

Notes & Comments

JURY CERTIFICATION OF FEDERAL SECURITIES FRAUD CLASS ACTIONS

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ABSTRACT—The rough equivalence of certification and ultimate outcome is class action dogma. If certification is granted, then the plaintiff “wins” by settlement because the risk of incurring class-wide liability by going to trial is too great. If certification is denied, the defendant “wins” because the case may not be worth litigating without the possibility of a class-wide recovery. This Note is about where the dogma is wrong. There are now cases where a denial of certification, just like a grant, presents to the defendant the risk of incurring class-wide liability at trial. This is because those cases are capable of what I call jury certification. Thanks to recent case law, there are now cases where the jury will decide an issue when it passes on the merits that is the same issue that the judge first decided during certification. The merits and class certification overlap on that issue. That overlap gives the jury’s verdict the power to, in effect, overrule the judge’s decision to deny certification. Thus, a defendant facing a certified class and a defendant facing an uncertified class capable of jury certification are in the same bargaining position—going to trial means risking class-wide liability. Here, I will explain how jury certification could work in federal securities class actions, where the conditions for jury certification are often found.

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INTRODUCTION

Class certification decides federal securities fraud class actions.¹ With few exceptions, certified classes settle and classes denied certification are abandoned.² And within a subset of securities class actions, those alleging misstatement-based securities fraud in violation of Securities and Exchange Commission Rule 10b-5, certification often turns on just one of its requirements: predominance.³ Securities fraud class actions can only be certified if common questions of fact or law “predominate,” that is, if the questions common to a class’s claims outweigh individual questions.⁴ Normally, fraud cases cannot be certified because reliance—did the plaintiff reasonably rely on the defendant’s misstatement—is a quintessentially individual question.⁵

So, typically, reliance destroys predominance.⁶ But in securities fraud, reliance can sometimes be presumed,⁷ and since the presumption applies to

¹ By “federal securities fraud class action,” I mean a securities fraud class action brought under Securities and Exchange Commission Rule 10b-5 (codified at 17 C.F.R. § 240.10b-5 (2012)) and § 10(b) of the Securities Exchange Act of 1934 (codified at 15 U.S.C. § 78j(b) (2012)).

² See, e.g., DONNA M. NAGY ET AL., SECURITIES LITIGATION AND ENFORCEMENT 429 (3d ed. 2011) (“The court’s decision on certification carries enormous significance for all concerned. If certification is denied, most (and possibly all) members of the might-have-been class will lose the opportunity to recover because they lack the resources to sue individually. On the other hand, a grant of certification may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.” (citations and internal quotation marks omitted)).

³ See e.g., *Bell v. Ascendant Solutions, Inc.*, No. Civ.A. 301CV0166N, 2004 WL 1490009, at *5 (N.D. Tex. July 1, 2004) (denying class certification solely based on predominance).

⁴ FED. R. CIV. P. 23(b)(3).

⁵ See *Basic Inc. v. Levinson*, 485 U.S. 224, 242, 243–44 (1988) (plurality opinion) (“Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones.”).

⁶ See *id.*

the entire class, common questions predominate.⁸ Thus, certification in securities fraud class actions involving misstatements often comes down to whether a presumption—called the fraud-on-the-market presumption⁹—applies. If it does, predominance is satisfied, and these securities fraud class actions tend to easily satisfy the other class certification requirements.¹⁰ Whether the presumption applies, in turn, depends on whether the security involved in the alleged fraud traded on a so-called “efficient market.”¹¹

In sum: if the market was efficient, the presumption applies; if the presumption applies, predominance is satisfied; if predominance is satisfied, the class is certified; and, if the class is certified, the plaintiff, in effect, wins. It all comes down to the judge’s market-efficiency finding on class certification. So it has been and so it is today.

In this Note, I try to upset that paradigm. I believe that defendants may now want to settle—with the entire class—even if the judge finds the relevant market inefficient and therefore denies certification. The reason boils down to what I call jury certification. The reason defendants settle when classes are certified is because going forward with the case means risking class-wide liability at trial.¹² Jury certification creates this same risk in cases where the judge denies certification.

How? Jury certification is shorthand for a series of procedural steps a plaintiff can take to, in effect, reverse the judge’s initial denial of certification after a jury trial but before final judgment is entered. Thus, a defendant facing a freshly certified class stands in the same position as a defendant facing an individual plaintiff who has just been denied certification but has jury certification available. Both defendants must choose between settling now or risking class-wide liability at trial.

⁷ See *id.* at 247 (discussing presumption); see also *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 152–54 (1972) (approving presumption based on material omissions).

⁸ *Basic*, 485 U.S. at 242 (plurality opinion).

⁹ In sum, the fraud-on-the-market presumption is based on the economic theory that, in an efficient market, all public information is incorporated into the price of a security. Thus, anyone who bought at the market price relied on all the public statements made about the security. See *id.* at 245–47 (plurality opinion); Note, *The Fraud-on-the-Market Theory*, 95 HARV. L. REV. 1143 (1982).

¹⁰ See Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. MICH. J.L. REFORM 323, 325–26 (2010) (“The dispositive issues [on class certification] for securities class actions are often whether common issues of loss causation or reliance predominate.”).

¹¹ See *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 42–43 (2d Cir. 2006) (finding the presumption did not apply as the plaintiffs failed to prove an efficient market); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 364 (4th Cir. 2004) (noting four requirements for the presumption to apply, including that the shares traded on an efficient market).

¹² See, e.g., William Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 380 (1973) (“[C]ertification of a broad class often determines the entire case by coercing the defendants to settle even unmeritorious claims.”).

Admittedly, jury certification only works in some cases. The judge must have denied certification solely based on a lack of predominance, and specifically a lack of predominance based on a finding of market inefficiency. Other than predominance, all the other certification requirements must have been found to be met.¹³ Many, many, securities class actions satisfy this condition.¹⁴ Assuming the condition is met, there are three paths to jury certification. All three paths begin with the individual plaintiff, who has just been denied class certification, proceeding to and winning a jury trial. This is counter to the usual practice. Usually, plaintiffs abandon their case if denied certification (with an exception being plaintiffs with massive individual damages, like institutional investors).¹⁵ But jury certification requires plaintiffs to press on and win. At the moment the jury finds the defendant liable for securities fraud, the three paths diverge.

First, a post-verdict plaintiff can immediately ask the judge to amend the order denying certification with a motion under Rule 23(c).¹⁶ When it found liability, the jury, in effect, disagreed with the judge's earlier finding on market efficiency; it had to or it could not have found the defendant liable. Market efficiency is both a certification requirement, in that it is necessary to satisfy predominance, and an element of the plaintiff's cause of action, in that it is necessary to prove reliance.¹⁷ Moreover, the jury is free to disagree with the judge, since the judge's class certification finding is not binding on the jury.¹⁸ By filing the Rule 23(c) motion, the plaintiff is asking the judge to substitute the jury's finding for her own. Under the jury's view, the market was efficient, and therefore, common questions could predominate. And since the individual plaintiff was a member of the

¹³ A putative class must meet all four Rule 23(a) requirements and the requirements of at least one of the four types of class actions laid out in Rule 23(b) for certification. See FED. R. CIV. P. 23(a).

¹⁴ Relatively recent examples of large securities class actions that fit this bill include: *In re PolyMedica Corp. Securities Litigation*, 432 F.3d 1, 3 n.4 (1st Cir. 2005); *Bell v. Ascendant Solutions, Inc.*, No. Civ.A. 301CV0166N, 2004 WL 1490009, at *4-5 (N.D. Tex. July 1, 2004); *Krogman v. Sterritt*, 202 F.R.D. 467, 471-73 (N.D. Tex. 2001).

¹⁵ See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-70 (1978) ("[W]ithout the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment . . ."); see generally John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 904-06 (1987) (breaking class actions into three categories based on marketability of individual claims).

¹⁶ See FED. R. CIV. P. 23(c)(1)(C).

¹⁷ See *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) ("It is undisputed that securities fraud plaintiffs must prove certain things in order to invoke *Basic's* rebuttable presumption of reliance. It is common ground, for example, that plaintiffs must demonstrate . . . that the stock traded in an efficient market . . ." (citing *Basic, Inc. v. Levinson*, 485 U.S. 224, 248 n.27 (1988))); *id.* at 2184 ("Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action." (quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlantic, Inc.*, 552 U.S. 148, 159 (2008)) (internal quotation marks omitted)).

¹⁸ See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011) ("[The overlapped issue is] an issue they will surely have to prove *again* at trial in order to make out their case on the merits.").

class, her claim is identical to those of the class; the liability finding on behalf of the individual plaintiff applies to the whole class. By winning her own case, the plaintiff has won the same trial the class would have won. Rule 23(c) can turn an individual plaintiff's win into a win for the class.

But judges have a great deal of discretion on Rule 23(c) motions.¹⁹ If the motion is denied, path number two provides a "Plan B." To follow the second path to jury certification, the plaintiff allows the case to terminate in a final, individual judgment. Then, with another member of the class as plaintiff, a second, identical class action is filed. When the time comes for the class certification motion, the judgment in the first case sets up collateral estoppel, preventing the defendant from arguing that the market was inefficient.²⁰ In the usual securities fraud case, certification turns on market efficiency because the other certification requirements are easily met, as they were in the first case. Thus, with the prior judgment in hand, the second plaintiff should easily obtain class certification and, shortly thereafter, a class-wide settlement.

The third path is a variation on the second. Like the second, this path involves two cases. But, unlike the second, for the third path, only the second case is a class action. It is not necessary that the first case be filed as or attempt to gain certification as a class action. Collateral estoppel can set up class certification in the second case so long as the first case's plaintiff has the same claim as the plaintiff class.²¹

Admittedly, all paths to jury certification are long and uncertain. They require judges to make decisions for which they have considerable discretion.²² A judge who believes that the Rule 23(c) motion or collateral estoppel involves substantial unfairness to the defendant is well within her rights to refuse either.²³ But, for two reasons, this does not make jury certification any less viable. First, forewarned is forearmed. To avoid a claim of prejudice, the plaintiff need only put the defendant on notice of her plans.²⁴ If the defendant has been warned that jury certification is contemplated, then it is the defendant's own fault for not taking the

¹⁹ 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1785.4 (3d ed. 2005) ("However, it must be noted that there is no requirement that the court alter its class-action order when the circumstances surrounding its initial determination change. The decision to amend a class-certification order is discretionary.")

²⁰ See generally *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326–33 (1979) (describing use of collateral estoppel in a securities case).

²¹ See *id.*; RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

²² See 7AA WRIGHT ET AL., *supra* note 19; *Parklane*, 439 U.S. at 331 ("We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied.")

²³ See 7AA WRIGHT ET AL., *supra* note 19; *Parklane*, 439 U.S. at 331.

²⁴ See *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 877–78 (11th Cir. 1986) (permitting a post-trial expansion of the class because notice deprived the defendant of a claim of prejudice).

individual plaintiff's case seriously. Second, jury certification does not need to be a sure thing to "work." Rather, it works if the defendant settles, and the defendant will settle based on its evaluation of the risk that the plaintiff will succeed. Defendants who are unwilling to brave that risk will settle.

And those settlements are significant. Currently, many securities fraud class actions are abandoned when judges deny certification solely on market-inefficiency grounds. Those cases are tallied in the defense win column. Jury certification could, potentially, put some of those many cases, involving many hundreds of millions of dollars,²⁵ back in the plaintiff's column. Accordingly, jury certification is literally a multi-million dollar proposition.

But, in spite of this, no plaintiff has yet tried it.²⁶ This should not be surprising. The normal practice—certify and settle; lose certification and abandon—is longstanding. The modern securities class action has been around since 1966.²⁷ But only recently has the case law evolved in a way that would allow jury certification. The key is what I call the overlap interpretation.

The overlap interpretation is an explanation of the interaction of Rule 23's class certification requirements and the elements of a substantive cause of action, like securities fraud. Under the overlap interpretation, a particular element of the plaintiff's claim is said to overlap with a certification requirement.²⁸ To get certified, the plaintiff must prove the element. If the case is certified, then the plaintiff will have to prove the element again at trial.²⁹ In securities fraud the overlap is on market efficiency—it is both a merits element, because it proves reliance, and it is also considered necessary to show predominance.³⁰

²⁵ See generally Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1497–98 & 1497 n.159 (2004) (providing examples of settlement amounts).

²⁶ Proving a negative is difficult. I base this statement on a thorough survey of reported cases, academic writing, and practitioner journals.

²⁷ See Simon, *supra* note 12, at 375–76 (describing how the 1966 amendments to Rule 23 created the modern class action).

²⁸ See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 (2011) ("In this case, proof of commonality necessarily *overlaps* with respondents' merits contention that Wal-Mart engages in a *pattern or practice* of discrimination." (first emphasis added)).

²⁹ *Id.* at 2552 n.6.

³⁰ See *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011) ("It is undisputed that securities fraud plaintiffs must prove certain things in order to invoke *Basic's* rebuttable presumption of reliance. It is common ground, for example, that plaintiffs must demonstrate . . . that the stock traded in an efficient market . . ." (citing *Basic, Inc. v. Levinson*, 485 U.S. 224, 248 n.27 (1988) (plurality opinion))); *id.* at 2184 ("Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action." (quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlantic, Inc.*, 552 U.S. 148, 159 (2008)) (internal quotation marks omitted)).

Practically speaking, the overlap interpretation does three things. First, it makes class certification harder to obtain.³¹ It was not long ago that all a securities fraud plaintiff needed to do to satisfy the predominance requirement was plead the fraud-on-the-market theory.³² The overlap interpretation requires them to prove its applicability by proving market efficiency. The difference is enormous: alleging versus proving. The second point is related to the first. Forcing plaintiffs to prove market efficiency makes class certification more expensive.³³ Class certification motions involving the overlap interpretation now come after enormous amounts of discovery, laden with expert opinions and exhibits.³⁴ This cost hits both plaintiffs and defendants, who will prepare and file their own expert opinions to counter the plaintiff's.

The third thing that the overlap interpretation does is what makes jury certification possible: it gives juries a say in class certification. Thanks to the overlap interpretation, the jury decides a certification requirement when it decides the merits of the plaintiff's case. Without the overlap interpretation, jury certification would be impossible.

The remainder of this Note has three Parts. In Part I, I briefly introduce key class action concepts, including a description of the overlap interpretation. Part II goes, step-by-step, through jury certification and closes by suggesting some countermeasures that defendants might employ against it. A conclusion follows.

I. CLASS ACTIONS, CLASS CERTIFICATION, AND THE OVERLAP INTERPRETATION

For those unfamiliar with class action litigation, this Part will introduce basic principles. Section A deals with the class action generally. Section B deals with class certification, describing its requirements and its legal and practical significance. Sections C and D describe the two recent

³¹ See Kaufman & Wunderlich, *supra* note 10, at 330 (“This growing trend requires plaintiffs to establish more and more of their securities fraud claims on a Rule 23 hearing.”).

³² See *Unger v. Amedisys, Inc.*, No. 01-703, 2003 WL 25739165, at *5–6 (M.D. La. Aug. 1, 2003) (certifying the class based on plaintiff's allegations that market was efficient); *Herbst v. Able*, 47 F.R.D. 11, 16 (S.D.N.Y. 1969) (“Defendants argue strenuously that this case involves predominantly individual questions of reliance, and that plaintiffs' theory of market fraud is inapplicable to a case involving the conversion of debt securities into equity securities. The court finds that these arguments go to the merits of plaintiffs' case rather than to the question of the maintenance of a class action in accordance with the manner in which plaintiffs seek to proceed.”).

³³ See Brief for Respondents at 10–11, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277), 2011 WL 686407, at *10–11 (“After extensive discovery, including over 200 depositions, production of more than a million pages of documents, and electronic personnel data, plaintiffs assembled a massive record to support class certification.”).

³⁴ See *id.*; see also Steig D. Olson, “Chipping Away”: *The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 955 (2009) (criticizing the overlap interpretation based on cost).

developments in class certification law that give rise to the possibility of jury certification: the overlap interpretation and, to a lesser extent, the preponderance standard. I note from the outset that I take no normative stance on either the state of class certification law or the place of class actions in litigation. I will, however, occasionally cite or discuss cases and scholarship that do.

A. *The Class Action*

A class action is a representative action.³⁵ A single person or small group—the class representative or representatives—brings a case alleging that they and others like them—the absent class members—have been wronged by the defendant. Instead of bringing multiple lawsuits or all joining in the same lawsuit, class action rules allow the representatives to litigate on behalf of absentees, all as one class, and without the absentees' involvement or, sometimes, even their knowledge.³⁶

Obviously, allowing one litigant to represent another creates the opportunity for the representative to take advantage of the absentee. A simple example would be a sellout: the class representative, sometimes called the named plaintiff, might be willing to “sell” the class's claims cheaply in a settlement so long as the defendant compensates the named plaintiff, or possibly the named plaintiff's attorney, at a premium.³⁷ To prevent sellouts and similar problems, would-be class representatives need judicial permission to litigate on a class's behalf.³⁸

First, an individual plaintiff will file a complaint that identifies the case as a putative class action. Then, the plaintiff will ask the court to “certify” the class.³⁹ Certification is permission. By moving for certification, the would-be representative is asking the judge for permission to represent the class. In federal courts, Rule 23 of the Federal Rules of Civil Procedure determines who gets that permission and who does not.⁴⁰

³⁵ See FED. R. CIV. P. 23(a) (“One or more members of a class may sue or be sued as representative parties on behalf of all members . . .”).

³⁶ In class actions brought under Rule 23(b)(1) and (b)(2), notice to the absent class members is not required. *Id.* 23(c)(2)(A). For class actions brought under Rule 23(b)(3), the court must provide to class members the “best notice that is practicable under the circumstances.” *Id.* 23(c)(2)(B). Accordingly, absent class members may be unaware that their rights are being adjudicated.

³⁷ See, e.g., Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 685, 728 (2005) (discussing reverse auctions).

³⁸ See Fed. R. Civ. P. 23(c)(1)(A) (“At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.”).

³⁹ *Id.*

⁴⁰ See *id.* 23.

B. Class Certification

Two aspects of class certification are important here: its legal requirements—the certification requirements—and its practical significance. If certification is permission, then certification’s significance flows from what the representative is permitted to do once certified.

1. *The Certification Requirements.*—Rule 23 contains the requirements for class certification in federal court.⁴¹ To be certified, a putative class must meet all four Rule 23(a) requirements and the requirements of at least one of the four types of class actions laid out in Rule 23(b).⁴² Generally, the requirements are meant to ensure two things: that the class representative will adequately protect the interests of the absent class members⁴³ and that the case will “work” as a class action.⁴⁴

By “work” I mean two things. First, it means that the class representative will, by proving her own claim, at the same time be proving the claims of the absent class members. Second, it means that the case must be one of a type that the rule deems appropriate for class treatment. After all, “[t]he class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’”⁴⁵ The exception only applies, per Rule 23, to four types of cases.⁴⁶

2. *Class Certification’s Significance.*—Class certification is central to class litigation because of its legal and practical significance.⁴⁷ The legal significance of certification is that absent members of a certified class are bound to the result of the litigation.⁴⁸ If the class is not certified, or decertified before a final judgment is entered, then the litigation has no

⁴¹ See *id.* 23(a), (b).

⁴² *Id.* The four types are generally referred to by their numbers: 23(b)(1)(A), (b)(1)(B), (b)(2), and (b)(3). *Id.* 23(b).

⁴³ See *id.* 23(a)(4) (“[T]he representative parties will fairly and adequately protect the interests of the class.”).

⁴⁴ See *id.* 23(b)(3) (instructing judges to consider whether the class action is “superior to other available methods” for deciding the case, including whether there are “likely difficulties in managing a class action”).

⁴⁵ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)).

⁴⁶ See FED. R. CIV. P. 23(b).

⁴⁷ See, e.g., Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1060 (2002) (“Courts are well aware that the decision to certify or not radically alters the incentive structure of litigation, as reflected in the creation of the interlocutory appeal mechanisms of Rule 23(f).”).

⁴⁸ See FED. R. CIV. P. 23(c)(2)(B)(vii) (directing courts to give notice to classes certified under Rule 23(b)(3) of “the binding effect of a class judgment on members”); see generally *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011) (“Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23.”).

binding effect on their rights.⁴⁹ An interesting consequence of this, recently confirmed by the Supreme Court, is that members of a putative class that is denied certification by one court can bring the same case and seek class certification in another court.⁵⁰

The practical significance of class certification is a product of its legal significance. Certification gives the class representative permission to try or settle the absent class members' claims.⁵¹ Prior to class certification, the class representative is a representative in name only; nothing she does affects the rights of the absent class members.⁵² This has enormous strategic consequences. As Judge Easterbrook concretely put it, certification transforms \$200,000 cases into \$200,000,000 cases.⁵³ Certification is the difference between a nuisance and a "bet the company" case.⁵⁴

On the other hand, if the judge denies class certification, that often means the end of the case.⁵⁵ The individual claims of the class representative may not be worth enough to justify paying a lawyer to pursue them. Cases like this are often abandoned if class certification is denied.⁵⁶ So class certification has big stakes for both sides. If the plaintiff wins, the defendant may risk liabilities in excess of its assets. If the

⁴⁹ See FED. R. CIV. P. 23(c)(2); see generally *Bayer Corp.*, 131 S. Ct. at 2379–81 (finding that class certification is a "precondition" for binding class members to suit outcome).

⁵⁰ *Bayer Corporation* effectively overruled *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763, 769 (7th Cir. 2003), which had held that a denial of certification was binding on the class members. *Bayer Corporation* acknowledged the policy behind the *Bridgestone* decision: there is "an asymmetric system in which class counsel can win but never lose" because they can relitigate certification. *Bayer Corp.*, 131 S. Ct. at 2381 (quoting *Bridgestone*, 333 F.3d at 767) (internal quotation marks omitted).

⁵¹ See FED. R. CIV. P. 23. This permission is subject to Rule 23(e), which requires court approval for class settlements. *Id.* 23(e) ("The claims . . . of a certified class may be settled . . . only with the court's approval.").

⁵² *Bayer Corp.*, 131 S. Ct. at 2380 ("Neither a proposed class action nor a rejected class action may bind nonparties.").

⁵³ *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001).

⁵⁴ In addition to *Szabo, id.*, these cases refer to class actions as "bet the company" or "bet-your-company" cases: *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co.*, 671 F.3d 635, 639 (7th Cir. 2011); *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915 (7th Cir. 2011); *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 279 (4th Cir. 2010); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 678 (7th Cir. 2009); *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 152 (2d Cir. 2001) (Jacobs, J., dissenting). This list is by no means exhaustive, and represents only the past ten years or so of appellate cases.

⁵⁵ See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469–70 (1978) ("[W]ithout the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment . . .").

⁵⁶ See generally John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 904–06 (1987) (breaking class actions into three categories based on marketability of individual claims).

defendant wins, the plaintiff may be forced to give up her case without a determination on the merits.

I would like to emphasize the significance of these stakes by introducing the reader to the debate about just how high they are. As I noted in the Introduction, many prominent legal thinkers believe that class actions, and specifically class certification, amount to legalized blackmail.⁵⁷ For ease of reference, I will call this group “the blackmail camp.”

There are many familiar and influential names in the blackmail camp. Justice Scalia⁵⁸ and Judges Friendly,⁵⁹ Easterbook,⁶⁰ and Posner⁶¹ have used and continue to use words like “blackmail” to describe the pressure defendants feel when facing the risk of class-wide liability. Justice Scalia’s recent opinion in *AT&T Mobility, LLC v. Concepcion* contains language typical of the group: “Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”⁶² So influential is the blackmail camp that they have turned class-certification-as-blackmail into an argument against class certification itself.⁶³ And the Advisory Committee’s Notes to Rule 23(f), which provide an exception to the final judgment rule and give parties a conditional right to appeal a denial or grant of class certification, treat the threat of blackmail in favor of allowing an appeal.⁶⁴

⁵⁷ See, e.g., HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 119–20 (1973) (calling class action settlements that defendants agree to because of a probability of a huge class judgment “blackmail settlements”); Simon, *supra* note 12, at 375 (equating class actions in antitrust and securities cases with “legalized blackmail” (quoting Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits*, 71 COLUM. L. REV. 1, 9 (1971)) (internal quotation marks omitted)); see also Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357, 1360–61 (2003) (“Judges Friendly, Posner, and Easterbrook are towering figures in American jurisprudence and cannot be dismissed as ideologues.”).

⁵⁸ See *Concepcion*, 131 S. Ct. at 1752 (Scalia, J.) (“Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”).

⁵⁹ See FRIENDLY, *supra* note 57, at 120 (calling class action settlements that defendants agree to because of a small probability of a huge class judgment “blackmail settlements”).

⁶⁰ See *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (Easterbrook, J.) (“Such a claim puts a bet-your-company decision to Bridgeport’s managers and may induce a substantial settlement even if the customers’ position is weak.”).

⁶¹ See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (“Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action ‘blackmail settlements.’ Judicial concern about them is legitimate” (citation omitted)).

⁶² See *Concepcion*, 131 S. Ct. at 1752.

⁶³ See Silver, *supra* note 57, at 1358 (“Hydraulic pressure . . . to settle’ is now a recognized objection to class certification.” (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001))).

⁶⁴ See FED. R. CIV. P. 23 advisory committee’s note (1998) (“An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.”); see also *Szabo*, 249 F.3d at 675 (granting interlocutory appeal under 23(f) because of settlement pressure).

The blackmail camp has ensconced its thesis in the case law and in the class action rule itself. But its opponents deride it as a myth.⁶⁵ The opponents have a variety of arguments, among them that there is no empirical verification for the blackmail claim.⁶⁶ Primarily, the opponents contend that (1) if the settled cases were truly meritless then the defendant would file a dispositive motion rather than settle and⁶⁷ (2) so long as the cases are not meritless, there is nothing normatively wrong about pressuring defendants to settle.⁶⁸

For my purposes, it is what the opponents do not say that is most important. The opponents of the blackmail camp do not argue that class certification exerts no or minimal pressure on defendants to settle. On the existence of pressure, many agree with the blackmail camp—the pressure is there, and it is enormous. Likewise, there appears to be no disagreement that the pressure itself is based on the size of the potential liability.⁶⁹ That is significant because it makes jury certification a viable strategy.

All agree that the risk of class-wide liability pressures the defendant to settle. And, as I mentioned in the Introduction, that is exactly the kind of pressure that jury certification or, as we will see, the possibility of jury certification can bring to bear.

C. *The Overlap Interpretation*

This section discusses the overlap interpretation. What I call the overlap interpretation is the view—now prevailing in the federal courts—that when plaintiffs bring class actions alleging certain causes of action, one or another of Rule 23’s class certification requirements “overlaps” with an element of that cause of action. Therefore, the plaintiff must prove that element to obtain certification. Then, assuming the judge certifies the class, the plaintiff must prove the element again at trial, because the judge’s finding of whether the overlapped element is met for certification purposes is not binding on the jury.⁷⁰

⁶⁵ Note the title: Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681 (2005).

⁶⁶ See *id.* at 697 (describing the similarity in rates of settlement for certified class actions and conventional lawsuits and concluding that “the Blackmail Myth quite simply does not comport with reality”).

⁶⁷ See Kanner & Nagy, *supra* note 65, at 696.

⁶⁸ See, e.g., *Klay v. Humana, Inc.*, 382 F.3d 1241, 1274 (11th Cir. 2004) (“[I]f their fears are truly justified, the defendants can blame no one but themselves.”).

⁶⁹ But see Kanner & Nagy, *supra* note 65, at 696–97.

⁷⁰ See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011) (“[The overlapped issue is] an issue they will surely have to prove *again* at trial in order to make out their case on the merits.”); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004).

The overlap interpretation shows up routinely in two types of class actions⁷¹: federal employment discrimination class actions⁷² and federal securities fraud class actions.⁷³ In securities fraud cases the overlap is often between the “efficient market” requirement and predominance.⁷⁴ Predominance comes from Rule 23(b)(3).⁷⁵ It is shorthand for saying that “questions of law or fact common to the class members predominate over any questions affecting only individual members.”⁷⁶ The predominance requirement ensures that the class action will consume less judicial time than individual actions.⁷⁷ The existence of an efficient market for the security at issue in the case is also a prerequisite to proving an element of the plaintiff’s case for liability.⁷⁸ That element is reliance: securities fraud plaintiffs need to prove reliance,⁷⁹ sometimes called transaction causation.⁸⁰

If the plaintiff proves an efficient market, the plaintiff almost certainly will obtain the so-called fraud-on-the-market presumption.⁸¹ This is a

⁷¹ Breach of warranty class actions are another type of class action where overlap occurs. *See Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001) (describing overlap in breach of warranty class action).

⁷² *See, e.g., Wal-Mart Stores, Inc.*, 131 S. Ct. at 2546–47 (reversing certification of plaintiff class in employment discrimination class action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006)). It is also worth noting that the conditions for jury certification probably arise more often in securities litigation than in employment discrimination. This is because, based on my review of cases, it often appears that certification is denied in employment discrimination on more than just the overlapped requirement. And jury certification is only possible where only the overlapped requirement is the grounds for denial. *See infra* Part II.A.1.

⁷³ *See, e.g., Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2183, 2187 (2011) (vacating denial of class certification for class brought under § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5 and remanding for further proceedings).

⁷⁴ *See, e.g., In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 26, 41–43 (2d Cir. 2006); *Gariety*, 368 F.3d at 366.

⁷⁵ FED. R. CIV. P. 23(b) (“A class action may be maintained if Rule 23(a) is satisfied and if: . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members . . .”).

⁷⁶ *Id.*

⁷⁷ *See* FED. R. CIV. P. 23 advisory committee’s note (1966) (“It is only where this predominance exists that economies can be achieved by means of the class-action device.”).

⁷⁸ *See Erica*, 131 S. Ct. at 2185 (“It is undisputed that securities fraud plaintiffs must prove certain things in order to invoke *Basic*’s rebuttable presumption of reliance. It is common ground, for example, that plaintiffs must demonstrate . . . that the stock traded in an efficient market . . .” (citing *Basic, Inc. v. Levinson*, 485 U.S. 224, 248 n.27 (1988) (plurality opinion))); *see also* Jeffrey L. Oldham, Comment, *Taking “Efficient Markets” Out of the Fraud-on-the-Market Doctrine After the Private Securities Litigation Reform Act*, 97 NW. U. L. REV. 995 (2003) (arguing that an efficient market is not the appropriate prerequisite to application of the theory); Note, *The Fraud-on-the-Market Theory*, *supra* note 9 (discussing the theory and its application in securities litigation).

⁷⁹ *Erica*, 131 S. Ct. at 2184.

⁸⁰ NAGY ET AL., *supra* note 2, at 149 (“[R]eliance (also known as transaction causation) . . .”).

⁸¹ *See Erica*, 131 S. Ct. at 2184–85 (“It is undisputed that securities fraud plaintiffs must prove certain things in order to invoke *Basic*’s rebuttable presumption of reliance. It is common ground, for example, that plaintiffs must demonstrate . . . that the stock traded in an efficient market . . .” (citing *Basic*, 485 U.S. at 248 n.27 (plurality opinion))).

presumption of reliance.⁸² All fraud plaintiffs (i.e., whether alleging securities or some other type of fraud) must show reliance: that they acted in reliance on the defendant's alleged misstatement.⁸³ Reliance is an individual question and therefore usually destroys predominance and, with it, any hope of certification.⁸⁴ If every member of the class had to show individual reliance, then common questions wouldn't predominate, and no class could be certified.⁸⁵ But the fraud-on-the-market presumption of reliance replaces individual reliance based on the idea that, in an efficient market, the market incorporates all public information, including the defendant's misstatements, into the price of a security.⁸⁶ Thus, anyone who bought at the market price relied on the misstatements simply by buying at the market price.⁸⁷ To obtain the presumption and, with it, predominance and class certification, a plaintiff must prove the presumption's prerequisite: that the market for the security is efficient.⁸⁸

1. Criticisms of the Overlap Interpretation.—Not everyone agrees that the overlap interpretation is correct.⁸⁹ And some have argued that, correct or not, it causes significant problems.⁹⁰ A main complaint is cost.⁹¹ If a plaintiff must prove an element of its case to get certification, it must have discovery, causing delay and expense.⁹² For example, the *Wal-Mart* case took almost two years from the complaint until the plaintiffs filed their class certification motion.⁹³ During that time, the parties exchanged more than a million pages of documents and took more than 200 depositions.⁹⁴

⁸² *Id.*

⁸³ *See Basic*, 485 U.S. at 243 (plurality opinion) (“[R]eliance is and long has been an element of common-law fraud . . .”).

⁸⁴ *Id.* at 242 (“Requiring proof of individualized reliance from each member of the proposed plaintiff class effectively would have prevented respondents from proceeding with a class action, since individual issues then would have overwhelmed the common ones.”).

⁸⁵ *Id.*

⁸⁶ *Id.* at 247 (“An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market price, an investor’s reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.”).

⁸⁷ *See id.*

⁸⁸ *See Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2185 (2011).

⁸⁹ *See, e.g., Olson, supra* note 34, at 937–38.

⁹⁰ *Id.* at 935.

⁹¹ *Id.* at 966 (discussing how a merits inquiry at certification can create expense and burden for the parties and court, using *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001), as an example).

⁹² *Id.*

⁹³ Complaint, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) (No. C01-02253) (filed June 8, 2001); Plaintiffs’ Motion for Class Certification, *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004) (No. C01-02253) (filed Apr. 28, 2003).

⁹⁴ Brief for Respondents at 10–11, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277), 2011 WL 686407, at *10–11 (“After extensive discovery, including over 200 depositions,

The claim that the overlap interpretation is incorrect rests on Rule 23's text. Both the commonality and predominance requirements demand "common questions."⁹⁵ Whether a pattern or practice exists or whether the market for a particular security is efficient are both questions. And they are common to all the class members in any discrimination or securities class action. Textually, commonality and predominance are satisfied so long as the plaintiffs allege them. The answer to the common question—yes, the market is efficient; no, there is no pattern or practice—is therefore irrelevant to certification. In other words, the overlap interpretation demands common answers, not common questions, and is therefore a faulty reading of the rule. In other words, the only way to square the overlap interpretation with the rule's text is to say that if the answer to a common question is "no," then the rule treats the question as if it doesn't exist.

This criticism hasn't been well addressed. One illustration comes from a securities fraud class action filed in the Middle District of Louisiana. The trial judge rejected the overlap interpretation and granted certification.⁹⁶ The judge called two decisions applying the overlap interpretation "troubling," adding that "whether the putative plaintiffs in this proposed class are entitled to the *Basic* presumption of reliance based on market efficiency is clearly a common question of law and fact that applies to each individual class member."⁹⁷ The trial judge ruled that predominance was satisfied so long as the plaintiff alleged an efficient market.⁹⁸ The Fifth Circuit reversed, adopting the overlap interpretation.⁹⁹ It is telling, I think, that the Fifth Circuit did not answer the lower court's questions about the overlap interpretation.

Several scholars have suggested that concern for defendants has led judges to ignore the textual flaws with the overlap interpretation: "It appears that one reason courts are scrutinizing the merits more closely may have to do with a concern about improper settlement leverage, and in particular the risk that certification might pressure unjustified settlements in frivolous and weak class action suits."¹⁰⁰ Whatever may be behind the overlap interpretation's acceptance, its proponents have yet to offer a convincing defense of its logic.

production of more than a million pages of documents, and electronic personnel data, plaintiffs assembled a massive record to support class certification.").

⁹⁵ See FED. R. CIV. P. 23(a)(2), (b)(3).

⁹⁶ See *Unger v. Amedisys, Inc.*, No. 01-703, 2003 WL 25739165, at *7 (M.D. La. Aug. 1, 2003), *vacated*, 401 F.3d 316 (5th Cir. 2005) ("[A]ny doubts as to the merits of Plaintiffs' case are not a reason to deny class certification.").

⁹⁷ *Id.* at *6.

⁹⁸ See *id.* at *7.

⁹⁹ *Unger*, 401 F.3d at 324–25.

¹⁰⁰ Robert G. Bone, *Sorting Through the Certification Muddle*, 63 VAND. L. REV. EN BANC 105, 109–10 (2010).

D. *The Preponderance Standard*

Rule 23 clearly says what the certification requirements are but does not instruct the judge to use any particular standard to decide when they have been met.¹⁰¹ It is interesting that even though the relevant text of Rule 23 has not changed,¹⁰² judges have progressed over the past four decades from granting certification based on the allegations in the plaintiff's complaint to requiring that the plaintiff demonstrate compliance with each element by a preponderance of the evidence.¹⁰³ Preponderance is now the consensus in the federal courts.¹⁰⁴

The move to preponderance is significant to jury certification. It is important that the certification standard is no higher—i.e., not clear and convincing evidence or beyond a reasonable doubt—than the standard used in civil jury trials. If the certification standard were higher, then the jury's finding might not properly be able to substitute for that of the judge. Because both the judge and the jury are deciding the same fact (whether the security trades on an efficient market) on the same standard (preponderance), jury certification is possible.

II. THE INS AND OUTS OF JURY CERTIFICATION

This Part has two sections. Section A explains jury certification step-by-step. Section B raises possible defenses to jury certification. Some of these defenses may defeat jury certification in a particular case, but none rob it of its viability or reveal it to be fundamentally unsound.

A. *Jury Certification: Step-by-Step*

In this section, I will identify what needs to happen during the progress of a lawsuit for jury certification to work. To present this information, I have broken this section into seven subsections: the denial of

¹⁰¹ The entire rule and the advisory committee notes are silent.

¹⁰² The text of Rules 23(a) and 23(b) has not been substantially amended since 1966. In 1966, commonality under Rule 23(a) required “questions of law or fact common to the class,” exactly as it does now. FED. R. CIV. P. 23(a)(2) (1966). Likewise, the 1966 version of Rule 23(b)(3) is very similar—and identical in meaning—to the current version. In 1966, the rule required that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members.” *Id.* 23(b)(3) (1966). Now, it reads “questions of law or fact common to class members predominate over any questions affecting only individual members.” *Id.* 23(b)(3).

¹⁰³ Compare *Richerson v. Fargo*, 61 F.R.D. 641, 642 (E.D. Pa. 1974), *vacated* 64 F.R.D. 393 (E.D. Pa. 1974) (“[T]he weight of authority has held that in such cases where a pattern of discrimination is alleged, the common questions of law and fact predominate.” (emphasis added)), with *Meyer v. Macmillan Publ’g Co.*, 95 F.R.D. 411, 414 (S.D.N.Y. 1982) (“We conclude that plaintiffs have provided sufficient evidence of the existence of a class as to whom there are common questions of law and fact.” (emphasis added)).

¹⁰⁴ See, e.g., *Behrend v. Comcast Corp.*, 655 F.3d 182, 190 (3d Cir. 2011) (“Plaintiffs bear the burden of establishing each element of Rule 23 by a preponderance of the evidence.”).

certification, giving notice, getting to the jury, possible settlement, winning at trial, the two paths to jury certification, and a summary.

1. *The Denial of Certification.*—Obviously, if the judge grants the plaintiff’s motion for class certification, then there is no need for jury certification. If, however, certification is denied, jury certification will not always be possible. Rather, the judge must deny certification in a specific way. Namely, the judge must find that all the certification requirements are satisfied *except* for the overlapped requirement: predominance. Further, the judge must conclude that the only reason that predominance is not satisfied is because the plaintiff failed to prove market efficiency. The judge must decide in favor of the plaintiff on all the other certification requirements because the jury cannot reach them. As it turns out, securities fraud class actions are routinely denied class certification solely on the basis of the plaintiff’s inability to prove market efficiency.¹⁰⁵ Accordingly, securities class action attorneys have opportunities to try jury certification.

2. *Giving Notice.*—Following the judge’s denial of certification, the plaintiff should give notice to the defendant of two things: that she will ask for certification again after trial and that she will attempt to prove market efficiency at trial. This means that the plaintiff must, in her individual trial, prove reliance by invoking the fraud-on-the-market presumption, the same as she would if she were officially representing the class. This amounts to telling the defendant that the trial will be a rematch of the parties’ certification arguments and evidence on market efficiency.

Without notice, the defendant might not realize the full stakes of the litigation. A defendant who is aware of the possibility of jury certification may litigate more aggressively than one who isn’t. The latter defendant might, when jury certification comes up—as I’ll discuss briefly—claim to be unfairly prejudiced. And that prejudice can weigh against jury certification in either its Rule 23(c) or collateral-estoppel forms. But, if the plaintiff tells the defendant what the true stakes of the litigation are, then any lack of aggression is the result of the defendant’s informed choice, and not a source of unfair prejudice.

3. *Getting to the Jury.*—At this point, after certification has been denied and notice given, the case may be ripe for settlement. A defendant who has no confidence in her ability to win summary judgment is in almost the same position at this point as she would have been had the class been certified. That is, the defendant must choose whether to settle now or risk liability to the class at trial. As both sides of the blackmail debate agree, this pressure has the capacity to induce settlement.¹⁰⁶

¹⁰⁵ See *supra* note 14.

¹⁰⁶ See *supra* notes 53–64.

If, on the other hand, the defendant has a plausible summary judgment¹⁰⁷ argument, then the defendant will be less inclined to settle. In the situation I've just described the defendant will likely have just such an argument: that the market is not efficient. After all, the judge in my hypothetical has just denied class certification, using a preponderance standard, on the very ground that the market was not efficient. Any reasonable defendant, having received notice that the plaintiff will attempt jury certification, will try to build on their momentum and file a summary judgment motion attacking market efficiency. The judge's certification finding is not binding on the jury.¹⁰⁸ Summary judgment, of course, would be. So to keep the hope of jury certification alive, the plaintiff must avoid summary judgment on market efficiency.

The plaintiff can do this by focusing on the difference in the standards used on certification and summary judgment. Certification uses preponderance;¹⁰⁹ summary judgment, the "reasonable juror" standard.¹¹⁰ Summary judgment should only be granted when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."¹¹¹ A dispute is "genuine" only if reasonable jurors could disagree about its outcome.¹¹² And since the standard that jurors employ in a civil case is, like in certification, one of preponderance, this means that if no reasonable juror could find by a preponderance of the evidence for one of the parties on a particular issue, then there is no genuine dispute as to that issue, and summary judgment should be granted.¹¹³

Preponderance is a higher standard than the reasonable juror standard. The plaintiff seeking jury certification must oppose summary judgment by convincing the judge that, although the plaintiff failed to show market efficiency by a preponderance at the certification stage, her evidence is sufficient to allow a reasonable juror to find market efficiency by a preponderance. In other words, the plaintiff's task is to convince the judge that a reasonable juror could disagree with her about market efficiency.

¹⁰⁷ I ignore judgment as a matter of law for two reasons. First, it is based on the same standard as summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) ("Petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict . . ."). Thus, the defendant's estimate of his chances of success is not likely to differ between the two motions. And second, as far as jury certification is concerned, the effect of summary judgment and judgment as a matter of law is the same: if the defendant wins, jury certification does not work.

¹⁰⁸ *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) ("The jury or factfinder can be given free hand to find all of the facts required to render a verdict on the merits, and if its finding on any fact differs from a finding made in connection with class action certification, the ultimate factfinder's finding on the merits will govern the judgment.").

¹⁰⁹ See *supra* Part I.D.

¹¹⁰ See *Anderson*, 477 U.S. at 249.

¹¹¹ FED. R. CIV. P. 56(a).

¹¹² See *Anderson*, 477 U.S. at 249.

¹¹³ *Id.*

Whether this task is doable is highly contextual. It will depend on specific facts and case law. But there is reason to believe that the space between preponderance and the reasonable juror standard is large enough to give plaintiffs a reasonable chance of success. This is because the verbal formulation of the reasonable juror standard, which makes it sound very close to a preponderance, does not reflect the deference many judges show to juries in practice.¹¹⁴ Accordingly, even though there may not seem to be much room between a preponderance (full stop) and what reasonable people could deem a preponderance, in practice, judges are willing to let the word “reasonable” do a lot of work. Moreover, the plaintiff will have the benefit of the judge’s certification opinion, which will likely identify where the judge thought the plaintiff’s evidence was lacking. A savvy plaintiff might revise her presentation or seek additional evidence to address these concerns in preparation for opposing a summary judgment motion.

4. *Possible Settlement.*—Assuming the judge denies summary judgment, or the defendant does not wish to risk injuring its bargaining position by moving for summary judgment and losing, then the defendant may settle. This presents an unresolved issue of law. While it is not unusual for judges to certify classes for settlement purposes,¹¹⁵ there are no reported cases of a judge doing so immediately after denying certification, as would happen here. The question is therefore whether the defendant’s newfound willingness to concede certification trumps the judge’s prior determination that certification was inappropriate. There are several reasons to believe it should.

First, Rule 23 allows judges to amend or alter denials of certification prior to final judgment.¹¹⁶ There is, therefore, no question of authority. Second, it’s the defendant’s funeral. The judge has no remaining institutional interest in protecting the denial of certification for its own sake;¹¹⁷ doing so only delays the litigation’s resolution. Third, there is no prejudice to absent class members. Their interests are independently protected by the requirement that the judge approve the settlement’s terms.¹¹⁸ Fourth, it is well recognized in overlap classes that the judge’s

¹¹⁴ See Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1334 (2005).

¹¹⁵ See 7AA WRIGHT ET AL., *supra* note 19, § 1797.2 (collecting cases).

¹¹⁶ FED. R. CIV. P. 23(c)(1)(C).

¹¹⁷ A judge might refuse certification, even where the parties agree to it, to protect the interests of the absent class members. In the case of a certification for settlement purposes, Rule 23 instructs judges to consider whether those interests were adequately served under the Rule 23(a)(4) requirement of adequacy. See *id.* 23(e)(2). Here, that requirement was, by hypothesis, found to have been satisfied when the judge denied certification (recall that for jury certification to work, the judge must find all the other requirements satisfied, so we assume here that she did).

¹¹⁸ See *id.* 23(e).

decision on the overlapped element is not final.¹¹⁹ It has always been a possibility that the jury would disagree with the judge at trial when deciding the case's merits. Here, that disagreement merely comes from another source—the defendant—and a little bit sooner than might otherwise be expected.

Finally, it seems unlikely that, in the absence of some legal directive or prejudice, a judge is likely to fight too hard against parties that wish to settle. There is an acknowledged judicial policy in favor of settlement.¹²⁰ Settlement saves time and resources, both the parties' and the court's. Where, as here, the alternative means continued complicated litigation, it seems unlikely that the judge would turn a willing defendant away.

5. *Winning the Trial.*—Assuming the case neither settles nor ends at summary judgment, the plaintiff must, of course, win the trial to keep the possibility of jury certification alive. Specifically, the plaintiff must win in a way that makes it clear that the jury decided the overlapped element—market efficiency—in its favor.¹²¹ When the overlapped element is a necessary element of the plaintiff's claim this takes care of itself. But, if the plaintiff presented alternative theories—individual reliance *and* the fraud-on-the-market presumption—then the plaintiff must use Rule 49(b).¹²²

Rule 49(b) allows the jury to enter a general verdict—i.e., the plaintiff wins, or the defendant wins—but also requires it to respond to individual fact questions.¹²³ In this case, the plaintiff will want to include as a fact question the overlapped element: was the relevant market efficient during the relevant time period?¹²⁴ If only a general verdict is returned or the

¹¹⁹ See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 n.6 (2011) (“[The overlapped issue is] an issue they will surely have to prove *again* at trial in order to make out their case on the merits.”); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 152–53, 60 (1982) (remanding with instructions to decertify the class following a post-trial appeal of class judgment).

¹²⁰ *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 330 (E.D.N.Y. 2010) (“There is a ‘strong judicial policy in favor of settlements, particularly in the class action context.’” (quoting *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009))).

¹²¹ Otherwise, collateral estoppel will not work. For a judgment to collaterally estop relitigation of a fact in a later case, the determination of that exact same fact must have been necessary to the judgment in a prior case. See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (“When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”).

¹²² FED. R. CIV. P. 49(b).

¹²³ See *id.*

¹²⁴ In particular, the plaintiff will want to make sure the question encompasses the scope—in time and place—of the class's claims, i.e., not just “Did the defendant operate under a pattern or practice of discrimination?” but “Did the defendant operate under a pattern or practice of discrimination at its Austin, Texas facilities between June 2010 and January 2012?” Collateral estoppel can be defeated if the issue decided in the prior litigation is not the exact same issue to be determined. See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). Accordingly, care is necessary to draft the jury question. For the same reason, if the plaintiff is relying on a general verdict, then the plaintiff's claim should

question is answered in the negative, then there is no basis to conclude that the jury actually decided the overlapped element, and neither path to jury certification will work.

Unfortunately, parties have no right to demand that questions be submitted under Rule 49(b).¹²⁵ In practice, the decision to submit a question to the jury rests in the absolute discretion of the trial court.¹²⁶ Accordingly, there is an element of risk here that would be minimized by proceeding under a single theory—i.e., trying to prove reliance with the fraud-on-the-market presumption alone. Plaintiffs who want to use the presumption and individual reliance will want to emphasize their trial strategy with the judge early and often, so that, when the Rule 49(b) request comes, the judge understands its importance.¹²⁷

6. *Three Paths to Jury Certification.*—If the jury returns a verdict that necessarily includes a finding in favor of the plaintiff on market efficiency, then jury certification remains viable under either of two approaches. The first is to make a motion to amend the order denying certification. The second is to allow the case to proceed to final judgment and then use that judgment as collateral estoppel in a second, identical class action. A variation on this second option—what I called the “third path” in the Introduction—is to skip the motion for certification in the first case, litigating the whole case as an individual securities fraud action and relying on the fraud-on-the-market theory for reliance.

a. *An amendment motion.*—A motion to amend the order denying certification raises three sets of issues: the judge’s authority to grant the motion, the motion’s merits, and the judge’s discretion to grant or deny the motion independent of its merits.

Rule 23(c)(1)(C) authorizes judges to “alter[] or amend[]” an order which “denies” certification until final judgment is entered.¹²⁸ Accordingly, so long as the motion is made between the return of the verdict and final judgment, the rule appears to authorize the motion. Judges, in fact, often

encompass—in time, place, etc.—the class’s claims. For this reason, it may be necessary to try two or more individual cases so that the judgment necessarily encompasses the full scope of the class’s claims.

¹²⁵ See Fed. R. Civ. P. 49(b) (“The court *may* submit to the jury forms for a general verdict, together with written questions on one or more issues of fact . . .” (emphasis added)).

¹²⁶ 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2505 (3d ed. 2008) (“Although, as noted earlier in the discussion, there are frequent judicial statements in the reported cases that the district court’s decision whether or not to use a special verdict under Rule 49(a) is reviewable by the court of appeals only for abuse of discretion, *there appears never to have been a reversal on this ground.*” (emphasis added) (citation omitted)).

¹²⁷ Judges have almost unreviewable discretion to allow special questions to be put to the jury. Accordingly, it is important that the judge understand why the questions are significant.

¹²⁸ FED. R. CIV. P. 23(c)(1)(C).

entertain post-trial motions to amend certification orders.¹²⁹ The most common of these is likely the motion to decertify, but at least one judge has amended an order to expand the class definition, thereby adding class members after trial.¹³⁰ A strong argument in favor of approving the motion is that the rule's text offers no reason to treat a motion to amend that *reverses a denial* of certification differently from one that *reverses a grant*; if judges routinely do one—and they do¹³¹—then the other is not problematic simply for being less common.

The merits of a motion to amend raise two issues. The first is whether, setting aside the overlapped element, anything else has changed in the certification calculus. Sometimes, trial reveals facts to the judge that, while not bearing on the merits of the dispute, give rise to grounds for decertification¹³² (thus, the post-trial decertification motions mentioned in the last paragraph). If nothing like that arises, then the second issue is whether the judge will choose to credit the jury's finding on market efficiency over her own prior finding. If the judge credits the jury, then she should grant the motion and certify the class.¹³³

There is, however, no case law or rule that compels the judge to abandon her prior finding in favor of the jury's. But even though the motion to amend cannot force the judge to accept the jury's finding, there are three reasons to expect that the judge, nonetheless, will. First, the jury made its decision based on a more developed presentation. Although discovery was perhaps complete when the certification decision was made,¹³⁴ regardless, the jury would have benefitted from live testimony rather than paper, as well as from any changes the parties made to their arguments in response to the judge's certification finding. It is reasonable to expect, after all, that the lawyers on both sides will have developed their arguments between certification and trial. (Who knows? Maybe the second presentation of the issue will secretly change the judge's mind too.)

The next two reasons are related. The first is that it might be unseemly for a judge to disagree with a jury verdict immediately following that

¹²⁹ See 7AA WRIGHT ET AL., *supra* note 19 (“Courts have modified or decertified classes at . . . the completion of the trial on the merits.”).

¹³⁰ *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 877–78 (11th Cir. 1986) (permitting a post-trial expansion of the class).

¹³¹ See, e.g., *Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 811 (5th Cir. 1982) (“The district court may decertify a class after trial . . .”).

¹³² See 7AA WRIGHT ET AL., *supra* note 19 (“[T]he action always can be decertified or the class description altered if later events suggest that it is appropriate to do so.”).

¹³³ See FED. R. CIV. P. 23(c) advisory committee's note (2003) (“A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.”). This statement implies that, once the court is satisfied that the requirements have been met, there is no reason not to certify.

¹³⁴ See Olson, *supra* note 34, at 954–56 (indicating that judges will allow plaintiffs to take merits discovery prior to class certification in overlap cases).

verdict. The judge does not have to accept the jury's verdict on the overlapped element in the motion to amend context, but that verdict will no doubt control the liability of the defendant. If the judge were to accept the finding for liability's sake but refuse to acknowledge it on the motion to amend, it would send an unflattering message about the judge's estimation of the jury, detracting from the perceived legitimacy of the civil justice system, generally, and the civil jury, specifically.

One complicating factor, which is the third reason that the judge may choose to acknowledge the jury's finding, is the Seventh Amendment's right to jury trial.¹³⁵ Seventh Amendment jurisprudence is notoriously convoluted.¹³⁶ The Seventh Amendment surely doesn't force the judge to accept the jury's finding, but the judge doing so would not be out of line with what courts have said about the overlap interpretation—namely, that the judge's finding cannot bind the jury¹³⁷—or with the charge leveled at the overlap interpretation by critics that it interferes with the plaintiff's Seventh Amendment rights.¹³⁸ Acquiescing in the jury's opinion avoids the issue entirely.

The final issue raised by the motion to amend is the judge's discretion. Even if the judge accepts the motion on the merits and acknowledges her authority to grant it, she does not have to. Motions under Rule 23(c)(1)(C) are discretionary.¹³⁹ In other post-trial motions under 23(c)(1)(C), discretion has been tied to prejudice, which has been tied to notice. Obviously, granting the motion does not prejudice the plaintiff or the absent class members. But it might unfairly prejudice a defendant if that defendant had been unaware that the trial was really a class trial in disguise. A reasonable defendant would be unlikely to expend the same amount of effort and resources on an individual case as on a class case. Accordingly, informing the defendant of the true stakes of the case is key to affording her a full and fair opportunity to litigate. This is why I suggest giving notice above.

b. A second class action.—All is not lost if the judge denies the motion to amend or if the plaintiff prefers not to file that motion. The alternative is to proceed to final judgment in the individual case and then

¹³⁵ U.S. CONST. amend. VII.

¹³⁶ Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 486–87 (1975) (describing the difficulty and confusion in Seventh Amendment analysis).

¹³⁷ *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) (“The jury or factfinder can be given free hand to find all of the facts required to render a verdict on the merits, and if its finding on any fact differs from a finding made in connection with class action certification, the ultimate factfinder’s finding on the merits will govern the judgment.”).

¹³⁸ See Olson, *supra* note 34, at 938 (criticizing overlap interpretation as abridging the jury trial right).

¹³⁹ 7AA WRIGHT ET AL., *supra* note 19 (“However, it must be noted that there is no requirement that the court alter its class-action order when the circumstances surrounding its initial determination change. The decision to amend a class-certification order is discretionary.”).

file an identical class action with a new named plaintiff. Then, the new class should move for class certification and use collateral estoppel to prevent the defendant from arguing that the market is efficient.¹⁴⁰ Collateral estoppel, generally, prevents a party from contesting an issue that was determined against it in a prior case if it had a full and fair opportunity to litigate the issue (again, this requires notice of the stakes in the first case), and it is clear that the judgment encompasses the issue (thus, the special questions under Rule 49(b)).¹⁴¹

With the overlapped element established, the nonoverlapped certification requirements remain. While the second judge is not required to find these in the plaintiff's favor, the first judge's decision on this point will be persuasive both on stare decisis and comity grounds.¹⁴² So, presumably, the second judge will decide the remaining requirements in the plaintiff's favor, and therefore certify the class.

Depending on the specific facts of the case, collateral estoppel may also be able to establish other elements of the class's claims as well. This advantage could be significant, as it would mean that the defendant effectively begins the case with the class certified and, potentially, summary judgment entered against it on liability. Rather than try to fight with those disabilities, a reasonable defendant would probably settle.

c. Two cases: one motion for certification.—The collateral estoppel option works even if the plaintiff never moves for class certification in the first case. This is the third path. If the plaintiff takes an individual case or a case with a few individual plaintiffs to trial and wins, then that judgment can be used for collateral estoppel in a follow-up class action in much the same manner as I describe above.

7. *Summary.*—One way to view jury certification is that, in the eyes of the risk-averse defendant, it transforms a denial of certification into a grant of certification whenever the defendant is less than confident that she can use summary judgment to prevent a trial. Jury certification requires only (1) a class action subject to the overlap interpretation,¹⁴³ (2) a denial of certification based solely on the overlapped element,¹⁴⁴ and (3) notice to the

¹⁴⁰ See generally *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326–33 (1979) (describing use of collateral estoppel in a securities case).

¹⁴¹ See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (“When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”).

¹⁴² See *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2382 (2011) (“[W]e would expect federal courts to apply principles of comity to each other’s class certification decisions when addressing a common dispute.”).

¹⁴³ See *supra* Part I.C.

¹⁴⁴ See *supra* Part II.A.1.

defendant.¹⁴⁵ The steps required to obtain jury certification, although not established with directly-on-point case law, are each, individually considered, relatively slight variations on current practices.

Thus, the strategy is viable. And there are two additional considerations that make it more so. First, it does not actually have to work in the sense of getting the class certified post-trial to work in the sense of producing a settlement. As long as it appears viable enough to the defendant, it will induce risk-averse defendants to settle. Second, there is little incremental cost and risk to the plaintiff (and her attorney) in attempting jury certification. In overlap cases most of the discovery necessary to try the case may well be concluded before the certification motion is filed.¹⁴⁶ That cost is sunk. And even though the cost of trying the case will likely be substantial, this cost should be weighed against the potential recovery for the entire class. Aside from cost, there is the lack of risk to the absent class members' claims to consider. If the plaintiff loses at trial, only the individual plaintiff's claim, now fairly adjudicated, is extinguished. The class's claims remain viable because the class was never certified and therefore the adverse judgment against a member of the class has no impact. Theoretically, the plaintiff's attorney can continue to retry the case until she runs out of representative plaintiffs.¹⁴⁷

B. Defenses to Jury Certification

I will now consider some countermeasures that defendants might employ if threatened with jury certification. In particular cases, some of these options may prevent the case from ever becoming a certified class action. In addition, the substantial amount of discretion that judges have at various points on the path to jury certification may be exercised in the defendant's favor and to the same effect. Yet, neither these countermeasures nor judicial discretion is a guaranteed shield. This is significant, because jury certification retains its viability as a negotiating chip so long as there is no surefire way to defeat it.

1. Summary Judgment.—One defensive option is to move for summary judgment immediately after class certification is denied, targeting the overlapped element.¹⁴⁸ This allows the summary judgment motion to

¹⁴⁵ See *supra* Part II.A.2.

¹⁴⁶ See Olson, *supra* note 34 (indicating that judges will allow plaintiffs to take merits discovery prior to class certification in overlap cases).

¹⁴⁷ There may be practical limits—the availability of class representatives, finances, etc.—but it is now clear that a decision not to certify a class does not bind the members of that would-be class. See *Bayer Corp.*, 131 S. Ct. at 2382 (“[T]he mere proposal of a class in the federal action could not bind persons who were not parties there.”).

¹⁴⁸ Summary judgment in federal court is not limited to entire claims or defenses. It can be targeted at specific facts or issues. FED. R. CIV. P. 56(a) (“A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought.”).

build on the momentum of the denial of certification. The judge just decided by a preponderance of the evidence that the market was not efficient.¹⁴⁹ She may, therefore, be willing to grant summary judgment if the defendant can convince her that the plaintiff's evidence of the overlapped element fails to meet the "reasonable juror" standard, as well.¹⁵⁰

2. *Rule 68 Offers of Judgment.*—Rule 68 allows a defendant to offer judgment on specific terms to the plaintiff.¹⁵¹ If the plaintiff accepts, the case is over. If the plaintiff declines the offer but ultimately recovers less than what was offered, then the plaintiff must pay whatever costs were incurred by the defendant from the date of the rejected offer forward.¹⁵² First, I will describe how a defendant might use Rule 68 to avoid jury certification. Then, I will discuss the relative strengths and weaknesses of Rule 68 as a countermeasure.

Rule 68 has been used in the class action context to "buy off" the individual plaintiff.¹⁵³ The buy-off moots the case, stripping the court of subject matter jurisdiction and, thereby, preventing a class from ever being certified.¹⁵⁴ Timing is critical. In the circuits where this strategy is available, the offer usually must come before the class certification motion is filed.¹⁵⁵ Otherwise, the absent class members are said to have a "stake" in the case; thus, mooting the individual plaintiff's case will no longer moot the entire case.¹⁵⁶

It is unclear whether a buy-off would work after the plaintiff is denied certification when that plaintiff intends to attempt jury certification. No court has decided whether the absent class members retain a stake in certification under these circumstances. If they do, then buy-off will not be an effective countermeasure against jury certification. One reason to think that the absent class members would retain a stake when the plaintiff intends to seek jury certification is that denials of certification are appealable¹⁵⁷ and amendable.¹⁵⁸ If the case can be mooted by a buy-off, then, in effect, the appealability and amendability provisions of Rule 23 are meaningless. Still, it is likely worth it for the defendant to argue that, once class certification is denied, the case can be mooted with an offer to the individual plaintiff, if for no other reason than that the point is unsettled.

¹⁴⁹ See *supra* note 104.

¹⁵⁰ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

¹⁵¹ FED. R. CIV. P. 68(a).

¹⁵² *Id.* 68(d).

¹⁵³ *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1084 (9th Cir. 2011).

¹⁵⁴ *Id.*; *Rand v. Monsanto Co.*, 926 F.2d 596, 597–98 (7th Cir. 1991).

¹⁵⁵ See, e.g., *Damasco v. Clearwire Corp.*, 662 F.3d 891, 895 (7th Cir. 2011).

¹⁵⁶ See *id.*

¹⁵⁷ Fed. R. Civ. P. 23(f).

¹⁵⁸ *Id.* 23(c)(1)(C).

That said, there are two related problems that make the buy-off option risky for defendants. First, it can be expensive. To moot the individual plaintiff's claim, the defendant will need to offer the entire value of that claim and attorneys' fees and costs.¹⁵⁹ Since precertification discovery in overlap class actions is apt to be expensive,¹⁶⁰ this strategy is unlikely to be cheap even if the individual plaintiff's damages are low.

The related problem is determining what the correct buy-off amount should be. The offer is invalid, meaning that it will not moot the case, unless it represents the full value of the plaintiff's claim.¹⁶¹ The cases where buy-offs have been used successfully to date are ones involving fixed, statutory damages. When damages are set, there is no difficulty calculating the appropriate amount.¹⁶² In securities cases, calculating individual damages for a correct buy-off amount is likely to be more difficult.¹⁶³

A final note is that there is little, if any, risk that by offering judgment the defendant will simply allow a different plaintiff to use the judgment to certify a class in another case by collateral estoppel. Consent judgments, of which Rule 68 offers a species, rarely support collateral estoppel.¹⁶⁴ Typically, collateral estoppel is only allowed on consent judgments when the judgment indicates that this was the parties' intent.¹⁶⁵

3. *“One-Way” Intervention.*—“One-way” intervention was a problem associated with a version of Rule 23 that no longer exists.¹⁶⁶ When the rule was first adopted in 1938, there was a type of class action, called the “spurious” class action, which had no binding effect on the rights of absent class members unless and until the absentee intervened as a party.¹⁶⁷ The problem was that, practically, this allowed absentees to wait until the merits of the case were decided, and then intervene only if their side won.¹⁶⁸ If their side lost, the absentee could just file an individual suit rather than

¹⁵⁹ See *Rand*, 926 F.2d at 597–98.

¹⁶⁰ See *supra* note 34 and accompanying text.

¹⁶¹ See *Damasco*, 662 F.3d at 893–94 (involving statute with a maximum possible recovery of \$1500 per violation and a settlement letter offering the individual plaintiff and “up to ten other affected people \$1,500 for each text message received from Clearwire, plus court costs”).

¹⁶² See, e.g., *id.*

¹⁶³ Damages in securities class actions are notoriously difficult to calculate, involving competing experts and dueling economics and complex mathematical models. If interested, wade in cautiously: Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1488–89 (1996); Elizabeth Chamblee Burch, *Reassessing Damages in Securities Fraud Class Actions*, 66 MD. L. REV. 348, 349 (2007); Bradford Cornell & R. Gregory Morgan, *Using Finance Theory to Measure Damages in Fraud on the Market Cases*, 37 UCLA L. REV. 883, 884 (1990).

¹⁶⁴ 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4443 (2d ed. 2002).

¹⁶⁵ *Id.*

¹⁶⁶ See FED. R. CIV. P. 23 (1938).

¹⁶⁷ *Id.*

¹⁶⁸ FED. R. CIV. P. 23 advisory committee's note (1966).

intervene because the class's loss did not bind her. The rulemakers sought to abolish one-way intervention in 1966. They eliminated the "spurious" class action and encouraged judges to decide certification before deciding the merits.¹⁶⁹

Defendants might argue that jury certification is, in effect, one-way intervention and, therefore, is impermissible. Admittedly, there is a resemblance. In both jury certification and in one-way intervention, the absent class members' rights do not become subject to alteration until the merits of their claims have already been decided in their favor.

There are three reasons to think that, in spite of this resemblance, the one-way intervention argument will not defeat jury certification. The first is textual. Rule 23 does not prohibit one-way intervention explicitly, but it does explicitly allow a denial of certification to be modified after trial.¹⁷⁰ This creates a tension because there is no way to modify a post-trial denial of certification that does not, in some way, resemble one-way intervention. To modify a denial, part of the denial must be revoked. This means that either absent class members that were initially excluded from the class definition must be let in, or claims that were not certified must now be certified. Either way, the result resembles one-way intervention and is clearly countenanced by the rule.

The second reason not to credit the one-way intervention argument is precedent. Judges have already considered and rejected the "looks like 'one-way' intervention" argument in the context of amending class definitions after trial.¹⁷¹ The final reason is practical. Even if one-way intervention is held to preclude a motion to amend that reverses a denial of certification, the same result can be achieved with nonmutual, offensive collateral estoppel, as discussed above. This has practical and doctrinal significance.

The practical significance is that collateral estoppel achieves the same result but with more litigation and, therefore, higher cost. The doctrinal significance is a little more complicated. When one-way intervention was "abolished" in 1966, a plaintiff could not use collateral estoppel based on a judgment to which she was not a party. This was an element of the doctrine of mutuality.¹⁷² In its fullest form, the doctrine of mutuality meant that only a party to a judgment could invoke that judgment for *res judicata* or collateral estoppel.¹⁷³ In other words, a jury certification/collateral estoppel strategy would not have worked in 1966, whatever the merits of the "one-

¹⁶⁹ *Id.*

¹⁷⁰ FED. R. CIV. P. 23(c)(1)(C).

¹⁷¹ *Amati v. City of Woodstock*, 176 F.3d 952, 957 (7th Cir. 1999) (discussing one-way intervention in the context of amendment motions under 23(c)).

¹⁷² See RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 1186–87 (5th ed. 2009) (discussing mutuality and the breach of mutuality).

¹⁷³ *Id.*

way” intervention argument, because the plaintiff in the second class action could not have used the prior judgment against the defendant since she was not a party to the first case.

Today, mutuality is gone.¹⁷⁴ Anyone can use a judgment against a party to that judgment, whether the user was a party to it or not. Without mutuality, prohibiting tactics that resemble “one-way” intervention is, practically speaking, impossible—the second plaintiff can now achieve through collateral estoppel what, before, would only have been possible through intervention. Accordingly, the decisions that broke mutuality should be taken as a judgment that the kind of unfairness sought to be prohibited by stopping “one-way” intervention is no longer an overriding systemic concern.

CONCLUSION

I would like to conclude by summarizing a key point, making a suggestion, and noting an irony. The key point is for the plaintiff’s securities fraud bar: whenever class certification is denied solely based on market inefficiency, abandoning the case means leaving the class’s money on the table. The main point of this Note has been to show that a denial of certification, under certain circumstances, can put the defendant in the same position as a grant of certification—forced to decide between settling and risking class-wide liability at trial.

The suggestion I have is for judges and scholars concerned about class actions and class certification. I have tried to avoid the normative here and instead focused on what I feel is a viable but as-yet-untested application of existing law. I am not, however, blind to the normative implications of jury certification. My suggestion is that those looking to categorize jury certification consider grouping it with the other recognized flaws of the overlap interpretation. As I noted above, the overlap interpretation is textually unjustifiable and costly for the parties. It is also what allows the jury to certify. Juries are the masters of a case’s merits and only by overlapping the merits with certification are juries given a say on certification. Therefore, if jury certification is troubling, so too should be the overlap interpretation.

Finally, I will note an irony. As I mentioned above, the overlap interpretation—which allows for jury certification—is likely the product of scholarly and judicial sympathy.¹⁷⁵ That sympathy, in turn, is based on the pressure that class action defendants feel to settle when faced with a certified class.¹⁷⁶ In other words, the overlap interpretation was meant to

¹⁷⁴ *Id.*

¹⁷⁵ See Bone, *supra* note 100; Olson, *supra* note 34, at 939 (suggesting that judicial sympathy for class defendants drove judges to adopt the overlap interpretation).

¹⁷⁶ See Olson *supra* note 34, at 939.

make class certification harder in order to protect defendants from having to choose between settlement and the risk of class-wide liability at trial. To the extent that observation is accurate, it is ironic that the overlap interpretation has the potential to achieve the opposite result by opening the door to jury certification.