FORM, SUBSTANCE, AND RULE 23: THE APPLICABILITY OF THE FEDERAL RULES OF EVIDENCE TO CLASS CERTIFICATION

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Rule 23 of the Federal Rules of Civil Procedure governs the standards for certifying a class action, a type of litigation whose aggregate form is intended to make litigation accessible to large groups of injured plaintiffs and incentivize the vindication of claims that may otherwise go unpursued in the face of high litigation costs. However, while due process requires that a certifying court find that each element of Rule 23 is satisfied through "evidentiary proof," the federal courts have failed to adopt any kind of consistent evidentiary standard to apply to the record proffered at class certification. This has resulted in the use of class certification as a bargaining chip between plaintiffs' lawyers and wealthy defendants, rather than as a procedural mechanism that serves to test the propriety of a particular action for class treatment. Ultimately, this dynamic harms the very injured plaintiffs that this mechanism seeks to protect. This Note examines the need for a uniform evidentiary standard and surveys the countervailing interests of absent class members, defendants, class counsel, and the court at this critical juncture in a class action proceeding. It then proposes a novel categorization of the Federal Rules of Evidence as either form- or substance-based, and argues that an evidentiary standard that properly balances the interests of all parties involved in the class action requires a certifying court to apply substance-based evidence rules in determining whether a proposed class satisfies Rule 23. Such a rule, this Note will argue, is essential to ensuring that absent class members are protected, rather than exploited, by the class action mechanism.

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* Copyright © 2020 by Madeleine M. Xu. J.D., 2020, New York University School of Law; B.S., 2015, Tufts University. I am extremely grateful to Professors Troy McKenzie and Erin Murphy for their guidance, feedback, and advice throughout the life of this Note. My particular gratitude to Professor McKenzie for inspiring and nurturing my love for civil procedure throughout my time at the Law School. I would also like to thank the editors of the *New York University Law Review*, and in particular Jessica Li, for their diligence in reviewing and editing this piece; my friends and peers who helped and supported me through this undertaking; and the American Mock Trial Association for sparking my passion for evidence law all those long years ago.

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Introduction

In the immediate aftermath of the Deepwater Horizon oil spill, Mikal Watts, a well-reputed plaintiff's attorney, filed a class action against BP under Rule 23 of the Federal Rules of Civil Procedure.[1] Watts claimed to represent a class of 42,000 Vietnamese fishermen, all of whom had suffered economic losses due to BP's annihilation of the Gulf Coast's fishing industry. Watts's case, along with all other civil matters related to Deepwater Horizon, were consolidated in a multidistrict litigation in federal district court in New Orleans.[2] In March of 2012, facing the prospect of hundreds of billions of dollars in liability, BP settled, agreeing to create a $2.3 billion fund for the fishermen.[3] The court approved a settlement class, certified under Rule 23(b)(3),[4] wherein Watts would receive some $400 million in attorneys' fees.[5]

That is, he would have, if it had not been discovered that Watts's inventory of Vietnamese fishermen did not exist.[6] While Watts had filed more than 40,000 claims on behalf of his purported clients, federal agents discovered that his client roll included 7000 made-up Social Security numbers, 15,000 stolen ones, and dozens of ineligible

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1 *See* Francesca Mari, *The Lawyer Whose Clients Didn't Exist*, Atlantic (May 2020), https://www.theatlantic.com/magazine/archive/2020/05/bp-oil-spill-shrimpers-settlement/609082; *see also In re* Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mex., on Apr. 20, 2010, 910 F. Supp. 2d 891 (E.D. La. 2012), *aff'd sub nom. In re* Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014).

2 *In re Oil Spill*, 910 F. Supp. 2d at 900–01.

3 *Id.* at 901, 909.

4 *Id.* at 903. For more on Rule 23's requirements, see *infra* notes 45–50.

5 Mari, *supra* note 1.

6 United States v. Warren, 728 F. App'x 249, 252 (5th Cir. 2018) (detailing that only 786 individuals from the 40,000-plus clients Watts claimed submitted claims, and only four were found to be eligible for payments).

claimants, including "a casino employee, a cosmetologist, a librarian, a soldier fighting in Afghanistan, a Buddhist monk, a Catholic priest, 240 people who'd died before the spill—and one dead dog named Lucy Lu."[7] As the courts sorted through this mess, real victims—fishermen whom Watts had claimed as clients—waited in purgatory, bound by the terms of a settlement that was now on the chopping block, and legally barred from recovering for their injuries in any other way.[8]

When BP agreed to the settlement, Watts had gloated to his law partners: "BP pays the $2.3 [billion] whether the proof supports it or not."[9] It didn't—but that discovery came too late for the fishermen whose claims had been extinguished nonetheless. Meanwhile, despite facing federal charges for fraud, Watts was ultimately awarded $18 million in attorneys' fees.[10]

The question of proof is at the heart of a growing debate in the field of aggregate litigation. Aggregate litigation, like the type brought against BP after Deepwater Horizon, changes the nature of a case by incorporating economies of scale into the classic plaintiff-versus-defendant formula. This scale transforms the interests, the stakes, and the consequences of litigation. Class actions, the most well-known form of aggregation, allow one or more named plaintiffs to bring claims against one or multiple defendants in pursuit of an interest shared by a group of nonlitigants so numerous that it would overwhelm the mechanism of joinder.[11] The representation of this group—the putative "class"—puts at the heart of the litigation the rights of not only the named parties but of parties who are not at the table. Rule 23 of the Federal Rules of Civil Procedure places the burden of safeguarding the interests of absent class members squarely at the feet of the court.[12] However, while Rule 23 lays out the elements required to certify a class in detail, it offers scant instruction as to how these elements should be evaluated by the certifying court—in other words, how these elements should be proven.

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[7] Mari, *supra* note 1.

[8] *Id.*

[9] *Id.*

[10] *In re* Oil Spill by Oil Rig "Deepwater Horizon" in Gulf of Mex., on Apr. 20, 2010, MDL 2179, 2019 WL 5864740, at *3 n.7 (E.D. La. Nov. 8, 2019) (order denying motions to recuse).

[11] *See* Fed. R. Civ. P. 23(a)(1) (requiring that joinder of all members of the putative class be "impracticable").

[12] *See* Taylor v. Sturgell, 553 U.S. 880, 897 (2008) (detailing the responsibility of the court to ensure adherence to the "special procedures" put in place to protect the interests of absent members of a putative class).

Rule 23 does not articulate the burden of proof that the movant must satisfy in order for the court to grant class certification.[13] The Rule is also silent as to what extent the record must be developed in order for the court to rule on a class certification motion.[14] Most importantly, Rule 23 sets forth no evidentiary rules or standards governing the materials the parties can offer in support of or in opposition to class certification.[15] This is especially problematic, as courts have long recognized that while the decision as to whether to certify a class must be separate from the merits of the underlying claim,[16] in many instances, a factual determination must be made in order for the court to make a finding on an element required for class certification.[17] In such cases, courts typically engage in a factual inquiry at class certification even if that factual inquiry overlaps with the merits.[18] However, despite the vital role that evidence plays in the courts' assessment of putative classes, most class certification hearings hew to an unwritten "no rules of evidence apply" rule that results in ad hoc judgments about what types of evidence will be considered in rendering the court's opinion.[19]

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[13] *See* FED. R. CIV. P. 23.

[14] *See id.*

[15] *See id.* This omission, in particular, stands in contrast to Rule 56, which allows parties to object that material used to support or oppose the motion for summary judgment is not reducible to admissible evidence. FED. R. CIV. P. 56(c)(2).

[16] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–78 (1974) (holding that a court cannot make a decision regarding an element of Rule 23 based on the court's assessment of whether the case was a good case on the merits).

[17] Even seemingly cut-and-dry elements like Rule 23(a)(1)'s numerosity requirement can necessitate a factual finding. *See infra* Section I.A.

[18] *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 312–15 (3d Cir. 2009) (delving into expert evidence regarding the feasibility of determining antitrust impact classwide where such inquiry was central to the existence of predominance under Rule 23(b)(3)). *Hydrogen Peroxide* stands for the general proposition that *Eisen* precludes a merits inquiry only where one is not necessary to determine whether an element of Rule 23 is met. *Id.* at 316–17. In light of these overlaps, some courts have even begun conducting evidentiary hearings *in advance of* class certification in order to make preliminary findings on the elements likely to be contested at class certification. However, even in ordering such evidentiary hearings, these courts have failed to articulate a clear evidentiary standard to be applied. *See, e.g.*, Jaffree v. Wallace, 705 F.2d 1526, 1536 (11th Cir. 1983) (finding that a hearing is required before a court can deny certification on grounds that the class representative is inadequate), *aff'd*, 466 U.S. 924 (1984); Int'l Woodworkers of Am. v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1268 (4th Cir. 1981) (finding an evidentiary hearing essential when "the written record leaves serious questions as to the propriety of class certification"); Shepard v. Beaird-Poulan, Inc., 617 F.2d 87, 89 (5th Cir. 1980) (finding that a court should ordinarily conduct an evidentiary hearing), *remanded on reh'g*, 638 F.2d 909 (5th Cir. 1981); Marcera v. Chinlund, 565 F.2d 253, 255 (2d Cir. 1977) (holding that courts should order an evidentiary hearing if a party requests), *vacated on other grounds sub nom.* Lombard v. Marcera, 442 U.S. 915 (1979).

[19] *See* Linda S. Mullenix, *Putting Proponents to Their Proof: Evidentiary Rules at Class Certification*, 82 GEO. WASH. L. REV. 606, 606 (2014) [hereinafter Mullenix, *Putting*

The Supreme Court has reinforced the importance of evidence at class certification, instructing that plaintiffs must "satisfy through evidentiary proof" the requirements of Rule 23.[20] However, it has steadfastly refused to explain what type of "evidentiary proof" is required. In light of this lack of guidance, the lower courts have developed varying degrees of attachment to the Federal Rules of Evidence in class certification hearings. Relying on Supreme Court dicta regarding the admissibility and reliability of expert testimony presented in support of class certification,[21] many circuits, including the Third Circuit,[22] Sixth Circuit,[23] Seventh Circuit,[24] Ninth Circuit,[25] Eleventh Circuit,[26] and district courts within the Second Circuit,[27] Fourth Circuit,[28] Fifth Circuit,[29] and D.C. Circuit[30] conduct full *Daubert* hear-

Proponents to Their Proof] (describing the "often cited precept[ ]" that "no rules of evidence apply" in class certification hearings).

20 Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013).

21 *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 354 (2011) (expressing "doubt" as to the district court's position that Federal Rule of Evidence 702 and the standards in *Daubert v. Merrell Dow Pharmaceuticals Inc.* "did not apply to expert testimony at the certification stage of class-action proceedings").

22 *In re* Blood Reagents Antitrust Litig., 783 F.3d 183, 187–88 (3d Cir. 2015) ("[A] plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*.").

23 *In re* Carpenter Co., No. 14-0302, 2014 WL 12809636, at *3 (6th Cir. Sept. 29, 2014) (finding that the district properly applied the *Daubert* standard to expert evidence presented at class certification "[g]iven the Supreme Court's statement in [*Dukes*]").

24 Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812–13 (7th Cir. 2012) (finding that expert testimony that is critical to certification of a class can only be used if a district court makes a conclusive ruling on the expert's qualifications).

25 Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011) (ruling that "the district court correctly applied the evidentiary standard set forth in *Daubert*" to expert testimony presented at class certification).

26 Sher v. Raytheon Co., 419 F. App'x 887, 890 (11th Cir. 2011) (finding reversible error in the district court's failure to "sufficiently evaluat[e] and weigh[ ] conflicting expert testimony on class certification" and refusing "to conduct a *Daubert*-like critique of the proffered expert['s] qualifications").

27 Hughes v. Ester C Co., 317 F.R.D. 333, 340 (E.D.N.Y. 2016) (finding that the *Daubert* standard for expert testimony is proper at the class certification stage, but only insofar as it is used to establish Rule 23 requirements); Chen-Oster v. Goldman, Sachs & Co., 114 F. Supp. 3d 110, 114–15 (S.D.N.Y. 2015) (same).

28 Good v. Am. Water Works Co., 310 F.R.D. 274, 284–85 (S.D. W. Va. 2015) (applying *Daubert* to evaluate expert testimony presented for class certification).

29 Cannon v. BP Prods. N. Am. Inc., No. 3:10-CV-00622, 2013 WL 5514284, at *5–6 (S.D. Tex. Sept. 30, 2013) (finding it reasonable "to consider the admissibility of the testimony of an expert proffered to establish one of the Rule 23 elements" in the class certification process (quoting Unger v. Amedisys Inc., 401 F.3d 316, 323 n.6 (5th Cir. 2005))).

30 Campbell v. Nat'l R.R. Passenger Corp., 311 F. Supp. 3d 281, 296 (D.D.C. 2018) (invoking the "heavy weight of authority" to find that a full *Daubert* analysis must be performed before expert testimony in support of class certification can be excluded).

ings when presented with expert evidence essential to class certification.[31] A smaller number of these courts have extended their reasoning regarding the Supreme Court's hints about *Daubert* to the rest of the Federal Rules of Evidence. At present, only the Fifth Circuit[32] and a handful of district courts[33] evaluate the admissibility of evidence proffered in support of class certification against the full range of the Federal Rules of Evidence.

On the other side of the circuit split, the Ninth Circuit has held that a district court commits an error of law when it declines to consider evidence at the class certification stage solely on the basis that that evidence is inadmissible at trial.[34] The Ninth Circuit's reasoning relies heavily on the rationale of the Eighth Circuit with regards to *Daubert* analysis in class certification.[35]

Existing literature has explored the extremes of this continuum, either advocating for the wholesale adoption of the Federal Rules of Evidence at class certification hearings,[36] or arguing that the Federal Rules of Evidence have no place in the class action procedure at all.[37] Both arguments raise important questions about the role of the class certification hearing and the practical implications of additional stringency. However, in light of the competing interests at play in a class action proceeding and the singularly important mechanism of class certification in adjudicating the due process rights of hundreds, if not thousands, of claimants in one fell swoop, the question of what role evidence rules should play in a class action necessitates a more nuanced view.

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[31] At present, the only circuit that has not followed *Dukes* in requiring *Daubert* hearings at class certification is the Eighth Circuit. *See In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 611–13 (8th Cir. 2011) ("We have never required a district court to decide conclusively at the class certification stage what evidence will ultimately be admissible at trial.").

[32] *See* Unger v. Amedisys Inc., 401 F.3d 316, 319, 325 (5th Cir. 2005) ("When a court considers class certification . . . it must . . . base its ruling on admissible evidence.").

[33] *See Campbell*, 311 F. Supp. 3d at 310–11; Zuniga v. Bernalillo Cty., 319 F.R.D. 640, 660 n.5 (D.N.M. 2016) (concluding "that the Federal Rules of Evidence apply to class certification hearings"); *In re* Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., No. 3:09-md-02100-DRH-PMF, 2012 WL 865041, at *7 (S.D. Ill. Mar. 13, 2012) (adopting the position that "the Federal Rules of Evidence apply at the class certification stage").

[34] Sali v. Corona Reg'l Med. Ctr., 909 F.3d 996, 1006–07 (9th Cir. 2018).

[35] *Id.* at 1004 ("Because a class certification decision 'is far from a conclusive judgment on the merits of the case, it is of necessity . . . not accompanied by the traditional rules and procedure applicable to civil trials.'" (quoting *In re Zurn Pex*, 644 F.3d at 613 (internal quotations omitted))).

[36] *See* Mullenix, *Putting Proponents to Their Proof*, *supra* note 19, at 645–48.

[37] *E.g.*, Libby Jelinek, Comment, *The Applicability of the Federal Rules of Evidence at Class Certification*, 65 UCLA L. Rev. 280 (2018).

This Note recommends a novel approach that balances the interests of prospective plaintiffs and defendants against the need to protect the rights of absent members of the putative class. The "no rules of evidence apply" standard adopted by the Ninth Circuit enables disloyal behavior by class counsel, puts defendants at risk of blackmail settlements, and provides insufficient incentive for judges to adequately safeguard the interests of absent class members.[38] On the other hand, the full adoption of the rules embraced by the Fifth Circuit may present too steep a barrier for plaintiffs.[39] This Note presents a novel categorization of the Federal Rules of Evidence and proposes that only those evidence rules that regulate the substance of the proffered evidence be applied at class certification.[40] Requiring the plaintiff to support her motion for class certification with evidence that *can be* admissible at trial sets an evidentiary standard just high enough to ensure that the court actively enforces the rights of absent class members but not so high as to be prohibitive for plaintiffs with scant resources but meritorious claims.

This Note proceeds in three Parts. Part I explains the requirement that elements of Rule 23 must be shown through evidentiary proof and surveys the existing circuit split on the application of the Federal Rules of Evidence to class certification. Part II discusses the interests at stake and argues that a heightened level of evidentiary scrutiny is necessary to balance and enforce these interests. Part III proposes a novel standard for evaluating evidence during class certification that ensures closer adhesion to the requirements of Rule 23 without unnecessarily burdening the class action mechanism.

I
Class Certification and the Role of "Proof"

The class action mechanism comes with a wealth of benefits. For one, class actions are an efficient method of adjudication where a large group of claims-holders allege similar or identical claims against

[38] *See infra* Part II.

[39] *See infra* Part II.

[40] Some evidence rules govern the kind of evidence that is admissible based on its substance. For example, the hearsay rules contained in Article VIII of the Federal Rules of Evidence detail which *types* of out-of-court statements may be relied on by the finder of fact based on the content of those statements. Other evidence rules govern what form admissible evidence must take. For example, the authentication rules contained in Article IX detail how to ensure that evidence is what it purports to be; these rules do not discriminate between admissible and inadmissible evidence based on its content. The distinction between a form-based rule and a substance-based rule is simply whether the contested evidence would be admissible if presented in a different form. For more on the form/substance distinction, see *infra* Part III.

the same defendant or group of defendants. Where joinder of all parties in interest is impracticable, the class action mechanism preserves judicial economy by allowing the court to resolve a large number of claims "in one fell swoop."[41] Similarly, the aggregation of claims through the class action mechanism promotes the enforcement of legal rights and remedies through litigation. Individual claims-holders who have small-dollar, negative-value claims are more likely to see those rights vindicated through a class action, where the sheer volume of negative-value claims exceeds the transactional cost of litigation. Finally, class actions offer defendants consistency and finality. In cases with sprawling scope, class treatment subjects defendants to a single judgment binding on the class.

The promise of finality presents one of the most unique aspects of the class action mechanism. As a representative action, the class action is an exception to the general rule against nonparty preclusion.[42] In order to present a legitimate representative action, there must be "special procedures to protect the nonparties' interests."[43] Rule 23 of the Federal Rules of Civil Procedure dictates such procedures for safeguarding the interests of absent class members in class actions.[44]

A. The Requirements of Rule 23

In order for a class action to be conducted, a court must issue an order determining that the action proposed by the plaintiff has satisfied the requirements of Rule 23.[45] Rule 23(a) sets out prerequisites which test the necessity of the class action mechanism,[46] the cohesiveness of the class,[47] and the adequacy of representation of absent class members' interests.[48] In addition to surmounting the prerequisites in Rule 23(a), a plaintiff seeking certification must also show that her proposed class fits within one of the class types described in Rule 23(b).[49] Rule 23's certification requirements test the propriety of the

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41 Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 911 (7th Cir. 2003).

42 *See infra* Section II.C.

43 Taylor v. Sturgell, 553 U.S. 880, 897 (2008).

44 FED. R. CIV. P. 23(a).

45 *Id.* 23(c)(1)(A).

46 *Id.* 23(a)(1).

47 *Id.* 23(a)(2)-(3).

48 *Id.* 23(a)(4).

49 *See id.* 23(b). Rule 23(b) lists two types of "mandatory" classes, and one "opt-out" class. Rule 23(b)(2) provides for the certification of a mandatory class when requesting injunctive or declaratory relief, while Rule 23(b)(1)(A) provides for the certification of a mandatory class where the prosecution of separate actions by or against individual class members would create a risk of inconsistent or varying adjudications. *Id.* These types of classes are "mandatory" because the rule does not provide absent class members in these

class action device and the likelihood that the class representatives' interests are so intertwined with those of the class that the interests of absent class members are sufficiently represented as to satisfy due process.[50]

Despite its clear-cut language, Rule 23 does not simply present a pleading standard that can be surmounted by a well-crafted complaint. Rather, the satisfaction of each requirement must be *proven* by the party seeking certification. Take, for example, the commonality requirement in Rule 23(a)(2). Rule 23(a)(2) issues a test of horizontal cohesion, requiring the plaintiff to show that there are questions of law or fact common to the class as a whole.[51] On its face, commonality requires only a "single question . . . common to the members of the class."[52] However, in *Wal-Mart Stores, Inc. v. Dukes*,[53] the Supreme Court outlined a more exacting commonality inquiry, requiring the existence of a common question "of such a nature that it is capable of classwide resolution," such that "[the] truth or falsity [of the common question] will resolve an issue that is central to the validity of each one of the claims in one stroke."[54] In *Dukes*, three named plaintiffs brought suit against Wal-Mart on behalf of a nationwide class of approximately 1.5 million current and former female employees, alleging that the company enabled discrimination against its female employees in violation of Title VII of the Civil Rights Act of 1964.[55] Because Wal-Mart had no express corporate policy discouraging the advancement of women, the root of the plaintiffs' claim was that the discretion given by Wal-Mart to local managers in making salary and promotion decisions resulted in a "corporate culture" of unlawful discrimination to which all Wal-Mart's female employees were subject.[56] In an opinion by Justice Scalia, the Court rejected this concept of commonality. It was not sufficient for plaintiffs to satisfy the bare face of

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types of class actions with an opt-out right. Thus, every member of the putative class is bound by settlement or judgment on class claims upon certification of the class. Meanwhile, Rule 23(b)(3) provides for the certification of a class when common questions predominate over questions individual to members of the class, and when the class action mechanism is superior to other available methods of adjudication. *Id.* Such classes are wholly or predominantly for money damages, and as such include an opt-out right.

[50] *See* Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979) ("[T]he class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.").

[51] Fed. R. Civ. P. 23(a)(2).

[52] Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 176 & n.110 (2003).

[53] 564 U.S. 338 (2011).

[54] *Id.* at 350.

[55] *Id.* at 342.

[56] *Id.* at 354.

Rule 23(a)(2) by submitting a complaint that "literally raises common 'questions.'"[57] Rather, plaintiffs had to give the court some assurance that answering a common question would resolve at least a piece of the litigation for the entire class.[58] Because plaintiffs advanced no evidence as to "whether 0.5 percent or 95 percent of the employment decisions at Wal-Mart might be determined by stereotyped thinking,"[59] the Court concluded that the plaintiffs had not put forth a common question apt to drive resolution in a manner that made the class action device the most efficient mechanism of resolving their claims.[60] Thus, commonality requires more than the barefaced pleading of common questions, but rather a showing that the use of a classwide proceeding can "generate common *answers* apt to drive the resolution of the litigation."[61]

In order to certify a class under Rule 23 and bind all absent class members to any judgment entered thereafter, the certifying court must find the requirements of the Rule met and issue a certification order.[62] However, none of the requirements of class certification under Rule 23 are easily satisfied by simply alleging the existence of, for example, a common question or a naturally limited fund. Even a prerequisite as clear-cut as numerosity must be satisfied through some type of proof.[63] Courts have long recognized that "[g]oing beyond the

57 *Id.* at 349 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

58 *Dukes*, 564 U.S. at 352.

59 *Id.* at 354 (quoting the testimony of Dr. Bielby, the plaintiffs' expert).

60 *Id.* at 359.

61 *Id.* at 350 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)) (arguing that what matters to the commonality inquiry is not the raising of common questions, but whether there are "[d]issimilarities within the proposed class" that "have the potential to impede the generation of common answers").

62 Fed. R. Civ. P. 23(e). While Rule 23 does not require the certifying court to issue findings of fact and conclusions of law regarding the satisfaction of Rule 23(a) and (b), virtually all federal courts now do so. *See, e.g.*, *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 794–95 (3d Cir. 1995) (observing that most district judges make formal findings on Rule 23(a) and (b) even though Rule 23 does not explicitly require it); St. Paul Fire & Marine Ins. Co. v. Del Webb Cmtys., Inc., No. 2:12-CV-00674-KJD, 2013 WL 1181904, at *2 (D. Nev. Mar. 19, 2013) (restating the court's certification order that was based on findings of fact and conclusions of law); Yeager's Fuel, Inc. v. Pa. Power & Light Co., 162 F.R.D. 482, 485 (E.D. Pa. 1995) (noting that a district court's ruling on class certification must set forth findings of fact and conclusions of law).

63 The numerosity requirement dictates that the putative class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Because impracticability is a soft standard that inevitably varies in application across jurisdictions, in order to meet this requirement, the plaintiff "must show some evidence of or reasonably estimate the number of class members" without relying on "pure speculation or bare allegations." Flores v. Anjost Corp., 284 F.R.D. 112, 123 (S.D.N.Y. 2012).

pleadings is necessary . . . in order to make a meaningful determination of the certification issues."[64] However, throughout the 1980s and 1990s, courts often treated the definitional provisions of Rule 23 as little more than a pleading standard. Some courts certified class actions on the pleadings alone, in the absence of a judicial hearing, supporting evidence, or any record on which to base the finding that Rule 23's elements had been met.[65] Others adopted a presumption in favor of class certification, wherein any doubts about the propriety of a proposed class action were resolved in favor of the moving plaintiff.[66] At the extreme end, courts issued "drive-by" certifications, wherein the mere filing of a class complaint with the clerk's office was sufficient to garner near-immediate class certification.[67] This refusal to closely examine the bases for class certification was rooted in the understanding that class certification must be separate from the merits of the underlying claim. This tenet of class action doctrine was reinforced by the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*,[68] which birthed the so-called "*Eisen* Rule," which courts interpreted as precluding any merits-based inquiry at the certification stage.[69]

As time went on, however, the courts began to recognize that certain factual determinations had to be made in order for the court to make a finding on an element required for class certification. In *General Telephone Co. v. Falcon*,[70] for example, the Supreme Court recognized that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification ques-

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[64] Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996).

[65] *See* Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 Tul. L. Rev. 1709, 1715 (2000) (describing the tendency of several state courts to certify anything that comes through the door).

[66] *See, e.g.*, Law v. NCAA, 167 F.R.D. 178, 181 (D. Kan. 1996) (asserting that district courts should construe Rule 23 liberally and resolve all doubts in favor of class certification); *In re* Carbon Dioxide Antitrust Litig., 149 F.R.D. 229, 232 (M.D. Fla. 1993) (stating that courts should resolve any doubts in favor of class certification).

[67] *See* Mullenix, *Putting Proponents to Their Proof*, *supra* note 19, at 614 (describing the practice of "drive-by" certifications); Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Legis. 483, 501 (2000) (illustrating the problem of "drive-by" certifications in several state courts); *see also* Mitchell v. H & R Block, Inc., 783 So. 2d 812, 818 (Ala. 2000) (characterizing Alabama as the poster child for "drive-by" class certifications).

[68] 417 U.S. 156 (1974).

[69] *See id.* at 158 (instructing that nothing in Rule 23 authorizes a court "to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action").

[70] 457 U.S. 147 (1982).

tion,"[71] noting that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'"[72] It was not until a decade ago that federal courts across the board began applying more stringent review to plaintiffs' motions for class certification, with judicial scrutiny reaching its apex in the Third Circuit with *In re Hydrogen Peroxide Antitrust Litigation*.[73]

B. *The Evolving Standard of Review in Class Certification Hearings*

In re Hydrogen Peroxide was an antitrust action brought against chemical manufacturers who sold hydrogen peroxide. Because individual injury is an element of an antitrust violation under the Sherman Act, the plaintiffs had the burden of showing that antitrust impact was capable of proof at trial through evidence that is common to the class rather than evidence that is individual to its members.[74] The District Court certified a (b)(3) class despite conflicting expert testimony as to whether common proof could be used to show antitrust impact class-wide.[75] The Third Circuit vacated the certification order.[76] In an opinion by Judge Scirica, the court instructed that the decision to certify a class action must be supported by findings by the court and cannot merely succeed on a "threshold showing" by the party seeking certification, that each requirement of Rule 23 is met.[77] In order to do this, a district court must "resolve all factual or legal disputes relevant to class certification *even if* they overlap with the merits – *including* disputes that may touch on an element of the underlying cause of action."[78] Finally, the court's obligation to evaluate all relevant evidence extends to expert testimony—when faced with expert testimony, the court must conduct *Daubert* hearings and weigh conflicting expert analyses against each other.[79] Because the District Court relied only on the plaintiff's expert in finding commonality and predominance satisfied, it erred in certifying the class.

Judge Scirica's opinion in *Hydrogen Peroxide* was not binding on sister circuits. However, its approach to the role of the certifying court

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[71] *Id.* at 160.
[72] *Id.* (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978)) (citation omitted).
[73] 552 F.3d 305 (3d Cir. 2008).
[74] *Id.* at 311.
[75] *Id.* at 312.
[76] *Id.* at 307.
[77] *Id.*
[78] *Id.* (emphasis added).
[79] *Id.* at 307, 323.

at class certification was prescient. Soon after *Hydrogen Peroxide* was handed down, the Supreme Court, in *Dukes*, admonished judges to conduct a "rigorous analysis"[80] in determining that the requirements of Rule 23 have been satisfied, reemphasizing that Rule 23 "does not set forth a mere pleading standard" and that a plaintiff seeking certification must "affirmatively demonstrate . . . compliance with the Rule."[81] Two years later, in *Comcast Corp. v. Behrend*,[82] the Court reversed the certification of another antitrust class action on the basis that plaintiffs had failed to show that the damages sought resulted from a classwide injury. The Court there reiterated that "certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied," noting that "such an analysis will frequently entail overlap with the merits of the plaintiff's underlying claim."[83] Most recently, in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,[84] the Court affirmed certification of a securities class action where the defendant had conceded to the efficiency of the market but alleged that plaintiffs needed to additionally prove that defendant's disclosures were actually material in order to use fraud-on-the-market theory[85] to overcome issues of predominance regarding individual reliance. There, the Court held that "merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[86] Because materiality is not a prerequisite to efficiency, the plaintiffs need not prove it at certification; if the defendant is right that the misstatement is not material, then the answer is not decertification but rather judgment on the merits with preclusive effect on all class members.

The increasingly prominent role that merits inquiries play in the class certification decision raises an important question—what kind of record should a certifying court rely on in issuing its certification deci-

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[80] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982)) (explaining that "actual, not presumed, conformance" with the requirements of Rule 23 is "indispensable," such that certification is proper only if the Rule 23 requirements have in fact been satisfied).

[81] *Id.*

[82] 569 U.S. 27 (2013).

[83] *Id.* at 33 (citation omitted).

[84] 568 U.S. 455 (2013).

[85] The fraud-on-the-market theory is based on the idea that, in an efficient securities market, materially misleading statements would defraud purchasers even if the purchasers do not rely on the misstatements. In *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), the Supreme Court held that reliance may be presumed where the market is efficient; thus, only by invoking the fraud-on-the-market theory can plaintiffs establish a classwide, rebuttable presumption of reliance that satisfies the (b)(3) predominance inquiry.

[86] *Amgen*, 568 U.S. at 466.

sion? More specifically, what kind of evidentiary standard should the court apply to the evidence presented to support the satisfaction of the requirements of Rule 23? The Court initially granted certiorari on the question of "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence" in *Comcast* but ultimately did not decide the issue in its opinion.[87] More recently, the Court denied certiorari in *Taylor Farms Pacific, Inc. v. Pena*,[88] a case from the Ninth Circuit which again squarely presented the question to the Court. In the absence of explicit guidance from the high court, lower courts have found themselves dealing with a pervasive circuit split on the question of what role the Federal Rules of Evidence have to play at class certification hearings.

C. The Ongoing Dispute over the Federal Rules of Evidence

Although the Supreme Court has never directly addressed the issue, the Court's dicta has strongly suggested that lower courts should scrutinize the admissibility and reliability of expert testimony presented in support of class certification.[89] As such, the vast majority of circuits that have spoken on the issue have held that "where an expert's testimony is critical to class certification, 'a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion'—i.e., 'the district court must perform a full *Daubert* analysis[90] before certifying the class.'"[91] The only circuit court in active disagreement is the Eighth Circuit.[92]

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[87] *See* Comcast Corp. v. Behrend, 569 U.S. 27, 33 n.4 (2013) (declining to address the issue because defendants had failed to raise an appropriate objection on that ground before the trial court).

[88] Taylor Farms Pac., Inc. v. Pena, 128 S.Ct. 976 (2018) (denying petition for certiorari).

[89] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 354 (2011) (expressing "doubt" as to the district court's position that the admissibility standards of Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals Inc.* "did not apply to expert testimony at the certification stage of class-action proceedings").

[90] The *Daubert* Test, first articulated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), sets the standard governing the reliability of expert witness testimony, an essential element of the admissibility of such testimony under Rule 702 of the Federal Rules of Evidence. Meeting the standard involves analyzing scientific methodology through a set of illustrative factors aimed at gauging the reliability of the expert's results. 509 U.S. at 592. The *Daubert* standard was partially codified in the 2000 Rule 702 amendment.

[91] Campbell v. Nat'l R.R. Passenger Corp., 311 F. Supp. 3d 281, 294 (D.D.C. 2018) (quoting Am. Honda Motor Co. v. Allen, 600 F.3d 813, 815–16 (7th Cir. 2010)).

[92] *See In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 611–13 (8th Cir. 2011) ("We have never required a district court to decide conclusively at the class certification stage when evidence will ultimately be admissible at trial.").

While a largely one-sided debate rages over the applicability of *Daubert* to expert testimony tendered in support of certification, the applicability of other provisions of the Federal Rules of Evidence to nonexpert evidence has garnered much less attention by the courts. Only two circuit courts have directly addressed the issue, and each arrived at a different result.

In *Unger v. Amedisys Inc.*,[93] the Fifth Circuit held that a district court's class certification finding "must be made based on adequate admissible evidence."[94] *Unger* was a securities class action in which plaintiffs sought to certify a (b)(3) class pursuant to a fraud-on-the-market theory.[95] In order to rely on the fraud-on-the-market theory, plaintiffs had to show that the securities at issue were traded in an efficient market.[96] To prove market efficiency, the plaintiffs relied heavily on two Internet printouts that purported to show the average weekly trading volume of the defendant's stock.[97] The district court relied on these "sketchy"[98] Internet printouts to conclude that the defendant's stock traded in an efficient market during the time in question.[99] On appeal, the Fifth Circuit found the district court's ruling unjustifiable on the basis that the Internet printouts constituted inadmissible hearsay. Holding that courts presented with motions for class certification must "base [their] ruling[s] on admissible evidence,"[100] the Fifth Circuit explained that "reliance on unverifiable evidence is hardly better than relying on bare allegations."[101] In concluding that the district court had committed reversible error, the court expounded that "[c]ourts cannot make an informed decision based on bare allegations, one-sided affidavits, and unexplained Internet printouts."[102]

District courts in other circuits have agreed.[103] Judges in the U.S. District Court for the District of Columbia, for example, have

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[93] 401 F.3d 316, 320 (5th Cir. 2005).

[94] *Id.* at 325 ("When a court considers class certification based on the fraud-on-the-market theory, it must engage in thorough analysis, weigh the relevant factors, require both parties to justify their allegations, and base its ruling on admissible evidence.").

[95] *See supra* note 85 and accompanying text.

[96] *Unger*, 401 F.3d at 322.

[97] *Id.* at 324.

[98] *Id.* at 320.

[99] *Id.* at 324.

[100] *Id.* at 325.

[101] *Id.* at 324.

[102] *Id.* at 325.

[103] *See, e.g.*, Campbell v. Nat'l R.R. Passenger Corp., 311 F. Supp. 3d 281, 309–11 (D.D.C. 2018) (concluding that the weight of Supreme Court authority requires the court to address evidentiary objections to the plaintiffs' proffered declarations before relying on them for class certification); Zuniga v. Bernalillo County, 319 F.R.D. 640, 660 n.5 (D.N.M. 2016) (concluding "that the Federal Rules of Evidence apply to class certification

evaluated nonexpert evidence pursuant to the Federal Rules of Evidence,[104] basing their decision on the position that Supreme Court jurisprudence supports the conclusion that "when a party objects to evidence provided in support of class certification, a district court must assess the admissibility of that evidence before certifying a class."[105] Most recently, a judge in the Eastern District of New York held that inadmissible hearsay could not be considered when ruling on a class certification motion.[106] The court referred to the Supreme Court's suggestion in *Dukes* that evidentiary standards for expert testimony apply at the class certification stage and reasoned that there is no logical basis for applying "only some of the Rules of Evidence to class certification motions. They should either apply in full, or not at all."[107]

On the opposite side of the aisle stands the Ninth Circuit in *Sali v. Corona Regional Medical Center*.[108] *Sali* was a wage and hour case brought by a class of registered nurses alleging that they were systematically underpaid by the defendant in violation of California law.[109] The defendant, in opposing class certification, argued, in part, that the named plaintiffs did not satisfy the Rule 23(a)(3) typicality require-

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hearings"); Soutter v. Equifax Info. Servs. LLC, 299 F.R.D. 126, 131 (E.D. Va. 2014) ("The Federal Rules of Evidence . . . 'apply to proceedings in United States courts,' subject to certain exceptions not applicable here. A motion for class certification is, without doubt, such a proceeding." (citations omitted) (quoting FED. R. EVID. 101)); *In re* Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., No. 3:09-md-02100-DRH-PMF, 2012 WL 865041, at *7 (S.D. Ill. Mar. 13, 2012) (adopting the position that "the Federal Rules of Evidence apply at the class certification stage"); Pecover v. Elec. Arts Inc., No. C 08-2820 VRW, 2010 WL 8742757, at *2 (N.D. Cal. Dec. 21, 2010) (arguing that nothing in the Federal Rules of Evidence or Federal Rules of Civil Procedure "suggest[s] that class action certification proceedings present an exception to FRE 1101 or that the Federal Rules of Evidence carry different meaning in the class action certification context than elsewhere"); Lewis v. First Am. Title Ins. Co., 265 F.R.D. 536, 544 (D. Idaho 2010) ("[T]he FRE and the minimal case law available support First American's position that the FRE apply generally at the class certification stage."); *see also* 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 3:14 (16th ed. 2019) ("When conducting its rigorous analysis of whether a class should be certified, the Court should apply the Rules of Evidence.").

[104] *See, e.g.*, *Campbell*, 311 F. Supp. 3d at 308–09 (admitting statistical evidence proffered by the plaintiff pursuant to the relevance standard of Federal Rule of Evidence 401); *see also* FED. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

[105] *Campbell*, 311 F. Supp. 3d at 310.

[106] Lin v. Everyday Beauty Amore Inc., No. 18-cv-729 (BMC), 2019 WL 3037072, at *2–3 (E.D.N.Y. July 11, 2019).

[107] *Id.* at *3.

[108] 909 F.3d 996 (9th Cir. 2018).

[109] *Id.* at 1000.

ment[110] because they had failed to present admissible evidence of their injuries.[111] In support of their motion for class certification, the two named plaintiffs had submitted a declaration by Javier Ruiz, a paralegal at class counsel's law firm, as evidence of their individual injuries. Ruiz had prepared spreadsheets that compared a random sampling of each named plaintiff's clock-in and clock-out times against defendant's records of their rounded, paid time in order to show that the defendant undercounted the named plaintiffs' clock-in and clock-out times by eight minutes per shift and six minutes per shift, respectively.[112] Defendants objected to the declaration, arguing that "(1) the declaration constituted improper lay opinion testimony and must be excluded under Federal Rules of Evidence 701 and 702; (2) Ruiz's opinions were unreliable; (3) the declaration lacked foundation and Ruiz lacked personal knowledge of the information analyzed; and (4) the data underlying Ruiz's analysis was unauthenticated hearsay."[113] The district court agreed with the defendant and struck the declaration as inadmissible, based on each of those grounds.[114]

On appeal, the Ninth Circuit reversed, holding that a district court commits an error of law where it declines to consider evidence at the class certification stage solely on the basis of its inadmissibility.[115] While acknowledging that a plaintiff seeking class certification bears the burden of satisfying Rule 23 through evidentiary proof, Judge Mendoza relied heavily on the Eighth Circuit's jurisprudence questioning the applicability of *Daubert*[116] and concluded that such

[110] Typicality requires that a plaintiff holding himself out as a class representative show that he "'possess[es] the same interest and suffer[s] the same injury' as the [absent] class members." Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 156 (1982) (quoting E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)).

[111] *Sali*, 909 F.3d at 1000.

[112] *Id.* at 1003.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] The Eighth Circuit has held that district courts do not need to conduct a full *Daubert* analysis at the class certification stage or even address whether proffered expert evidence will be admissible at trial. In lieu of *Daubert*, the Eighth Circuit imposed its own standard for assessing the reliability of expert evidence at class certification—"a focused *Daubert* analysis" that "scrutinize[s] the reliability of the expert testimony in light of the criteria for class certification and the current state of the evidence." *In re* Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 614 (8th Cir. 2011). The Eighth Circuit reasoned that class certification is "inherently tentative" and "preliminary" and may be revisited at any time during proceedings, and because full merits discovery is often not completed before a court rules on a motion for class certification, expert opinions and evidence "may have to adapt" and the district court may have to "reexamine its evidentiary rulings." *Id.* at 613. Additionally, because class certification "is far from a conclusive judgment on the merits of the case," the Eighth Circuit concluded that class certification does not require the traditional rules and procedures applied at trial. *Id.* The preliminary nature of the class

evidentiary proof need not be admissible.[117] On those grounds, the Ninth Circuit found that the district court improperly "rejected evidence that likely could have been presented in an admissible form at trial" and thus placed "formalistic evidentiary objections" above "proof that tended to support class certification."[118] However, the Ninth Circuit also clarified that "the district court need not dispense with the standards of admissibility entirely."[119] Rather, district courts at class certification should consider the admissibility of the evidence, but only to the extent necessary to evaluate "the weight that evidence is given at the class certification stage."[120] For example, the court is permitted to consider "whether the plaintiff's proof is, or will likely lead to, admissible evidence."[121] While the Ninth Circuit's approach does not entirely foreclose the relevance of the Federal Rules of Evidence to class certification, its approach to evidence remains ad hoc. In holding that the inadmissibility of evidence alone cannot be a basis for denying certification, the Ninth Circuit articulated no evidentiary standard to be applied instead.[122]

The Federal Rules of Evidence themselves purport to apply broadly to proceedings in federal courts—they apply to proceedings before district and circuit courts in all U.S. jurisdictions;[123] to all civil proceedings, which all class actions necessarily are;[124] and to all stages of a case or proceeding.[125] A class action certification hearing does not fall under any of the enumerated exceptions to the scope of the Federal Rules.[126] A plain reading of the Federal Rules, then, suggests that the Fifth Circuit's position should prevail. However, the

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certification hearing has also been cited by one of the few pieces of scholarship addressing the issue, in support of the view that the Federal Rules of Evidence need not apply at class certification. Jelinek, *supra* note 37, at 312–17.

[117] *Sali*, 909 F.3d at 1005–06.

[118] *Id.* at 1006.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* While no other circuit has echoed this stance, a number of district courts have taken the hardline position that the Federal Rules of Evidence should not apply at all. *See, e.g.*, Bell v. Addus Healthcare, Inc., No. C06-5188RJB, 2007 WL 3012507, at *3 (W.D. Wash. Oct. 12, 2007) ("[T]he Court is still not persuaded that it must apply the traditional rules . . . [to] evidence in support of class certification."); Fisher v. Ciba Specialty Chems. Corp., 238 F.R.D. 273, 279 (S.D. Ala. 2006) ("[T]he Federal Rules of Evidence are not stringently applied at the class certification stage because of the preliminary nature of such proceedings. Courts confronted with Rule 23 issues may consider evidence that may not ultimately be admissible at trial.").

[123] Fed. R. Evid. 1101(a).

[124] Fed. R. Evid. 1101(b).

[125] Fed. R. Evid. 1101(c).

[126] Fed. R. Evid. 1101(d) (listing exceptions to the general applicability of the Federal Rules of Evidence, including for determinations of preliminary questions of fact governing

rationales adopted by the Eighth and Ninth Circuit raise arguments that speak to the unique power of class litigation. While a certification decision is not the end goal of a class action and does not constitute a conclusive judgment on the merits of the case, it often has an outsized influence on the ultimate disposition of the action and carries with it serious consequences for the due process rights of absent class members. Thus, a nuanced view of what, if any, evidentiary standard should be applied requires due consideration of how litigation is transformed by certification and of the interests of each stakeholder in a class action.

II
Examining the Need for a Coherent Evidentiary Standard

Class certification is often considered the "single most important issue" in class action cases.[127] Because of the binding effect of class certification on absent class members and the sheer volume of claims aggregated against the defendant in a class action, the stakes involved in a class action are significantly higher than in ordinary litigation.[128] As such, a class certification hearing is "*the* major, significant litigation event in class litigation . . . . *It is the main event*."[129]

If the court denies class certification, consumers with small, negative-value claims may see their rights go unvindicated.[130] If certification is granted, defendants may capitulate to blackmail settlements rather than endure invasive discovery, a lengthy trial, and the risk of a bankrupting judgment.[131] The modern Rule 23 no longer has a provi-

admissibility, grand jury proceedings, and various categories of miscellaneous proceedings).

[127] *See, e.g.*, Arthur R. Miller, An Overview of Federal Class Actions: Past, Present, and Future 12 (1977) (explaining that "whether the case will be certified . . . is the single most important issue in the case" because defense lawyers "believe that their ability to settle the case advantageously . . . depends on blocking certification," while plaintiffs' counsel "believe that their ability to obtain a large settlement turns on securing certification").

[128] *See, e.g.*, Parker v. Time Warner Entm't Co., 239 F.R.D. 318, 341 (E.D.N.Y. 2007) (noting that in "high-stakes complex class action litigation" defendants may face "devastating judgments" and "catastrophic damages awards").

[129] Mullenix, *Putting Proponents to Their Proof*, *supra* note 19, at 631 (emphasis in original).

[130] *See generally* Linda S. Mullenix, *Complex Litigation: Negative Value Suits*, 26 Nat'l L.J. 1 (2004).

[131] *See* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 Notre Dame L. Rev. 1377, 1378 (2000) (explaining that blackmail settlements occur when "class counsel is able to threaten the defendant with a costly and risky trial").

sion for conditional certification of classes,[132] and class certification decisions are rarely overturned on appeal.[133] While the certification decision can be altered at any point prior to final judgment,[134] decertification orders are "extremely rare,"[135] especially as defendants' incentive to settle rarely gives the court an opportunity to reevaluate their initial certification decision.[136] The enormity of a class certification decision distinguishes it from other preliminary hearings; it is "not merely another provisional proceeding sandwiched among the judge's other daily routine proceedings."[137] In light of the gravity of the class certification decision, the lack of an evidentiary standard has serious consequences for all parties involved in the litigation but, most importantly, for absent class members.

132 *See* Fed. R. Civ. P. 23(c) advisory committee's notes to 2003 amendments (noting the deletion of the conditional certification provision and stating that "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met"). Conditional certification would allow the court to rule that the class will be certified as long as it meets certain additional requirements. If the court was not satisfied that the additional requirements were met, it could then strip the action of its status as a class action, essentially making the certification decision easily reversible.

133 While interlocutory appeals of class certification orders are permitted under Rule 23(f), these appeals are permissive. In fact, the court of appeals has "unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Fed. R. Civ. P. 23(f) advisory committee's notes to 1998 amendments. In addition, the appellate standard of review for class certification decisions is deferential. *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 312 (3d Cir. 2008) ("We review a class certification order for abuse of discretion . . . ."); Andrews v. Chevy Chase Bank, 545 F.3d 570, 573 (7th Cir. 2008) ("We generally review a grant of class certification for an abuse of discretion . . . ."). Collateral attacks after final judgment is entered are limited to attacks on procedural due process. The plaintiff cannot argue that she was not adequately represented in the prior suit; she can only argue that the prior court did not afford her a full and fair opportunity to litigate the issue. *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 377–80 (1996) (deferring to the Delaware court's finding of adequate representation and finding a full opportunity to litigate, based on the state's preclusion law, where the settlement released claims within exclusive federal jurisdiction); *see also* Epstein v. MCA, Inc. (*Epstein III*), 179 F.3d 641, 648 (9th Cir. 1999) ("Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review.").

134 Fed. R. Civ. P. 23(c)(1)(C).

135 Mullenix, *Putting Proponents to Their Proof*, *supra* note 19, at 631. *But see In re* Grand Theft Auto Video Game Consumer Litig., 251 F.R.D. 139, 155–57 (S.D.N.Y. 2008) (decertifying nationwide settlement class after determining that individual issues predominate).

136 *See* Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001) ("[A]n order certifying a class usually is the district judge's last word on the subject; there is no later test of the decision's factual premises (and, if the case is settled, there could not be such an examination even if the district judge viewed the certification as provisional).").

137 Mullenix, *Putting Proponents to Their Proof*, *supra* note 19, at 631.

A. Blackmail Settlements and the Stakes for the Defendant

Viewing class litigation through the eyes of the defendant makes clear the need for an evidentiary standard at class certification. The problem of blackmail in class settlements has been recognized by jurists since the early 1970s.[138] The root of the argument lies in the unique nature of aggregate litigation, which incorporates economies of scale into the standard formula of two-party litigation. In individual litigation, a trial determines only the defendant's liability to that individual plaintiff. However, once a class is certified, a defendant faces a single all-or-nothing trial that determines the defendant's liability to hundreds, if not thousands, of plaintiffs and a potential judgment aggregated into the millions.

This view of class certification as an all-or-nothing roll of the dice for the defendant featured prominently in Judge Posner's decision in *In re Rhone-Poulenc Rorer Inc.*,[139] one of the first cases to clearly articulate the conditions that give rise to a blackmail settlement. In *Rhone-Poulenc*, plaintiffs sought to certify a class consisting of persons with hemophilia who had contracted HIV from use of the defendants' HIV-tainted blood solids.[140] Defendants appealed the certification of the class to the Seventh Circuit on a writ of mandamus. In granting the writ, Judge Posner, writing for the court, posited that class certification presented a risk of irreparable harm.[141] Because Rule 23 at the time provided no mechanism for interlocutory review of class certification, by the time an appealable final judgment would have been issued, the defendants would already have been exposed to intolerable risk.[142] In individual litigation, the defendants would have faced only three hundred lawsuits, due to statutes of limitations.[143] While the potential damages in each were great, defendants had won twelve of the first thirteen individual cases brought against them on the same theories of liability, and were likely to win most of the remaining cases as well, resulting in total potential liability of no more than $125 million.[144] However, the certified class action swept in thousands of additional claims, increasing defendants' potential liability to $25 billion.[145] This potential liability—and its attendant risk

[138] *See* Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973).
[139] 51 F.3d 1293 (7th Cir. 1995).
[140] *Id.* at 1294.
[141] *Id.* at 1297.
[142] *Id.* at 1299–300.
[143] *Id.* at 1298.
[144] *Id.*
[145] *Id.*

of bankruptcy[146]—constituted "intense pressure to settle," such that there may never be a final judgment to review.[147] Under this theory, even a small probability of an immense judgment constitutes a "blackmail settlement."[148]

Some scholars have argued that the dangers of defendant blackmail are overstated.[149] However, even these critiques acknowledge that "a substantial majority" of certified classes end in classwide settlements.[150] According to a study by the Federal Judicial Center, the percentage of certified class actions that end in settlement ranges from 62% to 100%.[151] Out of the four federal districts studied, settlement rates for certified class actions were reported at 62%, 71%, 88%, and 100%.[152] In these same districts, the rate of certified class actions that made it to trial were 8% in one district, 6% in another district, and 0% in the other two.[153] Since *In re Rhone-Poulenc*, dozens of federal courts have expressed their concern about the risk posed by blackmail settlements.[154] In 1998, the Rules Committee amended Rule 23 to

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146 *See id.* at 1299 (articulating a concern that defendants in class actions are forced "to stake their companies on the outcome of a single jury trial, or [are] forced by fear of the risk of bankruptcy to settle even if they have no legal liability").

147 *Id.*

148 *See In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015–16 (7th Cir. 2002) (allowing interlocutory appeal in a class action because the legal claim made was novel and there was a high likelihood that the claims would be settled); *see also* West v. Prudential Sec., Inc., 282 F.3d 935, 937 (7th Cir. 2002) (same).

149 *See* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357 (2003); *see also* Hay & Rosenberg, *supra* note 131, at 1403–04 (discussing that plaintiffs also face an all-or-nothing gamble in class actions).

150 Silver, *supra* note 149, at 1399.

151 Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, Fed. Judicial Ctr., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 60 & n.213 (1996) (citing Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 Ind. L.J. 497, 501 (1987)).

152 *Id.* at 179 tbl.39. These settlement rates exclude classes that were certified for the purposes of settlement. *Id.*

153 *Id.*

154 *See, e.g.*, Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003) (discussing that there is a potential for very large damages awards which could induce unfair settlements); *In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 148 (2d Cir. 2001) (Jacobs, J., dissenting) (opposing class certification in part because the certification creates a danger of a coercive settlement); Newton v. Merrill Lynch, 259 F.3d 154, 163–64 (3d Cir. 2001) (stating a concern over the pressure certification can exert on defendants to settle); Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (same); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784–85 (3d Cir. 1995) (asserting that class actions create an opportunity for plaintiffs to use the threat of a class action to gain a settlement in excess of what the individual claims are worth); Griffin v. GK Intelligent Sys., Inc., 196 F.R.D. 298, 305 (S.D. Tex. 2000) (stating a concern over the pressure certification can exert on defendants to settle); Marascalco v. Int'l Computerized Orthokeratology Soc'y, Inc., 181 F.R.D. 331, 339 n.19 (N.D. Miss. 1998) (same).

adopt a provision allowing for interlocutory appeal to help alleviate settlement pressure.[155] This risk plays a factor in defendants' internal calculus: The defense bar continues to advise clients with the understanding that blackmail risk must factor into trial strategy.[156] Even the Supreme Court has tacitly conceded the existence of blackmail settlements.[157]

While defendant blackmail may not take the extortionate form vividly painted by Judge Posner, contemporary courts recognize that the heightened risk presented by aggregate litigation is exactly what makes certification such a dispositive stage of the class action.[158] A defendant facing such monumental risk is likely to settle even cases that are substantively weak rather than take their chances, making the rigor of the class certification decision all the more vital.

A more stringent standard for class certification mitigates the risk of blackmail settlements by requiring the court to more carefully consider whether the class action mechanism—with all its wide-ranging effects on bargaining power—is the proper vehicle for the class to vindicate its claims against the defendant. By centering the role of the court in determining whether class treatment is appropriate, a heightened evidentiary burden mitigates the risk that class certification is used as a vehicle for "strike-suit settlement[s]."[159]

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155 Fed. R. Civ. P. 23(f) advisory committee's notes to 1998 amendments ("[S]everal concerns justify expansion of present opportunities to appeal. . . . An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

156 *See, e.g.*, *Class Action Defense*, Venable LLP, https://www.venable.com/services/practices/class-action-defense (last visited May 26, 2020) (recognizing that defeating class certification "reduc[es] the potential exposure on a case from many millions of dollars to a negligible amount"); *Class Action Litigation*, Quinn Emanuel Trial Lawyers, https://www.quinnemanuel.com/practice-areas/class-action-litigation.aspx (last visited May 26, 2020) ("We know a class action can quickly become a tool for litigation extortion.").

157 *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) ("Certification of a large class 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.").

158 *See, e.g.*, Soutter v. Equifax Info. Servs. LLC, 299 F.R.D. 126, 130–31 (E.D. Va. 2014) (describing the changes in bargaining power caused by certification, and concluding that "the class certification decision is, as a practical matter, of dispositive consequence, notwithstanding that it is not dispositive in the same way as is a summary judgment motion").

159 *See Class Action Litigation*, *supra* note 156. A "strike suit" is a lawsuit of questionable merit brought by a plaintiff with the purpose of leveraging a settlement from the defendant that would amount to less than the defendant's cost of litigating. Strike suits are most common in the realm of securities law. *See generally* Note, *Extortionate Corporate Litigation: The Strike Suit*, 34 Colum. L. Rev. 1308 (1934).

More rigor at the class certification stage can also prevent plaintiffs' counsel from elbowing their way to the negotiation table by throwing voluminous binders of documents at the court. Because nothing prohibits a party from creating an evidentiary record consisting of materials that would be inadmissible at trial, plaintiffs' counsel can generate mountains of documents comprised of hearsay or otherwise inadmissible materials in the hopes of persuading the court that sheer volume of production is an adequate substitute for actual conformity with Rule 23.[160] Considering how frequently the size of the record is cited by reviewing courts as a basis for affirming class certification, this stratagem seems to be working.[161] Not only that, but permitting the plaintiff to bloat the record with material that is not probative of Rule 23 requirements runs the risk of creating a merits-based record for the purpose of convincing the court that the class should be certified in order to punish the wrongdoings of the defendant.[162] By requiring plaintiffs' counsel to do the legwork required to secure certification on the basis of admissible evidence, and by requiring the court to enforce this barrier to entry, adoption of an evidentiary standard at class certification equalizes bargaining power and reduces the likelihood that absent class members become bound by preclusive settlements without due cause.

The risk posed by blackmail settlements is not borne solely by defendants. The pressure to settle can combine with perverse incentives on the part of class counsel in a manner that illuminates the problem that a lack of evidentiary rigor creates for absent class members.

B. Sweetheart Settlements and Incentives for Class Counsel

Class certification does not exert settlement pressure solely on the defendant. The incentive to settle creates a parallel problem of "sweetheart settlements," wherein class counsel compromises the interests of absent class members by accepting undervalued settlements and releasing overbroad claims in order to avoid protracted liti-

[160] *See* Mullenix, *Putting Proponents to Their Proof*, *supra* note 19, at 624–25 ("The simple concept is that if the class proponents offer into the record dozens of black looseleaf binders of documents, there must be . . . class certification requirements . . . within the vast documentary evidence.").

[161] *See, e.g.*, Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1245 (11th Cir. 2008) (noting that "Family Dollar produced voluminous payroll records, store manuals, emails, and other communications").

[162] *See* Mullenix, *Putting Proponents to Their Proof*, *supra* note 19 at 626–27 (asserting that class counsel often presents the judge with vast amounts of the defendants' alleged bad conduct to suggest that "where there is smoke, there must be fire").

gation while collecting an outsize fee.[163] Here, it is absent class members who stand to lose, as class settlements increasingly broaden to include not only those claims brought by the class, but also claims that were not raised at all.

Additionally, because the majority of class actions proceed on contingency for class counsel,[164] class counsel has every incentive to settle claims upon certification in lieu of the expense of going to trial.[165] At the same time, class certification presents defendants with every incentive to "pay the class's lawyers enough to make them go away."[166] This is a toxic combination. Class counsel is not barred from negotiating the amount of attorneys' fees with the defendant in the course of negotiating the settlement,[167] a process that incentivizes class counsel to accept a settlement figure at a less-than-optimal amount in order to ensure first-class treatment of attorneys' fees.[168] Hence, throughout class action jurisprudence, evidence of collusion

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[163] *See, e.g.*, Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964) (observing that class counsel has "every incentive to accept a settlement that runs into high six figures or more regardless of how strong the claims for much larger amounts may be . . . [because] a juicy bird in the hand is worth more than the vision of a much larger one in the bush"); Hay & Rosenberg, *supra* note 131, at 1390 (discussing the argument that class counsel may "sell out" the class in a "sweetheart" settlement because "the defendant and the class counsel have a joint incentive to negotiate a settlement that gives the class counsel a generous attorney's fee, but gives the class members less than the fair value of their claims").

[164] *How Class Action Lawyers Get Paid*, Woodrow & Peluso LLC (Apr. 14, 2015), https://www.woodrowpeluso.com/single-post/2015/04/15/How-Class-Action-Lawyers-Get-Paid ("[T]he named plaintiff in a class action never pays the lawyer. Rather, class action lawyers take cases on a contingency basis and have their attorneys' fees approved by the court when a class settlement is approved or class judgment obtained."); *see* Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions 2009–2013*, 92 N.Y.U. L. Rev. 937, 938 (2017) (discussing the relationship in class action lawsuits between recovery and attorneys' fees rewarded); Daniel Fisher, *Study Shows Consumer Class-Action Lawyers Earn Millions, Clients Little*, Forbes (Dec. 11, 2013), https://www.forbes.com/sites/danielfisher/2013/12/11/with-consumer-class-actions-lawyers-are-mostly-paid-to-do-nothing (explaining some of the different modes and rationales behind attorneys' fees and class payouts).

[165] *See Kirby*, 333 F.2d at 347; *see also supra* Section II.B.

[166] *In re* Aqua Dots Prods. Liab. Litig., 654 F.3d 748, 753 (7th Cir. 2011); *see also supra* Section II.A.

[167] *See* Evans v. Jeff, 475 U.S. 717, 732 (1986) ("[A] general proscription against negotiated waiver of attorneys' fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement."); Staton v. Boeing Co., 327 F.3d 938, 972 (9th Cir. 2003) ("[T]he parties may negotiate and settle the amount of statutory fees along with the merits of the case, as permitted by *Evans*.").

[168] *See* Hay & Rosenberg, *supra* note 131, at 1391 (describing the tendency of pre-certification settlement agreements to generate scenarios in which defendants settle with whichever plaintiffs' lawyer settles for the lowest figure, incentivizing plaintiffs' counsel to underbid one another in order to secure attorneys' fees).

between plaintiff and defense counsel abounds. In *Reynolds v. Beneficial National Bank*,[169] the Seventh Circuit reversed certification of a settlement that paid out $4.75 million in attorneys' fees, where the settlement disbursed only $15 million in damages across one million class members, even though circumstantial evidence suggested that the defendant had initially valued the claims at over $25 million.[170] In *Staton v. Boeing Co.*,[171] the Ninth Circuit reversed a settlement that required Boeing to pay only $7.3 million in damages to the class and agree to duplicative injunctive relief, while pricing attorneys' fees at $4.05 million.[172] In *In re Cendant Corp. PRIDES Litigation*,[173] the Third Circuit reversed a settlement where the grant of attorneys' fees amounted to almost seven times the lodestar value of the attorneys' work on the case.[174] And in *In re Vioxx Products Liability Litigation*, the Eastern District of Louisiana signed off on a master settlement agreement which leveraged attorneys' fees to incentivize class counsel against advising clients with the strongest claims to opt out of the settlement.[175]

Sweetheart settlements become more problematic for absent class members as defendants seek settlement terms that release not only the claims filed against it but also other claims that were not brought by the class. These types of settlements are permitted even when there is no clear jurisdiction over all released claims, so long as all settled claims share a common nucleus of operative fact.[176] Courts tend to justify such arrangements on the basis that defendants are

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[169] 288 F.3d 277 (7th Cir. 2002).

[170] *See id.* at 282–84 (stating that although there was no clear proof of collusion between plaintiff and defense counsel, the circumstances of the settlement were suspicious).

[171] 327 F.3d 938.

[172] *See id.* at 944–45, 972 (determining that the award of fees was invalid because the procedures used didn't "protect[ ] the class from the possibility that class counsel were accepting an excessive fee at the expense of the class").

[173] 243 F.3d 722 (3d Cir. 2001).

[174] *See id.* at 732 & n.11, 744 (noting that the attorneys' fees, which amounted to over $19 million, were only 5.7% of the class's total recovery but over seven times the amount billed hourly).

[175] *See* Settlement Agreement Between Merek & Co., Inc. & The Counsel Listed on the Signature Pages Hereto, *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606 (E.D. La. 2008) (No. 1657) (requiring counsel to withdraw from representing any eligible claimant who failed to submit a non-deficient and non-defective Enrollment Form, thereby discouraging counsel from assisting plaintiffs with the strongest claims from opting out of the class settlement). https://www.beasleyallen.com/alerts/attachments/Vioxx%20Master%20Settlement%20Agreement%20-%20With%20Exhibits.pdf; *see also* Joint Report No. 36 of Plaintiffs' and Defendants' Liaison Counsel, *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606 (E.D. La. 2008) (No. 1657).

[176] *See* Sullivan v. DB Invs., Inc., 667 F.3d 273, 335 (3d Cir. 2011) (Scirica, J., concurring) (outlining that class certification only requires a "common nucleus of operative fact" even if there are variations in state law throughout class members).

paying peace premiums in exchange for the settlement and release of similar bundles of claims.[177] However, this practice poses the greatest risk to the rights of absent class members, as their *choses in action* are negotiated away even where their representatives have no bargaining power. The risks inherent in this dynamic are most evident in the Ninth Circuit's decision in *Epstein v. MCA, Inc.* (*Epstein III*).[178] *Epstein III* was issued on remand from the Supreme Court's decision in *Matsushita Electric Industrial Co. v. Epstein*.[179] Matsushita, the defendant, had been sued by two sets of shareholders, one of which alleged breach of fiduciary duty in state court in Delaware, while the other brought federal securities claims in federal court in California.[180] Despite little bargaining power,[181] Delaware counsel negotiated a settlement with Matsushita that released not only the low-value state law claims but also the high-value federal securities claims.[182] The Supreme Court held that the settlement was entitled to preclusive effect and thus barred further litigation of the California claims.[183] On remand, even though the Ninth Circuit believed that Delaware counsel failed to investigate or develop the federal claims, rolled over during settlement negotiations, and ultimately entered into a settlement that was "worthless except for [counsel's] own fees,"[184] the court, on rehearing, affirmed the dismissal of the federal claims.[185] In doing so, the Ninth Circuit held that collateral attacks on class settlements were limited to whether the earlier judgment asserted a full and fair opportunity to litigate the claim or issue; they do not include reconsideration of the merits or adequacy of representation, only procedural analysis.[186] Because both issue and claim preclusion attached to the certified settlement, the *Matsushita* shareholders lost the ability to litigate their high-value federal securities claims. Meanwhile, Delaware counsel collected one million dollars in fees.[187]

Imposing an evidentiary standard on class certification increases the rigor of the certification decision. Heightening certification standards reduces undue settlement pressure on defendants, which in turn

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177 *See id.* at 339.
178 179 F.3d 641 (9th Cir. 1999).
179 516 U.S. 367 (1996).
180 Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 370 (1996).
181 Because the Exchange Act conferred exclusive jurisdiction in the federal courts, *Matsushita*, 516 U.S. at 370, Delaware counsel could not carry out a threat to litigate the federal claims in Delaware state court. 15 U.S.C. § 78aa(a) (2018).
182 *Matsushita*, 516 U.S. at 371–72, 391.
183 *Id.* at 385–86.
184 Epstein v. MCA, Inc. (*Epstein II*), 126 F.3d 1235, 1251 (9th Cir. 1997).
185 *Epstein III*, 179 F.3d at 650.
186 *Id.* at 648.
187 *Matsushita*, 516 U.S. at 391 (Ginsburg, J., concurring in part).

disincentivizes sweetheart settlements.[188] Requiring the presentation of admissible evidence to support class certification, even for settlement classes, decreases the incentive to collude with defendants to sell out the class in exchange for an exorbitant attorneys' fee.[189] Moreover, evidence of investment in the case by class counsel is a useful proxy for loyalty to the class.[190] Additionally, an evidentiary standard for class certification enables objectors to challenge settlements in the same way that a defendant might challenge certification for trial. Such empowerment strengthens the effectiveness of this enforcement device, which is one of the few safeguards against collusive settlements.[191] Thus, adopting an evidentiary standard is protective not just of defendants but also of the rights of absent class members in incentivizing truly adequate representation.

C. The Role of the Court in Enforcing Due Process

Class counsel is not the only party in a class action proceeding tasked with safeguarding the interests of absent class members. Arguably, it is not class counsel but the certifying court which is deputized to play this role. In comparison to other provisions of the Federal Rules of Civil Procedure, which view the court as a neutral arbiter of law, Rule 23 gives the judiciary power to actively seize, rein in, control, and resolve sprawling litigation. It also delegates to the court the active responsibility of protecting the interests of absent class members by enforcing the requirements of Rule 23, including the requirement of assessing the adequacy of class counsel. In acting as the gatekeeper to the class action mechanism, the role of the court is to ensure the enforcement of due process for the dozens, hundreds, or thousands of individual class members who face the loss of voice, and in many cases the option to exit, in exchange for loyalty.[192] Consid-

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[188] *See supra* Sections II.A, II.B.

[189] Even a defendant seeking to reverse-auction a settlement would need to adequately compensate class counsel for the time and effort necessary to build a record of admissible evidence upon which to seek certification, and class counsel may be less incentivized to under-value the kind of meritorious claim it could support with admissible evidence.

[190] *Cf. In re* Cendant Corp. Litig., 264 F.3d 201, 235–36 (3d Cir. 2001) (noting that prior to settlement, there was a minimal amount of motion practice, discovery was virtually nonexistent, and counsel spent a relatively small amount of time on the case).

[191] *See* FED. R. CIV. P. 23(e)(5) (describing the mechanisms by which a class member may object to a proposed settlement).

[192] *See* Daly v. Harris, 209 F.R.D. 180, 189 (D. Haw. 2002) (explaining that enforcement of Rule 23(a)(4)'s adequacy requirement is vital in class actions because it "serves to protect the due process rights of absent class members who will be bound by the judgment"). Rule 23 also offers other due process protections—for example, the opt-out provision of Rule 23(c)(2). *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 814 & n.5 (1985) (holding that the provisions, such as those in Rule 23(c)(2), that allow class

ering the binding effect of class certification on the class and the difficulty of overturning class certification on appeal, the responsibility held by the court in the class action context is especially weighty.

In most cases, due process requires that a plaintiff who holds a *chose in action* have their day in court before their claim is extinguished.[193] One of the fundamental tenets of preclusion doctrine is that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."[194] Such judgments are not entitled to full faith and credit, rendering them nonbinding.[195] However, representative actions are one of the few narrow exceptions to the rule against nonparty preclusion. In *Taylor v. Sturgell*,[196] the Supreme Court ruled that a nonparty may be bound by a prior judgment if they were "'adequately represented by someone with the same interests who [wa]s a party' to the [prior] suit."[197] In holding there that the government's proffered theory of "virtual representation" was too expansive to constitute adequate representation, Justice Ginsburg explained that this exception was met only where the court in the first suit "'took care to protect the interests' of absent parties, or that the parties to that litigation 'understood their suit to be on behalf of absent [parties].'"[198] Thus, representative actions create a new role for the court—in lieu of acting as a neutral arbiter, as in individual litigation, a judge in a representative action must look out for the interests of nonparties who are absent.

The need for an evidentiary standard at the class certification stage, then, is most pressing when considered in light of the judicial role. Class certification is the formal recognition of a representative action; once the class is certified, all members of the putative class are bound by any subsequent judgment. Even when presented with black-

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members to opt out of damages suits, adequately protect those class members' due process rights). However, there is open debate as to whether mandatory classes seeking damages receive sufficient due process protection under Rule 23. For more on this issue, see Megan E. Barriger, Comment, *Due Process Limitations on Rule 23(b)(2) Monetary Remedies: Examining the Source of the Limitation in* Wal-Mart Stores, Inc. v. Dukes, 15 U. Pa. J. Const. L. 619, 626 (2012).

[193] *See* Richards v. Jefferson County, 517 U.S. 793, 798 (1996) (explaining that estoppel rules are bound up in the "deep-rooted historic tradition that everyone should have his own day in court" (citations omitted)).

[194] Hansberry v. Lee, 311 U.S. 32, 40 (1940); *see also Richards*, 517 U.S. at 797 (holding that the application of claim preclusion against a nonparty to the prior suit was inconsistent with the due process guarantees of the Fourteenth Amendment).

[195] Pennoyer v. Neff, 95 U.S. 714, 732–33 (1878).

[196] 553 U.S. 880 (2008).

[197] *Id.* at 894 (first alteration in original) (quoting *Richards*, 517 U.S. at 798).

[198] *Id.* at 896 (alteration in original) (quoting *Richards*, 517 U.S. at 802).

mail or sweetheart settlements, it is ultimately the responsibility of the court to consider whether the proposed deal adequately and fairly compensates absent class members.[199] In the course of certification, the role of the court is to safeguard the interests of absent class members and ensure that class treatment is the appropriate vehicle for addressing their claims.[200] In short, it is the responsibility of the certifying court to take care that absent class members' *choses in action* are not extinguished without due process of law. The procedural protection provided by Rule 23 on this front lies in the court's adherence to the requirements of the Rule itself. Thus, the role of the court in a class action proceeding cannot be adequately performed without requiring judges to evaluate class certification motions based on a true and reliable evidentiary record. If no evidentiary rules apply at class certification, the court can be persuaded to relinquish the rights of absent class members in the face of voluminous records of the defendant's wrongdoing or a large monetary settlement, whether or not certification is appropriate under Rule 23. The imposition of evidentiary rules incentivizes the court's vigorous defense of absent class members' interests in a way that the current system does not.

The stakes here illustrate the necessity of a uniform evidentiary standard to the record proffered for class certification. At minimum, an evidentiary standard ensures the certifying court's adherence to Rule 23, the only procedural mechanism protecting the due process rights of absent class members. On a broader scale, an evidentiary standard creates incentive effects that minimize the risk of blackmail settlements to defendants and enforces loyalty on the part of class counsel. Once it becomes clear that an evidentiary standard for class certification is needed, the question becomes *what* exactly that evidentiary standard should be.

III
A Form/Substance Evidentiary Rule for Class Certification

In light of the existing circuit split on the subject, the federal courts need a uniform, effective approach to evidence presented for class certification to fully address the stakes at issue. The few pieces of literature dedicated to the applicability of the Federal Rules of Evidence at class certification take an all-or-nothing approach—either

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199 Fed. R. Civ. P. 23(e).

200 *See generally* Note, *Conflicts in Class Actions and Protection of Absent Class Members*, 91 Yale L.J. 590, 591–92 (1982) (describing the role of the court in protecting absent class members' interests at the class certification stage).

the Federal Rules of Evidence must be adopted wholesale or set aside entirely.[201] The federal courts have taken a similar approach.[202] However, neither approach adequately addresses all of the interests at play in a class action proceeding. The Fifth Circuit's position that the Federal Rules of Evidence should be applied at class certification in their entirety risks turning certification into a mini-trial, thus losing many of the efficiency benefits of the class action device. On the other hand, the Ninth Circuit's position that no evidentiary standards should be enforced at class certification jeopardizes the due process protections of absent class members and is, at least in spirit, inconsistent with the Supreme Court's guidance in *Dukes*.

An evidentiary standard that respects these countervailing interests must then lie somewhere between *Unger* and *Sali*. This Note proposes that those Federal Rules of Evidence that govern the substance of the proffered evidence be applied at class certification. This substance-form distinction properly balances the interests of defendants in avoiding settlement blackmail and absent class members in enforcing due process against the interests of class counsel and putative named plaintiffs in preserving the accessibility of the class action mechanism. This proposed rule also resolves the existing circuit split by addressing both the Fifth Circuit's concerns over reliance on unreliable evidence and the Ninth Circuit's concerns over excessive formalism.

A. *Form and Substance in the Federal Rules of Evidence*

The Federal Rules of Evidence are fundamentally concerned with reliability. The Anglo-Saxon adversarial system of litigation centers on a fact-finding process that is based in both live and documentary testimony, and, as such, it is essential that the basis of that fact-finding be reliable. Accordingly, evidentiary rules governing issues such as hearsay,[203] original documents,[204] personal knowledge,[205] and expert

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[201] *Compare* Mullenix, *Putting Proponents to Their Proof*, *supra* note 19 (arguing that the Federal Rules of Evidence should apply across the board to class certification), *with* Jelinek, *supra* note 37 (arguing that none of the Federal Rules of Evidence should apply).

[202] For an overview of the federal courts' approach, see Section I.C.

[203] *See* Fed. R. Evid. art. VIII advisory committee's introductory note (noting that one of the purposes of the hearsay rule is "to encourage the witness to do his best with respect to each of [the factors of perception, memory, narration, and sincerity], and to expose any inaccuracies which may enter in" by requiring live, sworn testimony subject to cross-examination).

[204] *See* Fed. R. Evid. 1001 advisory committee's note (noting that the best evidence "afforded substantial guarantees against inaccuracies and fraud"); *see also* 2 McCormick on Evidence 229 (John W. Strong ed., 5th ed. 1999) (noting "the danger of mistransmitting critical facts which accompanies the use of written copies or recollection").

testimony[206] fundamentally reflect concerns over reliability. From this perspective, the Federal Rules of Evidence can be viewed as a set of policy judgments regarding what types of evidence are, and are not, reliable and valid bases for fact-finding.[207] This Note contends that these policy judgments fall into two buckets—rules that regulate the admissibility of evidence based on form and rules that regulate the admissibility of evidence based on substance.

Some evidence rules determine what evidence is reliable based on the form that evidence takes. These rules can be termed "form-based" rules. The evidence rules contained in Article VI of the Federal Rules of Evidence, for example, dictate who can testify as a witness,[208] the process of evaluating the truthfulness of witnesses,[209] and the requirement that witnesses testify only to matters of which they have personal knowledge.[210] These rules do not describe the type of information the court can consider in the process of fact-finding. Instead, they describe solely the means by which that evidence can be presented and, to a lesser degree, how that evidence should be weighed.[211] Another example of form-based rules are the authentication requirements of Article IX.[212] Authentication is fundamentally about correctly identifying a piece of evidence, which is an issue of the forms that evidence takes and the reliability of a claim that the evidence is what the proponent says it is, not of what kind of evidence can be considered. Finally, the "best evidence" rules contained in Article X primarily regulate form.[213] These rules aim to ensure reliability by requiring documentary evidence to take certain forms—spe-

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[205] *See* Fed. R. Evid. 602 advisory committee's note ("'[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact' is a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information.'" (alteration in original) (quoting McCormick on Evidence)).

[206] *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590–92, 590 n.9 (1993) (noting the common law's concern with reliable sources of information as manifested in the personal knowledge and hearsay rules and explaining that the reliability requirement in Rule 702 grows out of a concern about the wide latitude given to expert witnesses whose opinions need not be based on firsthand knowledge or observation).

[207] *See* Fed. R. Evid. 102 (describing the purpose of the evidence rules as "ascertaining the truth and securing a just determination").

[208] Fed. R. Evid. 601, 605–06.

[209] Fed. R. Evid. 603, 607.

[210] Fed. R. Evid. 602.

[211] The exception to this description of Article VI would be Rules 608 and 609, which dictate when evidence of a witness's character for untruthfulness, including a prior criminal conviction, can be used to attack a witness's credibility. Fed. R. Evid. 608–09. Here, because the rules are describing when a certain type of evidence can be considered by the court, the rules regulate substance rather than form.

[212] Fed. R. Evid. art. IX.

[213] Fed. R. Evid. art. X.

cifically, that they be admitted in original form where possible.[214] Fundamentally, form rules further the goals of evidence law by imposing procedural requirements designed to ensure that the evidence presented is likely to be reliable; they do not distinguish between reliable and unreliable evidence based on the content of the proffered evidence.

Other evidence rules do constitute substantive judgments as to what types of evidence can be considered reliable. These rules can be termed "substance-based" rules. The most obvious example of this type of evidence are the rules regulating the admissibility of expert opinions.[215] Rule 702 states that a witness proffered as an expert may offer opinion testimony only by demonstrating that the expert's specialized knowledge would be useful to the trier of fact, that the testimony is based on sufficient facts and data, that the testimony is the result of reliable principles and methods, and that the expert reliably applied the principles and methods to the facts of the case.[216] The *Daubert* factors explicitly test the reliability of the expert's methodology.[217] Rule 702 is clear—opinion testimony that clears the bar set in the rule is admissible; opinion testimony that does not satisfy Rule 702's requirements is not. The rule is not concerned with how the evidence is presented—whether as live testimony, or a written report—but rather with the substance of what is offered. Another example of a substance-based rule is the full set of hearsay rules contained in Article VIII.[218] While Rule 802 offers a broad definition of hearsay, Rules 803 and 804 outline clear categorical carve-outs for types of hearsay statements—out-of-court statements offered for the truth of the matter asserted—that are nonetheless admissible.[219] For example, records of regularly conducted activities are categorically admissible under Rule 803(6),[220] and public records are categorically admissible under Rule 803(8).[221] In most proceedings where these evidence rules are applied, statements offered into evidence that meet the definitions set out in Rule 803(6) and Rule 803(8) are admissible for the purposes

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214 Fed. R. Evid. 1002.

215 Fed. R. Evid. 702–05.

216 Fed. R. Evid. 702.

217 The Supreme Court's opinion in *Daubert* instructs that in assessing reliability under Rule 702(c), judges should consider whether the theory or technique has been or can be tested, has been subjected to peer review and publication, has a known error rate, and has gained widespread acceptance within the field. These factors, while relevant, are not necessarily dispositive. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593–94 (1993).

218 Fed. R. Evid. art. VIII.

219 *Compare* Fed. R. Evid. 801, *with* Fed. R. Evid. 803, 804.

220 Fed. R. Evid. 803(6).

221 Fed. R. Evid. 803(8).

of fact-finding unless limited by some other provision of the Federal Rules of Evidence.[222]

The fundamental difference between form-based rules and substance-based rules is the degree to which they constitute a bar to a piece of proffered evidence. If a piece of evidence is objected to as inadmissible under a form-based rule, reformulating it into an admissible form is sufficient to surmount this evidentiary hurdle. However, a substance-based rule is an absolute bar to the admissibility of evidence. If a piece of evidence elicits a substance-based objection, no amount of reshaping, reformulating, or foundation-laying can defeat the objection—no matter how the information is presented, the type of evidence proffered is categorically either admissible or inadmissible. A declarant-witness's prior out-of-court statement is typically inadmissible hearsay[223] regardless of whether she recalls it in her oral testimony or if counsel proffers it in written form. A lay witness's opinion is inadmissible if it is not based in personal knowledge, no matter how truthful the witness is.[224] Inadmissible character evidence cannot be rendered admissible when issued as an opinion as to the defendant's character rather than as a recollection of a specific instance of conduct.[225]

In light of this categorization, this Note argues that substance-based rules should apply to class certification proceedings, while form-based rules should not.

B. *Class Certification and the Form/Substance Distinction*

Due to the interests at stake, an evidentiary standard at class certification must increase the rigor of the class certification decision. As described in Part II, the imposition of an evidentiary standard relieves settlement pressure on defendants by imposing a higher bar on class certification, which is often an outcome-determinative juncture in

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[222] Some categories of evidence are regulated by both form- and substance-based rules. For example, the character evidence rules in Article IV dictate both what types of character evidence is admissible, and, in the case of admissible character evidence, what form the testimony must take. *Compare* FED. R. EVID. 404 (describing which types of character evidence are admissible and which types are not admissible), *with* FED. R. EVID. 405 (describing appropriate methods for proving character when evidence of a person's character or character trait is admissible). Thus, while it may be difficult to categorize the full slate of character evidence rules as either form- or substance-based, individual rules can generally be sorted after some analysis.

[223] *See* FED. R. EVID. 801(d)(1) (listing the three narrow conditions under which a declarant-witness's prior statements do not constitute hearsay). Also, we assume here that the statement does not fall under one of the hearsay exceptions in Rule 803 and Rule 804.

[224] FED. R. EVID. 701.

[225] *See* FED. R. EVID. 404 (explaining the prohibited uses of character evidence and outlining the forms which admissible evidence may take).

class action litigation.[226] Relieving settlement pressure on defendants also protects the interests of absent class members by decreasing the incentive for class counsel to engage in sweetheart settlements and incentivizes both class counsel and the courts to look more closely at the record at class certification to ensure that the requirements of Rule 23 are actually being met.[227] This incentive is especially important in light of the role of Rule 23 in ensuring procedural due process for the rights of absent class members; by requiring more judicial involvement at the class certification stage, an evidentiary standard pushes courts to engage in their role as the gatekeeper of the aggregation decision[228] and the last line of defense for absent class members against overambitious but inadequate class representatives.[229]

On the other hand, requiring class counsel to do more work on the front end increases transaction costs in a way that may disincentivize plaintiffs' counsel from pursuing low-value claims.[230] Adopting the full, formalistic slate of evidence rules requires a higher upfront investment by class counsel and would most likely result in the filtering out of cases that may be weaker on the merits or more difficult to certify. In addition, requiring that all evidence presented at the preliminary stage of class certification be admissible under the Federal Rules of Evidence may place too much of a burden on plaintiffs' counsel working on contingency, leading meritorious cases to slip through the cracks due to the heightened transactional cost of litigation. In practice, such a standard may also require the court to try the case before trying the case, which severely reduces the efficiency gains offered by the class action mechanism. This suggests that the across-the-board adoption of the Federal Rules of Evidence championed by the Fifth Circuit is ultimately inefficient and fails to serve some of the goals of the class action device.

Adopting solely substance-based rules at the class certification stage balances these countervailing interests. On the one hand, imposing rules that substantively regulate the content on the record requires class counsel to create a record geared towards satisfying the requirements of Rule 23, requires the court to substantively engage with both the record and the requirements, and therefore is likely to

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[226] *See supra* Section II.A.

[227] *See supra* Section II.B.

[228] For more on class certification and the role of the court as gatekeeper, see Richard Marcus, *Reviving Judicial Gatekeeping of Aggregation: Scrutinizing the Merits on Class Certification*, 79 Geo. Wash. L. Rev. 324 (2011).

[229] *See supra* Section II.C.

[230] Silver, *supra* note 149, at 1392 ("When facing the prospect of litigating for years without being paid, a contingent-fee lawyer's interest in a case will predictably diminish.").

reduce the certification of improper or non-meritorious claims, thus relieving the kind of settlement pressure that would result in both blackmail and sweetheart settlements. On the other hand, by relieving counsel of the need to present evidence in the forms that would be required by imposing the full slate of evidence rules, the bar is not set so high as to disincentivize counsel from bringing meritorious claims, while still requiring just enough upfront investment by class counsel to serve the above-listed deterrent effects.[231]

This proposed rule is also functional. The distinction between form- and substance-based rules is fairly straightforward. The question that drives the inquiry is whether the contested evidence would be admissible if presented in a different form. If the answer is yes, the rule that forms the basis of the opposing party's evidentiary objection is a form-based rule. If the answer is no, then the rule is necessarily substance-based.[232] At class certification, the party seeking to admit the contested evidence onto the record should be required only to show that the proffered evidence could be presented in an admissible form at trial. This standard is similar to that required for summary judgment,[233] making it a standard that is not entirely new to the courts that have to apply it. It is also far simpler a rule to implement than other form-or-substance inquiries the federal courts have been forced to engage in.[234]

In addition to its functionality, the focus on substance-based rules is also consistent with the guidance issued by the Supreme Court, albeit in dicta, thus far. As noted, the Supreme Court has suggested on multiple occasions that certifying courts confronted with expert evidence at the class certification stage apply *Daubert* in analyzing and weighing expert testimony.[235] *Daubert* and Rule 702 are fundamentally substance-based evidence rules primarily concerned with the

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[231] It is important to note here that these are academic assessments of the possible effects of adopting this rule on the above-listed parties. Because no other scholarship has contemplated a compromise between adopting the full slate of Federal Rules of Evidence and adopting none at all, there is little in the way of concrete data as to the possible effects of such a compromise.

[232] This distinction is made clear in Section III.A.

[233] *See* FED. R. CIV. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."). Note, however, that the summary judgment standard for evidence is somewhat more stringent than that proposed for class certification, as summary judgment usually occurs after discovery, while class certification typically occurs at a much earlier stage.

[234] *See, e.g.*, Shady Grove Orthopedic Ass'n v. Allstate Ins. Co., 559 U.S. 393 (2010) (illustrating the Supreme Court's convoluted and somewhat tortured application of the *Erie* doctrine, which distinguishes between substantive and procedural federal rules, statutes, and practices); *see also* any first-year law student's attempt to illustrate the *Erie* doctrine in the form of a flow chart.

[235] *See supra* notes 89–92 and accompanying text.

type of expert evidence that courts can rely on.[236] In evaluating expert evidence, the court serves a "gatekeeping role"[237] that cannot be abdicated in the class action setting solely because the court is dealing with aggregated claims rather than individual litigation.[238] This reasoning logically extends to other substantive standards, such as those regarding hearsay. If the court must look to evidence law in determining what kind of evidence is sufficiently reliable to underpin a class certification decision when proffered as expert testimony, it should refer to the same source in adjudging the reliability of all evidence offered in support of class certification.

The form-substance distinction also addresses the concerns raised by the Ninth Circuit in *Sali*.[239] The court in *Sali* was fundamentally concerned that "relying on formalistic evidentiary objections" prevented the district court from considering evidence that "likely could have been presented in an admissible form at trial" and would have gone a significant way in support of plaintiffs' motion for class certification.[240] In holding that the district court committed reversible error in applying the Federal Rules of Evidence to evidence offered in support of class certification, the court objected to the application of form-based rules, which resulted in the exclusion of payroll data relevant to the questions of commonality, typicality, and predominance.[241] The application of substance-based rules, however, would resolve the Ninth Circuit's concerns about excessive formalism. It would also allow for the admission of the payroll data in *Sali*,[242] while still barring the Internet printouts rejected in *Unger*.[243] This result is consistent with the values of reliability advanced by both courts in their opinions

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[236] *See supra* Section III.A.

[237] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596–97 (1993).

[238] *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 323 (3d Cir. 2008) (emphasizing the importance of the court's gatekeeping function in requiring *Daubert* at class certification); *In re* Blood Reagents Antitrust Litig., 783 F.3d 183, 185 (3d Cir. 2015) (same).

[239] *See supra* notes 34–35 and accompanying text.

[240] Sali v. Corona Reg'l Med. Ctr., 909 F.3d 996, 1006 (9th Cir. 2018).

[241] The district court ruled that plaintiff's proffered attestation was inadmissible both because it was not authenticated and because it constituted improper opinion testimony due to the witness's lack of personal knowledge sufficient to attest that the data accurately represented plaintiff's employment records. *Sali*, 909 F.3d at 1003. As noted, both the authentication rules and the requirement of personal knowledge are form-based rules. *See supra* Section III.A.

[242] As the Ninth Circuit noted in its decision, plaintiffs subsequently submitted affidavits in support of the payroll data's authenticity. *Sali*, 909 F.3d at 1006.

[243] *See supra* text accompanying notes 97–102. Based on the information available in the Fifth Circuit's opinion regarding said printouts, they do not seem to fall into any of the exceptions to the hearsay rule listed in Rule 803, which likely renders them inadmissible hearsay under Rule 802.

and with the value of reliability that fundamentally undergirds the Federal Rules of Evidence.

Conclusion

Class certification is a vital juncture in the life of a class action. Unlike other preliminary hearings considered by the Federal Rules of Civil Procedure, class certification is the "main event"[244] in aggregate litigation. It is at this juncture that dozens, hundreds, or thousands of absent class members stand to lose their ability to vindicate their *choses in action* in exchange for the efficiencies of a representative action, their due process rights enforced only by the degree to which the certifying court hews to the procedural requirements of Rule 23. But while Rule 23 often requires certifying courts to engage in fact-finding while determining whether a class should be certified, there is no uniform evidentiary standard applied to the evidence produced for the purposes of class certification.

The adoption of a uniform evidentiary standard at class certification serves to enforce the kind of "rigorous analysis" that the Supreme Court has repeatedly called for.[245] By requiring the federal courts to make certifying decisions based on reliable evidentiary proof, a uniform evidentiary standard ensures adherence to the due process protections inherent in the requirements of Rule 23. An evidentiary standard that requires the application of substance-based Rules of Evidence to the record proffered for class certification balances the need to protect absent class members' due process rights against the need to maintain the efficiencies of the class action mechanism. It recognizes the necessity of ensuring that evidence offered to satisfy Rule 23 is reliable and sustainable, while guarding against the kind of excessive formalism that would play to the detriment of many valid claims. Requiring certifying courts to apply only those Federal Rules of Evidence which regulate substance addresses the countervailing interests of absent class members, defendants, class counsel, and the courts, and provides a functional and consistent standard to which the courts can adhere. Thus, the adoption of such a standard improves the effectiveness of the class action mechanism for all.

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[244] Mullenix, *Putting Proponents to Their Proof*, *supra* note 19, at 631.
[245] Comcast Corp. v. Behrend, 569 U.S. 27, 33 (2013).