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Individualized Affirmative Defenses Bar Class Certification—Per Se

Priya Laroia

Black's Law Dictionary defines an affirmative defense as a "defendant's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecutor's claim, even if all allegations in the complaint are true." Courts often consider affirmative defenses when making class certification determinations. However, they disagree about the amount of weight to afford affirmative defenses, especially when these defenses turn on facts unique to each individual's case. Examples of individualized defenses include contributory negligence and statutes of limitations. This disagreement has led to a circuit split in which the Fourth Circuit has found class certification erroneous if individualized affirmative defenses exist. Other circuits, however, have rejected this per se rule.

In Broussard v Meineke Discount Muffler Shops, Inc, the Fourth Circuit held that when affirmative defenses turn on individual issues, "class certification is erroneous." The court decided this issue while analyzing a class's satisfaction of the Federal Rule of Civil Procedure 23 ("Rule 23") certification prerequisites.

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1 B.A. 2001, Northwestern University; J.D. Candidate 2004, University of Chicago.
2 See, for example, Waste Management Holdings, Inc v Mowbray, 208 F3d 288, 295 (1st Cir 2000) (claiming that settled law authorizes consideration of affirmative defenses in certification decisions); Castano v American Tobacco Co, 84 F3d 734, 744 (5th Cir 1996) (arguing that a court must understand claims, defenses, relevant facts, and applicable substantive law before certifying a class).
3 See, for example, Mowbray, 208 F3d at 296 (arguing against giving individualized defenses so much weight that they become a per se bar to certification); Broussard v Meineke Discount Muffler Shops, Inc, 155 F3d 331, 342 (4th Cir 1998) (advocating a per se bar to certification when individualized affirmative defenses exist within a case).
5 See Broussard, 155 F3d at 342.
6 See, for example, Mowbray, 208 F3d at 296; In re Linerboard Antitrust Litigation, 305 F3d 145, 162–63 (3d Cir 2002).
7 155 F3d 331 (4th Cir 1998).
8 See id at 342.
that appear in subsection (a) of the rule. The First Circuit, in *Waste Management Holdings, Inc v Mowbray,* rejected the position set forth in *Broussard*—that individualized affirmative defenses create a per se bar to class certification. According to *Mowbray,* the Fourth Circuit's decision contradicted precedent and "[ignored] the essence of the predominance inquiry" mandated by Rule 23(b)(3). The First Circuit did not address the fact that the Fourth Circuit had rendered its rule with regard to Rule 23(a) and that it had not even considered the Rule 23(b)(3) predominance requirement in its *Broussard* decision.

The existence of a single individualized affirmative defense could shift a representative plaintiff's interests away from those of some members of the class, despite shared interests in the claims of the case. For instance, in a case where the defendant raises a contributory negligence defense, a representative plaintiff whose claim is not affected by the defense may not argue as strongly for strict liability theories as an affected, absent class member would argue for them.

This Comment advocates the per se bar adopted by the Fourth Circuit in *Broussard.* Part I outlines the current state of the law surrounding this issue. Part I A outlines and explains the requirements for certification appearing in Rule 23. Part I B explores the proper analysis for courts to use in the decision to certify a class. Part I C details the case law regarding the role of affirmative defenses at the certification stage and discusses the current circuit split. Part I D discusses the First Circuit's apparent disregard of the distinction between Rule 23(a) and Rule 23(b)(3) in *Mowbray.*

Part II of this Comment argues in favor of the per se bar in the context of the commonality, typicality, and adequacy of representation requirements of Rule 23(a), but not in the Rule 23(b)(3) predominance context. The reason for this distinction, as described in Part II, derives from the mandates of the different subsections of Rule 23. Part III explains that while the *Broussard* per se bar appears to contradict precedent, the holding is, in fact,
a natural outgrowth of the important Supreme Court class certification decision in *Eisen v Carlisle and Jacquelin*.14 Finally, Part IV argues for strict adherence to the *Eisen* principle: a court should not examine the substantive merits of a claim in making certification decisions.15 The per se bar provides a means to ensure that courts do not violate this principle. Part IV also details why, despite criticism to the contrary, the per se bar does not create an opportunity for defendants to engage in strategic behavior to avoid class certification.

### I. THE STATE OF CURRENT LAW

The circuit split over the per se bar arose from confusion in the law. Courts often have muddled the distinctions between the various requirements for certification under Rule 23.16 Although the Supreme Court has issued decisions indicating the appropriate scope of a certification inquiry,17 these decisions sometimes have added to courts’ questions about the appropriate analysis at the certification stage.18 In order to assess the propriety of the per se bar against individualized affirmative defenses, it is necessary to examine certification analysis generally and determine how and when the per se bar would apply.

#### A. Certification Under Rule 23

Rule 23 governs class certification.19 Rule 23(a) provides the four prerequisites to class certification.20 Rule 23(b) details the three types of class action suits allowed by the Federal Rules.21 A

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15 See id at 177.
16 See, for example, *Barnes v American Tobacco Co*, 161 F3d 127, 141 (3d Cir 1998) (noting that the commonality and typicality requirements of Rule 23(a) tend to merge).
17 See *General Telephone Co of the Southwest v Falcon*, 457 US 147, 160 (1982) (requiring courts to probe behind the pleadings when necessary to making an informed certification decision); *Eisen*, 417 US at 177 (prohibiting courts from making a preliminary merits inquiry at the certification stage).
18 See, for example, *Love v Turlington*, 733 F2d 1562, 1564 (11th Cir 1984) (stating that although a trial court cannot look at the merits of a case at the certification stage, a court should not artificially invoke this principle to avoid examining the necessary factors in a certification decision); *Blackie v Barrack*, 524 F2d 891, 901 (9th Cir 1975) (noting that because a trial judge cannot engage in a preliminary merits inquiry at the certification stage, he must necessarily decide the issue with some speculation); *Huff v N.D. Cass Co of Alabama*, 485 F2d 710, 714 (5th Cir 1973) (recognizing the tension between the two different approaches to class certification).
19 FRCP 23.
20 FRCP 23(a).
21 FRCP 23(b).
class must satisfy all of the Rule 23(a) prerequisites and fit into one of the Rule 23(b) classifications in order to achieve certification.22

Under Rule 23(a), plaintiffs first must prove that the size of the potential class makes joinder of all of the class members impracticable.23 Second, the commonality requirement demands that there be questions of law or fact common to the entire class.24 Named plaintiffs can satisfy this requirement by showing that they have at least one question of law or fact in common with the prospective class.25 Third, under the typicality prerequisite, the claims and defenses of the representative parties must be typical of the claims and defenses of the class.26 This requirement asks the court to examine the efficiency of maintaining the class and to determine whether the interests of the named plaintiffs are sufficiently aligned with those of the absentee plaintiffs to warrant consolidation.27 Finally, a court may certify a class only if “the representative parties will fairly and adequately protect the interests of the class.”28 Courts often refer to this requirement as the “adequacy of representation” element of Rule 23(a).29

After a court determines that a class meets the Rule 23(a) prerequisites, it must also ensure that the class fits into one of the Rule 23(b) categories. Rule 23(b)(1) and Rule 23(b)(2) authorize mandatory class actions. Mandatory class actions are those in which class members cannot avoid the preclusive nature of a class judgment by opting out of the litigation and pursuing their claims individually.30 Parties often seek certification under Rule 23(b)(1) when defendants have only a limited fund from which to pay plaintiffs’ damages.31 In these cases, courts use the mandatory class action device to avoid situations in which the first plaintiffs that successfully adjudicate their claims deplete the

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22 FRCP 23.
23 FRCP 23(a)(1).
24 FRCP 23(a)(2).
26 FRCP 23(a)(3).
27 See Baby Neal, 43 F3d at 57, citing Weiss v York Hospital, 745 F2d 786, 810 (3d Cir 1984).
28 FRCP 23(a)(4).
29 See Ortiz v Fibreboard Corp, 527 US 815, 828 n 6 (1999) (detailing the four prerequisites of Rule 23(a)).
30 See id at 833 n 13 (noting that in a mandatory class action, absentee plaintiffs may not exclude themselves from class membership).
31 See id at 834–35 (noting that the limited fund case is a recurring type of case under Rule 23(b)(1)(b)).
defendants' funds, effectively denying relief to the rest of the injured plaintiffs. In Rule 23(b)(2) mandatory class actions, an injunction or declaratory relief provides the appropriate remedy for the class.

Unlike Rule 23(b)(1) and Rule 23(b)(2) classes, Rule 23(b)(3) class actions allow class members to opt out of a class. In order to certify a class in the Rule 23(b)(3) category, the court must determine that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and that the class action method is superior to other means of adjudicating the plaintiffs' claims.

B. Ruling on the Merits in Class Certification Decisions

When a court makes a certification decision, it must decide how deeply to examine the case in order to detect or anticipate factors that may undermine the proposed class's satisfaction of Rule 23. Such factors include affirmative defenses. Therefore, in order to assess how courts should treat affirmative defenses, it is first necessary to consider the broader debate about the degree to which a court may analyze the substantive merits of a case when ruling on class certification.

The Supreme Court, in Eisen, explicitly declared that Rule 23 does not authorize a preliminary inquiry into the merits of a case at the certification stage. In a 1982 employment discrimination case, General Telephone Co of the Southwest v Falcon, however, the Court declared that a court sometimes may need to "probe beyond the pleadings" before determining the propriety of class certification. In making this statement, the Court relied on language from a 1978 case, Coopers & Lybrand v Livesay. The Court in Coopers refused to exempt class certification decisions

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32 See id.
33 FRCP 23(b)(2).
34 FRCP 23(c)(2).
35 FRCP 23(b)(3).
36 See Huff, 485 F2d at 713–14 (discussing a court's need to make decisions about the extent of discovery and the extent of examination of the merits at the certification stage).
37 See Mowbray, 208 F3d at 295 (stating that settled law requires courts to consider affirmative defenses in certification inquiries).
38 See Eisen, 417 US at 177 (noting that a merits inquiry at the certification stage would bestow the benefits of a class action on the plaintiffs before they satisfied the Rule 23 requirements).
40 Id at 160.
41 See id, citing Coopers & Lybrand v Livesay, 437 US 463, 469 (1978).
The final-judgment rule prohibits parties from appealing a lower court decision unless it represents the final judgment in a case. See *Coopers*, 437 US at 464–65, 465 n 1. Very few judicial decisions are excepted from the final-judgment rule. See id at 468.

46 See id at 469.

47 See, for example, *Love v Turlington*, 733 F2d 1562, 1564 (11th Cir 1984); *Blackie*, 524 F2d at 901; *Huff*, 485 F2d at 714.


49 See id at 1564 (upholding the denial of certification because of a failure to satisfy Rule 23(a) commonality and typicality requirements).

50 Id.
tension between *Eisen* and *Falcon*, gave rise to the current circuit split.


Although courts often consider affirmative defenses during the certification stage, courts differ in how much value to attribute to the existence of the defenses. Some courts use the existence of individualized affirmative defenses as a determinative factor, while others simply include them in the balancing of issues undertaken in a certification decision. These differences provide the basis for the current debate and circuit split over the per se bar.

Despite the ambiguity generated by the tension between the *Eisen* and *Falcon* rulings, the First Circuit believes that settled law requires courts to consider affirmative defenses when making certification decisions. In support of this position, the *Mowbray* court cited the Fifth Circuit’s decision in *Castano v American Tobacco Co.* The *Castano* court approved of courts looking beyond the pleadings at the certification stage in order to understand not only defenses, but also pertinent claims, facts, and law. Other circuits have likewise considered affirmative defenses when making certification rulings. For example, in *Barnes v American Tobacco Co.*, the Third Circuit decided that affirmative defenses, as well as causation and addiction issues, generated too many individual questions to permit certification. By contrast, the Ninth Circuit, in *Williams v Sinclair*, found that a class alleging securities violations satisfied the predominance requirement of Rule 23(b), even though a statute of limitations defense presented individual issues.

Given the *Williams* decision, it is somewhat surprising that another Ninth Circuit decision provides precedent for the current controversy. In *In re N D of California, Dalkon Shield IUD Prods*

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48 See, for example, *Mowbray*, 208 F3d at 295 (claiming that settled law authorizes consideration of affirmative defenses in certification decisions); *Castano v American Tobacco Co.*, 84 F3d 734, 744 (5th Cir 1996) (arguing that a court must understand claims, defenses, relevant facts, and applicable substantive law before certifying a class).

49 *Mowbray*, 208 F3d at 295.

50 Id, citing *Castano*, 84 F3d at 744.

51 *Castano*, 84 F3d at 744.

52 161 F3d 127 (3d Cir 1998).

53 Id at 143.

54 529 F2d 1383 (9th Cir 1975).

55 See id at 1388.
Liab Litig, the Ninth Circuit reviewed a Northern District of California judge's decision to consolidate numerous suits filed against a medical manufacturer. The Ninth Circuit discussed generally how individual issues might outnumber common ones in products liability cases because of the potential affirmative defenses, such as assumption of risk, contributory negligence, and the statute of limitations, that can arise. The court found that the class could not meet the commonality requirement of Rule 23(a) because of the possibility of different representations, warnings, and injuries, as well as the different defenses available. The court also found that the class did not satisfy the typicality and adequacy of representation requirements of Rule 23(a) or meet any of the Rule 23(b) requirements because of additional causation, duty of care, and warranty differences among the putative class members. Although the court did not explicitly discuss the issue, the Ninth Circuit does not appear to have advocated a per se bar to certification when affirmative defenses exist in a case. In fact, the discussion in Dalkon about the class's many flaws indicates that affirmative defenses served as only a single factor in the court's decision to deny certification.

2. The circuit split.

The current circuit split arose from this rather murky body of law. The split stems from widespread confusion regarding the issues in this area of class certification law and, arguably, from a misapplication of precedent. Although individualized affirmative defenses apparently played only a small part in the Ninth Circuit's refusal of class certification in Dalkon and did not persuade the court to bar certification in Williams, the Fourth Circuit cited the Dalkon decision in Broussard.

In Broussard, a class of franchisees claimed that their franchiser's advertising practices constituted a breach of contract. Individual contracts required franchisees to financially contribute

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56 693 F2d 847 (9th Cir 1982).
57 See id at 848-49 (pointing out that the district court consolidated the suits without the consent of the parties and without providing notice of status hearings to out-of-state parties).
58 Id at 853.
59 Id at 854.
60 Dalkon, 693 F2d at 854-56.
61 Id.
62 Broussard, 155 F3d at 334.
to the advertising that the franchiser undertook on their behalf.\textsuperscript{63} The plaintiffs claimed that the franchiser wastefully expended the franchisees’ contributions by retaining advertising agencies with very high rates of commission.\textsuperscript{64} The class sought certification under Rule 23(b)(2).\textsuperscript{65} The Fourth Circuit ruled that the class did not meet the commonality, typicality, and adequacy of representation requirements of Rule 23(a) and overturned the lower court’s decision to certify.\textsuperscript{66} First, the court explained that a statute of limitations defense turned on facts specific to each individual plaintiff’s case.\textsuperscript{67} Second, the court worried that the diversity among the class members would create a conflict of interest that might undermine the adequacy of representation prong.\textsuperscript{68} The Fourth Circuit, quoting Dalkon, stated: “the Ninth Circuit has recognized, when the defendant’s ‘affirmative defenses (such as . . . the statute of limitations) may depend on facts peculiar to each plaintiff’s case,’ class certification is erroneous.”\textsuperscript{69} Thus, the court adopted the per se bar.

The First Circuit, in Mowbray, rejected the Fourth Circuit’s position.\textsuperscript{70} The plaintiffs in Mowbray alleged that the defendant, Waste Management, had overstated its earnings to the detriment of stock purchasers.\textsuperscript{71} The representative plaintiff of the class had sold his business to Waste Management in exchange for Waste Management stock.\textsuperscript{72} This exchange took place under a contract asserting the validity of Waste Management’s past earnings reports.\textsuperscript{73} It was later revealed, however, that these reports overstated true earnings.\textsuperscript{74} The district court certified a class of all of the investors who had relied to their detriment on the validity of the overstated reports.\textsuperscript{75} The First Circuit granted Waste Management’s request for an interlocutory appeal on the class certification issue.\textsuperscript{76} Waste Management’s only claim on appeal was

\textsuperscript{63} Id.
\textsuperscript{64} Id at 335.
\textsuperscript{65} Id at 336.
\textsuperscript{66} Broussard, 155 F3d at 352.
\textsuperscript{67} Id at 340.
\textsuperscript{68} Id at 337.
\textsuperscript{69} Id at 342, quoting Dalkon, 693 F2d at 853 (omission in original).
\textsuperscript{70} See Mowbray, 208 F3d at 296 n 4.
\textsuperscript{71} See id at 291.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} See Mowbray, 208 F3d at 291.
\textsuperscript{75} Id at 292.
\textsuperscript{76} Id.
that the certified class did not satisfy the predominance requirement of Rule 23(b)(3). The court acknowledged that affirmative defenses weigh against the decision to certify a class but rejected the Fourth Circuit's position that when such defenses exist, certification is always erroneous. The court insisted that judges should not reduce the predominance requirement to a "mechanical, single-issue test." It found that sufficient common issues could predominate over an individualized defense, such as a statute of limitations defense. The decision emphasized that accepting the Fourth Circuit's position would contradict precedent and ignore the "essence of the predominance inquiry."

The Mowbray court never addressed the fact that the Broussard decision only dealt with the commonality, typicality, and adequacy of representation requirements of Rule 23(a). Broussard did not purport to make any statements about the predominance inquiry's essence. In fact, the class in Broussard sought certification under Rule 23(b)(2) and, consequently, the Fourth Circuit never considered the interrelation of the per se bar and the Rule 23(b)(3) predominance requirement. Hence, these two decisions may not provide as direct a conflict as a cursory reading might imply.

Nevertheless, in In re Linerboard Antitrust Litigation, the Third Circuit similarly erred in echoing Mowbray's rejection of Broussard. The Linerboard case involved a class seeking Rule 23(b)(3) certification based on allegations of a Sherman Act antitrust violation. Plaintiffs alleged that the manufacturers of a material used to make corrugated paper and containers had lowered production rates, and therefore supply, in order to increase demand and, thus, prices. The district court certified a class of

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77 Id at 295.
78 See Mowbray, 208 F3d at 296, 296 n 4 (accepting the result in Broussard but rejecting the Fourth Circuit's position to the extent that it creates a per se rule).
77 Id at 296.
60 Id.
81 Id at 296 n 4.
82 See Broussard, 155 F3d at 352.
83 See id at 337 n 3 (refusing to decide whether the class met the Rule 23(b) requirements because it failed to meet the prerequisites of Rule 23(a)).
84 Id at 336.
85 In re Linerboard Antitrust Litigation, 305 F3d 145 (3d Cir 2002).
86 Id.
88 Linerboard, 305 F3d at 148.
89 Id at 150–51.
paper purchasers and a class of container purchasers. The Third Circuit acknowledged that some elements of a statute of limitations defense would require individualized proof but refused to apply the per se bar advocated by the Fourth Circuit. The court found that, despite the individual issues, the class satisfied the predominance requirement. The court favored adjudication of any individualized factual issues in the same fashion that courts determine individualized damages rewards. Like Mowbray, the Linerboard opinion did not discuss the fact that Broussard dealt solely with Rule 23(a) requirements.

D. The Lost Distinction

Despite the courts' apparent disregard for the distinction between Rule 23(a) and Rule 23(b)(3), each section demands a very different inquiry. The two sections protect parties from distinctive harms and serve different underlying purposes. Rule 23(a) focuses on protecting absentee plaintiffs, while Rule 23(b)(3) balances the class mechanism against other forms of litigation.

The Supreme Court has stated that the commonality and typicality requirements of Rule 23(a) tend to merge. Both requirements help determine whether maintaining a class action would be economical and whether the claims of the named plaintiffs and those of the class sufficiently overlap. This overlap helps ensure that the named plaintiffs will protect the interests of the class members. The adequacy of representation prong of Rule 23(a) similarly requires courts to investigate the abilities of the representative plaintiffs to protect the interests of the absentee plaintiffs.

In contrast, Rule 23(b)(3) predominance requires that common issues constitute a significant part of each individual case. Many courts have found that as long as common issues predomi-
nate, the existence of individual issues does not preclude class certification.\textsuperscript{100} Hence, although the predominance requirement may protect the interests of absentee plaintiffs in some circumstances, Rule 23(a) explicitly focuses on that protection.

Some courts have noted that the threshold for satisfying Rule 23(a) requirements is not high.\textsuperscript{101} Plaintiffs often face more difficulty in satisfying the predominance requirement of Rule 23(b)(3).\textsuperscript{102} This level of difficulty should be inversed in the affirmative defense context, as discussed in Part II.

II. THE PER SE RULE SHOULD APPLY TO RULE 23(a)
COMMONALITY, TYPICALITY, AND ADEQUACY OF REPRESENTATION DETERMINATIONS

Rule 23(a)'s prerequisites focus on a concern for protecting absentee plaintiffs. Rule 23(b)(3)'s predominance inquiry determines whether the class action is the superior method of adjudication owing to the existence of a common class goal. This distinction indicates that the per se bar should apply to Rule 23(a), but not to Rule 23(b)(3). Like Rule 23(a), the bar shields plaintiffs from having their claims adjudicated by representatives unable to adequately protect their interests.

A. Rule 23(a) Demands the Per Se Bar

Rule 23(a)'s commonality and typicality prerequisites require a court to consider the protection of absentee plaintiffs' interests.\textsuperscript{103} The presence of individualized affirmative defenses weighs

\textsuperscript{100} See, for example, Amchem Products, Inc v Windsor, 521 US 591, 623 (1997) (indicating that the predominance inquiry requires a balancing analysis of the individual and common issues); Williams, 529 F2d at 1388 (stating that "[g]iven a sufficient nucleus of common questions, the presence of the individual issue" does not prevent certification in securities class actions); Umbriac v American Snacks, Inc, 388 F Supp 265, 273 (E D Pa 1975) (noting that individual statute of limitations issues do not preclude maintenance of a class action and that a court can resolve individual questions after the completion of the class controversy); Lamb v United Security Life Co, 59 FRD 25, 34 (S D Iowa 1972) (finding that, in light of the importance of private securities actions, individualized statute of limitations issues should only preclude certification if they predominate over common issues).

\textsuperscript{101} See Jenkins, 782 F2d at 472 (stating that class will satisfy the commonality requirement as long as there exists a need for and benefit from combining the claims and will fulfill the typicality requirement if the class members share similar legal and remedial theories).

\textsuperscript{102} See id (noting that predominance requires that common issues constitute a significant part of each individual case).

\textsuperscript{103} See Falcon, 457 US at 157–58 n 13 (noting that the commonality and typicality requirements tend to merge into a single inquiry).
against representative plaintiffs' claims that a class satisfies these prerequisites. Adequacy of representation also suffers when affirmative defenses affect representative plaintiffs differently than they affect absent plaintiffs.

Nevertheless, some courts have futilely attempted to alleviate these problems while maintaining a class action.\textsuperscript{104} For instance, in \textit{Doglow v Anderson},\textsuperscript{105} the Eastern District of New York held that if the plaintiffs prevailed on the common issues in the litigation, the court, cooperating with both parties, would easily develop procedures to resolve the individual issues.\textsuperscript{106} In order to carry out the order, the court mandated that the case not proceed unless the plaintiffs could show a substantial possibility that they could prevail on the merits.\textsuperscript{107} The Second Circuit overturned the district court decision with explicit language discouraging the district court from requiring that the plaintiffs essentially prove the merits of their case prior to certification.\textsuperscript{108} Perhaps the district court judge found that advantaging one party by making a preliminary merits inquiry was necessary to achieve an economical disposition of individual issues. Such an approach, however, cannot satisfy the mandate of \textit{Eisen}, which explicitly declares that Rule 23 does not authorize a preliminary inquiry into the merits of the suit at the certification stage.\textsuperscript{109}

The adequacy of representation that absentee plaintiffs receive suffers when individualized affirmative defenses arise. Some courts have found that even if individual issues would reduce the economy or the protection of absentee interests, certification is still proper.\textsuperscript{110} These courts seem to balance the economy of maintaining a class action against the protection of absentee interests. However, in a system where each plaintiff gets only a single chance to adjudicate his claim, a court should minimize any reduction in the protection of absentee interests.

The mere existence of an individualized affirmative defense would alter the way that a representative plaintiff pursues the

\textsuperscript{104} See \textit{Doglow v Anderson}, 43 FRD 472, 491 (E D NY 1968), revd on other grounds, 438 F2d 825 (2d Cir 1971).
\textsuperscript{105} 43 FRD 472 (E D NY 1968).
\textsuperscript{106} Id at 491.
\textsuperscript{107} Id at 501.
\textsuperscript{108} See id at 830.
\textsuperscript{109} See \textit{Doglow}, 438 F2d at 830.
\textsuperscript{110} \textit{See Eisen}, 417 US at 177.
\textsuperscript{111} See, for example, \textit{Santiago v City of Philadelphia}, 72 FRD 619, 628–29 (E D Pa 1976) (warning of the particularly damaging nature of individual issues in Rule 23(b)(2) class actions but permitting the plaintiffs to prove that they could still satisfy the Rule 23(a) requirements).
litigation because, presumably, each plaintiff wants to ensure his own personal success in the case. For example, if a defendant asserts a contributory negligence claim that would not affect the representative plaintiff but would affect other plaintiffs in the class, the representative plaintiff and affected plaintiffs would likely choose different litigation strategies. Those affected by the defense might pursue strict liability theories or other claims that could escape the application of the defense, even if these strategies presented less likelihood of eventual success. In contrast, the representative plaintiff would avoid risks and direct the litigation in the manner most likely to result in an award for himself. This reality necessarily reduces protections for absentee plaintiffs whose relevant facts differ from those of the representative plaintiffs. Accordingly, an individualized affirmative defense inherently destroys the protection of absentee interests that is central to the commonality, typicality, and adequacy of representation requirements of Rule 23(a).

This analysis does not ignore the possibility that a plaintiff may be able to individually pursue an applicable claim not pursued by the class. The problem arises when, because of a looming defense, the representative plaintiffs adjudicate the claims that they do pursue less effectively—from the perspective of some absentee plaintiffs—than if some subset of the class had adjudicated the claims. Such affirmative defenses inherently undermine the prerequisites of Rule 23(a).

B. Bifurcation Is Not the Answer

A court cannot solve the problems that necessitate the per se bar by bifurcating a class. Individualized determinations of liability issues should be distinguished from individualized determinations of damages awards. Many courts have certified classes for liability determinations while requiring individual trials to resolve claims for damages. Although a representative plaintiff's motives may change because of the amount of damages he seeks to collect after a liability finding, one can assume that he

111 Subclasses and bifurcation differ in this analysis. Under Rule 23(c)(4)(A), a court can certify a class but create subclasses which are each individually treated like a class. This would avoid the conflict of interest problems that necessitate the bar because each subclass would act individually on all of its issues. Therefore, courts need not apply the per se bar where they could create subclasses.

112 See Linerboard, 305 F3d at 163 (suggesting a similar bifurcation for individualized affirmative defenses and damages issues).
will pursue the best possible litigation strategy to ensure a favorable liability finding, thereby protecting the class on the certified issues. However, when an individual issue arises in the liability context, it compromises the principles supporting class action lawsuits that are embodied in the Rule 23(a) requirements. In a case with individualized defenses, every plaintiff becomes an inadequate representative of the class because his claims become atypical of or uncommon to some subset of the class.

Individualized liability issues should not be bifurcated in the way that damages considerations are bifurcated in the class action context. Any bifurcation of issues gives rise to Seventh Amendment concerns. Whenever a second jury considers questions related to issues considered by a first jury, courts worry that the second jury may in fact revisit the questions decided by the first jury. When bifurcating damages issues only, these concerns lessen because the second jury cannot reconsider the first jury's liability finding. Moreover, in the damages context, the second jury may not even hear much of the evidence necessary to form an opinion about liability. This relatively clear distinction between the roles of the two juries would disappear if, for instance, a first jury dealt with issues of causation and a second jury decided questions of contributory negligence. The second jury would have much of the same evidence before it and could essentially nullify the first jury's liability finding under the guise of a contributory negligence decision. Bifurcation of affirmative defenses, therefore, would not solve the problems corrected by the per se bar.

While the federal appellate judiciary has avoided certification based on bifurcated or "phased trials," the Texas state courts have certified classes under these conditions. The Texas courts certify even questionably satisfactory classes, reasoning that the court may later decertify the class if necessary. Although one academic commentator advocates the Texas approach by arguing that a class necessitating such bifurcation can still satisfy the Rule 23(b)(3) requirements of predominance and superiority,
the federal courts, as well as the Texas Supreme Court, have re-
jected this approach.118

Because of Rule 23(a)'s demand for the protection of absentee
plaintiffs, courts must be cautious of adopting any class adjudica-
tion approach that would lessen the already stripped down rights
of absentee plaintiffs. Since many plaintiffs would not and could
not bring their claims without the class action option, the legal
system allows class action suits.119 However, the class mechanism
reduces protections for absentee plaintiffs simply because these
plaintiffs lack control over, and perhaps even knowledge of, the
litigation of their own legal claims.120 The class action mechanism
does not authorize courts to implement additional measures that
lesser protections for absentee plaintiffs. Rather, the reduced
protections in the class setting require courts to guard absentee
rights with an increased vigor.121

Bifurcation of issues involving affirmative defenses further
reduces protections for absentee plaintiffs. If a court acknowl-
edges that individual plaintiffs will have varying litigation
strategies and varying facts to prove when addressing affirmative
defenses, it cannot find that the representative plaintiffs will
adequately protect the absentee plaintiffs' interests on the class
liability issues. Because a court cannot examine the merits of
each individual's case at the certification stage,122 bifurcation on a
case-by-case basis is inappropriate. Moreover, because the federal
appellate judiciary reluctantly engages in issue bifurcation, ab-
sentee class plaintiffs cannot rely on this adjudication approach
to protect their interests.123

118 See Sherman, 74 Tulane L Rev at 1607-10 (cited in note 114).
119 See Robert G. Bone and David S. Evans, Class Certification and the Substantive
Merits, 51 Duke L J 1251, 1272 (2002) (explaining that the class action device provides
some plaintiffs with the only practical legal means of pursuing their claim).
120 See Susan P. Koniak, Through the Looking Glass of Ethics and the Wrong with
Rights We Find There, 9 Georgetown J Legal Ethics 1, 12-13 (1995) (noting that through-
out litigation, a class member may never know that a court is determining her legal
rights).
121 See id at 21-22 (cited in note 120) (noting that the vulnerability of criminal defen-
dants and absent class members leads courts to conclude that these powerless players
require more protections, but pointing out that fewer obligations are placed on the attor-
neys who represent these groups).
122 See Eisen, 417 US at 177.
C. The Per Se Bar Should Apply Only to Rule 23(a)

In contrast to the Rule 23(a) prerequisites, the predominance requirement of Rule 23(b)(3) requires a balancing test. The First Circuit correctly pointed out that a per se rule applicable to Rule 23(b)(3) would ignore the "essence of the predominance inquiry." The predominance requirement demands only that common issues constitute a significant part of each individual case. While an affirmative defense may weigh against a finding of predominance, it does not necessarily preclude a finding that the class meets the requirement. Therefore, although the per se bar makes sense in the Rule 23(a) context, it does not logically flow from the Rule 23(b)(3) predominance requirement.

Courts have noted that it is often harder for potential plaintiff classes to satisfy the predominance requirement than it is to satisfy the requirements of Rule 23(a). A plaintiff class trying to satisfy the certification requirements of Rule 23(a) need not show that every single plaintiff would try the case in exactly the same way. The class must, however, show that the representative plaintiffs have enough in common with the absent plaintiffs to indicate that they intend to move the litigation in a direction agreeable to the entire class. However, to satisfy predominance under Rule 23(b)(3), the representative plaintiff must further show that these common issues dominate in the case. Even if the plaintiffs had five legal theories in common, and this commonality ensured that the representative plaintiffs would pursue rigorously a beneficial course of litigation, a court may not find the predominance requirement satisfied if the representative plaintiffs had fifteen other legal theories, applicable only to them.

In contrast, affirmative defenses may not affect the Rule 23(b)(3) predominance inquiry because despite the fundamental problems that they pose, a court may find that common issues still dominate the litigation. A single affirmative defense does not necessarily affect the fact that plaintiffs have numerous claims,

124 Mowbray, 208 F3d at 296 n 4.
125 Jenkins v Raymark Industries, Inc, 782 F2d 468, 472 (5th Cir 1986) (finding that predominance is satisfied if common issues are a significant part of the individual cases).
126 Mowbray, 208 F3d at 296.
127 See Jenkins, 782 F2d at 472 (noting the low threshold for satisfying the commonality requirement).
128 See id (noting that commonality and typicality seek to find simply a similarity in legal and remedial theories).
129 See id.
facts, and legal theories in common. A possible conflict on a single claim may not necessarily destroy predominance within a class. Similarly, a single affirmative defense does not inherently undermine the mandates of Rule 23(b)(3). On the other hand, a single individualized affirmative defense does destroy a class’s ability to satisfy Rule 23(a) because it undermines the representative plaintiffs’ ability to adequately represent the interests of absentee plaintiffs with different factual claims.

One could argue that courts should have the opportunity to determine an affirmative defense’s effect on a class on a case-by-case basis. However, affirmative defenses inherently undermine the principles of Rule 23(a) that require the protection of absentee plaintiffs’ interests. The only way that a judge could determine otherwise would be by examining the merits of the case and finding that the defense was unlikely to succeed. The per se rule, therefore, simply protects courts from violating the Eisen doctrine.

D. Why the Distinction?

It may appear that the application of the per se bar only to Rule 23(a) is irrelevant because the Rule 23(a) requirements are prerequisites to a court ever pursuing Rule 23(b) inquiries. A per se bar for individualized affirmative defenses at either stage would prevent certification of a Rule 23(b)(3) class action. Yet, adopting this position would seriously affect Rule 23(b)(1) and Rule 23(b)(2) class actions.

Clarifying the proper application of the per se bar may result in fewer mandatory class certifications. This result properly addresses the concerns of fairness that courts often have for absentee plaintiffs in mandatory classes. In fact, individual issues can be more damaging in mandatory class actions than they are in opt-out class actions. It is essential to ensure that absentee plaintiffs’ interests are protected in a litigation system where each plaintiff has only a single opportunity to adjudicate his

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130 See Jenkins, 782 F2d at 472 (noting that plaintiffs can satisfy the commonality requirement simply by showing that there is a need for and benefit from the combination of claims into a class action).


132 See Santiago v City of Philadelphia, 72 FRD 619, 628–29 (E D Pa 1976) (discussing the effect of individual damages issues on a Rule 23(b)(2) class action).

133 See id at 628–29.
claim. Accordingly, the per se bar will give plaintiffs protection in the cases in which they need it most.

III. THE PER SE BAR FLOWS DIRECTLY FROM SUPREME COURT PRECEDENT

The per se bar provides courts with a means to maneuver within the framework provided by Eisen and Falcon. It prevents courts from inquiring into the merits of a defense at the certification stage, while still allowing them to probe behind the pleadings as necessary. While the Broussard court did not specifically explain the per se bar as a means of satisfying Eisen and Falcon, it apparently did not intend to upset either Supreme Court decision. Therefore, although the Fourth Circuit may have misread the Ninth Circuit's precedent when it adopted the per se bar, this should not lead other courts to discount the Fourth Circuit's position.

The Fourth Circuit cited the Ninth Circuit's Dalkon decision when it called for the per se bar. The Dalkon court discussed the possible impropriety of class certification in the products liability context because individual issues often outnumber common issues in those types of cases. The court then cited affirmative defenses as the only example in support of its concern about individual issues. The court determined that the class in Dalkon met neither the Rule 23(a) requirements of commonality, typicality, and adequacy of representation nor any of the Rule 23(b)(3) requirements.

The Ninth Circuit's reasoning does not necessarily lead to the Fourth Circuit's conclusion in Broussard. The Dalkon decision merely pointed to affirmative defenses as one of many individualized issues in the case. The combination of numerous individualized issues led the court to find certification inappropriate. Moreover, although neither the Broussard nor the Dalkon courts discussed the issue, given the Ninth Circuit's still valid Williams decision.

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134 The Broussard court cited Eisen and Falcon for propositions not relating to its holding on the per se bar.
135 See Broussard, 155 F3d at 342.
136 See Dalkon, 693 F2d at 853.
137 See id.
138 See id at 854–56.
139 See id at 853–54.
140 See Dalkon, 693 F2d at 853–56.
precedent, it is unlikely that the *Dalkon* court intended the Fourth Circuit's result.\(^\text{141}\)

One should not then conclude, however, that the Fourth Circuit's position lacks precedent. In fact, the Fourth Circuit's position flows directly from the Supreme Court's *Eisen* decision. The Fourth Circuit scrupulously followed *Eisen's* command that a court must not inquire into the merits of a case at the certification stage.\(^\text{142}\) The Fourth Circuit may have feared that a court could only allow certification in the face of individualized affirmative defenses by violating the *Eisen* rule, inquiring into the merits, and determining that the defense was unlikely to prevail. The per se rule protects against such violations.

Moreover, the *Broussard* position does not contradict *Falcon*, but rather allows courts to obey the dictates of that case as well. Under *Falcon*, a court can probe behind the pleadings to determine whether a class meets the Rule 23 requirements.\(^\text{143}\) The per se bar would not apply in a case where a court probed behind the pleadings and found that an affirmative defense was improperly pled or was used as a shielding tactic by defendants. Yet *Falcon* does not permit a court to go further and determine if the defense actually has merit.\(^\text{144}\) A court would have to apply the per se bar if it determined that the defense was properly and legitimately pled. The *Broussard* court apparently did not intend to reject the *Falcon* holding. In fact, the court actually cited *Falcon* for support of another proposition.\(^\text{145}\) Therefore, although it may appear that the *Broussard* court did not base its position in the precedent that it cited, the per se bar does provide a way of resolving the *Eisen–Falcon* tension while adhering to the spirit of these decisions. It does not allow courts to consider the merits of an affirmative defense, but it does authorize them to look beyond the pleadings in order to assess their frivolity.\(^\text{146}\)

\(^{141}\) See Williams, 529 F2d at 1388 (finding that individualized issues, such as a statute of limitations defense, did not necessarily preclude class certification in a federal securities law case).

\(^{142}\) See Eisen, 417 US at 177.

\(^{143}\) See Falcon, 457 US at 160.

\(^{144}\) See id.

\(^{145}\) See Broussard, 155 F3d at 337 (quoting Falcon regarding the role of the commonality and typicality requirements).

\(^{146}\) For development of this argument, see Part IV B.
IV. COURTS MUST STRICTLY ADHERE TO THE RULE OF EISEN

As the Supreme Court specifically stated, the *Eisen* decision protects both plaintiffs and defendants. Therefore, in conjunction with *Falcon*, courts should scrupulously follow Eisen's mandates to avoid harm to absentee plaintiffs and to prevent plaintiffs from coercing defendants into settling cases involving weak claims and allegations. Moreover, this approach does not provide defendants with an opportunity to engage in strategic behavior in order to avoid class certification because *Falcon* allows courts to foil such attempts.

A. Following *Eisen* and *Falcon*—Even in the Face of Uncertainty

While adherence to the holdings of both *Eisen* and *Falcon* has generated some uncertainty, courts should continue to scrupulously follow both decisions. This path best protects the policy interests that motivated the Supreme Court in formulating these two opinions. Most courts have properly toed, and continue to toe, the line between the two principles.

Courts understand that *Eisen* strictly prohibits any merits inquiries at the certification stage. For example, the Fifth Circuit, in *Miller v Mackey International, Inc.*, worried that evaluating the merits of a case may convert a certification decision into a motion to dismiss or a motion for summary judgment. Like the Supreme Court in *Eisen*, the Fifth Circuit in *Miller* said that the

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147 See *Eisen*, 417 US at 177–78.

148 But see Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 Tenn L Rev 1, 4–5 (2001) (arguing for a reversal of *Eisen* by requiring judges to estimate the value of the damages of the class claims and the number of claims involved in the suit).

149 See *Falcon*, 457 US at 160 (noting that courts can probe behind the pleadings to determine the propriety of class certification).

150 See, for example, *Love*, 733 F2d at 1564 (stating that although a trial court cannot look at the merits of a case at the certification stage, a court should not artificially invoke this principle to avoid examining the necessary factors in a certification decision); *Blackie v Barrack*, 524 F2d 891, 901 (9th Cir 1975) (noting that because a trial judge cannot engage in a preliminary merits inquiry at the certification stage, he must necessarily decide the issue with some speculation); *Huff v N.D. Cass Co of Alabama*, 485 F2d 710, 714 (5th Cir 1973) (recognizing the tension between *Falcon*, which requires courts to find out about the plaintiffs' claims at an early stage, and *Eisen*, which limits the courts inquiry).

151 452 F2d 424 (5th Cir 1971).

152 See id at 428 (overturning a district court's denial of class certification because of the belief that the plaintiff's claim lacked merit and that certification could seriously harm the defendant).
language and history of Rule 23 forbid such an inquiry. The court pointed out that the "failure to state a cause of action is entirely distinct from a failure to state a class action." Consequently, courts have adhered to the Eisen rule even when it results in rendering certification decisions with some uncertainty. The Ninth Circuit noted that pursuant to the Eisen rule, judges necessarily must base their certification decisions on some degree of speculation. One Oregon district court certified a class although it lacked certainty regarding even the class members' standing to bring the suit.

Yet, not all courts have adopted this approach. The Seventh Circuit, in Szabo v Bridgeport Machineries, Inc, argued against blind adherence to the Eisen principle. In an opinion by Judge Easterbrook, the court held that a judge should make any factual and legal inquiries necessary in order to properly apply Rule 23, even when this approach leads to a preliminary inquiry of the merits of a claim. The court further argued that Eisen does not stand for the proposition that a court may not look at the merits to determine if a proposed class satisfies the Rule 23 requirements. Rather, Eisen only prohibits courts from actually deciding cases at the certification stage. The court cited Falcon for the proposition that the "similarity of claims and situations must be demonstrated, rather than assumed." This interpretation is at odds with other courts' applications of the Falcon and Eisen

153 Id.
154 Id.
155 Rule 23(c)(1) allows a judge to certify a class conditionally so that he may alter or amend his decision at any time prior to a decision on the merits. FRCP 23(c)(1). However, none of the cases cited in note 150, which support the proposition that courts often certify classes with uncertainty, were resolved by conditional certification.
156 See Blackie, 524 F2d at 901 (approving conditional certification of a class alleging violations of the Securities and Exchange Act of 1934, 15 USC § 78(j)(2000)).
158 249 F3d 672 (7th Cir 2001).
159 See id at 676 (expressing concern that the defendants' inclination to settle class action suits requires courts to make informed certification decisions).
160 Id.
161 Szabo, 249 F3d at 677. Compare Dwight J. Davis and Karen R. Kowalski, Use and Misuse of Expert Opinions at the Class Certification Stage: Use of Expert Opinions Should Not be Permitted, but if Courts Continue to Do So, Defendants Must Attack the Expert's Qualifications and Present Their Own, 69 Def Couns J 285, 289 (2002) (arguing that the Szabo court did not intend to violate the Eisen requirements because it limited itself to pursuing only those inquiries necessary to determine the propriety of class certification).
162 Szabo, 249 F3d at 677.
163 Id.
Nevertheless, the Seventh Circuit remanded the case so that the district court could pursue a merits inquiry. The Szabo case is best viewed as demonstrating the frustration that courts have had in balancing the Eisen and Falcon rules, and as a departure from both.

If followed, the Szabo holding would lead to the very danger that the Supreme Court sought to avoid in Eisen and would contradict the position articulated in Falcon. Plaintiffs effectively would enjoy the benefit of a class action—a determination on the merits—before they had met the requirements of class certification. A representative plaintiff could use a judge’s favorable opinion on the merits of a case to pressure the defendants into a blackmail settlement.

The Supreme Court adequately addressed Szabo’s concerns about Eisen in Falcon by allowing judges to avoid relying on insufficient pleadings at the certification stage. Falcon thus provides courts with the opportunity to make the inquiries necessary to apply Rule 23 without allowing courts to determine the plaintiffs’ likelihood of success on the merits at the certification stage. The Rule 23 requirements do not involve questions about the probability of prevailing on the merits; therefore, a merits inquiry would never be necessary in rendering a certification decision. The Rule 23 requirements deal with the structure and probable projection of a lawsuit. Following this course does not mean that courts simply must consider the merits of claims and defenses without any evidence. Courts must only determine if, under the facts and law pled, a genuine issue exists as to whether an affirmative defense would apply.

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164 See, for example, Love, 733 F2d at 1564; Blackie, 524 F2d at 901; Huff, 485 F2d at 714.
165 Szabo, 249 F3d at 678.
166 See Eisen, 417 US at 177–78.
167 See In re Rhone-Poulenc Rorer, Inc, 51 F3d 1293, 1298–99 (7th Cir 1995) (allowing writ of mandamus to permit review of a certification decision because of plaintiffs’ opportunity to use certification to blackmail large settlements from defendants).
168 See Falcon, 457 US at 160 (noting that the pleadings sometimes lack clarity on the issues of fairness to absentees’ interests).
169 See Love, 733 F2d at 1564 (arguing that a court should be allowed to make informed decision on whether Rule 23 requirements are met without reaching the merits of the claims).
170 See FRCP 23.
B. Strict Adherence to Supreme Court Precedent Serves Both Plaintiffs and Defendants

Strict adherence to the principles set forth by the Supreme Court in Eisen and Falcon best serves the interests of both plaintiffs and defendants. Merits inquiries at the certification stage tip the balance of a lawsuit in favor of one party and create opportunities for "blackmail settlements."171 This concern exists not only when dealing with the merits of a plaintiff's complaint, but also when considering a defendant's affirmative defenses. No element of a class action lawsuit should be considered on the merits at the certification stage.172 Moreover, this approach does not require courts to ignore bad faith attempts to defeat class certification. A court can assess the frivolity of an affirmative defense under the principle of Falcon.173

One of the rationales for the Eisen decision was that merits inquiries at the certification stage give plaintiffs an unfair advantage.174 Although the class action device developed primarily as a tool to assist plaintiffs, the Court found that inquiring into the merits of a claim at the certification stage would bestow the benefits of a class action upon the potential plaintiff class before it had satisfied the requirements of Rule 23.175 If a putative class found that a judge favored its case on the merits, it may have more leverage in extracting settlements from defendants, even though defendants may have won the case upon a full showing of the evidence.176 The Court also worried that such preliminary decisions about the merits may unfairly burden absentee plaintiffs.177 An unfavorable statement by the court prior to a full presentation of the evidence and legal claims could diminish an absentee plaintiff's opportunities for success before he has had a chance to litigate his claims, personally or through a certified representative.178

171 See Rhone-Poulenc, 51 F3d at 1298 (noting that after a plaintiff class is certified, a defendant may feel an intense pressure to settle in order to avoid the looming possibility of bankruptcy).
172 See Eisen, 417 US at 177.
173 See Falcon, 457 US at 160.
174 See Eisen, 417 US at 177.
175 Id.
176 See Rhone-Poulenc, 51 F3d at 1298.
177 Id.
178 Id.
Nevertheless, at least one academic article advocates reconsideration of the *Eisen* rule. Professors Robert G. Bone and David S. Evans contend that if judges do not inquire into the merits of a claim, parties simply can create frivolous claims or defenses in order to bolster or undermine findings under Rule 23. They argue that when a defendant presents an affirmative defense contending that the plaintiffs' claims completely lack merit, a judge must determine how closely to examine the merits of the defense. However, *Falcon* provides the solution to these concerns by allowing courts to seek and foil frivolous defenses. Under *Falcon*, at the certification stage, a court can determine whether a defense will present a genuine issue in the case by looking beyond the pleadings.

Additionally, although inverse motivations in the certification process could lead plaintiffs to create frivolous claims in order to achieve certification, courts have relied on *Eisen* and *Falcon* to deal with those situations. Courts should afford defendants the same trust and deference that they afford plaintiffs. Although the class action device developed primarily as a means to protect plaintiffs and give them an opportunity to bring claims that they may not have pursued otherwise, the certification process must provide some protections for defendants as well. The Supreme Court emphasized this notion by specifically noting that the *Eisen* decision would prevent plaintiffs from receiving a determination on the merits before they had met the requirements of Rule 23.

The distinction between a frivolity inquiry and a merits inquiry is not merely theoretical. In fact, federal courts make an analogous distinction when they determine whether they have federal question jurisdiction over a claim. The Supreme Court has stated that a court should generally assume that a complaint alleging a controversy under the laws of the United States provides a jurisdictional basis. The Court noted that while a com-

179 See Bone and Evans, 51 Duke L J at 1253–58 (cited in note 121) (arguing that the importance of settlement in creating procedural rules has increased since *Eisen*).

180 See id at 1269.

181 Id at 1271.

182 See *Falcon*, 457 US at 160 (allowing courts to probe behind the pleadings before ruling on certification).

183 See id.

184 See id. See also *Eisen*, 417 US at 177.

185 See *Falcon*, 457 US at 177–78.

186 See *Bell v Hood*, 327 US 678, 681–82 (1946) (holding that a claim seeking money damages for alleged Fourth and Fifth Amendment violations by FBI agents invoked fed-
plaint must present a federal question, whether a complaint states a cause of action upon which relief can be granted is a question of law and must be decided after a court has assumed jurisdiction. However, an exception to this rule does exist. A federal court can dismiss a claim for lack of jurisdiction when the claim that invokes a federal question "appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." Thus, this jurisdictional example demonstrates another instance in which courts pursue frivolity inquiries early in a lawsuit without undertaking merits inquiries.

The Supreme Court has performed frivolity inquiries in the federal question jurisdiction context. In *Illinois Central Railroad Co v Adams*, the Court found that a claim seeking to enjoin the railroad commission from taxing a particular railroad line was neither insubstantial nor frivolous. The claim set forth relevant constitutional provisions, a proposed interpretation of those provisions under the case law, a settled rule of state property law, the current law of tax exemptions, provisions of the corporation's charter, and the contracts asserting the exemption. The Court found these pleadings sufficient to pass a frivolity test but refused to consider whether the defendant enjoyed immunity as a representative of the state because that issue presented a question on the merits.

This analogous context demonstrates the distinction between a frivolity inquiry and a merits inquiry that also should apply to class certification involving affirmative defenses. A court can look to the pleadings and determine if sufficient law exists to support a claim. The court can assess whether the facts of the case present a genuine issue as to whether the asserted law may apply. The court need not decide how to interpret the law, whether the facts satisfy the requirements of the law, or whether the law

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187 See id at 682.
188 Id at 682–83.
189 See *Illinois Central Railroad Co v Adams*, 180 US 28 (1901) (finding federal jurisdiction over a claim seeking to enjoin a railroad commission from taxing a particular railroad line even though it was unclear if defendant enjoyed immunity as a representative of the state).
190 180 US 28 (1901).
191 Id at 35.
192 Id at 35–36.
193 Id at 36–37.
would afford the plaintiffs the relief that they seek. Pursuant to
Falcon and Eisen, the court can look at the pleadings and probe
behind them if necessary to find sufficient law and facts indicat-
ing that the asserted defense is not frivolous.\textsuperscript{194} The jurisdic-
tional analogy proves that toeing the line between a frivolity inquiry
and a merits inquiry is possible.

In the jurisdiction context, the Supreme Court has advocated
a presumption in favor of jurisdiction.\textsuperscript{195} In the certification con-
text, courts should maintain a presumption against certification.
A presumption in favor of class certification would seriously in-
jure defendants by coercing them into “blackmail settlements.”\textsuperscript{196}
While a court could always decertify a class or grant conditional
certification, some defendants may not wish to take risks and
may settle with an improperly certified class.\textsuperscript{197} On the other
hand, if a plaintiff class does not achieve certification, plaintiffs
could continue to assert their claims individually. Moreover, if
additional discovery indicated the propriety of certification and if
the representative class sought reconsideration of the issue, a
court could grant certification at a later stage.

This wait-and-see approach would balance defendants’ and
plaintiffs’ interests. One academic article has suggested, however,
that when a defendant faces multiple individual suits, as opposed
to one class action suit, he enjoys an unfair advantage.\textsuperscript{198} Because
of the numerous suits, a defendant is able to approach the litiga-
tion on an economy of scale, while the plaintiffs proceed on an all-
or-nothing basis.\textsuperscript{199} Because the defendant presents the same de-
fense repeatedly, he limits the resources expended in each indi-
vidual case and can improve his defense over time.\textsuperscript{200} Yet, a class

\textsuperscript{194} See Falcon, 457 US at 160; Eisen, 417 US at 177.
\textsuperscript{195} See Bell, 327 US at 682 (stating that a court “must assume jurisdiction to decide
whether allegations state a cause of action on which the court can grant relief as well as to
determine issues of fact arising in the controversy”).
\textsuperscript{196} See Rhone-Poulenc, 51 F3d at 1298 (permitting review of a certification decision to
prevent plaintiffs from using certification to blackmail a large settlement from the defen-
dants). See also Thomas E. Willging, Laural L. Hooper, and Robert J. Niemic, An Empiri-
cal Analysis of Rule 23 to Address the Rulemaking Challenges, 71 NYU L Rev 74, 143
(1996) (providing an empirical analysis of the prevalence of settlement in cases where
courts certify plaintiff classes).
\textsuperscript{197} Bruce Hay and David Rosenberg, “Sweetheart” and “Blackmail” Settlements in
parties will pay a premium to avoid taking a gamble.”).
\textsuperscript{198} But see id (arguing that without class certification, a defendant has an unfair ad-
vantage of treating the cases as it would a class action, namely, on an economy of scale).
\textsuperscript{199} See id.
\textsuperscript{200} See id.
deserving certification should achieve certification, even if it occurs after the initiation of individual lawsuits. Any initial advantage to the defendant, therefore, should disappear after certification.201

CONCLUSION

The Fourth Circuit’s adoption of a per se bar to class certification in cases involving individualized affirmative defenses logically flows from the Supreme Court’s decisions in Eisen and Falcon. Current law suffers from a lack of clarity. While the Fourth Circuit first set forth the bar as a requirement of Rule 23(a), other courts have criticized it as an unnecessary breach of Rule 23(b)(3) requirements. The bar, however, should only apply at the Rule 23(a) stage of the certification process. The bar protects the principles supporting the requirements of Rule 23(a), including the emphasis on protecting absentee plaintiffs’ interests.

Affirmative defenses inherently undermine the propriety of class certification. Even the bifurcation of liability issues cannot remedy this reality. The per se bar also flows from and furthers the goals of Eisen and Falcon. It prevents courts from considering the merits of plaintiffs’ claims while still allowing them to probe behind the pleadings at the certification stage.

201 See Sherman, 74 Tulane L Rev at 1615 (cited in note 114) (noting that federal cases and the Texas Supreme Court do not conform to some Texas state courts’ views that certification decisions must be made early and that the presumption should be in favor of certification, but rather hold that the court should conduct discovery to fully understand the claims and defenses of a case before certifying the class).