging employment discrimination. The named plaintiff had sued his employer for discriminatory promotion practices.[21] However, the plaintiff class which the court ultimately certified included not only employees who had been affected by the allegedly discriminatory promotion practices, but also applicants whom the defendant had allegedly refused to hire for discriminatory reasons.[22] After a trial, the district court's class findings were diametrically opposed to its conclusions about the named plaintiff: as to the named plaintiff, the court found discrimination in promotion practices, but not in his hiring, and for the class it found discrimination in hiring practices, but not as to promotions.[23] The Court, examining these results, also noted that "predictably," the plaintiff had tried to prove his claims and the class claims in unrelated ways—for himself he presented proof of intentional discrimination, while, for the class, he limited his presentation to statistical evidence showing disparate impact.[24] Highlighting the issues with the proceeding, the Court stressed that the district court should not simply have accepted the plaintiff's allegations of compliance with Rule 23(a), admonishing that "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."[25] Here, as in *Livesay*, the Court highlighted the need for "rigorous analysis" at the class certification stage.

II. Evidence-Based Analysis of Tort and Product Liability Classes

In addressing class actions involving mass tort and product liability claims, courts have heeded the Supreme Court's admonitions in *Livesay* and *Falcon*, and closely scrutinized plaintiffs' allegations to ensure that they complied with Rule 23's requirements. *Szabo v. Bridgeport Machs., Inc.* is a noteworthy example of the approach taken in this line of cases.[26] There, the Seventh Circuit addressed the certification of a nationwide class of customers that had purchased the defendant company's machine tools.[27] The plaintiff alleged, on behalf of the class, that those tools were defective and that the company had fraudulently marketed them.[28] In analyzing and ultimately certifying the proposed class, the district court cited *Eisen* and refused to look beyond the pleadings to determine whether the claims could be established through common proof.[29] The Seventh Circuit vacated the certification order, holding "[t]he proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it."[30] Judge Easterbrook, writing for the court, explained that the district court had misinterpreted *Eisen*, emphasizing that, under *Falcon*, "similarity of claims and situations must be demonstrated rather than assumed."[31] The court noted several factual issues which the district court needed to consider in deciding whether to certify the class. For example, the court questioned whether other tools had the same problems as the model plaintiff purchased, and whether the many sellers of the company's products nationwide had all made the same representations to their customers.[32] The court identified these and other issues as "daunting obstacles" to certification.[33]

Szabo illustrates the high level of scrutiny to which class allegations in mass tort and product liability cases are now routinely subjected.[34] Indeed, in *Castano v. Am. Tobacco Co.*, the Fifth Circuit noted that "historically, certification of mass tort litigation classes has been disfavored," citing a "traditional concern over the rights of defendants."[35] Among the explanations for this tradition, the Fifth Circuit cited the "insurmountable pressure" on defendants to settle even unmeritorious claims, once a class has been certified.[36] Judge Easterbrook in *Szabo* similarly acknowledged that pressure, and also noted the practical finality of the decision to certify a class among the reasons for rigorously applying Rule 23's requirements at the certification stage.[37]

III. Almost Presumptive Certification in Securities and Antitrust Conspiracy Cases

In contrast to class certification decisions in the tort and product liability settings, certification decisions in securities and antitrust class actions have—until very recently—seemed to reflect an *Eisen* hangover. Rather than closely scrutinizing the evidence likely to be adduced at trial, courts in securities and antitrust cases have almost presumed compliance with Rule 23 elements. Even the Supreme Court, in *Amchem Prods., Inc. v. Windsor*, has offered the dictum that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."[38]

The "fraud on the market" presumption of reliance has been the primary driver behind courts' accommodation of securities fraud classes, as, when properly applied, that presumption relieves plaintiffs of the otherwise

individualized burden of establishing that the defendant's alleged misrepresentations caused them to purchase the defendant's securities.[39] The doctrine provides that, in an efficient market, the alleged misrepresentation is factored into the price of a security, along with all other publicly available information, so that any investor purchasing or selling the stock at its market price is presumed to have relied on the misrepresentation.[40] Of course, if the market for a security is not efficient, there can be no presumption of reliance, and therefore no class action, since "[without] the [fraud-on-the-market] presumption individual questions of reliance would predominate over common questions."[41] But, where the market for a security is efficient, the fraud on the market presumption allows plaintiffs to aggregate claims that would otherwise be ineligible for class treatment. This forgiving point of departure, coupled with the occasional nod to *Eisen*, has traditionally led courts to dispense with a detailed review of whether the material elements of plaintiffs' and putative class members' claims turn on common evidence.

In re One Bancorp Sec. Litig. reflects the traditional analysis.[42] There, the plaintiffs sought certification of a class asserting securities fraud claims, invoking the fraud on the market presumption.[43] The defendants admitted that the presumption could apply, but argued that the plaintiffs needed to show, or at least allege, that the securities at issue were traded in an efficient market.[44] The court spent but one sentence addressing the issue—citing *Eisen*, the court held that the plaintiffs "need not prove the merits of their case at [the class certification] stage of the litigation" and refused to examine the issue any further.[45] The court thus allowed the plaintiffs the benefit of the fraud on the market presumption, without so much as considering whether the plaintiffs could fulfill the prerequisites laid out in *Basic*.[46] To be sure, there have been exceptions to this traditional approach over the years; indeed, shortly after *Basic* was handed down, a district court in *In re MDC Holdings Sec. Litig.* held that a plaintiff must establish market efficiency to benefit from the fraud on the market presumption.[47] However, such rigorous analysis has been the exception rather than the rule, with most decisions citing *Eisen* and side-stepping any searching analysis of the evidence at the class certification stage.[48]

In antitrust cases, the presence of conspiracy allegations has generally been cited as facilitating the aggregation of claims, since the question whether the defendants conspired or not is, definitionally, common to all putative class members.[49] Very little attention has been paid to the separate question—analogous to reliance in securities actions—whether the evidence pertaining to the impact of the conspiracy on putative class members is also common. *In re Linerboard Antitrust Litig.* is characteristic of the typical approach.[50] There, rather than closely examining whether common issues would predominate in the trial of plaintiffs' claims, the court relied primarily upon a presumption that the alleged conspiracy had a class-wide impact.[51] Affirming the district court's certification of a class on that basis, the Third Circuit indicated that the district court had also relied upon expert testimony submitted by plaintiffs.[52] Though that testimony had fallen short of using a specific econometric model to demonstrate the alleged impact, the court found it to be sufficient.[53] Indeed, the district court and the Third Circuit both apparently accepted the experts' contentions without subjecting their methodologies to any scrutiny—for example, as to one expert, the Third Circuit simply concluded: "We deem his conclusion to be significant because it was supported by charts and studies."[54] Though this approach falls short of assuring the "actual, not presumed, conformance with Rule 23" which the Supreme Court pronounced "indispensable," this kind of analysis has proved common in antitrust conspiracy cases.[55]

IV. A New Direction in Recent Securities and Antitrust Decisions

Recent decisions in both securities and antitrust litigation have begun scrutinizing more closely the evidence likely to pertain to class claims at trial. Harmonizing *Eisen* with subsequent Supreme Court decisions, the courts in *In re Initial Public Offering Sec. Litig.*,[56] *Oscar Private Equity Inv. v. Allegiance Telecom, Inc.*,[57] and *Blades v. Monsanto*[58] each engaged in rigorous evidentiary analysis and demonstrated a willingness to examine the merits of plaintiffs' claims to the extent that the merits intersected with Rule 23's requirements. These cases constitute important steps forward in ensuring the required "actual conformance with Rule 23," per the Supreme Court's instructions in *Falcon*, regardless of the subject matter of the putative class claims. And they hold plaintiffs to a substantive evidentiary burden at the class certification stage that should be instructive in class litigation of all kinds.

A. In re Initial Public Offering ("IPO") Sec. Litig.

The *IPO* litigation's most remarkable feature may be its size rather than its holding—the action was actually comprised of 310 *consolidated* class actions, which had themselves been constructed from thousands of class

complaints.[59] These myriad complaints alleged that underwriters, issuers, and their officers had defrauded investors in connection with the IPOs of 310 issuers' securities.[60] One might speculate that it was the enormity of the plaintiff class (and thus the potential damages) that finally led the court to expand to the securities litigation context the rigorous analysis that had typically been reserved for other disciplines.

In fact, the Second Circuit used this securities case to clarify that a more rigorous standard would be required in *all* class actions. At the district court level, Judge Scheindlin had cited *Eisen*'s proscription against conducting a preliminary inquiry into the merits.[61] With that understanding of the Supreme Court precedent, Judge Scheindlin went on to apply *Caridad v. Metro-North Commuter Railroad*,[62] Second Circuit precedent requiring only that plaintiffs make "some showing" to carry their burden at the class certification stage.[63] The Second Circuit reversed, holding that *Caridad*'s lax standard, and Judge Scheindlin's analysis, had been based on a misunderstanding of *Eisen*.[64] The court explained that the "no merits inquiry" language in *Eisen* did not pertain to the analysis of whether Rule 23's requirements had been fulfilled, and that *Caridad* and the lower court had taken the language "out of its context."[65] The Second Circuit explained the standard for class certification arising from its analysis:

With *Eisen* properly understood to preclude consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement, there is no reason to lessen a district court's obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue.[66]

In so holding, the court noted that it was aligning the Second Circuit's standard with, among others, that which was articulated in *Szabo v. Bridgeport Machs., Inc.* (discussed above).[67]

Having jettisoned the trial court's mistaken reading of *Eisen*, the Second Circuit then required the plaintiffs to establish that the securities markets involved were efficient (and thus that they were entitled to the fraud on the market presumption) by a preponderance of the evidence.[68] Gone was the notion that they could prevail just by producing "some evidence" that the presumption's prerequisites could be met.[69] The court's analysis demonstrated that the plaintiffs could not meet their burden.[70] Noting the absence of contemporaneous analyst coverage for IPO shares, the court pointed out that the market for such shares lacked the flow of information characteristic of an efficient market.[71] The court further emphasized that, on the plaintiffs' own allegations, the market in IPO shares was slow to integrate corrective information, and therefore did not behave like an efficient market.[72] Thus, when the court tested whether Rule 23's requirements *had* been met, rather than assessing whether plaintiffs' evidence suggested they *could* be met, the court found that the purported class action was unsustainable.

Beyond ensuring that plaintiffs had to meet the same burden on a motion for class certification regardless of the subject matter of their claims, this case also constituted a convergence of different disciplines' applications of Rule 23 in another respect. Whereas the tort cases described above reflect an interest in protecting defendants from undue settlement pressure, the opposite concern was frequently expressed in securities cases. That is, in securities cases, it was common for courts to be more indulgent of class treatment to ensure that plaintiffs would be able to vindicate their rights in case their allegations proved to be true.[73] The Second Circuit's analysis in *IPO* was not skewed by that goal.

B. Oscar Private Equity Inv. v. Allegiance Telecom, Inc.

Allegiance, like *IPO*, involved the availability of the fraud on the market presumption.[74] There, an investor filed suit after the defendant telecommunications company revealed that it had misstated its line-count information.[75] On the date of that announcement, the company's stock price dropped by 28 percent.[76] However, besides correcting its line count information, the company made other significant announcements on that day; in the same release to the market, the company reported that it had missed analysts' earnings per share targets, that it had experienced greater losses than certain analysts had expected, and that it had a "very thin margin for error" in meeting its revenue covenants for the coming year.[77] Plaintiff, on behalf of the class of investors that was damaged by this stock price drop, claimed that the misstated line-count information constituted securities fraud, and sought to recover damages for the class. As in nearly all securities class actions, plaintiff's ability to bring its claims on a class basis depended upon the availability of the fraud on the market presumption—without it, individual issues of reliance would predominate.

On appeal, the Fifth Circuit held that the district court had abused its discretion in certifying the class, and held plaintiffs to a heightened standard when invoking the fraud on the market presumption. In doing so, the court echoed the concerns courts have expressed in the mass torts context about the "*in terrorem* power of certification"—the court implied that fairness demanded that it rigorously analyze any class,

because certification could have the effect of forcing a settlement even of unmeritorious claims.[78] The court thus applied a standard analogous to that employed by the Second Circuit in *IPO*, and weighed the evidence for and against market efficiency, requiring the plaintiff to prove that the fraud on the market presumption should apply by a preponderance of the evidence.[79] The court further held that in order to receive the benefit of the fraud on the market presumption, the plaintiff had to prove, by a preponderance of the evidence, that the line-count restatement had moved the stock price.[80] In other words, plaintiff would be required to show loss causation at the class certification stage in order to establish the conditions for a fraud on the market.[81]

Discerning the link between loss causation and Rule 23 requires taking a closer look at the fraud on the market presumption which, as *IPO* explained, a securities plaintiff practically requires to obtain class certification. The fraud-on-the–market theory presumes that an efficient market would have incorporated the misrepresentation into the price the plaintiffs paid for the stock.[82] Thus, merely by purchasing shares whose price has been affected by misrepresentations or omissions, a plaintiff can, under the doctrine, establish the element of reliance.[83] The question the Fifth Circuit grappled with was: what if the alleged misrepresentation did not move the stock price? The Fifth Circuit reasoned that without proof that a misrepresentation moved the market in some way, then the stock price can no longer supply the causal link between the misrepresentation and the plaintiff's injury.[84] With this link severed, the fraud on the market theory should no longer be available to the plaintiff, and class litigation should founder on the requirement that reliance be proved the old-fashioned way: individually.[85] Thus, the Fifth Circuit's approach, motivated by due process concerns for both the plaintiff and the defendant, can be presented simply as a logical result of an emphasis on ensuring actual, rather than presumed, compliance with Rule 23.[86]

C. Blades v. Monsanto Co.

Courts have also begun applying analogous rigor in addressing class treatment of antitrust conspiracy claims.[87] *Monsanto*[88] illustrates the new approach.[89] The Eighth Circuit in that case affirmed the district court's refusal to certify a class whose alleged injury could not be established through common proof. There, plaintiff farmers alleged a nation-wide conspiracy among companies selling genetically modified seeds and Monsanto, the company that had developed the genes used in those seeds, to inflate the seeds' prices.[90] To demonstrate the alleged price-fixing had caused class-wide injury—an essential element of plaintiffs' class certification theory—plaintiffs submitted expert testimony.[91] This did not differentiate *Monsanto* from other antitrust cases, as plaintiffs frequently rely upon expert testimony to establish this element.[92] However, the court's analysis of that testimony did set this case apart.

Instead of accepting the expert's testimony at face value, the district court analyzed his claims as well as the assumptions underlying his conclusions.[93] In doing so, the court did not opine as to his credibility or the validity of his conclusions, but limited its inquiry to whether his testimony demonstrated that impact could be shown using class-wide proof.[94] The court found that it did not. Indeed, the court indicated that the expert proffered by plaintiffs had assumed the very conclusion he should have been proving—that the markets and alleged conspiracy operate in a way that would impact the whole class.[95] The facts on the ground, involving varying growing conditions, consumer preferences, and geographic locations resulted in "highly individualized" markets and widely varying prices.[96] The district court responded: "I cannot 'presume' or 'assume'—much less 'conclude'—class-wide impact here."[97] In place of the previous practice of almost presumptive certification, the Eighth Circuit in *Monsanto*, like the Second Circuit in *IPO* and the Fifth Circuit in *Allegiance*, required plaintiffs to convince the court that their purported class claims actually turned on common proof.

Importantly, the district court in *Monsanto* cited *Eisen*, but not for the proposition that it is improper to delve into the merits of the plaintiffs' claims on class certification.[98] Rather, the court relied on *Eisen* to inform *how* it could conduct its merits inquiry. The court began its predominance analysis by citing *Falcon*, and noting that a Rule 23(b)(3) class action necessitated "looking behind the pleadings."[99] It then used *Eisen* to explain that this merits inquiry should only entail determining whether common proof would be required to support plaintiffs' allegations, using particular caution where the dispute approached the heart of the plaintiffs' claim.[100] *Monsanto* thus harmonized *Eisen* with the Supreme Court's subsequent instructions to ensure actual compliance with Rule 23.

V. Toward A Common Fact-Finding Standard Under Rule 23

These recent cases from the securities and antitrust arenas, where courts have traditionally been most indulgent of class treatment, offer important lessons for courts addressing class certification generally, particularly with regard to the nature of the evidentiary burden

plaintiffs should properly bear at the class stage. They suggest that on factual elements necessary to the Rule 23 inquiry, plaintiffs should be required to demonstrate those elements by a preponderance of the evidence, rather than merely providing "some evidence," or showing enough evidence to survive a hypothetical summary judgment motion on the question, as one commentator recently suggested.[101]

Whether under Rule 23(b)(3) or otherwise, the court needs to understand what issues and defenses can be tried with proof common to all, and what issues will fracture into individual proceedings. This essentially is a factual inquiry: is the named plaintiffs' proof of reliance (to take the securities fraud example) the same proof that will be offered by absent class members? Only after making such factual findings concerning which questions do and do not turn on common proof can the court then proceed to the discretionary elements of Rule 23 analysis. Under Rule 23(b)(3), this discretionary element involves ascertaining whether common questions "predominate" over individual ones.[102] Similarly, under 23(b)(2), the court makes a discretionary determination regarding whether the relation of common to individual questions is such that the proposed class is sufficiently cohesive to warrant a joint trial.[103] Thus, in *IPO*, the plaintiffs properly bore the burden of establishing market efficiency, and in *Allegiance*, plaintiffs needed to show loss causation, since the courts of appeals determined that those were critical factual underpinnings to their burden of showing that reliance was subject to common proof in their securities fraud claims. Similarly, the court in *Monsanto* required plaintiffs to show that the "causation of injury" element of their claims would turn on common proof. When plaintiffs could not meet this burden, the court properly held that their action did not warrant class treatment.

Anything short of requiring plaintiffs to establish that allegedly common issues turn on "classwide" proof common to all claimants, *by a preponderance*, is insufficient to protect the parties and the courts from improvident class litigation. If a material issue in the case appears to the court, at the class certification stage, to turn on individual evidence and require claimant-by-claimant factfinding, it is unlikely to mature into a "common" issue before the commencement of trial. Certification on the basis that plaintiff has "some" evidence to suggest that the issue "could" be adjudicated with common evidence therefore commits the parties to wasteful expenditures on notice, and usually to gargantuan discovery, with little if any payoff, since the class should properly require decertification. Or worse: since courts rarely revisit class determinations in practice,[104] application of a lesser evidentiary standard can result in a hopelessly complex class trial that will either disintegrate into individualized proceedings (if due process principles are faithfully applied) or be tried to judgment only through an artificial homogenization of the issues and proof at trial, usually to the detriment of the defendant.

The Federal Reporters are replete with cases that vividly illustrate the problems that arise when a court fails to properly scrutinize the probable trial evidence at the class certification stage. *Broussard v. Meineke* is one such case.[105] There, the Fourth Circuit ultimately decertified a class of franchisees making claims against their franchisor, but not before the parties had spent untold resources on a lengthy trial.[106] The claims included in the initially certified class involved the breach of multiple, materially different contracts, and various alleged misrepresentations which had been made to each franchisee individually.[107] The result was that, at trial, the franchisor was forced to defend against a "fictional composite," and did not have the benefit of deposing or cross-examining the members of the "disparate" group that actually made up the plaintiff class.[108] On appeal, the Fourth Circuit recognized that the lower court had improperly certified a class, and went on to detail a litany of individualized factual issues that the district court failed to consider.[109] Among those issues were: material variations among the class members' contracts, the franchisor's varying representations to each class member, each franchisee's individual reliance on the franchisor's representations, the reasonableness of that reliance, the tolling of the statute of limitations, and the calculation of damages.[110] Indeed, by the time they finished their analysis, the exasperated Fourth Circuit panel wrote: "frankly, in these circumstances, we doubt that any set of claims is common to or typical of this class."[111] Thus, they reversed the lower court's judgment in its entirety, concluding that the district court had failed to observe "the most primary principles of procedure and the most settled precepts of commercial law."[112]

Had the trial court held plaintiffs to a preponderance burden in showing that the material elements of their claims would turn on proof common to all, the train wreck cleaned up by the Fourth Circuit on appeal could have been avoided. *IPO*, *Allegiance*, and *Monsanto* likewise teach that application of a less rigorous standard to the factual elements of a plaintiff's Rule 23 burden poses unnecessary risks to the parties and to the courts. Requiring plaintiffs to meet a preponderance standard, rather than simply showing that common proof might be assembled down the road, is consistent with the rigorous treatment the Supreme Court called for in *Livesay* and

Falcon, and, indeed, by Rule 23 itself, which requires a court to find that class treatment *is* proper, not that it "could be."

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Endnotes

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

2 Oscar Private Equity Inv. v. Allegiance Telecom, Inc., 487 F.3d 261, 267 (5th Cir. 2007).

3 Newton v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 259 F.3d 154, 164 (3d Cir. 2001).

4 *See* Thomas E. Willging & Shannon R. Wheatman, *An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation*, Federal Judicial Center, at 50 (2005), *available at* http://www.fjc.gov/library/fjc_catalog.nsf/.

5 *See, e.g., In re N. Dist. of Cal., Dalkon Shield, IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982); Barnes v. Am. Tobacco Co., 176 F.R.D. 479 (E.D. Penn. 1997).

6 *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251 (February, 2002) (providing a detailed discussion of the development of the Supreme Court precedent as well as the divergence of securities litigation and mass tort litigation).

7 417 U.S. 156, 177 (1974).

8 437 U.S. 463, 469 (1978).

9 457 U.S. 147 (1982).

10 *See id.* at 161.

11 *See* 417 U.S. at 167-68.

12 *See id.*

13 *Id.* at 168.

14 *See id.*

15 *See id.* at 177.

16 *Id.*

17 *See* 437 U.S. at 469. Ultimately, Fed. R. Civ. P. 23(f) superseded the Court's conclusion that a certification or decertification order was not immediately appealable.

18 437 U.S. at 469 n.12 (quoting 15 Charles Alan Wright, et al., Federal Practice and Procedure § 3911, p. 485 n.485 (1976)).

19 *Id.*

20 457 U.S. at 160.

21 *See id.* at 150.

22 *See i*d. at 152.

23 *See id.*

24 *Id.* at 159.

25 *Id.* at 160.

26 249 F.3d 672 (7th Cir. 2001).

27 *Id.*

28 249 F.3d at 673, 678.

29 *Id.* at 674-675.

30 *Id.* at 675.

31 *Id.* at 677.

32 *See id.*

33 *Id.* at 678.

34 *See also, e.g.,* Zinser v. Accufix Research Inst., Inc. 253 F.3d 1180 (9th Cir. 2001); Haley v. Medtronic, Inc., 169 F.R.D. 643 (C.D. Cal. 1996); *In re GMC Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305 (S.D. Ill. 2007).

35 84 F.3d 734, 746-47 (5th Cir. 1996).

36 *Id.*

37 *See* 249 F.3d at 675-76.

38 521 U.S. 591, 625 (1997).

39 *See* Basic v. Levinson, 485 U.S. 224, 241-247 (1988) (holding that the presumption may be used to fulfill the reliance requirement in actions for securities fraud); *see also, e.g., In re Bearingpoint Inc. Sec. Litig.*, 232 F.R.D 534, 542-43 (E.D. Va. 2006).

40 *See Basic*, 485 U.S. at 243-44.

41 *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 43 (2d Cir. 2006).

42 136 F.R.D. 526 (D. Me. 1991).

43 *See id.* at 528, 532.

44 *See id.* at 532.

45 *Id.*

46 *See id.*

47 754 F. Supp. 785 (S.D. Cal. 1990).

48 *See, e.g.,* Garfinkel v. Memory Metals, Inc., 695 F. Supp. 1397 (D. Conn. 1988); Zinberg v. Washington Bancorp, Inc., 138 F.R.D. 397, 404 (D.N.J. 1990); Kinney v. Metro Global Media, Inc., C.A. No. 99-579 ML, 2002 U.S. Dist. LEXIS 18628, at **9-11 (D.R.I. Aug. 22, 2002); *In re Blech Sec. Litig.*, 187 F.R.D. 97, 104 (S.D.N.Y. 1999).

49 *See, e.g.,* Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc., 209 F.R.D. 159, 165-67 (C.D. Cal. 2002).

50 305 F.3d 145 (3d Cir. 2002).

51 *See id.* at 151-52.

52 *See id.* at 153-155.

53 *See id.*

54 *Id.* at 153.

55 *See, e.g.,* Bogosian v. Gulf Oil Corp., 541 F.2d 534 (3d Cir. 1977); *In re Alcoholic Beverages Litig.*, 95 F.R.D. 321 (S.D.N.Y. 1982); *In re Potash Antitrust Litig.*, 159 F.R.D. 682 (D. Minn. 1995).

56 471 F.3d 24 (2d Cir. 2006). O'Melveny & Myers LLP represented Defendant-Appellant Robertson Stephens, Inc. in this matter.

57 487 F.3d 261 (5th Cir. 2007).

58 400 F.3d 562 (8th Cir. 2005).

59 *See* 471 F.3d at 27.

60 *See id.*

61 *See id.* at 29-30.

62 191 F. 3d 283 (2d Cir. 1999).

63 471 F.3d at 29-30.

64 *See id.* at 33, 35.

65 *Id.* at 35.

66 *Id.* at 41.

67 *See* 471 F.3d at 41.

68 Just before the Second Circuit decided *IPO*, a class certification decision in the Southern District of New York similarly required plaintiffs to prove market efficiency by a preponderance of the evidence in order to avail themselves of the fraud on the market presumption. *See* Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 05 Civ. 1898 (SAS), 2006 U.S. Dist. LEXIS 52991, at *44-45 (S.D.N.Y. Aug. 1, 2006). However, the district court in *Bombardier* was still constrained by *Heerwagen v. Clear Channel Commc'ns.*, 435 F.3d 219 (2d Cir. 2006), pre-*IPO* Second Circuit precedent (discussed below at note 87) prohibiting the imposition of a preponderance burden where the element to be established overlapped with the merits. *See id.* Thus, the district court in *Bombardier* premised its holding on the conclusion that the question of whether plaintiffs were entitled to the fraud on the market presumption was not a merits issue. *See id.*

69 *See id.* at 42-45.

70 *Id.*

71 *See id.* at 42-43.

72 *See id.* at 43.

73 For example, this concern is a common justification for courts' certification of classes notwithstanding the intraclass conflicts identified in *In re Seagate II Sec. Litig.*, 843 F. Supp. 1341 (N.D. Cal. 1994). *See, e.g., In re Intelligent Elec., Inc. Sec. Litig.*, No. 92-1905, 1996 U.S. Dist. LEXIS 1713 (E.D. Pa. Feb. 13, 1996); Weikel v. Tower Semiconductor Ltd., 183 F.R.D. 377 (D.N.J. 1998).

74 487 F.3d 261 (5th Cir. 2007).

75 *See id.* at 262-63.

76 *See id.* at 263.

77 *See id.*

78 *Id.* at 267.

79 *Id.* at 267-68.

80 *See id.* at 265.

81 *See id.*

82 *See Basic*, 485 U.S. at 243-44.

83 *See* 487 F.3d at 264.

84 *See id.* at 264-65.

85 *See id.* at 264.

86 *See id.* at 267.

87 Indeed, it was in an antitrust decision that the Second Circuit first hinted at the sea-change coming in *IPO*. *See* Heerwagen v. Clear Channel Commc'ns., 435 F.3d 219 (2d Cir. 2006). While *Heerwagen* held that the court should not weigh evidence on class certification where Rule 23's requirements intersect with the merits of the underlying litigation, the Second Circuit also held that plaintiffs had to establish predominance under Rule 23 by a preponderance of the evidence where the predominance inquiry was independent of the merits. *See id.* at 231-33.

88 400 F.3d 562 (8th Cir. 2005).

89 *See also, e.g.,* Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp., 03-40973, 2004 U.S. App. LEXIS 11160 (5th Cir. June 7, 2004); Rodney v. Northwest Airlines, Inc., 04-5752, 2005 U.S. App. LEXIS 18242 (6th Cir. Aug. 22, 2005).

90 *See id.* at 565.

91 *See id.* at 569-70.

92 *See, e.g., Linerboard*, 305 F.3d 145 (discussed above).

93 *See* 400 F.3d at 569-70.

94 *See id.*

95 *See id.* at 570.

96 *Id.*

97 *Id.* at 570, 575 (affirming this aspect of the district court's reasoning).

98 *See id.* at 566-67.

99 *Id.* at 566.

100 *See id.* at 567.

101 *See* Alan B. Morrison, *Determining Class Certification: What Should the Courts Have to Decide?*, 8 Class Action Litig. Rep. (BNA) 541 (July 27, 2007).

102 *See, e.g.,* Haywood v. Barnes, 109 F.R.D. 568, 581 (E.D.N.C. 1986).

103 *See, e.g.,* Geraghty v. U.S. Parole Comm'n., 719 F.2d 1199, 1205-06 (3d Cir. 1983).

104 *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1301 (2002).

105 155 F.3d 331 (4th Cir. 1998).

106 *See id.* at 336-37.

107 *See id.* at 340-41.

108 *Id.* at 345.

109 *See id.* at 340-44.

110 *See id.*

111 *Id.* at 343.

112 *Id.* at 352.