IN RE NEW MOTOR VEHICLES CANADIAN EXPORT ANTITRUST LITIGATION: EXAMINING THE REQUISITE LEVELS OF INQUIRY INTO THE MERITS OF A CASE AT THE CLASS CERTIFICATION STAGE

ABSTRACT

This note examines the recent United States Court of Appeals for the First Circuit decision in In re New Motor Vehicles Canadian Export Antitrust Litigation (Motor Vehicles), specifically the court's treatment of Federal Rule of Civil Procedure 23 (Rule 23) in an antitrust context. It isolates the issue concerning the appropriate level of inquiry into the merits of a case during the Rule 23 class certification stage of a court proceeding. The note begins by detailing the language of Rule 23 and by discussing the relevant United States Supreme Court jurisprudence. It continues by exploring the dissention among circuits and commentators' interpretations of the rule. The note ultimately concludes that the First Circuit's ruling in Motor Vehicles was correct because it supports the adoption of a mandatory weak-form rule in the class certification setting.

I. INTRODUCTION

The First Circuit's decision in In re New Motor Vehicles Canadian Export Antitrust Litigation¹ (Motor Vehicles) involved a multidistrict consumer action that accused automobile manufacturers of illegally blocking lower-priced imports from Canada. Plaintiffs' claim was significantly based on "the currency exchange rate differential between the strong United States dollar and the cheaper Canadian dollar."² Plaintiffs argued that this differential created an "opportunit[y] in the gray market to sell lower-priced Canadian cars in the United States."³ Plaintiffs alleged that "individual automobile manufacturers engaged in business practices, both legal and illegal, designed to restrict the flow of Canadian cars into the United States" and asserted "that these business practices had the effect of suppressing the supply of Canadian cars in the United States."⁴ Plaintiffs' antitrust theory utilized two stages.⁵ First, the conspiracy between automobile manufacturers

¹522 F.3d 6 (1st Cir. 2008).
²Id. at 9.
³Id.
⁴Id. at 10.
⁵Motor Vehicles, 522 F.3d at 11.
allowed them "to maintain artificially inflated national [manufactured suggested retail prices (MSRPs)] and dealer invoice prices within the United States." And, second, the inflated prices "resulted in higher purchase prices paid by individual consumers." But a major issue in the case was whether the district court inquired into the relevant merits of the lawsuit when it certified the classes under Federal Rule of Civil Procedure 23(b)(3). The court held:

that when a Rule 23 requirement relies on a novel or complex theory as to injury, as the predominance inquiry does in this case, the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed.

This note concludes that this decision was meritorious. To support this conclusion, this note will detail the language of Federal Rule of Civil Procedure 23 (Rule 23), explore the relevant Rule 23 jurisprudence, discuss the comparative handling of the issue within different circuits and between commentators, and describe important policy considerations. Interpretation of Delaware's class action certification rule by its courts in the corporate context will also be discussed. This note proposes that when the merits of a case overlap with the class certification requirements, courts must make a rigorous inquiry into the merits before a class may be certified. Thus, the
court's decision in *Motor Vehicles* should be upheld in the wake of an appeal.11

II. BACKGROUND

A. Rule 23: Class Actions

Class actions have two principal purposes: "(1) promoting judicial economy through the efficient resolution of multiple claims in one case, and (2) providing an opportunity for persons with small claims to assert their rights."12 Rule 23 governs federal class action certification.13 A party seeking class certification must first meet four requirements.14 After satisfying Rule 23(a), the potential class must meet the criteria of one of the three prongs contained in Rule 23(b).15 The relevant portion states that a class action can be utilized if:

the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or

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11The *Motor Vehicles* litigation is pending in the United States District Court for the District of Maine after remand from the First Circuit.

12L. Elizabeth Chamblee, *Between "Merit Inquiry" and "Rigorous Analysis": Using Daubert to Navigate the Gray Areas of Federal Class Action Certification*, 31 FLA. ST. U. L. REV. 1041, 1044 (2004) (noting that trial judges "should be ever mindful of these" purposes when deciding whether to certify a class). See also Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (discussing class action policy considerations and its benefits to smaller claims affecting large groups of claimants).


14Id. at 23(a); see also Chamblee, *supra* note 12, at 1045 (discussing the Rule 23(a) requirements). The four requirements of Rule 23(a) are:

(1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.


15See Fed. R. Civ. P. 23(b); see also Chamblee, *supra* note 12, at 1046 (discussing the subdivisions of Rule 23(b)).
undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.  

B. How "Searching" an Inquiry Into The Merits of a Case Should a Court Make at the Class Certification Stage: Eisen to Falcon

Three United States Supreme Court decisions have set the stage for the split between circuits regarding how "searching" of an inquiry into the merits of a case a court should make at the class certification stage. The first decision is Eisen v. Carlisle & Jacquelin. The trial judge, in determining how to allocate notice costs, conducted a preliminary hearing on the merits of the case. The judge concluded that the merits inquiry favored the plaintiffs and allocated ninety percent of the notice costs to the defendants. On appeal, the United States Supreme Court held that the trial court erred by commencing a preliminary inquiry into the merits of the case at the certification stage. The Supreme Court's holding was premised on three principles: (1) "the language [and] history of Rule 23" did not give a court the authority to carry out a preliminary inquiry into the merits of a case "to determine whether [the suit] may be maintained as a class action," (2) "a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials," and (3) allowing a preliminary inquiry into the merits of a case would "allow[] a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it."  

The second case to address this issue was Coopers & Lybrand v. Livesay. Although the Court's language was unclear, it seemed to have recognized the necessity for some level of inquiry into the merits of a case.

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19Id.; see also Robert G. Bone & David S. Evans, Class Certification and the Substantive Merits, 51 DUKE L.J. 1251, 1264-65 (2002) (discussing the trial judge's opinion in Eisen).  
20Eisen, 417 U.S. at 177-78; see also Bone & Evans, supra note 19, at 1264-65 (explaining the justifications for the Eisen holding).  
21Eisen, 417 U.S. at 177-78.  
22437 U.S. 463 (1978). This case involved securities purchasers who alleged that an accounting firm had violated the federal securities laws. Id. at 465-66.
during the class certification stage.\textsuperscript{23} The Supreme Court stated that an "[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims."\textsuperscript{24} The Court went on to observe that "[t]he more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits . . . ."\textsuperscript{25}

The final Supreme Court decision to set the stage for the circuit split was \textit{General Telephone Co. of the Southwest v. Falcon}.\textsuperscript{26} The respondent alleged racial discrimination and sought to certify a "class of all hourly Mexican[-]American employees who have been employed, are employed, or may in the future be employed and all those Mexican-Americans who have applied or would have applied for employment had the Defendant not practiced racial discrimination in its employment practices."\textsuperscript{27} The Supreme Court reversed the judgment of the court of appeals that allowed the respondent's class certification.\textsuperscript{28} The Court stated that the Rule 23(a) requirements were not satisfied by the "mere fact that a complaint alleges racial or ethnic discrimination."\textsuperscript{29} An oft-cited portion of the opinion clearly demonstrates the Court's viewpoint on Rule 23 class certification.

The District Court's error in this case . . . is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a). As we noted in \textit{Coopers & Lybrand v. Livesay}, "the class determination generally involves considerations that are 'emmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe

\textsuperscript{23}Id. at 469.
\textsuperscript{24}Id. at 469 n.12 (quoting 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3911, at 485 n.45 (1976)).
\textsuperscript{25}Id. (quoting WRIGHT ET AL., supra note 24, § 3911, at 485 n.45).
\textsuperscript{26}457 U.S. 147 (1982).
\textsuperscript{27}Id. at 151. The respondent's argument in favor of certification was supported by the Fifth Circuit decision in \textit{Johnson v. Georgia Highway Express, Inc.}, stating that "any victim of racial discrimination in employment may maintain an 'across the board' attack on all unequal employment practices alleged to have been committed by the employer pursuant to a policy of racial discrimination." \textit{Id.} at 151-52 (citing Johnson v. Ga. Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969)).
\textsuperscript{28}Id. at 161.
\textsuperscript{29}Id. at 157.
behind the pleadings before coming to rest on the certification question.\(^{30}\)

The Court went on to articulate that "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."\(^ {31}\) *Falcon* makes clear that some inquiry into the merits during the class certification stage is warranted when the merits of the case overlap the Rule 23 criteria.\(^ {32}\) The federal circuit courts, however, are split as to how "searching" of an inquiry is required.

### III. DIFFERENT INTERPRETATIONS OF RULE 23

#### A. Dissention Among Circuits

The federal courts have labored to square *Eisen's* prohibition of a preliminary inquiry into the merits with *Falcon's* requirement of a thorough Rule 23 analysis.\(^ {33}\) This undertaking is arduous because of the overlap between the Rule 23 requirements and the prohibition on preliminary inquiries.\(^ {34}\) All circuits faced with this dilemma have agreed "that when class criteria and merits overlap, the district court must conduct a searching inquiry regarding the Rule 23 criteria."\(^ {35}\) But the circuit courts' views regarding the appropriate degree of inquiry differ.\(^ {36}\) Two major camps have formed among the circuits.\(^ {37}\) One camp (Camp A) favors a more "rigorous" inquiry into the merits.\(^ {38}\) This group "forbid[s] district courts from relying on plaintiffs' allegations of sufficiently common proof and require[s] the

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\(^{30}\) *Falcon*, 457 U.S. at 160 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978)); *see also* Bone & Evans, *supra* note 19, at 1267-68 (discussing the *Falcon* decision and agreeing that a plaintiff may not rely on a mere allegation to satisfy Rule 23's certification requirements); David S. Evans, *Class Certification, the Merits, and Expert Evidence*, 11 GEO. MASON L. REV. 1, 9-10 (2002) (stating, in accordance with *Falcon*, that a "judge should not merely accept plaintiff's allegation that [Rule 23] is satisfied").

\(^{31}\) *Falcon*, 457 U.S. at 161.

\(^{32}\) Id. at 156-58 (describing how evidence of racial discrimination under Title VII vis-à-vis a single plaintiff is insufficient to certify a class of plaintiffs under Rule 23).

\(^{33}\) Bone & Evans, *supra* note 19, at 1268.

\(^{34}\) Id.

\(^{35}\) *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 24 (1st Cir. 2008).

\(^{36}\) Id.

\(^{37}\) *See id.* The Second, Fourth, Fifth, and Seventh Circuits require an inquiry while the Third and Eighth Circuits, at times, require an inquiry. Id.

\(^{38}\) Id.
court to make specific findings that each Rule 23 criterion is met. In contrast, the second camp (Camp B) "sometimes require[s] an inquiry into and preliminary resolution of disputes, but [it does] not require findings and do[es] not hold that such inquiry will always be necessary."

1. A Closer Look at Camp A

The Second, Fourth, Fifth, and Seventh Circuits have positioned themselves at the "more rigorous end" of the merits spectrum. For example, the Second Circuit's decision in In re Initial Public Offerings Securities Litigation involved class actions against underwriters, issuers, and individual officers of the issuing companies which alleged a violation of federal securities law. The trial judge, limited by Eisen, found that when the merits of a case were "enmeshed" with Rule 23 criteria, the plaintiff was required to make "some showing" that such requirements were met. The circuit court rejected the district court's legal standard and held that, when certifying a class, a trial judge must conduct a thorough analysis of the Rule 23 requirements and resolve factual disputes relevant to each requirement.

A second example is the Fourth Circuit's decision in Gariety v. Grant Thornton, LLP. In Gariety, the plaintiffs alleged violations of the Securities Exchange Act and fraud against an accounting firm. The plaintiffs relied on a "fraud-on-the-market theory" to satisfy the commonality and predominance of common issues prong under Rule 23(b)(3). The trial

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39 Motor Vehicles, 522 F.3d at 24.
40 Id.
41 Id.; see, e.g., In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 32-33 (2d Cir. 2006) (describing the Falcon holding as "[the principal Supreme Court decision on determining Rule 23 requirements"); Unger v. Amedisys Inc., 401 F.3d 316, 320 (5th Cir. 2005) (construing Falcon as "requir[ing] district courts to conduct a rigorous analysis of Rule 23 prerequisites"); Gariety v. Grant Thornton, LLP, 368 F.3d 356, 365 (4th Cir. 2004) (describing certifying a class based on plaintiffs' allegations as a "fail[ure] to comply adequately with the procedural requirements of Rule 23"); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 677 (7th Cir. 2001) (opining that using plaintiffs' "incontestable allegations" is "injurious to other class members [and] . . . defendants").
42 471 F.3d 24 (2d Cir. 2006).
43 Id. at 27.
44 Id. at 30. The trial judge concluded: "In order to pass muster, plaintiffs—who have the burden of proof at class certification—must make 'some showing.' That showing may take the form of, for example, expert opinions, evidence (by document, affidavit, live testimony, or otherwise), or the uncontested allegations of the complaint." Id. (quoting In re Initial Pub. Offering Sec. Litig., 227 F.R.D. 65, 93 (S.D.N.Y. 2004)).
45 Id. at 41.
46 368 F.3d 356 (4th Cir. 2004).
47 Id. at 360.
48 Id. at 361. The "fraud-on-the-market" theory has been described as follows:
judge failed to look beyond the plaintiffs' pleadings to determine whether the fraud-on-the-market presumption of reliance applied to the case when certifying the class. The Fourth Circuit held that the trial court erred by not looking outside of the plaintiffs' pleadings and required the trial court to make "findings" when the merits of a case overlap with Rule 23 requirements.

2. A Closer Look at Camp B

The Third and Eighth Circuits have positioned themselves at the "less rigorous end" of the inquiry into the merits spectrum. The Eighth Circuit's decision in *Blades v. Monsanto Co.* exemplifies Camp B's theory. In *Blades*, the plaintiffs alleged that defendant corporations conspired to inflate the prices of corn and soybean seeds in violation of section 1 of the Sherman Act. The plaintiffs argued on appeal that "the district court improperly resolved disputes between the parties' experts that go to the merits of the case" when it ruled on class certification. The Eighth Circuit, however, stated that "a court may [sometimes] be required" to analyze the merits of a case when ruling on class certification, but the most noteworthy aspect of this case is the fact that the court expressed caution when such inquiries into

The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in the case of direct reliance on misrepresentations.

*Id.* at 363 (quoting Basic Inc. v. Levinson, 485 U.S. 224, 241-42 (1988)).

*Id.* at 364, 367.

*Gariety*, 368 F.3d at 366-67. The First Circuit has noted that "circuits' use of the term 'findings' in this context should not be confused with binding findings on the merits." In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 24 (1st Cir. 2008) (quoting In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 39 (2d Cir. 2006); Gariety, 368 F.3d at 366). "The judge's consideration of merits issues at the class certification stage pertains only to that stage; the ultimate factfinder, whether judge or jury, must still reach its own determination on these issues." *Id.* (quoting Initial Pub. Offering, 471 F.3d at 39; Gariety, 368 F.3d at 366).

*Motor Vehicles*, 522 F.3d at 24; see also *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005) (suggesting caution when "the class certification stage comes to the heart of the claim").

400 F.3d 562 (8th Cir. 2005); see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 (3d Cir. 2001) ("In reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action.") (emphasis added).

*Blades*, 400 F.3d at 565-66.

*Id.* at 575.

*Id.*
the merits appear to be necessary. The court stated that "such disputes [regarding the merits of the case] may be resolved only insofar as resolution is necessary to determine the nature of the evidence that would be sufficient, if the plaintiff’s general allegations were true, to make out a prima facie case for the class." The court went on to state that "[t]he closer any dispute at the class certification stage comes to the heart of the claim, the more cautious the court should be in ensuring that it must be resolved in order to determine the nature of the evidence the plaintiff would require."

B. Interpretation of Delaware's Class Action Certification Rule in a Corporate Setting

Delaware’s class action certification rule mimics Federal Rule 23. While not directly speaking about the inquiry into the merits issue, the Delaware Court of Chancery appeared to permit such an inquiry in In re TD Banknorth Shareholders Litigation. TD Banknorth involved a suit brought against TD Banknorth, Inc. by former investors in the company. A key component of the plaintiffs' complaint alleged that defendant Toronto-Dominion breached a stockholder agreement. The defendants claimed that class certification was inappropriate in this case because the plaintiffs failed to satisfy Rule 23(a)(4). The defendants alleged that the plaintiffs' class

56 Id. at 567.
57 Blades, 400 F.3d at 567.
58 Id.
60 William B. Rubenstein, A Transactional Model of Adjudication, 89 GEO. L.J. 371, 382-83 (2001). Like Rule 23, Delaware’s class action certification rule requires numerosity, commonality, typicality, and adequacy of representation. Del. Ct. Ch. R. 23(a). The language expressed in Delaware Court of Chancery Rule 23(b) is similar to the language set forth in Rule 23(b). Compare Del. Ct. Ch. R. 23(b) (listing maintainable class actions), with FED. R. CIV. P. 23(b) (listing “types of class actions” in virtually identical language).
62 Id.
63 Id. Toronto-Dominion Bank bought a fifty-one percent interest in Banknorth in March of 2005. Id. Toronto-Dominion and Banknorth executed a stockholders' agreement which included "restrictions on Toronto-Dominion's ability to propose or effectuate a going private transaction with Banknorth before March 1, 2007." Id. On November 20, 2006, Banknorth officially announced that "Toronto-Dominion would acquire the remaining Banknorth common stock for $32.33 per share." Id.
64 Id. at *2, reprinted in 34 Del. J. Corp. L. at 425. "Rule 23(a)(4) requires that a class representative 'fairly and adequately protect the interests of the class.'" Id.

Delaware case law makes clear that in order to meet this requirement "a representative plaintiff must not hold interests antagonistic to the class, retain competent and experienced counsel to act on behalf of the class and, finally,
representatives failed to demonstrate sufficient knowledge of the litigation. The court, however, concluded that the plaintiffs met the Rule 23(a)(4) burden. This conclusion was largely based on the potential class representatives' testimony. Though not an acknowledged practice, the court apparently considered portions of the testimony which dealt with the merits of the case when it decided that the plaintiffs satisfied Rule 23. For instance, the court considered H. Louis Farmer's (one of the plaintiffs who sought class representative certification), statement that "he considered the price offered in the going private transaction to be inadequate by at least $10 per share based on his familiarity with the stock as a longtime stockholder." The court recognized that Farmer's testimony provided a basis for the claims alleged in the complaint. Consideration of this testimony by the court in a class certification context is similar to the First Circuit's scrutiny of the plaintiffs' expert in Motor Vehicles. But unlike Motor Vehicles, whether the merits of the case in TD Banknorth overlapped with the Rule 23 criterion is debatable. Nonetheless, it is clear that the TD Banknorth court inquired into, and considered, the merits of the plaintiffs' claim when it determined whether Rule 23(a)(4) was satisfied.

C. Proposals for a Unified Rule: The Pros and Cons of Strong-Form, Weak-Form, and Super-Weak Rules

Most interpretations of Supreme Court jurisprudence concerning inquires into the merits of a case at the certification stage fall within three rule proposals. These rules, identified by Professor Geoffrey Miller as strong-form, weak-form, and super-weak rules, all possess distinct pros and cons. It is debatable which proposal offers the best unified rule to the overarching question.

A strong-form rule stands for the proposition that a court ruling on a class certification motion "may not go beyond the face of the pleadings with respect to any issues relating to the merits, but must instead accept as true

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possess a basic familiarity with the facts and issues involved in the lawsuit." *Id.* (quoting O'Malley v. Boris, No. 15,735, 2001 WL 50204, at *5 (Del. Ch. Jan. 11, 2001)).


*66Id.* at *1, *4-5, reprinted in 34 Del. J. Corp. L. at 422, 427, 430-31.

*67Id.* at *3-5, reprinted in 34 Del. J. Corp. L. at 426-31.

*68Id.* at *3, reprinted in 34 Del. J. Corp. L. at 427.


*70See infra* notes 108-22 and accompanying text.

*71See Geoffrey P. Miller, Review of the Merits in Class Action Certification, 33 Hofstra L. Rev. 51, 55-62 (2004) (arguing that a weak-form rule is superior to a strong-form or super-weak rule and discussing recent cases implementing the weak-form model).

*72Id.* at 62-84.
the well-pleaded allegations in the complaint."73  Strong-form rules are attractive because they promote judicial economy.74 This rule alleviates the burden placed upon a court at certification by eliminating any inquiry into the merits75—i.e., the judge does not need to waste precious time "hearing arguments and deliberating on the merits."76

In contrast, a strong-form rule is unattractive because it increases the likelihood of certification errors.77 It is well established that the merits of the case are often intertwined with the requirements of Rule 23.78 Professor Miller argues that when a court is permitted to look beyond a party's potentially biased pleadings and examine the merits of a case along with the Rule 23 requirements, it is more likely to rule correctly on certification.79

A super-weak form rule permits a court to assess the plaintiff's probability of success at trial during the class certification stage.80 An argument in favor of the adoption of a super-weak rule is the potential decrease in errors at trial.81 A court's "accurate assessment of . . . [a case's probability of success] may improve the accuracy of [a] trial"82 and provides

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74See Bone & Evans, supra note 19, at 1317-19 (discussing process costs of parties, which include litigation, opportunity, and other private costs, of strong-form and weak-form rules).
75Miller, supra note 71, at 82-84 (comparing the merits of judicial economy in the strong-form rule with the other forms' more rigorous inquiry procedure).
76Bone & Evans, supra note 19, at 1318.
77Miller, supra note 71, at 65-66.
78See Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 108 (2d Cir. 2007) (stating that "[i]n deciding whether . . . [the Rule 23 predominance prong] is met, the district court must make a 'definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues'") (quoting In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41 (2d Cir. 2006)); Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372, 381-82 (5th Cir. 2007) (taking notice that plaintiffs' reliance on the fraud-on-the-market theory and broad theory of liability overlap Rule 23 requirements); Bell v. Ascendant Solutions, Inc., 422 F.3d 108, 109 (5th Cir. 2007) (discussing the overlap of the merits of the case and Rule 23 requirements); Mulford v. Altria Group, Inc., 242 F.R.D. 615, 626-27 (D.N.M. 2007) (discussing the court's requirement of a showing of evidence that all class members suffered economic loss to satisfy the predominance prong of Rule 23).
79Miller, supra note 71, at 66.
80Id. at 62. See generally Bone & Evans, supra note 19 (arguing that a super-weak rule should be adopted during the class certification stage based on an analysis of the costs and benefits within each form).
81Miller, supra note 71, at 68.
82Id. But cf. id. at 68 n.99 (quoting 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, 402-03 (1996) ("[P]reliminary assessments could be very troublesome—and misleading—if they were based on inadequate information and therefore unreliable.").
a court the opportunity to gain a preliminary glimpse into the relevant facts and law of a case to enable improved rulings. 83

A drawback to a super-weak rule is the possible unfair advantage it affords plaintiffs. 84 A court implementing a super-weak rule will issue an opinion regarding a plaintiff's probability of success at trial. 85 Obviously, a plaintiff would be more inclined to remain in litigation if a court determines the probability of success is high and would likely pursue a different tactic or "opt-out" of the litigation if the probability of success is low. 86 This advantage cuts both ways, however. A defendant could potentially benefit from a court's early examination of the plaintiff's case, thus allowing that party to weigh potential settlement options. Overall, however, a plaintiff gains a greater advantage than a defendant.

A weak-form rule allows courts to make preliminary inquiries into the merits of a case when the merits overlap with the Rule 23 criteria. 87 A weak-form rule can be best described as a compromise between a strong-form rule and super-weak rule that balances the need for a fair trial with the need to reduce certification errors without introducing the pros and cons that are inherent in the other rule forms. For instance, a weak-form rule is superior to a strong-form rule with regard to the reduction of errors in certification, but is inferior to a super-weak rule in the certification error context. 88 A weak-form rule would also create fewer advantages for plaintiffs than a super-weak rule, but would increase such an advantage when compared to a strong-form rule. 89

83 Miller, supra note 71, at 68.
84 Id. at 71.
85 Id.
86 Id.
87 See Miller, supra note 71, at 59 (citing In re Union Sec. Litig., 107 F.R.D. 615, 618 (C.D. Cal. 1985)).
88 See id. at 65-67. Professor Miller argues that weak-form rules are better at reducing certification errors than strong-form rules because weak-form rules allow some inquiry into the merits of a case when intertwined with Rule 23 requirements. Id. at 67. If the probability of success at trial, however, is intertwined with a Rule 23 requirement, a weak-form rule would be inferior to a super-weak rule because the latter permits an inquiry into a case's probability of success at trial. Id.
89 Id. at 74. Professor Miller argues that "[b]ecause . . . [weak-form rules] disclose the trial court's preliminary assessment of issues relevant to certification, they do offer some information that [plaintiff] could use to her advantage when deciding whether to opt out." Id. In contrast, unlike super-weak rules, weak-form rules do not allow a preliminary determination of the probability of success at trial. Id. at 74-75.
IV. Why a Weak-Form Rule Should Be Adopted As a Unified Response and Was Appropriate In In Re New Motor Vehicles Canadian Export Antitrust Litigation

A. A Court Must Make a Rigorous Inquiry Into the Merits When They Overlap With Rule 23 Class Certification Requirements

One might argue that Eisen forbids a weak-form rule. Proponents of such an argument have arguably misinterpreted the Eisen decision. The issue before the Eisen court was substantially different from issues involving an overlap between the merits and Rule 23. The trial court in Eisen held a preliminary hearing on the merits to determine who should pay notice costs. The Supreme Court, however, rejected the trial court's inquiry into the merits. The Eisen decision, surprisingly, made no mention of what evidence could be used to satisfy the Rule 23 requirements. Thus, the Eisen Court did not explicitly state that an inquiry into the merits of a case was prohibited when the merits overlap with the Rule 23 requirements. A federal court that relies on Eisen to prohibit such an inquiry is likely in error.

The language within the Supreme Court's decision in Falcon supports a weak-form rule. In Falcon, the Court asserted that a trial judge must conduct a "rigorous analysis" into each requirement of Rule 23. Curiously, the Court also stated that a party's pleadings will sometimes be sufficient to

90 See Evans, supra note 30, at 35 (discussing the arguable misinterpretations of Eisen by subsequent cases); see also F. Ehren Hartz, Certify Now, Worry Later: Arkansas's Flawed Approach to Class Certification, 61 ARK. L. REV. 707, 726-28 (2009) (discussing the "prevailing interpretation of Eisen" by subsequent cases and arguing that Arkansas courts should not follow Eisen and its progeny).
91 See Hartz, supra note 90, at 727 ("The point is that the Supreme Court [in Eisen] was not faced with determination of any particular Rule 23 requirement or a requirement that overlapped with the merits.") (quoting In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 34 (2d Cir. 2006)); Miller, supra note 71, at 52 (stating that Eisen "concerned notice costs and not certification").
93 Id. at 177-79.
94 Id.; see also Evans, supra note 30, at 9 (discussing the facts of Eisen and concluding that the Court failed to address "what evidence could be used to assess the Rule 23 requirements").
95 See Miller, supra note 71, at 63 (arguing that Eisen does not require the implementation of a strong-form rule); see also Defendants' Opposition to Exemplar State Plaintiffs' Motion for Class Certification at 16, In re New Motor Vehicles Canadian Exp. Antitrust Litig., 235 F.R.D. 127 (D. Me. 2006) (No. 03-md-1532), 2005 WL 3725975 [hereinafter Brief for the Defendant] (arguing that the Eisen Court forbids a court's determination of the merits of a case during class certification).
97 Id. at 161.
satisfy the Rule 23 requirements when they overlap with the merits. Although the Court's language does not imply that a district court must make an inquiry into the merits when the merits overlap with Rule 23 criteria, one must wonder when reliance on a party's pleadings would be considered a "rigorous" analysis. It is difficult to formulate a claim in which the pleadings clearly establish the Rule 23 requirements when overlapped with the merits. The "rigorous analysis" language should be interpreted to mean that a district court must be certain that the Rule 23 requirements are satisfied when certifying a class. It is truly a rare case in which the district court is certain that Rule 23 is satisfied without an inquiry into the merits (when the merits and Rule 23 criteria overlap).

There is power in numbers. A majority of the circuits have rejected the district courts' implementation of strong-form rules and require the use of a weak-form rule. The Second, Fourth, Fifth, and Seventh Circuits forbid "district courts from relying on plaintiffs' allegations of sufficiently common proof and require[e] the courts to make specific findings that each Rule 23 criterion is met." If the Supreme Court is faced squarely with this issue, it should certainly be persuaded by this majority.

The adoption of a mandatory weak-form rule analysis will promote judicial economy. This proposition may come across as counterintuitive. As stated earlier, a purported advantage of a strong-form rule is judicial economy. It is proposed that the adoption of a weak-form rule would also further this goal, possibly more so than a strong-form rule. A strong-form rule conserves resources at the certification stage. Under a strong-form rule, a court is not permitted to look beyond a party's pleadings to satisfy the Rule 23 criteria. This certainly saves time and money at the certification stage. Are these savings, however, worthwhile if a class is certified based on questionable or nonmeritorious theories? A court's utilization of a weak-form rule would likely weed out cases with such theories. The costs of organizing a trial (court costs, attorney's fees, discovery, etc.) are much greater, theoretically, than the costs of making a preliminary inquiry into the merits at class certification.

98 Id. at 160.
99See In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 24 (1st Cir. 2008).
100 Id.
101 But see Miller, supra note 71, at 83-84 (discussing judicial economy and stating that "efficiency implications of the weak-form rule are . . . ambiguous").
102 See supra notes 72-74 and accompanying text.
103 Miller, supra note 71, at 82.
104 See id. at 82, 84.
A unified adoption of a weak-form rule would protect defendants from unfair settlement pressure.\textsuperscript{105} An imminent class action suit is potentially disastrous for any defendant because a defendant may be inclined to settle a case even though he or she is likely to prevail at trial as there is a fear of a potential catastrophic result.\textsuperscript{106} The implementation of a weak-form rule would avoid this problem. A defendant would not feel pressure to settle a nonmeritorious class action because such a claim would not pass Rule 23 muster.

It is true that the adoption of a weak-form rule may give plaintiffs an undue advantage.\textsuperscript{107} When a court looks at the merits of a case at certification, a plaintiff is bound to learn some valuable information. This information, however, will not allow a plaintiff to predict, with any degree of certainty, how a trier of fact will ultimately decide at trial.\textsuperscript{108} Under this note's proposition, a court need not establish "hard factual proof" that a claim will be victorious at trial.\textsuperscript{109} This note agrees with the First Circuit that an "explanation of how the pivotal evidence behind plaintiff's theory can be established" will suffice.\textsuperscript{110} Based on this assessment, a court would not, and should not, rule on the probability of success of a plaintiff's claim. A court's certification ruling should only provide information discussing whether plaintiff's theory is meritorious. Thus, under a weak-form rule, a plaintiff will be provided with valuable information, but this information will not provide an absolute answer as to how the court will rule on the merits at trial.

B. A Rigorous Inquiry Into the Merits is Necessary to Appropriately Address the Certification Question

A brief look at the First Circuit's inquiry in \textit{In re New Motor Vehicles Canadian Export Antitrust Litigation} is illustrative. "To establish an antitrust claim, plaintiffs typically must prove (1) a violation of the antitrust laws, (2) an injury they suffered as a result of that violation, and (3) an

\footnotesize{\begin{itemize}
\item \textsuperscript{105} \textit{Id.} at 86 ("Weak-form rules provide some protections to defendants against the risk of unfair settlements.").
\item \textsuperscript{106} Evans, \textit{supra} note 30, at 6 (discussing the economic pressures felt by defendants to settle in the class action context once a class is certified).
\item \textsuperscript{107} This notion was one of the concerns of the \textit{Eisen} Court. \textit{See} Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-79 (1974).
\item \textsuperscript{108} Compare this to super-weak form rules which allow trial judges to make an inquiry into the probability of success at trial at the class certification stage. \textit{See} Miller, \textit{supra} note 71, at 85.
\item \textsuperscript{109} \textit{See} \textit{In re} New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 29 (1st Cir. 2008).
\item \textsuperscript{110} \textit{Id.}
\end{itemize}
estimated measure of damages." As discussed above, the plaintiffs in *Motor Vehicles* claimed that the defendant automobile manufacturers organized to restrict the flow of Canadian automobiles into the United States. The theories set forth to satisfy elements two and three of the antitrust requirements were novel and hotly contested between the parties. Plaintiffs utilized an expert witness, Stanford University Professor Robert E. Hall, to establish that defendants' actions caused injury and measurable damages. The expert's basic proposition was "but for" the defendants' restraint on competition, the importation of Canadian cars would have resulted in lower dealer invoice prices and MSRP of automobiles sold in the United States. The expert "opined that class members would have experienced common impact from the changed MSRP and dealer invoice prices because a change in these prices would shift the entire negotiating range, benefiting . . . essentially all consumers." Professor Hall proposed two approaches to prove that the potential class members were damaged by the defendants' actions. First, the professor relied on Nash equilibriums—"statistical models . . . used in the auto industry to predict market outcomes." Second, Professor Hall proposed a benchmark method in which he would compare the U.S.-Canadian automobile market with a similar market not affected by defendants' actions. But the court was not totally convinced that these methods could even prove injury and measurable damages. Additionally, Professor Hall failed to state with any particularity how these two approaches would satisfy the antitrust requirements or how these methods could show how the purchases were affected by these higher

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111 Id. at 19 n.18 (citing Sullivan v. Nat'l Football League, 34 F.3d 1091, 1103 (1st Cir. 1994)).
112 Id. at 10.
113 Motor Vehicles, 522 F.3d at 10-11.
114 Id. at 20.
116 Motor Vehicles, 522 F.3d at 20; see also Hall Expert Report, supra note 115, at 41-49 (explaining the concerns of "unilateral imposition of restraints" in gray markets and concluding that no tightening occurred in the class period involved in this case).
118 Motor Vehicles, 522 F.3d at 20; see also Hall Expert Report, supra note 115, at 37 (explaining the theory and uses of Nash equilibriums).
119 Motor Vehicles, 522 F.3d at 20; see also Hall Expert Report, supra note 115, at 49-69 (comparing similar events in the European Union with those that occurred in *Motor Vehicles*).
120 See Motor Vehicles, 522 F.3d at 29. For a judicial discussion of establishing causation in a Rule 23 setting, see Bell Atl. Corp. v. AT&T Corp., 339 F.3d 294, 302 (5th Cir. 2003).
prices. In sum, the expert believed that one or both of these novel approaches could prove that the plaintiffs suffered injury as well as establish a measure of damages.

The predominance requirement of Rule 23(b)(3) was the prong under scrutiny in this case. A plaintiff must prove that "common issues . . . constitute a 'significant part'" of a claim to establish predominance. The plaintiff must further prove that the issues in the class action 'are subject to generalized proof, and thus applicable to the class as a whole,' and that these collective issues predominate over issues that require individualized proof.

Based on this definition of predominance, the First Circuit was correct when it insisted that an inquiry into the merits was necessary to satisfy the "rigorous" analysis language of Falcon. The plaintiffs relied primarily on their submission of expert testimony to prove that the defendants' actions caused injury and measurable damages. It was critical for the court to note that Professor Hall was unable to explain how his approaches actually impacted members of the potential class. The First Circuit could not proclaim in good faith that the predominance prong of Rule 23 was satisfied when the plaintiffs failed to set forth an explanation of how each potential class member was affected. The court's hands were tied because it had no way to determine whether all class members were impacted by defendants' actions or if there was a rational means of establishing impact. Issues within the plaintiffs' antitrust claim were clearly enmeshed within the predominance prong of Rule 23. Therefore, a decision by the First Circuit to certify the plaintiffs' class, without further inquiry into the merits, would have been in direct conflict with Falcon.

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121 See Motor Vehicles, 522 F.3d at 21, 29; see also Hall Expert Report, supra note 115, at 49 (comparing the effect of the antitrust elements on a similar situation in Europe).
122 See Motor Vehicles, 522 F.3d at 22-23.
124 Id. at 1057-58 (citing In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 136 (2d Cir. 2001)).
125 Motor Vehicles, 522 F.3d at 27-29.
126 Id. at 29.
Aside from the aforementioned policy considerations, the First Circuit was also correct in requiring an inquiry into the merits because its failure to do so could lead to an abundance of non-meritorious class certification attempts. If the First Circuit approved the district court's certification of a class without an inquiry into the merits, prospective litigants might be more encouraged to organize a class based on an unproven theory to pursue recovery. This slippery slope would be unduly burdensome to the courts, as well as to potential defendants who incur substantial costs when defending such claims.  

The mandatory requirement imposed upon a court to inquire into the merits (when overlapped with Rule 23 requirements) would dissuade lawsuits premised on unsubstantiated theories of culpability.

V. CONCLUSION

The First Circuit correctly decided the Rule 23 issue in Motor Vehicles. Vital elements of the plaintiffs' antitrust claim clearly overlapped with the predominance prong of Rule 23(b)(3). The court's inquiry into the merits of the case was necessary to ensure proper class certification and should not have been erroneously hindered by Eisen or other unsubstantiated public policy concerns. A unified weak-form rule should be adopted requiring trial courts to make a rigorous inquiry into the merits whenever they overlap with the Rule 23 criteria. This proposition is supported by United States Supreme Court jurisprudence. A trial judge cannot satisfy the "rigorous analysis" language of Falcon unless he or she makes an inquiry into the merits when the merits of the case are inseparable from a Rule 23 requirement. Furthermore, the adoption of a unified weak-form rule in the class certification context would promote judicial economy and protect defendants from unfair settlement pressure.

Seth H. Yeager

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128 See Brief for the Defendant, supra note 95, at 16 ("[C]lass action machinery is expensive and in our view a court has the power to test disputed premises early on . . . .") (quoting Tardiff v. Knox County, 365 F.3d 1, 4 (1st Cir. 2004)).