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CLASS ACTION CERTIFICATION IN PRIVATE SECURITIES LITIGATION: ENDANGERED SPECIES?

*“Once, long ago and far away—say, before mid-2006—securities class actions were almost automatically certified.”*¹

INTRODUCTION

In the late 1990’s and in 2000, an exceptionally large number of initial public offerings (“IPOs”) traded at “extraordinary and immediate aftermarket premiums.”² During this bubble period, a select few investors received these “hot” allocations.³ Regulatory agencies probed into the impropriety of the distributions and investor confidence in the integrity of the pricing process plummeted.⁴ Furthermore, corporate accounting scandals, most notably with Enron and WorldCom, ran rampant.⁵

¹ John C. Coffee, Jr., *Future of Class Actions Depends on Pending Cases*, N.Y.L.J., March 29, 2007, at 5.

² NYSE/NASD IPO ADVISORY COMMITTEE, REPORT AND RECOMMENDATIONS I (2003), http://www.finra.org/web/groups/rules_regs/documents/rules_regs/p010373.pdf.

³ *See id.* Underwriters endowed “hot” IPO shares to senior executives of companies from whom the underwriter aspired to acquire future investment banking business. *See* JAMES D. COX ET AL., *SECURITIES REGULATION: CASES & MATERIALS* 140 (Aspen Publishers 5th ed. 2006).

⁴ NYSE/NASD IPO ADVISORY COMMITTEE, *supra* note 2, at 1. Investor confidence over the propriety of the pricing process decreased because of large first-day price increases in the IPOs. *Id.* Those select few investors who received shares of “hot” IPO allocations received an immediate substantial profit. *Id.* Abusive behavior on the part of investment banks and corporate officers resulted because their shares were guaranteed a profit and were often allocated for a promise of future business. *Id.* Investigations revealed that certain underwriters and other participants in IPOs engaged in improper and often illegal conduct contrary to the best interests of investors and the U.S. markets. *Id.* This conduct was most frequent during the IPO bubble period of the late 1990’s and early in 2000. *Id.* The Committee proposed forward-looking reforms to prevent future abuse. *Id.* at 4-19. The National Association of Securities Dealers, Inc. (“NASD”) began the underlying investigations against the investment banking firms in May 2000. Press Release, Nat’l Ass’n of Sec. Dealers, Inc., NASD Charges Frank Quattrone with Spinning, Undermining Research Analyst Objectivity, Failure to Cooperate in Investigation (Mar. 6, 2003), <http://www.finra.org/PressRoom/NewsReleases/2003NewsReleases/P002948.html>. According to Mary Schapiro, NASD Vice Chairman, “Recent investigations into conflicts of interest on Wall Street have shown that in too many cases in the past, investors’ interests were compromised for greater investment banking revenues.” *Id.*

⁵ *See* Penelope Patsuris, *The Corporate Scandal Sheet*, Aug. 26, 2002, www.forbes.com/2002/07/25/accountingtracker.html (listing corporate accounting scandals that “rocked the markets” in early 2000’s); *see also* COX, *supra* note 3, at 9-10 (discussing both Enron’s and

In an attempt to reform the underwriters' improper IPO practices, the New York Attorney General's Office and other regulatory agencies entered into a \$1.4 billion "Global Settlement" with the nation's top ten investment banking firms.⁶ The goal of this historic agreement was to "balance[] reform in the industry and bolster confidence in the integrity of equity research" along with resolving the existing conflict of interest schemes.⁷ Additionally, enforcement actions by these agencies addressed improper IPO arrangements.⁸ For example, the National Association of Securities Dealers, Inc. ("NASD") and the Securities and Exchange Commission ("SEC") filed a set of IPO rules aimed at promoting fair IPO allocations.⁹ Also, at the SEC's request, the NASD and the New York Stock Exchange ("NYSE") formed an IPO Advisory Committee that issued a report recommending changes in regulations applicable to IPO underwritings.¹⁰ These regulatory agencies also brought actions against

WorldCom's failings).

⁶ See Press Release, SEC, NY Attorney Gen., NASD, NASAA, NYSE and State Regulators Announce Historic Agreement to Reform Investment Practices; \$1.4 Billion Global Settlement Includes Penalties and Funds for Investors (Dec. 20, 2002), <http://www.sec.gov/news/press/2002-179.htm> (stating purpose and terms of "global settlement"). The agreement concluded a joint investigation by the regulatory agencies into the undue influence of investment banking interests on securities research at investment banks. *Id.*

⁷ *Id.* Terms of the agreement included: absolute separation between research and investment banking to prevent stock recommendations influenced by pressure to secure investment banking clients; ban on IPO spinning; independent research for a five-year period; full disclosure of analyst recommendations; and monetary sanctions totaling \$1.4 billion in penalties, restitution, and fines to be used for investor education. *Id.* Eliot Spitzer, former New York Attorney General, stated, "This agreement will permanently change the way Wall Street operates." *Id.* Former NASD Chairman and CEO, Robert Glauber, noted, "This settlement marks a vital step in restoring investor confidence . . . [I]t makes plain that cleaning up research and IPO practices is not just good ethics – it's good business." *Id.* Former NASAA President Chris Bruen referred to the agreement as "represent[ing] the dawn of a new day on Wall Street." *Id.*

⁸ See Roberta S. Karmel, *Underwriters' Victory in Supreme Court Case*, N.Y.L.J., Aug. 16, 2007, at 3; see also *infra* notes 9-11 and accompanying text (addressing enforcement actions in response to inappropriate activities in securities industry).

⁹ See Karmel, *supra* note 8, at 3; see also Press Release, Nat'l Ass'n of Sec. Dealers, Inc., NASD: 2003 in Review (Dec. 30, 2003), <http://www.finra.org/pressroom/newsreleases/2003/newsreleases/p002808> (announcing NASD's focus on IPO issues by proposing rules to promote fair IPO allocation). The proposals "address[ed] the areas of conflicts of interest, illicit quid pro quo arrangements, spinning and other IPO allocation abuses – along with enhancing the process of the pricing of IPO shares." *Id.* In addition, the NASD established an Investor Education Foundation to provide investors with information and tools to assist in their understanding of the financial markets. *Id.*

¹⁰ See NYSE/NASD IPO ADVISORY COMMITTEE, *supra* note 2, at 3-20 (recommending changes to IPO underwriting process to securities industry). The Committee's proposals supplemented the Global Settlement; the Sarbanes-Oxley Act of 2002; and relating regulatory rules pertaining to analyst conflicts, corporate governance, and registered representatives. *Id.* at 3. The four basic themes of the recommendations included: 1) pricing of IPOs in a transparent fashion to avoid aftermarket misrepresentations; 2) elimination of abusive allocation practices; 3)

corporate officers at Credit Suisse First Boston (“CSFB”) and Salomon Smith Barney (“SSB”).¹¹

In the aftermath of the high tech bubble burst and resulting corporate scandals, individuals sought redress against underwriters.¹² Specifically, many shareholders brought private class actions to seek justice for their securities fraud claims.¹³ Today, despite the scandals and reforms, “[o]nce-thriving securities-fraud lawsuits, hailed by shareholders and bashed by businesses, are facing an onslaught of legal challenges that could cripple the controversial class actions.”¹⁴ Class action lawsuits are decreasing in frequency and “[b]usinesses are stepping up their assault on what they call frivolous litigation.”¹⁵

improvement of the flow of and access to information regarding IPOs by regulators; and 4) encouragement of highest possible standards for underwriters. *Id.* Following these recommendations “the SEC approved a new rule that fosters a public distribution of IPO shares by prohibiting the purchase of IPOs by industry ‘insiders’ and other persons who are in a position to direct futures business.” Nat’l Ass’n of Sec. Dealers, Inc., *supra* note 9.

¹¹ See Press Release, Nat’l Ass’n of Sec. Dealers, Inc., Salomon Smith Barney Fined \$5 Million for Issuing Misleading Research Reports on Winstar; Charges Filed Against Jack Grubman and Christine Gochuico (Sept. 23, 2002), <http://www.finra.org/PressRoom/NewsReleases/2002NewsReleases/P002912> (announcing fine for SSB’s issuing materially misleading research reports in 2001 on Winstar Communications, Inc.). In March 2003, charges were brought against Frank Quattrone, the former head of CSFB’s technology sector investment banking group, for IPO spinning violations as well as mismanaging his organization to the detriment of research analyst objectivity. See Nat’l Ass’n of Sec. Dealers, Inc., *supra* note 4.

¹² See Karmel, *supra* note 8, at 3 (stating regulatory probes and private actions brought against underwriters). For example, in one case, thousands of investors filed class actions against 310 issuers, fifty-five underwriters, and hundreds of individuals, alleging securities laws violations due to abuses in IPO underwritings. In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 27 (2d Cir. 2006), *reh’g denied*, 483 F.3d 70 (2d Cir. 2007) [hereinafter *In re IPO*].

¹³ See Adam C. Pritchard, *Should Congress Repeal Securities Class Action Reform?* 2 (Univ. of Mich., John M. Olin Center for Law & Economics, Working Paper No. 03-003, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=389561 (“The recent spate of corporate scandals has brought the class action bar to the surface, lured by the prospect of tens of millions of dollars in attorneys’ fees.”). Further, the SEC commented that private class actions are a “necessary supplement” in an effort to police fraud. *Id.* at 3. These class actions promised compensation to fraud victims and “str[uck] genuine fear into the hearts of corporate executives.” *Id.*

¹⁴ Edward Iwata, *Fewer Lawsuits Charge Securities Fraud*, (Oct. 7, 2007), http://www.usatoday.com/money/companies/2007-10-07-securities-fraud-lawsuits_N.htm?csp=34. Class action securities fraud filings dropped far below historical averages for the fourth consecutive six-month period beginning mid-2005 and ending mid-2007. See News Release, Stanford Law School Securities Class Action Clearinghouse and Cornerstone Research, Sec. Class Action Filings in First Half of 2007 Remain Well Below Historical Averages (July 9, 2007), http://securities.stanford.edu/scac_press/20070710_YIR07mid_Press_Release.pdf.

¹⁵ Iwata, *supra* note 14. Despite the decline in class action filings, settlements have exceeded previous totals. See News Release, Cornerstone Research, Sec. Class Action Settlements Skyrocket in 2006 Finds Cornerstone Research (Mar. 21, 2007), http://securities.stanford.edu/Settlements/REVIEW_1995-2006/Settlements_Through_12_2006_PR.pdf. The increase in the total value was due to an increase in the average settlement size and not an increase in the number

This Note, guided by Rule Twenty-Three of the Federal Rules of Civil Procedure (“Rule 23”) and appellate case law, explores a major procedural hurdle that plaintiffs face during securities class action certification.¹⁶ Part II examines the history of securities fraud class action claims.¹⁷ Sections A and B of Part II observe the role of Rule 23 in securities class actions by outlining the certification requirements and the Rule’s 1998 amendment that impacts these actions.¹⁸ In addition, Section C takes a close look at the current circuit split over the extent to which courts may inquire into the merits of a case in evaluating class certification.¹⁹ Specifically, this section compares the “some showing” standard with the “rigorous analysis” standard behind this inter and intra circuit conflict.²⁰

Part III explores the potential impact of the *In re Initial Public Offerings Securities Litigation*²¹ [hereinafter *In re IPO*] decision.²² Specifically, issues considered in this section include: forum shopping by the plaintiffs, extension of discovery for counsel, small investors’ prospects of going solo, and whether other federal class action suits will be affected.²³ Finally, Part IV concludes with a suggestion that at the class certification stage, judges must allow the parties to develop and present a full record of Rule 23 issues.²⁴ These tough standards will likely result in the contraction of class action certification for securities litigation.²⁵

HISTORY

Class Action Development and Procedures

In the aftermath of the stock market crash of 1929 and during the New Deal, Congress enacted the nation’s first two pieces of federal

of cases settled. *Id.*

¹⁶ See FED. R. CIV. P. 23 (encompassing class action rule of civil procedure); see also Jonathan C. Dickey, *Current Trends in Federal Securities Litigation*, at 417-18 (P.L.I. Corporate Law and Practice Course Handbook Series No. 11072, 2007) (stating Rule 23 governs federal security class actions and case law interpretations).

¹⁷ See *infra* Part II.

¹⁸ See *infra* Parts II(A) and (B).

¹⁹ See *infra* Part II(C).

²⁰ See *infra* text accompanying notes 46-82 (comparing conflicting circuit standards).

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

²² See *infra* Part III.

²³ See *infra* notes 86-104 and accompanying text.

²⁴ See *infra* Part IV.

²⁵ See *infra* Part IV.

securities legislation: the Securities Act of 1933 (“Securities Act”) and the Securities Exchange Act of 1934 (“Exchange Act”).²⁶ Both Acts only provided for government enforcement of securities laws violations.²⁷ In 1971 the United States Supreme Court held that section 10(b) of the Securities Act allowed for a private right of action.²⁸ Once the private right of action was allowed, a litigation explosion ensued and securities suits began to be filed as class actions under Rule 23.²⁹ Securities class action abuse followed, prompting Congress to enact litigation reform.³⁰

²⁶ See THOMAS LEE HAZEN, *LAW OF SECURITIES REGULATION* 17-23 (Thomson / West 5th ed. 2005) (describing antecedents of securities regulation in United States). The Securities Act regulates the initial distribution of securities by requiring the issuer of securities to register with the SEC and submit a prospectus prior to a public offering. Mark D. Wood, *Understanding the Securities Law 2007: Liability for Securities Laws Violations* at 606-24 (P.L.I. Corporate Law and Practice Course Handbook Series. No. 10973, 2007). This Act requires full disclosure with the goal of providing investors with an adequate opportunity to assess the merits of an investment. See also *Can-Am Petroleum Co. v. Beck*, 331 F.2d 371, 373 (10th Cir. 1964) (stating purpose to “protect the naïve or uninformed investor and to deny recourse to the reckless or fraudulent seller of securities”). The Exchange Act regulates all aspects of the post-distribution of securities. See HAZEN, *supra*, at 22. This Act is broader than the Securities Act because it regulates all market exchanges as well as broker-dealers and focuses on both buyers and sellers of securities. See *id.* at 22-23. Further, this Act provides the SEC with disciplinary powers. See Wood, *supra*, at 589.

²⁷ See Russell Kamerman, Note, *Securities Class Action Abuse: Protecting Small Plaintiffs’ Big Money*, 29 CARDOZO L. REV. 853, 857 (2007) (stating no private right of action when securities laws initially enacted).

²⁸ See *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 (1971) (confirming an implied cause of action can be brought under Section 10(b) and Rule 10b-5). Since 1975, the Supreme Court has taken a restrictive view of federal securities laws, especially with regard to implied private rights of action, to the point of rejecting many SEC views. See HAZEN, *supra* note 26, at 5.

²⁹ See FED. R. CIV. P. 23 (outlining class action certification requirements). Rule 23, which governs class actions, requires a two-step analysis to determine if class certification is appropriate. *Id.* First, plaintiffs must satisfy all four prerequisites for certification in Rule 23(a): 1) numerosity; 2) commonality; 3) typicality; and 4) adequacy of representation. *Id.* Second, the action must also satisfy one of the conditions outlined in Rule 23(b). *Id.* Those injured by a securities law violation can bring a civil action to the courts for damages under either a specific liability provision, or they can assert an implied right of action under the provision prohibiting such conduct. See HAZEN, *supra* note 26, at 5. In addition to specific violations such as “insider trading,” a large number of allegations included corporate mismanagement. See *id.* Plaintiffs brought suits under federal securities laws to overcome state court restrictive decisions and procedural obstacles. See *id.*

³⁰ See HAZEN, *supra* note 26, at § 1.8 (articulating litigation reform). In 1995, Congress enacted the Private Securities Litigation Reform Act (“PSLRA”). *Id.*; see also Private Securities Litigation Reform Act, 15 U.S.C. § 78u (2000). The PSLRA’s purpose was “to prevent law firms from paying illegal kickbacks to lead plaintiffs, to prevent class actions from being used as strike suits, and to prevent lawyer-driven securities class actions.” Kamerman, *supra* note 27, at 860-61. Primarily, the PSLRA increased the pleading standards in federal class actions for the plaintiffs. See Thomas O. Gorman, Robert J. Tannous, & William P. McGrath, Jr., *Securities Class Actions & Derivative Litigation: Issues that Keep Corporate Counsel Awake at Night*, BUSINESS LAW TODAY, Nov.-Dec. 2007, at 37-41. Subsequently, Congress enacted the

Federal Rules of Civil Procedure Issue in Securities Class Actions

The Private Securities Litigation Reform Act (“PSLRA”) heightened pleading standards for securities class actions and made class certification the critical litigation decision.³¹ Historically, Rule 23 was interpreted liberally and courts generally found class certification appropriate for securities litigation.³² Further, “for many years, effective, timely and meaningful appellate review of class certification order in securities class actions was lacking.”³³ In 1998, Rule 23 was amended to include 23(f), which allows parties to request an immediate appeal by the circuit courts of any order granting or denying class certification without having to first obtain consent from the lower court.³⁴

This Rule, however, does not state the standard of review to determine whether such appeal is warranted.³⁵ Each circuit court of

Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), Pub. L. No. 105-353, 112 Stat. 3227 (codified as amended at 15 U.S.C. § 78(b)(b)) (2000). The SLUSA preempts most securities fraud class actions involving publicly traded securities. *See HAZEN, supra* note 26, at §1.2(3)(e). Thus, securities class actions involving fraud must be brought into federal court under federal law. *See Kamerman, supra* note 26, at 864.

³¹ *See* THEODORE J. SAWICKI, CRAIG H. KUGLAR & J. ALEXANDER REED, SECURITIES LITIGATION: FORMS AND ANALYSIS 1-86 (Thomson / West ed. 2008) (database updated July 2008). If the class is certified then there is an incentive for the defendant to settle because his exposure is multiplied exponentially. *Id.* However, if the class certification is denied, then plaintiff is left with her claim alone, and the prospect of litigation through trial is unpleasant and financially impracticable. *Id.* Thus, few class actions are litigated in court. *Id.* *See generally* FED. R. CIV. P. 23, *supra* note 29 and accompanying text (outlining Rule 23).

³² *See* SAWICKI, *supra* note 31, at 1-86 to 1-89 (discussing historic interpretation of Rule 23).

³³ *Id.* at 1-86.

³⁴ *See* FED. R. CIV. P. 23(f). The rule states,

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Id. The purpose of the rule is to alleviate the following three concerns: 1) denial of class certification may sound the “death knell” of litigation because plaintiffs’ claims are too small to justify the expense of litigation; 2) defendant will be pressured to settle even if plaintiffs’ case is weak; and 3) most class actions are settled before an appeal and therefore fundamental issues of class actions are poorly developed. *See* SAWICKI, *supra* note 31, at 1-86 (summarizing Advisory Committee opinions of Rule 23(f)). Rule 23(f) gives the defendant an opportunity to seek appellate review in a putative securities class action. *See* FED. R. CIV. P. 23(f). Appellate review is important because “the Supreme Court has repeatedly recognized, [that] litigation under Rule 10b-5 presents a danger of vexatiousness different in the degree and in kind from that which accompanies litigation in general. This concern is only amplified if a class is certified.” Scott D. Musoff, *Giving Teeth to the PSLRA*, N.Y.L.J., July 9, 2007, at 13.

³⁵ *See* SAWICKI, *supra* note 31, at 1-86. However, the Rule’s advisory committee’s note

appeals articulated a standard for its jurisdiction.³⁶ The “reverse death knell doctrine” weighs heavily on all jurisdictions and “applies where the order granting class certification so raises the stakes for the defendant that it will be forced to settle rather than proceeding with a ‘bet the company’ trial.”³⁷

Rule 23(f) impacted securities class actions in numerous ways by allowing interlocutory appeals.³⁸ These appeals involve: (1) the basic requirements of Rule 23 and the standard used to determine if met; (2) the proper standard for district courts in ruling on motions for class certification; (3) the important underlying substantive law; and (4) the application of the “fraud-on-the-market doctrine.”³⁹ Recent decisions emphasize that trial courts should conduct a rigorous analysis of class certification requirements and carefully analyze the evidence supporting certification because of the impact of class certification on defendants.⁴⁰

Class Certification Standards Under FED R. CIV. P. 23: In re IPO

Securities class actions were almost automatically certified before mid-2006 because of: “(1) the ‘fraud on the market doctrine’ which eliminated the need to show individual reliance[;] (2) a minimal loss causation standard; and (3) the rule in *Eisen v. Carlisle & Jacquelin*,⁴¹ that the district court could not, at the certification stage, ‘conduct a preliminary inquiry into the merits of a suit.’”⁴² Classes were filed, certified, and then

provides some guidance. See FED. R. CIV. P. 23(f) advisory committee’s note (stating that “[p]ermission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.”).

³⁶ See SAWICKI, *supra* note 31, at 1-87 (outlining standards of review in all circuit courts of appeals). For example, the Seventh Circuit was the first circuit to explain a standard of review for applications under Rule 23(f). *Id.* The court defined three categories of instances in which review is appropriate. See *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999). First, when the denial of class certification ends the plaintiff’s case. *Id.* at 834. Second, when the classification allowance raises the stakes so high for the defendant that he will be forced to settle rather than proceed with a “bet the company” trial. *Id.* at 834-35. Third, when a fundamental legal issue needs clarification. *Id.* at 835.

³⁷ SAWICKI, *supra* note 31, at 1-90.

³⁸ See *supra* note 34 and accompanying text (discussing Rule 23(f)).

³⁹ See SAWICKI, *supra* note 31, at 1-91 to 1-96 (detailing instances of Rule 23(f) appeals).

⁴⁰ See cases cited *infra* note 50 (holding requirement to look beyond pleadings at certification stage); see also *Dickey*, *supra* note 16, at 420 (discussing recent class certification issues in federal appellate court decisions); Susan E. Hurd & Michael Johnson, *2d Circuit’s ‘IPO’ Ruling*, THE NAT’L L. J., Jan. 29, 2007, at 15 (arguing for allowance of full record on Rule 23 at class certification stage).

⁴¹ 417 U.S. 156, 177 (1974).

⁴² *Coffee, Jr.*, *supra* note 1, at 5 (listing factors allowing automatic certification). However,

generally settled.⁴³ Recently, the circuit courts have issued conflicting opinions addressing the way trial courts should certify a class in securities cases.⁴⁴ Particularly, the “merits” inquiry and the “fraud-on-the-market” doctrine received attention.⁴⁵

1. Circuit Split Over the Extent of the “Merits” Inquiry When Evaluating Class Certification

The source of the appellate court conflict is the appropriate evidentiary standard—the extent of inquiry into the merits of a case—necessary to satisfy class certification requirements.⁴⁶ Courts take two very different approaches to class certification.⁴⁷ The minority stance is that the class certification decision should be made “as soon as practicable after the commencement of the action” and be “tailored to facts emerging in discovery.”⁴⁸ The minority courts, using the “some showing” standard,

“[f]ollowing the Supreme Court decision in *Eisen v. Carlisle & Jacquelin*, courts have struggled to define with precision the standards governing a district judge’s adjudication of a motion for class certification under Rule 23.” See DECHERT LLP, SECOND CIRCUIT IMPOSES STRINGENT BURDENS FOR CLASS CERTIFICATION UNDER RULE 23 1 (2006), http://www.dechert.com/library/WCSL_12-06_Alert.pdf.

⁴³ See Coffee, Jr., *supra* note 1, at 5 (detailing Second Circuit Rule 23 standards). For example, the Second Circuit explained that plaintiffs only had to make some showing of certification requirements and not satisfy the preponderance of evidence standard as required by other circuits. See *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999).

⁴⁴ See JONATHAN C. DICKEY, CURRENT TRENDS IN FEDERAL SECURITIES LITIGATION, American Law Institute – American Bar Association Continuing Legal Education (June 28-29, 2007), at 759.

⁴⁵ *Id.* (noting diverging federal court securities class certification opinions and recent Supreme Court decisions insisting “everything . . . now up for grabs”).

⁴⁶ See Dickey, *supra* note 16, at 421 (characterizing circuit split based on merits inquiry).

⁴⁷ See *id.*

⁴⁸ See *id.* (citing *Oscar Private Equity Inv. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 266 (5th Cir. 2007)); see also Kent Yalowitz & Elizabeth A. Wells, *The Importance of Discovery from “Absent” Class Members. It Can Make all the Difference on the Motion to Certify*, N.Y.L.J., June 18, 2007, at S8 (suggesting pre-certification discovery from absent class members useful for deciding Rule 23 conformity); Christopher M. Mason, Esq. & Richard A. McGuirk, Esq., *The In re Initial Public Offering Securities Litigation Class Certification Reversal: How Far Will the Ripples Spread?*, Nixon Peabody LLP Class Action Alert: Recent Developments in Class Action Law, Dec. 12, 2006 at 3, <http://www.nixonpeabody.com/publications/detail3.asp?id=1621> (implying discovery into case merits may be necessary at class certification stage). In 2003, Rule 23 was amended to require that the class certification decision be made “at an early practicable time.” FED. R. CIV. P. 23(c)(1)(A). The advisory committee’s notes approved “controlled discovery into the merits” of Rule 23 issues and advised that a court should refuse to certify until all Rule 23 requirements are met. FED. R. CIV. P. 23(c) advisory committee’s notes; see also *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 39 (2d Cir. 2006) (commenting on significance of 2003 Rule 23 amendments).

find that class certification is “divorced from the merits of the claim.”⁴⁹ The majority of circuit courts disavow that certification is always divorced from any inquiry into the merits of the case.⁵⁰ These courts adopt a “rigorous analysis” standard in deciding class certification.⁵¹ The district court must make sure that every Rule 23 requirement is met before certifying a class.⁵² Confusion arises when a Rule 23 requirement overlaps with the merits of the case.⁵³ When an overlap occurs, the conflict becomes whether the trial court has the authority to conduct an inquiry into the merits during the class certification stage.⁵⁴

⁴⁹ See *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 266 (5th Cir. 2007) (suggesting outdated view to keep separate merits inquiry from certification determination). *But see* *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (deciding district court’s “function at class certification stage was not to determine whether plaintiffs had stated a cause of action or whether they would prevail on the merits, but rather whether they had shown, based on methodology that was not fatally flawed, that the requirements of Rule 23 were met.”); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292 (2d Cir. 1999) (concluding plaintiffs must make “some showing” in order to satisfy class certification burden of proof). “Some showing” may take the form of expert opinions, uncontested allegations in the complaint, and evidence from an affidavit or live testimony. See *In re IPO*, 471 F.3d at 30.

⁵⁰ See *Dickey*, *supra* note 16, at 421; see also *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 6 (1st Cir. 2005) (aligning with majority view that district court entitled to look beyond pleadings); *Blades v. Monsanto Co.*, 400 F.3d 562, 566-67 (8th Cir. 2005) (agreeing with circuit majority that inquiry into merits may be required to meet certification requirements); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) (arguing for courts to look beyond pleadings to ensure all certification requirements are met); *Cooper v. Southern Co.*, 390 F.3d 695, 712 (11th Cir. 2004) (recognizing evidence pertaining to Rule 23 requirements often embodies merits of litigation); *Newton v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 259 F.3d 154, 166 (3d Cir. 2001) (quoting *Szabo v. Bridgeport Machs. Inc.*, 249 F.3d 672, 676 (7th Cir. 2001)) (“Before deciding whether to allow a case to proceed as a class action, . . . [courts] should make whatever factual and legal inquiries are necessary under Rule 23.”). These circuits hold that if courts only consider the pleadings, then “parties would have wide latitude to inject frivolous issues to bolster or undermine a finding of predominance.” Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1269 (2002).

⁵¹ See *supra* note 50 and accompanying text (outlining instances of merits inquiry). In application, “it may be necessary for the court to probe behind the pleadings” *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

⁵² See *Dickey*, *supra* note 16, at 422 (stating prerequisite for every Rule 23 requirement prior to class certification).

⁵³ See *id.* (identifying problem when Rule 23 requirements intersect with merits of suit).

⁵⁴ See *id.* (presenting conundrum of whether judge may conduct merits inquiry at certification). The creation of the inter and intra circuit conflicts lies with two Supreme Court decisions. See *Falcon*, 457 U.S. at 147; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 156 (1974). In *Falcon*, the Court determined that a class action “may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” *Falcon*, 457 U.S. at 161. The *Falcon* Court noted that “actual, not presumed, conformance with Rule 23(a) remains . . . indispensable.” *Id.* at 160. Most significantly, the *Falcon* Court held that “class determination generally involves considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiff’s causes of action.’” *Id.* (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) and *Mercantile Nat. Bank v. Landeau*, 371 U.S. 555, 558 (1963)). In

2. The Second Circuit's "Rigorous Analysis" Determination

The Second Circuit acknowledged Rule 23's uncertainty and clarified the standards governing class certification motions in its recent decision in *In re IPO*.⁵⁵ The court determined the appropriate standards that govern a district judge in adjudicating a motion for class certification under Rule 23.⁵⁶ Specifically, the court addressed whether the 2003 amendments to Rule 23 are consistent with the "some showing" standard that the Second Circuit utilized in previous decisions.⁵⁷ The Second Circuit dealt the plaintiff's bar a significant blow by rejecting the lenient "some showing standard" and insisting on a more stringent standard.⁵⁸

In addition, the court acknowledged the troublesome issue that arises when a Rule 23 requirement overlaps with a merits issue.⁵⁹ In

1974, however, the *Eisen* Court cautioned: "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." *Eisen*, 417 U.S. at 177. The *Eisen* Court reasoned that a defendant may be prejudiced in future proceedings when there is a preliminary determination of the merits during class certification. *Id.* at 178. Many circuit courts interpreted this decision as an absolute ban on issues of fact at the class certification stage when the facts overlap with the underlying merits of the lawsuit. See David L. Yohai & David. R. Singh, *Outside Counsel: A More Rigorous Approach to Class-Certification Motions*, N.Y.L.J., Mar. 22, 2007, at 4 (addressing class certification concerns). Thus, most courts "simply accepted allegations on such 'overlap' issues as true or applied relaxed standards of proof, such as the district court's 'some showing standard' . . . [thereby] making it relatively easy to certify class actions." See AKIN GUMP STRAUSS HAUER & FELD LLP, SECOND CIRCUIT REQUIRES HEIGHTENED STANDARD OF PROOF FOR CLASS CERTIFICATIONS EVEN IF MERITS ISSUES ARE INVOLVED 1 (Feb. 23, 2007), http://www.akingump.com/files/Publication/a508a307-6de5-46d5-8392-48016e9345cf/Presentation/PublicationAttachment/db31a4aa-eb5f-437f-a57b-4852_be03e319/948.pdf. Further, despite the *Falcon* and *Eisen* decisions, the Supreme Court "has said little about meeting the Rule 23 requirements." *In re IPO*, 471 F.3d 24, 33 n.4 (2d Cir. 2006).

⁵⁵ See *In re IPO*, 471 F.3d at 26.

⁵⁶ See *id.* (signaling broad issue before court).

⁵⁷ *Id.* at 31. Within this broad issue the court also analyzed: 1) whether the court must make a definitive ruling that each Rule 23 requirement must be met or whether only some showing is enough; 2) whether a Rule 23 requirement that overlaps with a merits issue lessens the standard for a Rule 23 requirement; and 3) whether the trial court abused its discretion by granting a motion for class certification in the pending litigation. *Id.* at 26-27.

⁵⁸ See *id.* at 27 ("A district judge may not certify a class without making a ruling that each Rule 23 requirement is met and that a lesser standard such as 'some showing' for satisfying each requirement will not suffice. . . ."). The court interpreted *Falcon*'s "rigorous analysis" language to apply with "equal force to all Rule 23 requirements." *Id.* at 32 nn.3-4. While acknowledging that "until now, our Court has been less than clear as to the applicable standards for class certification . . . [,]" the court concluded that the use of "some showing" standard was erroneous. *Id.* at 32. Thus, the tougher standard will make it difficult for small investors to find counsel to pursue individual suits. See Nathan Koppel & Paul Davies, *What to Do if Your Class-Action Suit Dies -- Small Investors Face Choice After Ruling in Big IPO Case: The Prospects for Going Solo*, WALL ST. J., Dec. 7, 2006, at D1.

⁵⁹ *In re IPO*, 471 F.3d at 41. The court aligned itself with *Gariety*, *Szabo*, and all other

examining this dilemma, the court evaluated *Eisen* and concluded that there was no basis for finding that a specific Rule 23 requirement was not established just because it overlapped with the merits of the case.⁶⁰ The court held that the statement in *Eisen* that courts considering certification may not look into the merits of a case was “made in a case in which the district judge’s merits inquiry had nothing to do with determining the requirements for class certification.”⁶¹ Thus, the Second Circuit in *In re IPO* mandates trial courts to use the rigorous analysis standard when making certification determinations even when the analysis compels inquiry into the merits of the case.⁶²

3. Effects of *In Re IPO* in Other Circuits

Since the *In re IPO* decision, the Fifth Circuit has issued two decisions reversing class certification orders in securities class actions.⁶³ The Fifth Circuit, like the Second Circuit, disavowed the view that certification is always divorced from an inquiry into the merits of a case.⁶⁴ For example, in *Regents of the University of California v. Credit Suisse First Boston (USA), Inc.*,⁶⁵ Enron shareholders brought suit against three investment banks for allegedly participating in fraudulent behavior that led

decisions that required “definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues. As *Gariety* usefully pointed out, the determination as to a Rule 23 requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge.” *Id.*

⁶⁰ See *id.* at 33 (explaining court’s reasoning).

⁶¹ *Id.* at 33. “In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.” *Id.* (quoting *Miller v. Mackey Int’l*, 452 F.2d 424, 427 (5th Cir. 1971)).

⁶² *In re IPO*, 471 F.3d at 27. The court concluded that a district court: 1) may certify a class only after making a finding that all Rule 23 requirements are met and that “some showing” standard will not suffice; 2) must make such determination even if there is an overlap between Rule 23 requirement and a merits issue; 3) must assess all evidence; and 4) may not certify cases pending on this appeal as class actions. *Id.* The prevailing viewpoint is that a court must examine whether all Rule 23 requirements are met even if the process requires the court to resolve issues that overlap with the merits of the case. See *supra* note 50 and accompanying text (determining preliminary inquiry into merits at class certification stage necessary to determine Rule 23 status).

⁶³ See *infra* text accompanying notes 64-70 (discussing Fifth Circuit case law reversing class certification by following merits inquiry).

⁶⁴ See *Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372, 381 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1120 (2008) (finding no compelling Fifth Circuit or Supreme Court precedential support to disallow merits inquiry); see also *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007) (finding obligation to ensure Rule 23 requirements met not diminished by overlapping requirements/merits issue).

⁶⁵ 482 F.3d 372 (5th Cir. 2007).

to Enron's collapse.⁶⁶ The Fifth Circuit reversed class certification and held that on a Rule 23(f) appeal, "this court can, and in fact must, review the merits of the district court's theory of liability insofar that they also concern issues relevant to class certification."⁶⁷ Furthermore, in *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*,⁶⁸ the Fifth Circuit overturned a class certified by a Texas federal court because the plaintiffs failed to prove loss causation.⁶⁹ The majority held, "district courts often tread too lightly on Rule 23 requirements that overlap with the 10b-5 merits, out of mistaken belief that merits questions may never be addressed at the class certification stage."⁷⁰

The lone dissenter lies in the Ninth Circuit.⁷¹ *Dukes v. Wal-Mart Stores, Inc.*⁷² is not a securities case, yet is indicative of the Circuit's most recent treatment of class action certification.⁷³ This case involved a Title VII (of the 1964 Civil Rights Act) action alleging that Wal-Mart was responsible for sex discrimination against its female employees.⁷⁴ In upholding the plaintiffs' class, the court established a lenient standard for district court review of the plaintiffs' certification evidence.⁷⁵ Thus, the Ninth Circuit holds its district courts to a less demanding "sufficiency of evidence" standard, while the majority of courts utilize a "rigorous analysis" standard.⁷⁶

Despite this opinion, the Ninth Circuit indicated it could review the

⁶⁶ See *id.* at 377-79 (discussing facts of case).

⁶⁷ *Id.* at 381 (stating case holding). "The fact that an issue is relevant to both class certification and the merits . . . does not preclude review of that issue." *Id.* at 380.

⁶⁸ 487 F.3d 261 (5th Cir. 2007).

⁶⁹ *Id.* at 269-70 (discussing facts of case). "By requiring plaintiffs to demonstrate loss causation before they may be certified as a class, *Oscar* functions as a means for screening out frivolous claims while at the same time protecting businesses from coerced settlements." Recent Case, *Fifth Circuit Holds That Plaintiffs Must Prove Loss Causation Before Being Certified As A Class – Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007), 121 HARV. L. REV. 890, 897 (2008).

⁷⁰ *Oscar Private Equity Invs.*, 487 F.3d at 268; see also *Unger v. Amedisys, Inc.*, 401 F.3d 316, 321 (5th Cir. 2005) (concluding Rule 23 text requires court to find all facts favoring class certification).

⁷¹ See *infra* text accompanying notes 72-76.

⁷² 474 F.3d 1214 (9th Cir. 2007), *withdrawn & superceded by*, 509 F.3d 1168 (9th Cir. 2007).

⁷³ See *Dukes*, 509 F.3d at 1176-93 (exemplifying Ninth Circuit's treatment of class certification).

⁷⁴ See *id.* at 1174-75 (discussing facts of case).

⁷⁵ *Id.* at 1244. The court cited *Eisen* for support of its deferential standard, saying "the district court was on very solid ground here as it has long been recognized that arguments evaluating the weight of evidence or the merits of a case were improper at the class certification stage." *Id.* at 1227.

⁷⁶ See *supra* note 50 and accompanying text (outlining majority standard).

merits in two prior decisions in the securities arena.⁷⁷ For example, in *Blackie v. Barrack*,⁷⁸ the court decided that determinations relevant to certification criteria “may require review of the same facts and the same law presented by review of the merits.”⁷⁹ In addition, this standard was reiterated in *Hanon v. Dataproducts Corp.*,⁸⁰ in which the court stated that trial courts are “at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case.”⁸¹ Therefore, what emerges is not only an inter-circuit conflict, but also an intra-circuit conflict.⁸²

ANALYSIS

Until the United States Supreme Court resolves the circuit split, the impact of the *In re IPO* decision will likely change the class certification approach in both Second Circuit district courts and courts elsewhere.⁸³ An immediate result of denial of class certification in a situation like *In re IPO* is that individual investors will be unable to pursue a suit on their own.⁸⁴ Specifically, it will be difficult for an individual to procure legal representation.⁸⁵ The amount of damages for an individual to recover must be financially rewarding in order for an attorney to take on the case.⁸⁶ Further, the risk of losing the suit will also make an attorney less willing to support an individual investor in her fight against a large financial institution.⁸⁷

In addition, an inquiry into the merits will make it more difficult for plaintiffs to pass the once relatively simple class certification hurdle.⁸⁸ The plaintiffs and their counsel now have the burden of satisfying the

⁷⁷ See *infra* text accompanying notes 78-82 (allowing merits inquiry in securities cases).

⁷⁸ 524 F.2d 891 (9th Cir. 1975).

⁷⁹ *Id.* at 897.

⁸⁰ 976 F.2d 497 (9th Cir. 1992).

⁸¹ *Id.* at 509 (quoting *In re Unioil Sec. Litig.*, 107 F.R.D. 615, 618 (C.D. Cal. 1985)).

⁸² See *supra* text accompanying notes 46-81 (articulating circuit split).

⁸³ See *infra* notes 84-104 and accompanying text (analyzing impact of *In re IPO* decision).

⁸⁴ See Koppel & Davies, *supra* note 58, at D1 (reasoning plaintiffs will have insufficient economic resources to continue litigation on individual basis).

⁸⁵ *Id.*; see also Yalowitz & Wells, *supra* note 48, at S8 (reiterating very high stakes at class certification stage “because of the expense of preparing and trying a class action (and the risks of an unfavorable outcome) are generally magnified greatly as compared to an individual case”).

⁸⁶ See Koppel & Davies, *supra* note 58, at D1 (arguing claims need to be “anywhere from a hundred thousand to several million to make pursuing them worth a lawyer’s time”).

⁸⁷ See *id.* (addressing difficulties for small investors to find counsel to pursue individual suits).

⁸⁸ See *infra* notes 89-91 and accompanying text (discussing expansion of evidence to satisfy class action burden).

requirements for class action.⁸⁹ As such, discovery must expand to allow a court to comply with the standard that “all of the evidence must be assessed as with any other threshold issue.”⁹⁰ Evidence from affidavits, documents, or testimony must be presented to determine if the class should be certified, yet in evaluating this evidence, the judge must ensure that a Rule 23 hearing does not “extend into a protracted mini-trial of substantial portions of the underlying litigation”⁹¹

The message from the *In re IPO* decision is clear: “plaintiffs should be held to their burden of proof for each Rule 23 element, and that a district court must consider all evidence relevant to such issues, including rebuttal evidence offered by the defendants.”⁹² Although presenting enough evidence will carry a substantial investment of time and resources for the plaintiffs, it will likely result in satisfaction of the Rule 23 burden.⁹³ In addition, the defendant will have an opportunity to use materials gathered from discovery to oppose class certification.⁹⁴

Given the importance of class certification in securities litigation, the Second Circuit took a significant step toward “protecting defendants from meritless class action by clearing up confusion around what standards govern class certification motions.”⁹⁵ As a result, insurers and financial services have a stronger defense against plaintiffs who were previously

⁸⁹ See Hurd & Johnson, *supra* note 40, at 15 (advising lawyers to present enough evidence to support Rule 23).

⁹⁰ *In re IPO*, 471 F.3d 24, 27 (2d. Cir. 2006). See Mason & McGuirk, *supra* note 48, at 3 (addressing possible discovery expansion allowing trial court resolution of relevant class certification issues including case merits). This allowance goes beyond limiting the scope of the court’s analysis to the complaint allegations. Hurd & Johnson, *supra* note 40, at 15.

⁹¹ *In re IPO*, 471 F.3d at 41 (cautioning judge’s evaluation of Rule 23 evidence). See Mason & McGuirk, *supra* note 48, at 3 (“Most courts, however, will probably struggle diligently with the opposing obligations to resolve all factual issues necessary for class certification decision, even if those issues are ‘identical to issue on merits’, yet somehow at the same time try not to examine merits.”).

⁹² Hurd & Johnson, *supra* note 40, at 15 (articulating necessity of presenting evidence to meet and rebut burden of proof).

⁹³ See Yalowitz & Wells, *supra* note 48, at S8 (“From the perspective of a plaintiff, a relatively modest ‘up front’ investment in time and resources at an early stage can provide a more robust record for carrying the burden of showing that the case satisfied the rigorous requirements of Rule 23.”).

⁹⁴ See *id.* The *In re IPO* opinion “provides ammunition” to counter the argument that a court cannot conduct an inquiry into the case merits. Mason & McGuirk, *supra* note 48, at 3. Specifically, the *In re IPO* decision may aid defendants opposed to class certification because “[e]very class action defendant wants its evidence disputing Rule 23 requirements considered in order to try to fend off the enormous settlement pressure often arising from certification.” *Id.* (quoting *In re IPO*, 471 F.3d at 39 n.9).

⁹⁵ Yohai & Singh, *supra* note 54, at 16. The Second Circuit “provided much needed, practical guidance to lower courts on how best to comply with the rigorous analysis obligation.” Hurd & Johnson, *supra* note 40, at 15.

certified using the minimal “some showing” standard.⁹⁶ Thus, counsel for financial services and insurance companies will use the clarified standard to protect their rights and defend against meritless class action suits.⁹⁷

The application of the merits inquiry attempts to prevent the high social costs of frivolous and weak class action suits.⁹⁸ Given the dynamics of class action suits and the prevalence of settlements, it is necessary to allow for a rigorous review of the substantive merits and the likelihood of success at the certification stage.⁹⁹ Lenient certification standards will likely invite meritless class action suits that settle because a defendant will want to avoid potentially crippling, even bankrupting, damage awards that may result from litigating the case.¹⁰⁰

There lies a high probability for other circuits and the United States Supreme Court to adopt this policy because the clear trend now is to allow a rigorous analysis into the merits of a case.¹⁰¹ Otherwise, plaintiffs hoping to certify will arguably forum shop to the jurisdictions that do not apply the rigorous standard.¹⁰² Furthermore, although the *In re IPO* decision is a securities suit, the holding is applicable to class actions generally.¹⁰³ Plaintiffs have to prove each Rule 23 element by a preponderance of evidence, thereby making it more difficult to obtain class certification in federal court.¹⁰⁴

⁹⁶ See Yohai & Singh, *supra* note 54, at 16.

⁹⁷ See *id.* (arguing *In re IPO* as huge step protecting defendants from baseless class actions by defining certification standards). Further, counsel for insurance companies and financial services will be able to use the certification standards to defend meritless class action suits. *Id.*

⁹⁸ Bone & Evans, *supra* note 50, at 1254 (arguing in favor of rigorous analysis standard for class certification).

⁹⁹ See *id.* (proposing judges assess all evidence whenever Rule 23 calls for inquiry into merits-related factors).

¹⁰⁰ See *id.* (reasoning because lesser standard is “weakly justified,” it is unevenly applied).

¹⁰¹ See PERKINS COIE, SECOND CIRCUIT APPLIES STRINGENT STANDARD FOR CLASS CERTIFICATION IN IPO LITIGATION, Jan. 5, 2007, http://www.perkinscoie.com/news/pubs_detail.aspx?publication=1031&op=updates.pdf (addressing likelihood of other courts to adopt *In re IPO* holding).

¹⁰² See WILLIS NORTH AMERICA, WALL STREET VICTORY FOR UNDERWRITERS IN IPO LADDERING CASES: MORE QUESTIONS THAN ANSWERS, (Feb. 2007) Issue 6, page 2, available at <http://www.willis.com/documents/publications/industries/financialinstitutions/FIAIert0207.pdf> (acknowledging possibility of forum shopping if class action ban).

¹⁰³ Hurd & Johnson, *supra* note 40, at 15. The decision “provided practical guidance to lower courts on how to comply with rigorous analysis, it will have implications for any putative class where for example a defendant will argue ‘that the class should not be certified because individualized issues predominate over common ones.’” *Id.*

¹⁰⁴ See AKIN GUMP STRAUSS HAUER & FELD LLP, *supra* note 54, at 1 (concluding second circuit’s decision will make it more difficult to obtain federal class certification); see also Mason & McGuirk, *supra* note 48, at 3 (“Arguably the amount of effort now necessary to make the certification decision will be greater, thus, courts are less likely to certify class.”).

CONCLUSION

While it is true that historically, securities class actions were almost always certified, the current circuit court trend suggests the opposite will occur in the future. It is likely that an inquiry into the merits of a case will occur when the rigorous analysis standard is used. As a result, courts must ensure that every Rule 23 requirement is met. At the class certification stage, the judge must allow parties to present a full record of the Rule 23 requirements. The most efficient way of doing so is to expand discovery. From the defendant's perspective, pre-certification discovery will provide a fair opportunity to oppose class certification. In addition, the judge must hear evidence from both sides and must be persuaded that the fact at issue is ascertained. At the same time, she must ensure that adjudicating the motion for class certification does not end up as a mini trial on the issues.

The rigorous analysis standard necessitates that the plaintiff proposed class is prepared to satisfy each Rule 23 requirement with adequate evidence. As such, plaintiffs' counsel must be on notice. This is not a heavy burden. The purpose of the standard is to prevent litigating meritless claims which is a waste of the court's time and resources. The flood gates will not re-open following the decisions to not certify. Specifically, individual investors are unlikely to pursue a lawsuit because the cost of doing so is extraordinary. Therefore, the contraction of securities class action litigation will continue.

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