CURTAILING THE IMPACT OF CLASS ACTIONS ON ANTITRUST POLICY

*JONATHAN M. JACOBSON & JOYCE CHOI**

Thou shalt not grant or deny class certification based on an analysis of the probability of success on the merits of the plaintiffs' claim. That fundamental principle of procedural jurisprudence was announced over 25 years ago in *Eisen v. Carlisle & Jacquelin*[1] and remains bedrock law today. But the principle has had increasingly negative consequences, has helped lead to an undue narrowing of substantive antitrust rules, and is no longer supported by the reasons originally given for it. This Article, therefore, suggests that *Eisen* has outlived its usefulness and should be overruled.

I.

The complaint in *Eisen* challenged the "odd-lot differential"—a markup imposed on those who traded odd lots (typically, those amounts not rounding to 100)—on the New York Stock Exchange.[2] The charge was that the broker defendants had monopolized odd-lot trading and had elevated the markup in violation of the antitrust and securities laws.[3] The action was brought on behalf of a putative class of all traders who had purchased securities in odd lots on the Exchange for the period allowed by the statute of limitations.[4]

The district court initially denied class certification, but the U.S. Court of Appeals for the Second Circuit reversed that determination and remanded for consideration of a number of issues, most prominently the matter of notice under Rule 23(c)(2).[5] On remand, the district court concluded that, although the named plaintiff's claim was for just $70, the cost of providing notice was much higher. Notice by publication would only cost $21,720; personal notice by mail was estimated to cost $225,000.[6] The plaintiff made

* Partner and associate, respectively, Wilson Sonsini Goodrich & Rosati, New York. Many thanks to Professor Daniel Rubinfeld for helpful comments.

1. 417 U.S. 156 (1974).

2. *Id.* at 160.

3. *Id.*

4. *Id.*

5. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 568–70 (2d Cir. 1968) (remanding for evidentiary hearing on what type of publication would suffice to comply with Rule 23(c)(2) provisions and due process considerations).

6. *Eisen*, 417 U.S. at 167.

clear that he could not pay even the lower amount,[7] and would not pay given the disparity compared to his claim.[8] The court decided, however, that the plaintiff's inability to pay the cost of notice did not by itself mean that he was an inadequate class representative.[9] Instead, the district court concluded that the determination of who would bear the notice costs would be based on an assessment of the merits following a preliminary hearing.[10] The court held such a hearing, found that the plaintiff was "more than likely" to prevail at trial, and ruled that the defendants should therefore bear 90 percent of the cost of notice.[11] On appeal, the Second Circuit again reversed.[12] The court concluded that publication notice was not sufficient and individual notice was required.[13] More importantly for present purposes, the court concluded that a preliminary inquiry into the merits was improper and that the plaintiff, as the proponent of class treatment, bore the full responsibility for funding the notice.[14] Because the plaintiff refused to do so, the court denied class certification.[15]

The Supreme Court granted certiorari and effectively affirmed.[16] Writing for the Court, Justice Powell's opinion first agreed with the Second Circuit that, because the names of class members were "identifiable through reasonable effort," notice by mail was required notwithstanding the expense.[17] Further, the Court rejected the idea that an inquiry into the merits was permissi-

7. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 269 (S.D.N.Y. 1971).

8. *Eisen*, 417 U.S. at 167–68.

9. *Eisen*, 52 F.R.D. at 269–70.

10. *Id.* at 270–71.

11. Eisen v. Carlisle & Jacquelin, 54 F.R.D. 565, 567 (S.D.N.Y. 1972).

12. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1008 (2d Cir. 1973).

13. *Id.* at 1015.

14. *Id.* at 1015–17.

15. *Id.* at 1016–17.

16. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974). At the time, district courts (and some circuit courts) were divided on the propriety of preliminary merits hearings. In favor of preliminary merits hearings: Dolgow v. Anderson, 43 F.R.D. 472, 501 (E.D.N.Y. 1968), *rev'd on other grounds,* 438 F.2d 825 (2d Cir. 1971); Milberg v. W. Pac. R.R., 51 F.R.D. 280, 282 (S.D.N.Y. 1970); City of Phila. v. Emhart Corp., 50 F.R.D. 232, 234–35 (E.D. Pa. 1970). Against preliminary merits hearings: Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970); Miller v. Mackey Int'l, Inc., 452 F.2d 424, 429–30 (5th Cir. 1971); Mersay v. First Republic Corp. of Am., 43 F.R.D. 465, 469 (S.D.N.Y. 1968); Fogel v. Wolfgang, 47 F.R.D. 213, 215 n.4 (S.D.N.Y. 1969); Cannon v. Tex. Gulf Sulphur Co., 47 F.R.D. 60, 65–66 (S.D.N.Y. 1969); Berland v. Mack, 48 F.R.D. 121, 132 (S.D.N.Y. 1969); Katz v. Carte Blanche Corp., 52 F.R.D. 510, 513 (W.D. Pa. 1971); Dorfman v. First Boston Corp., 62 F.R.D. 466, 472 (E.D. Pa. 1973).

17. *Eisen*, 417 U.S. at 175–76.

ble to determine whether the case warranted treatment as a class action.[18] The Court maintained that inquiring into the merits would give the plaintiff some of the benefits of class certification before a class was even certified, that defendants might be prejudiced by such a preliminary determination, and that an early merits conclusion was inconsistent with Rule 23's requirement that the certification determination be made "as soon as practicable after the commencement of the action."[19]

II.

For many years, *Eisen* made class certification progressively easier. Courts carefully avoided any discussion of the merits, sometimes even in contexts in which a determination whether the plaintiff had satisfied the elements of Rule 23 necessarily touched on merits-related issues. Indeed, notwithstanding the Supreme Court's recognition in *Coopers & Lybrand v. Livesay*[20] that the certification decision is often enmeshed with merits issues,[21] and its determination in *General Telephone Co. v. Falcon*[22] that a "rigorous analysis" is required before class certification can be granted,[23] grants of class certification in antitrust cases quickly became routine. Courts proceeded from the premise that "the substantive allegations of the complaint [should be taken] as true,"[24] and concluded that any doubts had to be resolved "in favor of certifying the class."[25] Many decisions indicated that class certification was especially appropriate in antitrust cases and that common proof of the issue of violation alone was sufficient to satisfy the predominance requirement of Rule 23(b)(3).[26] And even though the critical issue in many cases was whether each class member incurred

18. *Id.* at 177.

19. *Id.* at 177–78 (internal citations omitted). Rule 23(c)(1) has since been amended. It now states that certification must be determined "[a]t an early practicable time." FED. R. CIV. P. 23(c)(1)(A). The change was made in recognition that "[t]ime may be needed to gather information necessary to make the certification decision." FED. R. CIV. P. 23(c)(1)(A) advisory committee's note on 2003 amendments (2003).

20. 437 U.S. 463 (1978).

21. *Id.* at 469 n.12.

22. 457 U.S. 147 (1982).

23. *Id.* at 160–61.

24. Blackie v. Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975).

25. *In re* Playmobil Antitrust Litig., 35 F. Supp. 2d 231, 239 (E.D.N.Y. 1998) (citing *In re* Control Data Corp. Sec. Litig., 116 F.R.D. 216, 219 (D. Minn. 1986)).

26. *See* HERBERT NEWBERG ET AL., NEWBERG ON CLASS ACTIONS §§ 18:25–18:26 (4th ed. 2009) [hereinafter NEWBERG]; *see, e.g.*, *In re* Warfarin Sodium Antitrust Litig., 391 F.3d 516, 528–29 (3d Cir. 2004) (citing Amchem Prods., Inc. v. Wind-

similar injuries in a similar fashion from the conduct at issue, courts regularly rejected defense protests to certification with the principle that "[a]t this stage in the proceedings, the Court only must find that plaintiffs have set forth a valid methodology for proving antitrust impact common to the class, not that they will prove it."[27]

Decisions in the Second, Third, and Ninth Circuits took these principles to extremes. In *Caridad v. Metro-North Commuter Railroad*,[28] the Second Circuit prohibited district courts from weighing conflicting expert evidence or engaging in a "battle of experts" concerning the elements of Rule 23.[29] That court went further in *In re Visa Check/MasterMoney Antitrust Litigation*,[30] concluding that challenges to the presentation of the plaintiffs' expert—often the only source of evidence supporting class certification—were limited to determining whether the expert's "proposed methods are so insubstantial as to amount to no method at all."[31] The Third Circuit followed similar reasoning in its decision in *In re Linerboard Antitrust Litigation*,[32] as did the Ninth Circuit in its original panel decision in *Dukes v. Wal-Mart, Inc.*[33]

Within the past few years, a number of these permissive rulings have been curtailed. Starting with a non-antitrust decision by Judge Easterbrook in the Seventh Circuit, courts began to recognize that a plaintiff had to establish the requirements of Rule 23 even if proof of one or more of the Rule's requirements overlapped with an evaluation of the merits.[34] Recognizing this point in *Heerwagen v. Clear Channel Communications*,[35] the Second Circuit denied certification of a national class of concert-goers.[36] The court recognized that "rock concert" markets are necessarily local, not national[37]—a point that plainly overlapped with the merits issue of the scope of

sor, 521 U.S. 591, 623–24 (1997)); Mularkey v. Holsum Bakery, Inc., 120 F.R.D. 118, 122 (D. Ariz. 1988).

27. *In re* Magnetic Audiotape Antitrust Litig., No. 99 CIV. 1580(LMM), 2001 WL 619305, at *6 (S.D.N.Y. June 6, 2001).

28. 191 F.3d 283 (2d Cir. 1999).

29. *Id.* at 292–93.

30. 280 F.3d 124 (2d Cir. 2001).

31. *Id.* at 134–35 (quoting *In re* Potash Antitrust Litig., 159 F.R.D. 682, 697 (D. Minn. 1995)).

32. 305 F.3d 145, 155 (3d Cir. 2002).

33. 474 F.3d 1214, 1227 (9th Cir.), *withdrawn & superseded*, 509 F.3d 1168, 1178–79 n.2 (9th Cir. 2007), *on reh'g en banc*, 603 F.3d 571 (9th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3114 (U.S. Aug. 25, 2010) (No. 10-277).

34. Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001).

35. 435 F.3d 219 (2d Cir. 2006).

36. *Id.* at 222–23, 235.

37. *Id.* at 228–229.

the national market, but that also went to the heart of Rule 23(b)(3)'s requirement that common questions predominate. With multiple local markets rather than a single national market, the violation issue could not be common to all members of a putative national class.[38] Instead, the proof would vary from one area to another, precluding any finding of commonality under Rule 23(b)(3). Certification was therefore denied.[39]

Heerwagen was followed by the Second Circuit's landmark decision in *In re Initial Public Offering Securities Litigation*,[40] which expressly overruled *Caridad* and *Visa Check* and established that merits inquiries are permissible in class certification to the extent required to determine whether Rule 23's requirements have been satisfied.[41] The Third Circuit followed suit in *In re Hydrogen Peroxide Antitrust Litigation*,[42] as did the Ninth Circuit en banc in *Dukes*.[43] Despite the occasional outlier,[44] it now appears settled that merits inquiries are permitted to the limited extent of determining whether a plaintiff's claims are typical, whether common questions predominate, or whether the other requirements specified in Rule 23 have been met. Critically, however, what is still *not* permitted is an analysis of the merits to determine whether the case is sufficiently meritorious to warrant class action treatment—or, in the language of the Rule, whether the strength of the case on the merits makes class action treatment superior to non-class resolution.

III.

Since *Eisen*, class actions have become increasingly prevalent.[45] Class actions follow not only criminal antitrust convictions, but they also regularly follow closely on the heels of simple announcements of grand jury investigations.[46] Others are brought by purported

38. *Id.* at 229.

39. *Id.* at 229, 235.

40. 471 F.3d 24, 41 (2d Cir. 2006).

41. *Id.* at 41–42.

42. 552 F.3d 305, 320 (3d Cir. 2008).

43. Dukes v. Wal-Mart, Inc., 603 F.3d 571 (9th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3342 (U.S. Dec. 06, 2010) (No. 10-277).

44. *E.g.*, *In re* Nifedipine Antitrust Litig., 246 F.R.D. 365 (D.D.C. 2007).

45. *See generally* ABA SECTION OF ANTITRUST LAW, ANTITRUST CLASS ACTIONS HANDBOOK 4–24 (2010).

46. For examples of guilty pleas, see *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., 546 F.3d 981 (9th Cir. 2008); *e.g.*, Press Release, U.S. Dep't of Justice, Antitrust Div., Samsung Agrees to Plead Guilty and to Pay $300 Million Criminal Fine for Role in Price Fixing Conspiracy (Oct. 13, 2005), *available at* http://www.justice.gov/atr/public/press_releases/2005/212002.htm; Press Re-

classes of purchasers who have simply copied civil complaints filed,[47] for example, by competitors. Still others are based on nothing more than stories cobbled together from news clippings.[48]

These cases are rarely easy to confine. Because of the lure of large attorneys' fees resulting from significant settlements, any class action complaint that appears likely to survive a motion to dismiss tends to attract follow-on cases. Direct purchaser cases are often followed by indirect purchaser cases under applicable state laws.[49] Later-filed cases are often brought in other federal district courts, or removed to federal court under the Class Action Fairness Act,[50] frequently resulting in proceedings before the Judicial Panel on Multidistrict Litigation. Then, once the cases are consolidated before a single district judge, the plaintiffs' counsel bargain among themselves for positions as lead counsel, liaison counsel, or members of the executive committee—all of which are expected to lead to large fee awards when the case is eventually settled.

The key moment in many of these cases is the determination of whether a class should be certified. If class certification is granted, the potential exposure is often so great as to make settlement the only prudent course, whether the case has any merit or not. To take a hypothetical but realistic example, certification of a class of two million members, each with a claim averaging $1000, increases the defendants' exposure from $1000 to $2 billion, or $6 billion after trebling.[51] Even if a case is severely lacking in merit so that the defendants have a 90 percent likelihood of prevailing, the expected

lease, U.S. Dep't of Justice Antitrust Div., Four Infineon Technologies Executives Agree to Plead Guilty in International DRAM price-fixing conspiracy (Dec. 2, 2004), *available at* http://www.justice.gov/opa/pr/2004/December/04_at_773.htm. The first of the *DRAM* class actions was brought within days of the announcement of a grand jury investigation. *See* Complaint, Nespole v. Micron Tech., Inc., 228 F. Supp. 2d 1379 (S.D.N.Y. June 21, 2002) (No. 02 CV 4798) (class action complaint); *In re* Micron Techs. Inc. Sec. Litig., 247 F.R.D. 627, 631 (D. Idaho 2007) ("On June 17, 2002, the U.S. Department of Justice (DOJ) issued a federal grand jury subpoena to Micron, seeking documents relating to communications between DRAM manufacturers regarding the pricing and sales of DRAM chips. DOJ also issued subpoenas to the other two largest global manufacturers of DRAM, Samsung and Infineon Technologies.").

47. *See, e.g.*, *In re* Live Concert Antitrust Litig., 247 F.R.D. 98, 102 (C.D. Cal. 2007).

48. *In re* Online DVD Rental Antitrust Litig., No. M 09-2029 PJH, 2010 WL 2680837, at *3–4 (N.D. Cal. July 6, 2010).

49. *See generally* ABA SECTION OF ANTITRUST LAW, INDIRECT PURCHASER LITIGATION HANDBOOK (2007).

50. *See* 28 U.S.C. § 1332(d) (2006).

51. Trebling of damages in antitrust cases is mandatory under 15 U.S.C. § 15(a) (2006).

exposure is 10 percent of $6 billion, or $600 million. Paying hundreds of millions to settle this unmeritorious case still makes sense.

The late Milton Handler was often prone to hyperbole, but his comments on this process bear repetition:

> Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure — it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional right to a trial on the merits. The distinctions between innocent and guilty defendants and between those whose violations have worked great injury and those who have done little if any harm become blurred, if not invisible. The only significant issue becomes the size of the ransom to be paid for total peace.[52]

IV.

It seems plain that the potential excesses inherent in antitrust class action litigation have had some impact on the Supreme Court. Unfortunately, the impact has not been felt in class certification determinations, as the Court has not considered the requirements of Rule 23 in any depth for over twenty years. What the Court has done, instead, is to narrow the *substantive* scope of the antitrust laws—sometimes in an excessive and unfortunate way.

Since the partial victory for the plaintiffs in *Hartford Fire Insurance Co. v. California*[53] in 1993, no plaintiff has prevailed in whole or in part in any substantive antitrust decision on the merits in the Supreme Court. Many of the cases since then were relatively uncontroversial decisions, such as *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*[54] and *Texaco Inc. v. Dagher*,[55] but others have involved serious questions of law and policy. The defendants have prevailed every time, and in most of the cases the vote has not even been close.

In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*,[56] for example, the Court significantly narrowed the scope of Section 2 of the Sherman Act.[57] The Court concluded that it was

52. MILTON HANDLER, 25 YEARS OF ANTITRUST 864–65 (1973).
53. 509 U.S. 764 (1993).
54. 549 U.S. 312 (2007).
55. 547 U.S. 1 (2006).
56. 540 U.S. 398 (2004).
57. *Id.* at 415–16.

lawful for Verizon, which had a local telephone lines monopoly, to discriminate against would-be rivals and thus exclude them from competing effectively in the local telephone service market.[58] Seemingly contrary to decades of precedent holding that there was no implied immunity from the presence of federal regulatory oversight,[59] the Court concluded that the presence of regulation limited the need for antitrust intervention—doing so in the face of an express statutory "savings clause" that was intended to preclude, or so Congress thought, any finding of implied immunity.[60] In addition, in addressing whether Verizon's de facto refusal to deal was actionable, the Court expressly limited its prior 1985 decision—a unanimous one—in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[61] stating, gratuitously, that "*Aspen Skiing* is at or near the outer boundary of § 2 liability."[62] The decision, moreover, was a lopsided 9–0 (although Justices Stevens, Souter, and Thomas concurred only in the result, stating that they would have dismissed the case instead for lack of standing).[63]

The decision in *Bell Atlantic Corp. v. Twombly*,[64] decided in 2007, reached further. Like *Trinko*, the case arose on a motion to dismiss, and the industry setting was again local telephone service.[65] The plaintiffs alleged that the business decision of each of the nation's local carriers, including Bell Atlantic, AT&T/SBC, Bell South, and Qwest, not to enter each other's local market, was the product of an unlawful conspiracy.[66] The Second Circuit had sustained the complaint on a questionable basis, relying principally on the allegations of parallel conduct,[67] although the complaint also alleged communications in trade association-type settings, quotations from news reports, and conduct said to be contrary to individual self interest.[68] The Supreme Court might well have simply reversed under the traditional doctrine that parallel conduct, without more, is not

58. *Id.* at 410–11, 415–16.

59. *See, e.g.*, Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City, 452 U.S. 378, 388–89 (1981).

60. *Trinko*, 540 U.S. at 412–15.

61. 472 U.S. 585 (1985).

62. *Trinko*, 540 U.S. at 408–10 (discussing *Aspen*, 472 U.S. 585).

63. *Id.* at 416–18.

64. 550 U.S. 544 (2007).

65. *Id.* at 549.

66. *Id.* at 550–51.

67. *See id.* at 553.

68. *See id.* at 552, 567–69.

conspiracy[69] and that the additional facts alleged really added nothing more. Instead, however, the Court reached out to overrule the decades-old standard of *Conley v. Gibson*,[70] which had established that complaints could not be dismissed unless it was clear that the plaintiff would be unable to prove any set of facts that would entitle him to relief.[71] In its place, the Court articulated a new requirement that a plaintiff allege facts with sufficient specificity to state a claim for relief that is "plausible."[72] Allegations merely consistent with unlawful conduct are not enough; rather, there has to be enough "factual enhancement" or "heft" to suggest a plausible violation.[73] The Court gave the provisions of Rule 8, requiring just "a short and plain statement of the claim," lip service only.[74] The vote was 7–2, with only Justices Stevens and Ginsburg dissenting.[75]

Roughly a month after *Twombly*, the Supreme Court decided *Credit Suisse Securities (USA) LLC v. Billing*.[76] As in *Trinko* and *Twombly*, the case arose on a motion to dismiss under Rule 12(b)(6).[77] The plaintiffs alleged that the defendant investment banks violated the Sherman Act by forming syndicates that raised the prices paid by investors in initial public offerings (IPOs) by technology companies through a variety of practices not authorized under the securities laws or by any Securities and Exchange Commission regulation or order;[78] these included practices such as: "laddering" (requiring buyers to purchase additional shares at escalating prices); fixing commission rates at unusually high levels; and tying purchases of desirable IPO shares to commitments to purchase shares in less desirable IPOs.[79] As in *Trinko*, there was a savings clause intended to preclude antitrust immunity.[80] Additionally, prior case law had established, without controversy, that immunity from the antitrust laws could not be implied (even without a savings clause) from the presence of a regulatory regime unless there was a showing of a "clear repugnancy" that the two sets of laws

69. *See, e.g.*, Theatre Enters. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540–41 (1954).

70. 355 U.S. 41 (1957).

71. *Id.* at 45–46.

72. *Twombly*, 550 U.S. 544, 556 (2007).

73. *Id.* at 557.

74. *Id.* at 555–60.

75. *Id.* at 570.

76. 551 U.S. 264 (2007).

77. *Id.* at 270.

78. *Id.* at 278.

79. *Id.* at 268–70.

80. *Id.* at 275.

could not coexist in tandem.[81] Nevertheless, the Supreme Court held that the complaint failed to state a claim based on implied immunity of these practices due to overlapping securities laws regulation.[82] The Court reasoned that although there was no current conflict, it was possible that one might arise in the future.[83] Prior law, requiring an actual and irreconcilable conflict,[84] was simply ignored. Only Justice Thomas dissented, although Justice Stevens concurred in the result only.[85]

In addition to *Trinko*, *Twombly*, and *Billing*, several other recent decisions have cut back on the scope of the antitrust laws. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*[86] overruled the century-old per se rule against vertical price fixing.[87] *Illinois Tool Works Inc. v. Independent Ink, Inc.*[88] overruled the presumption of market power from the possession of a patent and clearly implied overruling of the per se rule for tying.[89] *Weyerhauser* made predatory buying cases virtually impossible,[90] and *Pacific Bell Telephone Co. v. LinkLine Communications*[91] eliminated any prospect of price squeeze liability.[92] Apart from *Leegin*, none of these decisions can be viewed as especially controversial. But as a group, especially when combined with *Trinko*, *Twombly*, and *Billing*, they highlight the current Court's commitment to curtailing the antitrust laws.

The procedural implications of *Twombly* have been particularly profound. Until the 1980s, antitrust litigation had been largely a trial practice. Summary judgment was disfavored[93] and Rule 12 dismissals almost unthinkable. By 1986, however, antitrust had become largely a summary judgment practice. The decisions in *Celotex*

81. *See, e.g.*, ANTITRUST MODERNIZATION COMMISSION, REPORT & RECOMMENDATIONS 357–66 (2007).

82. *Billing*, 551 U.S. at 267–68.

83. *Id.* at 279–84.

84. *See, e.g.*, Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City, 452 U.S. 378, 388–89 (1981).

85. *Billing*, 551 U.S. at 285 (Stevens, J., concurring), 287 (Thomas, J., concurring).

86. 551 U.S. 877 (2007).

87. *Id.* at 882.

88. 547 U.S. 28 (2006).

89. *Id.* at 31.

90. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 325 (2007).

91. 129 S. Ct. 1109 (2009).

92. *Id.* at 1114–15.

93. Poller v. CBS, 368 U.S. 464, 473 (1962) ("[S]ummary procedures should be used sparingly in complex antitrust litigation.").

Corp. v. Catrett,[94] *Anderson v. Liberty Lobby, Inc.*,[95] and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*[96] made summary judgment the focus of virtually every case such that the few plaintiffs' cases that survived summary judgment typically settled for significant value. Only a tiny percentage of cases ever reached trial. By 2002, the Second Circuit was able to say, persuasively, that summary judgment in antitrust cases is "particularly favored."[97] Now, antitrust has become a motion to dismiss practice. Scarcely a case is filed that is not met with a motion to dismiss. And because most courts, in another change from prior practice, typically stay all discovery pending resolution of the motion,[98] the incentive for a defendant to seek dismissal (and thus delay discovery) is heightened even further.

The overhang of private litigation generally, and class actions in particular, in these decisions is apparent. *Trinko*, *Twombly*, and *Billing* were all putative class actions. The Court was especially concerned about potentially abusive litigation in *Twombly*. Recognizing the "extensive scope of discovery in antitrust cases," and the reality that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases,"[99] the Court justified its new pleading standard on the need to avoid such abuse:

> [D]iscovery accounts for as much as 90 percent of litigation costs when discovery is actively employed. . . . That potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.[100]

94. 477 U.S. 317 (1986).

95. 477 U.S. 242 (1986).

96. 475 U.S. 574 (1986).

97. PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 104 (2d Cir. 2002).

98. *E.g.*, Wagner v. Circle W. Mastiffs, No. 2:09-cv-0172, 2009 WL 5195862, at *2 (S.D. Ohio Dec. 22, 2009) (staying all discovery related to the antitrust claims).

99. *Twombly*, 550 U.S. at 558–59.

100. *Id.* at 559 (citing Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000)) (internal punctuation omitted).

Similar concerns were echoed in *Billing*.[101]

V.

The concerns expressed about private litigation in *Twombly* and *Billing* have contributed significantly to the reality, pointed out recently by Federal Trade Commissioner Rosch, that "the Supreme Court has steadily been 'shrinking' the ambit of the Sherman Act both procedurally and substantively."[102] This shrinkage has been problematic. Decisions in the late 1970s through the early 1990s made clear that the focus of the antitrust laws was on the promotion of consumer welfare; this perspective commanded unusually broad support in the academy, the enforcement agencies, and the private bar. The perspective has been noticeably absent, however, from the Court's more recent decisions; the focus, instead, has been on the harms potentially caused by false positives. Moreover, many of these decisions are at least debatable on their merits and some aspects of their reasoning. For example, the expansion of implied immunity in the face of congressional savings clauses in both *Trinko* and *Billing* seems wrong. *Twombly*, moreover, cuts an especially broad swath. It curtails not only cases without merit, but has at least equal potential to inhibit potentially meritorious cases filed based on a view of the facts that can be substantiated only after some discovery has been taken.[103]

The Supreme Court's evident concern with the potential abuse of antitrust law seems overbroad. Although thirty-five years ago, precedents such as *Utah Pie*,[104] *Schwinn*,[105] *Pabst*,[106] *Fortner I*,[107] and *Topco*[108] gave rise to legitimate concerns of substantive false positives, those decisions have all now been overruled either expressly or in practical effect. They have been replaced by a regime under which horizontal restraints are governed by *BMI*[109] and *Dagher*,[110]

101. Credit Suisse Sec. (USA) LLC v. Billings, 551 U.S. 264, 281–84 (2007) (noting risk "that antitrust courts are likely to make unusually serious mistakes" where securities markets are involved).

102. Intel Corp., No. 9341, 2009 WL 49999728 (Fed. Trade Comm'n Dec. 16 2009) (Rosch, Comm'r, concurring in part and dissenting in part).

103. For a recent and potentially important decision appearing to limit the reach of *Twombly*, however, see Starr v. Sony BMG Music Entm't., 592 F.3d 314, 323 (2d Cir. 2010).

104. Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967).

105. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

106. United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

107. Fortner Enters. v. U.S. Steel Corp., 394 U.S. 495 (1969).

108. United States v. Topco Assocs., 405 U.S. 596 (1972).

109. Broad. Music, Inc. v. CBS, 441 U.S. 1 (1979).

vertical restraints by *Sylvania*[111] and *Khan*,[112] tying by *Fortner II*[113] and *Illinois Tool*,[114] predatory pricing by *Brooke Group*,[115] and mergers by *General Dynamics*.[116] The prospects for false positives have been reduced dramatically and can no longer reasonably be viewed as a basis for narrowing substantive antitrust laws further.[117] The risk now is one of false negatives, and that risk may be becoming increasingly serious.[118] Worse, although the Court seems predominantly concerned with the potential for abuse in private litigation, the Court's limitations on substantive antitrust in cases such as *Billing* and *Trinko* extend more broadly. The effects of these cases may well limit even government enforcement.[119]

The general concerns about private litigation appear to be likewise overbroad. Individual private cases are typically not subject to the same abuses as class action litigation. Individual litigants must hurdle the antitrust injury requirement,[120] and the plaintiffs must bear their share of the burden and the cost of discovery. Importantly, discovery goes both ways, thus carrying a threat of "mutual assured destruction" if matters get out of hand. Individual plaintiffs normally have no incentive, therefore, to increase the cost of discovery to pressure defendants into settling. Often, in fact, in individual litigation, the incentives may be reversed, with defendants

110. Texaco Inc. v. Dagher, 547 U.S. 1, 5–8 (2006).

111. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58–59 (1977).

112. State Oil Co. v. Khan, 522 U.S. 3 (1997).

113. U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610 (1977).

114. Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 36 (2006).

115. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

116. United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

117. For an excellent discussion, see Andrew I. Gavil, *Antitrust Bookends: The 2006 Supreme Court Term in Historical Context*, 22 ANTITRUST 21 (2007).

118. For a recent and especially narrow construction of section 2, in the context of a putative class action, see Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 998–1000 (9th Cir. 2010). Perhaps because class certification had been denied and the "value" of the case had thus been diminished, the class plaintiffs in the case did not even seek rehearing en banc in *Allied*, notwithstanding the opinion's articulated conflict with the D.C. Circuit's opinion in the *Microsoft* case.

119. *Cf.* Rambus Inc. v. FTC, 522 F.3d 456, 463 (D.C. Cir. 2008).

120. Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). Antitrust injury is a requirement in all cases but is easily satisfied in class action cases brought by purchasers claiming overcharges. It can be a difficult hurdle for cases brought by competitors. *See generally* Jonathan M. Jacobson & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with* Brunswick v. Pueblo Bowl-O-Mat, 66 ANTITRUST L.J. 273 (1998).

seeking to enhance the scope of discovery to pressure the individual plaintiff to yield.

Class actions, however, are different. In consumer cases, discovery is almost entirely one-sided, with the defendants bearing virtually the entire burden of production and the lion's share of the cost. The imbalance may be less acute in business-to-business class actions, but even there the costs and burdens are borne overwhelmingly by defendants. The upshot is a built-in incentive for discovery abuse, especially in consumer cases. Typical cases involve some or all of the following:

- Refusal to agree on custodian limits
- Refusal to agree on search terms for electronic data
- Unrealistic demands for document preservation, imposing significant information systems and storage costs
- Costly data demands
- Insistence on senior executive depositions irrespective of basis

Concerns that appear, at least in part, to have motivated the Supreme Court's recent campaign to narrow the scope of the antitrust laws, are valid when confined to an identifiable minority of cases, namely, class actions. There is no evidence to support the view that there continue to be false positives sufficient to warrant further curtailment of substantive antitrust doctrine,[121] nor evidence to suggest any prevalence of abusive behavior in non-class action private litigation. The problem is in the class action arena, and logic suggests that the solution should be in that arena as well.

VI.

The rationale underlying the class action device, and Rule 23 generally, remains entirely valid. In the antitrust context, if there is a violation affecting many who are injured in a similar fashion, having the issues adjudicated in one proceeding rather than many (or, more realistically, none) makes good sense. Importantly, class actions also provide a useful means for defendants to buy universal peace by settling consensually with all similarly situated who might be prompted to sue.

Problems arise, however, when contested class certifications are too easy. The basic Rule 23 requirements for class certification

121. *See* Jonathan Jacobson, *Towards a Consistent Antitrust Policy for Unilateral Conduct*, THE ANTITRUST SOURCE, Feb. 2009, at 3, *available at* http://www.abanet.org/antitrust/at-source/09/02/Feb09-Jacobson2-26f.pdf.

have due process overtones and cannot be ignored.[122] Classes should never be certified, for example, unless the members of the putative class can assert that they were injured by the same conduct in the same way. The recent elevation of the requirements for class certification, as reflected in *Szabo*, *Heerwagen*, *IPO*, *Hydrogen Peroxide*, and *Dukes II*, was therefore essential to correct the error in the *Caridad* line of cases that allowed classes to be certified based on little more than some expert's unsupported say-so. *Szabo* and the cases following it do not, however, truly solve the basic problem. In many cases, the requirements of Rule 23 can be satisfied even if the underlying case lacks merit, and the potential for a legalized blackmail effect will persist in any such case where the pleading requirements of *Twombly* can be met.

The problem can be resolved, or at least mitigated substantially, by overruling *Eisen* and requiring that a case be shown to have merit before class certification is granted. The standard for the requisite showing on the merits need not be insuperable, but at a minimum there should be some showing of at least a 40 percent likelihood of success—one that could be described as a "substantial possibility of success on the merits." Arguments could be made for a higher standard, such as a "reasonable probability" of success on the merits (meaning 50.1 percent or more), but whatever the precise standard, a requirement of proof that the case have *some* significant merit would be beneficial.

Such a requirement could most easily and effectively be achieved by amending Rule 23. That approach would involve approval of both the Supreme Court and Congress through the rules amendment process and would allow all affected constituencies to express their views. Alternatively, the Supreme Court could simply overrule *Eisen* through the certiorari process. That, however, would require the "right" case to come along, the issue to be preserved throughout the trial and appellate process, and the Supreme Court then to grant certiorari. Given that: (i) few class certification orders are reviewed on an interlocutory basis under Rule 23(f), (ii) the Supreme Court has never granted certiorari from a denial of Rule 23(f) review, (iii) class actions are so rarely tried, (iv) final judgments after trial in class action cases are almost unheard of, and (v)

122. *See* FED. R. CIV. P. 23(d)(2) advisory committee's note ("[M]andatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill the requirements of due process to which class action procedure is of course subject."); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (pointing out that notice is an integral part of due process).

the Supreme Court has not granted review on any Rule 23 class certification issue in years, the prospects for the issue to reach the Supreme Court anytime soon must be viewed as dim.[123]

That said, a compelling argument can nevertheless be made for overruling *Eisen* even without amending Rule 23. The present text of Rule 23(b)(3) requires that in any action for damages, the proponent of certification demonstrate "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[124] As others have argued in the past, this wording provides textual support for express consideration of the merits, beyond their relationship to the other elements of Rule 23, in determining whether a class should be certified.[125]

Moreover, the reasons given in *Eisen* for avoiding consideration of the merits no longer seem valid, if indeed they ever were. The *Eisen* Court's first point was that an inquiry into the merits would give the plaintiff some of the benefits of class certification before certification was granted.[126] However, events since *Eisen* have demonstrated that *declining* to inquire into the merits effectively resolves the merits in the plaintiffs' favor (if certification is granted) by compelling settlement to avoid the threat of ruinous liability. Given a choice between these two options, evaluating the merits preliminarily would seem to be the lesser of the evils.

The Court's second rationale was that evaluating the merits prior to class certification might prejudice defendants by denying them the discovery needed to mount an appropriate defense.[127] That argument does not hold up. At least in the antitrust context, it is a rare case indeed in which an antitrust defendant cannot make out at least a preliminary defense before all discovery has been completed. In some cases, nonparty discovery may be necessary, but there is no reason why that discovery could not be taken in advance of the certification decision. Discovery prior to class certification is the norm in most contexts anyway.

123. The Supreme Court recently denied certiorari in a case that would have allowed it to pass on a number of significant issues under Rule 23. Kohen v. Pac. Inv. Mgmt. Co., 571 F.3d 672, 679–80 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1504 (2010). Still, the continuing validity of *Eisen* was not among the questions presented.

124. FED. R. CIV. P. 23(b)(3).

125. Douglas M. Towns, *Merit-Based Class Action Certification: Old Wine in New Bottle,* 78 VA. L. REV. 1001, 1009 (1992); Bartlett H. McGuire, *The Death Knell for* Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits, 168 F.R.D. 366, 382 (1996).

126. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177–78 (1974).

127. *Id.* at 178.

The third reason articulated by the *Eisen* Court was that allowing a preliminary ruling on probable merits was inconsistent with Rule 23's requirement that certification be determined "as soon as practicable after commencement of [the] action."[128] Practice under the Rule, however, has long permitted discovery prior to class certification. In any event, the text of the Rule has since been amended and now provides that certification should be determined "[a]t an early practicable time."[129]

Accordingly, none of the reasons advanced in support of the *Eisen* decision provides any reasoned basis for rejecting a preliminary inquiry into the merits in the current legal environment. So, if precedent does not compel adherence to *Eisen*, and if the text of Rule 23 permits an inquiry into the merits, the remaining question is whether or not permitting a preliminary evaluation of the merits is supported by considerations of policy. The view here is that policy considerations militate strongly in favor of abandoning the rule of *Eisen*. While there would be negatives as well as positives, the positives appear to outweigh the negatives significantly.

A. Negatives.

On the negative side, with *Eisen* gone, on average, more discovery would be required before certification is determined. The change here, though, should be modest. Some discovery has long been permitted prior to class certification and, after *IPO* and *Hydrogen Peroxide*, it is now clear that that this discovery may be quite substantial and may overlap significantly with merits discovery. The overlap is sufficiently great, in fact, that some courts today are considering class certification together with motions for summary judgment.[130]

Another more significant negative is that abandoning *Eisen* will tend to make the already crucial class action certification even more critical. District court judges already have considerable discretion in class certification, as appeals under Rule 23(f) are granted only rarely,[131] and allowing a single judge to make a determination

128. *Id.* (citing the then-current version of FED. R. CIV. P. 23(c)(1)).

129. FED. R. CIV. P. 23(c)(1)(A).

130. *See, e.g.*, Marcus Corp. v. Am. Express Co., No. 04 Civ. 5432 (S.D.N.Y. March 30, 2009) (denying class certification without prejudice to renew, if warranted, following determination of motions for summary judgment).

131. NEWBERG, *supra* note 26, § 7:38 (citing Prado-Steiman *ex rel.* Prado v. Bush, 221 F.3d 1266, 1276–77 (11th Cir. 2000) ("[I]nterlocutory appeals are inherently 'disruptive, time-consuming, and expensive,' and consequently are generally disfavored. . . . We will therefore use restraint in accepting Rule 23(f) petitions,

on both certification and preliminary merit means that determination will go far in dictating the outcome of the case.[132]

Despite the significance of this negative, it seems doubtful that it will reflect a truly significant change from the reality that defendants face today—namely, that a grant of class certification increases the pressure to settle irrespective of the perceived strength of the defense on the merits. Today, if certification is granted, the case will likely settle. If certification is granted and summary judgment for the defendants is denied, settlement is almost certain. Without the rule of *Eisen*, a grant of class certification will have an effect similar to a post-certification denial of summary judgment today. Any differences are unlikely to be dramatic.

B. Positives.

The positive effects of overruling *Eisen* appear to be far stronger. Low-merit cases will be discouraged ex ante. No longer will plaintiffs be encouraged to file cases based on arguments of common impact alone. Instead, plaintiffs will have an incentive to sue only in those cases where the prospects for ultimate success appear strong. Their incentives, then, will more closely mirror the incentives of individual plaintiffs in deciding whether to sue. Correspondingly, for those cases having substantial merit, the incentives of defendants to settle for reasonable value will be high.

Relatedly, without *Eisen,* plaintiffs will have to make greater monetary investments in document review, depositions, and experts before class certification. These are investments that should be encouraged for meritorious cases but discouraged for cases brought primarily for their *in terrorem* value in inducing settlement. Likely effects include: (1) a more even distribution of settlement bargaining leverage by causing a more equal distribution of pre-certification litigation costs, and (2) a reduction in the number of false negatives prompted by *Twombly* by discouraging premature dismissals of potentially meritorious complaints. Today, the text and subtext of *Twombly* call out to district courts to err on the side of dismissal of antitrust cases to avoid settlements induced by the

and these interlocutory petitions will not be accepted as a matter of course.")); *see* FED. R. CIV. P. 23(f) advisory committee's note ("The court of appeals is given unfettered discretion whether to permit the [Rule 23(f)] appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari.").

132. Nothing in the text of Rule 23(f) or the advisory committee comment to the provision's addition in 1998 suggests that appeals under the rule should be permitted as rarely as existing appellate practice suggests. Overruling *Eisen* might have the odd, but beneficial effect, of causing more 23(f) appeals to be allowed.

threat of onerous discovery. But if judges are aware that only cases with substantial merit will be certified as class actions, this effect is likely to recede over time. Without *Eisen*, courts will be freer to focus on the merits of a case. Less important issues, such as the degree of similarity or dissimilarity of the impact of an alleged violation on class members, will have less impact on ultimate outcomes.

It must also be acknowledged that overruling *Eisen* would mean that fewer cases would be certified as class actions. Proponents of class treatment would have to satisfy all the elements of Rule 23 that they must satisfy today, and they would face the additional hurdle of convincing a court that their case has substantive merit. Costs for financing class actions would rise. The inevitable result would be to decrease the number of cases allowed to proceed on a class basis.

But decreasing the number of classes that are certified is likely to have beneficial effects on balance. As mentioned, it will discourage unmeritorious cases ex ante and focus courts more precisely on the substantive issues—the issues that truly matter—in resolving the case. Most importantly, from a longer-term perspective, it will reduce the factors motivating the Supreme Court to curtail the substantive reach of the antitrust laws. If fewer class actions translate into Supreme Court decisionmaking that is focused on consumer welfare, rather than the need to curtail private litigation excesses, we will all be better off.