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Superstar Judges as Entrepreneurs: The Untold Story of Fraud-on-the-Market

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Superstar Judges as Entrepreneurs: The Untold Story of Fraud-on-the-Market

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This Article unites two disparate subjects of profound interest to legal scholars. One is fraud-on-the-market, reaffirmed late last term in Erica P. John Fund, Inc. v. Halliburton Co. (Halliburton II)*. Probably the most important claim in the securities litigation universe, fraud-on-the-market is the* sine qua non *of almost every securities class action that is filed. The other subject consists of the judicial opinions of Judges Frank Easterbrook and Richard Posner, the "superstars" of the current federal appellate bench.*

My purpose is several-fold: first, to show that fraud-on-the-market's evolution, up through and culminating in Halliburton II*, has been driven in significant measure by an unheralded series of contributions by Judge Easterbrook, Judge Posner, or a combination; and second, to reveal, by the use in part of an empirical spotlight, the strategies that they employed to bring their contributions to life.*

Judges Easterbrook and Posner influenced fraud-on-the-market by dominating the development of Rule 23(f) of the Federal Rules of Civil

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Procedure. Effective beginning more than ten years after Basic Inc. v. Levinson, *Rule 23(f) facilitates permissive appeals of certification orders, where fraud-on-the-market issues tend to arise.*

Their domination of Rule 23(f)'s development has had three dimensions. First, Judge Posner played a role in prompting the Rule's adoption. Second, he or Judge Easterbrook authored the Seventh Circuit's first seventeen reported Rule 23(f) opinions. Those opinions, which urged active use of the Rule in general and expressed antipathy towards fraud-on-the-market in particular, helped to fuel a series of rulings in other circuits that were hostile to fraud-on-the-market. Third, Judge Easterbrook thereafter wrote a Rule 23(f) opinion supportive of fraud-on-the-market, which influenced the Supreme Court's approach in Halliburton II *and elsewhere.*

Judges Easterbrook and Posner advanced their views by employing various strategies, including occasionally depicting precedent with less than complete accuracy. Other strategies seemed aimed at maximizing their opportunities to write Rule 23(f) opinions in the first place. Indeed, when serving as the presiding judge of their respective panels, they assigned Rule 23(f) opinions only to themselves or each other. Moreover, they had a greater number of such opinions to assign than would otherwise have been the case because the panels over which they presided tended to follow a peculiar practice upon granting permission to appeal a certification order, namely, retaining the appeal for decision rather than surrendering it for reassignment. There is cause at least to wonder whether, by so doing, they assumed more authority over important questions of class action law than any two jurists ought to have had.

Two perspectives have to date inhibited the exploration of the superstars' entrepreneurship. One holds that essentially all judicial activity tends to be all strategy, all the time. This perspective fails to appreciate the singular role played by the superstar judges in the formulation of the legal canon and the consequent importance of focusing on their operations. The other perspective regards entrepreneurship as noteworthy only to the extent that it occurs at the Supreme Court. This view ignores the fact that the superstar judges approach Supreme Court Justices in terms of the degree of influence that they wield.

TABLE OF CONTENTS

INTRODUCTION

> The best judges . . . have wanted to change the law and have succeeded in doing so. — Richard A. Posner[1]

Within the ranks of sitting federal circuit judges, Frank Easterbrook and Richard Posner stand out as the "superstars" in multiple respects.[2] One is the frequency with which their opinions are cited by courts outside their circuit.[3] Another is how often law school casebooks feature their opinions as principal cases.[4] Several scholars have hypothesized that these achievements reflect not only "merit" but also an inclination towards entrepreneurship,[5] that is, a proneness to market their ideas and to seize opportunities for doing so.[6]

Inspired by this hypothesis, I have written this Article with two purposes in mind. The first is to demonstrate the ways in which Judges Easterbrook and Posner have driven the evolution of fraud-on-the-market[7] in the period following its endorsement in *Basic Inc. v.*

[1] RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 127 (1990).

[2] Stephen Choi and Mitu Gulati have coined the "superstar" phraseology to denote the leading sitting federal appeals court judges — notably, Seventh Circuit Judges Easterbrook and Posner. *See* Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 50 (2004) [hereinafter *An Empirical Ranking*]. Their counterparts in previous generations include the late Second Circuit Judges Henry J. Friendly and Learned Hand. Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 IOWA L. REV. 1141, 1179 (2002).

[3] *See* Choi & Gulati, *An Empirical Ranking*, *supra* note 2, at 50 (noting that Judges Easterbrook and Posner each outstripped the sample mean by more than four standard deviations in a study of citations spanning a two-year period). Citations outside a judge's home circuit encompassed those from other circuits, from state courts, and from the Supreme Court. *See id.*

[4] *See* Gulati & Sanchez, *supra* note 2, at 1166.

[5] For the seminal work on entrepreneurial judging, written by political scientists, see WAYNE V. MCINTOSH & CYNTHIA L. CATES, JUDICIAL ENTREPRENEURSHIP: THE ROLE OF THE JUDGE IN THE MARKETPLACE OF IDEAS (1997).

[6] Frank Cross and Stefanie Lindquist have speculated that high citation rates may reflect a tendency towards entrepreneurship. *See* Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383, 1419-22 (2009). They have cautioned, however, that their hypothesis is "purely theoretical." *Id.* at 1425. Similarly, Mitu Gulati and Veronica Sanchez have attributed the success of Judge Posner in the "casebook market," and by implication that of Judge Easterbrook as well, to their efforts at targeting an academic audience. *See* Gulati & Sanchez, *supra* note 2, at 1180-81.

[7] For illustrative commentary, see Barbara Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N.C. L. REV. 435 (1984); William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69 (2011); John C.P. Goldberg & Benjamin C. Zipursky, *The Fraud-on-the-Market Tort*, 66 VAND. L. REV. 1755 (2013); Donald C.

Levinson[8] up through and including its reaffirmation last term in *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*).[9] Legal scholars have thus far altogether overlooked their efforts in this regard.[10]

The other purpose is to identify, by the use in part of an empirical spotlight, the strategies that they employed to advance their views. By so doing, I hope to elicit scholarly interest in the superstars' entrepreneurial behavior. This largely unexplored area of inquiry has the potential greatly to enhance our understanding about how legal doctrine evolves.

Two different perspectives have together inhibited the examination of the superstars' entrepreneurship. One, coming from the direction of political science, holds that essentially all judicial activity amounts to all strategy, all the time.[11] This view fails to appreciate the singular role of the superstars as architects of the legal canon and the consequent importance of studying their strategies in particular. The other perspective, common among legal scholars, is to regard entrepreneurship as noteworthy only to the extent that it occurs on the Supreme Court.[12] This view ignores the fact that the superstar

Langevoort, Basic *at Twenty: Rethinking Fraud on the Market*, 2009 WIS. L. REV. 151 [hereinafter Basic *at Twenty*]; Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on* Amgen *and the Second Coming of* Halliburton, 57 ARIZ. L. REV. 37 (2015); Jonathan R. Macey & Geoffrey P. Miller, *The Fraud-on-the-Market Theory Revisited*, 77 VA. L. REV. 1001 (1991).

[8] 485 U.S. 224 (1988).

[9] 134 S. Ct. 2398, 2408-13 (2014).

[10] For legal commentators who have acknowledged Easterbrook and Posner's pre-*Basic* support for fraud-on-the-market, see Flamm v. Eberstadt, 814 F.2d 1169, 1179-80 (7th Cir. 1987) (Easterbrook, J.); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 15.8 (3d ed. 1986); Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 708 n.28 (1982). *See generally* Langevoort, Basic *at Twenty*, *supra* note 7, at 164-65, 178-81, 188-89 (discussing the early efforts of Easterbrook, as both scholar and jurist, to premise fraud-on-the-market on the efficient market hypothesis).

[11] *See* Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 514 (1998) (reviewing LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998)) (describing the authors, political scientists, as urging the view that "strategy explains everything" on the Supreme Court).

[12] This viewpoint can be inferred from the existence of numerous articles by legal scholars on the strategies employed by Supreme Court Justices and the absence of such articles on the strategies of circuit court judges. For illustrative articles about the former, see Margaret Meriwether Cordray & Richard Cordray, *Strategy in Supreme Court Case Selection: The Relationship Between Certiorari and the Merits*, 69 OHIO ST. L.J. 1, 1-3 (2008); Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 764-69 (2013); Paul J. Wahlbeck, *Strategy and Constraints on Supreme Court Opinion Assignment*, 154 U. PA. L. REV. 1729, 1729-30 (2006). *See also* E.

judges approach Supreme Court Justices in terms of the degree of influence that the judges wield.[13]

Judges Easterbrook and Posner succeeded in influencing fraud-on-the-market's evolution by dominating the development of Rule 23(f) of the Federal Rules of Civil Procedure ("FRCP"). Effective at the end of 1998, more than ten years after *Basic*,[14] Rule 23(f) offers a mechanism for appealing certification orders that omits the restrictions that have hobbled the older, alternative mechanism set forth in 28 U.S.C. § 1292(b) — namely, the need for the trial court to agree to an appeal as well as to find a controlling question of law as to which there is a substantial ground for a difference of opinion.[15]

Their domination in this regard has consisted of three dimensions. First, Judge Posner played a role in prompting Rule 23(f)'s adoption.[16] Second, he or Judge Easterbrook authored each of the Seventh Circuit's first *seventeen* reported Rule 23(f) opinions.[17] Those opinions advocated active use of Rule 23(f) in general and also expressed antagonism towards fraud-on-the-market in particular,[18] fueling the hostile stances to that claim adopted by other circuits pursuant to Rule 23(f).[19] Thereafter, Judge Easterbrook changed direction with a Rule

Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1627 (2004) (invoking the entrepreneurship of the late Justice Lewis F. Powell, Jr. to explain the large number of antitrust and securities cases heard by the Supreme Court during his tenure). Conversely, the principal work on strategies at the circuit level is unpublished. *See* Jeffrey A. Berger & Tracey E. George, *Judicial Entrepreneurs on the U.S. Courts of Appeals: A Citation Analysis of Judicial Influence* 7-8, 19-20 (Vanderbilt Univ. Law Sch., Law & Econ., Working Paper No. 05-24, 2005), *available at* http://ssrn.com/abstract=789544.

13 *Cf.* Gulati & Sanchez, *supra* note 2, at 1143 (depicting the legal canon as comprised of opinions authored by Supreme Court Justices, the superstars, and the superstars' counterparts from previous generations). For the identification of these counterparts, see Gulati & Sanchez, *supra* note 2, at 1179.

14 The decision date for *Basic Inc. v. Levinson* was March 7, 1988. *See* Basic Inc. v. Levinson, 485 U.S. 224 (1988). Rule 23(f) became effective on December 1, 1998. *See* Amendments to Fed. Rules of Civil Procedure, Criminal Procedure, Evidence and Appellate Procedure, 177 F.R.D. 530 (U.S. 1998) (setting effective date of December 1, 1998 and transferring Rule 23(f) and other amendments from the Supreme Court to Congress under the Rules Enabling Act).

15 *See infra* notes 109–11 and accompanying text. For an acknowledgement that these obstacles were deliberately omitted from Rule 23(f), see FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment.

16 *See infra* notes 120–47 and accompanying text.

17 *See infra* notes 169–77 and accompanying text.

18 *See infra* notes 196–232 and accompanying text.

19 For illustrative decisions, see *infra* notes 234–36 and accompanying text.

23(f) opinion that embraced fraud-on-the-market.[20] That opinion shaped the approach to fraud-on-the-market taken by the Supreme Court in *Erica P. John Fund, Inc. v. Halliburton Co. (Halliburton I)*,[21] *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,[22] and *Halliburton II*.[23]

This Article proceeds in five Parts. Part I sets the stage. After examining the crucial role played by fraud-on-the-market in class actions brought under Section 10(b) of the Securities Exchange Act of 1934[24] and Rule 10b-5,[25] it turns to why the questions left unanswered by *Basic*[26] did not quickly become lower court grist. One reason involved a strained interpretation of a 1974 Supreme Court decision that was not put to rest until after the turn of the twenty-first century.[27] The other involved the limited opportunities for obtaining appellate review of certification orders[28] prior to the addition of Rule 23(f) to Rule 23.[29]

Part II examines how Judge Posner promoted the addition of Rule 23(f) through the auspices of his 1995 opinion in *In re Rhone-Poulenc Rorer, Inc*.[30] That opinion served as a scarcely concealed memorandum to the Advisory Committee on Civil Rules, which must approve any proposed amendment to the FRCP before it can become law.[31] To

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[20] *See* Schleicher v. Wendt, 618 F.3d 679, 682 (7th Cir. 2010). This is discussed *infra* Part IV.

[21] 131 S. Ct. 2179 (2011).

[22] 133 S. Ct. 1184 (2013).

[23] 134 S. Ct. 2398 (2014).

[24] Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2012).

[25] 17 C.F.R. § 240.10b-5 (2014).

[26] 485 U.S. 224 (1988).

[27] The Supreme Court decision in question was *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). For a discussion of the strained interpretation of *Eisen*, which was rejected as a formal matter in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 (2011), see *infra* notes 100–05 and accompanying text. Ten years before the *Dukes* decision, Judge Easterbrook dealt the strained interpretation a substantial blow in *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001), discussed *infra* notes 186–95 and accompanying text.

[28] These orders are interlocutory. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 470-77 (1978).

[29] For the text of Rule 23(f), see *infra* note 162 and accompanying text.

[30] 51 F.3d 1293 (7th Cir. 1995).

[31] *See* 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1001 n.18 (3d ed. 2005). Approval must come not only from the Advisory Committee on Civil Rules, but also thereafter from the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, and Congress. *See id.*; *see also* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103-04 (2002).

make his case for Rule 23(f), as well as for another amendment to Rule 23,[32] Judge Posner depicted two lines of precedent with less than complete accuracy.[33]

Part III focuses on the authorship by Judges Easterbrook and Posner of the Seventh Circuit's first seventeen Rule 23(f) reported opinions.[34] Part III explains how they cornered the market in this respect. A portion of the explanation derives from the fact that opinions are assigned by the panel's presiding judge, a position determined by seniority.[35] Judge Easterbrook or Judge Posner presided over sixteen of the seventeen panels and in that capacity assigned the Rule 23(f) opinions only to themselves or each other.[36] But how did it happen that one or the other of them was a member of all seventeen panels in the first place? The answer involves the nature of the panels: eleven of the seventeen were motions panels that granted permission to appeal and then retained the appeal for decision. If the motion panels had instead surrendered the appeals for reassignment to merit panels, some percentage of those merit panels would likely not have included Judge Easterbrook or Judge Posner. In this event, Judges Easterbrook and Posner would have written fewer Rule 23(f) opinions, since a judge cannot write an opinion on behalf of a panel on which he does not serve.[37]

Part III then turns to the initial Rule 23(f) opinions that carried significance for fraud-on-the-market's evolution. These opinions included two by Judge Easterbrook, one with Judge Posner on the panel,[38] that not only denigrated *Basic* but also depicted a crisis involving *in terrorem* securities class action settlements without acknowledging the existence of the two statutes that had been enacted to address that crisis[39] — the Private Securities Litigation Reform Act of 1995 ("PSLRA")[40] and the Securities Litigation Uniform Standards

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32 *See infra* notes 148–58 and accompanying text.

33 *See infra* notes 140–42, 148–52 and accompanying text.

34 For a list of the seventeen opinions, see *infra* note 161.

35 *See infra* note 169 and accompanying text.

36 For a table capturing the opinions, the presiding judges, and the opinion writers, see *infra* note 175 and accompanying text.

37 *See* 28 U.S.C. § 46(c) (2012).

38 The two were *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999) (discussing securities issues in the context of a case not involving securities law) and *West v. Prudential Securities, Inc.*, 282 F.3d 935 (7th Cir. 2002) (discussing securities issues in the context of a fraud-on-the-market case). The opinion in *Blair* was written with Judge Posner on the panel. *See Blair*, 181 F.3d at 833.

39 *See infra* notes 196–215, 217–32 and accompanying text.

40 Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat.

Act of 1998 ("SLUSA").[41] These opinions in all likelihood played a role in fueling the imposition by other circuits of substantial new burdens on plaintiffs seeking certification in fraud-on-the-market cases.[42]

Part IV examines Judge Easterbrook's subsequent Rule 23(f) opinion in *Schleicher v. Wendt*,[43] which sent fraud-on-the-market off in a new direction.[44] Sparing the plaintiffs the burdens that the defendants sought to impose on them, Judge Easterbrook saluted *Basic*, celebrated the PSLRA and the SLUSA as Congress's solution to *in terrorem* settlements, and called upon the courts to refrain, on separation-of-powers grounds, from creating their own solutions to the *in terrorem* securities class action settlement phenomenon.[45] After considering various explanations for the shift,[46] Part IV concludes by examining the impact of *Schleicher* on the Supreme Court's three most recent engagements with fraud-on-the-market[47] — *Halliburton I*,[48] *Amgen*,[49] and *Halliburton II*.[50]

Part V takes a closer look at strategies that Judges Easterbrook and Posner employed to accentuate their influence. The most startling involves their occasional less than fully accurate portrayals of precedent,[51] which, it appears, may not be one-off events. A Westlaw search indicates that since 1982,[52] the Seventh Circuit has issued fifty-seven reported signed majority opinions charged by a dissent or concurrence with misstating precedent.[53] Judge Easterbrook or Judge Posner wrote twenty-nine of these opinions, with the remaining

737 (codified as amended in scattered sections of 15 U.S.C.).

[41] Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered subsections of 15 U.S.C. §§ 77, 78, 80).

[42] *See infra* notes 233–38 and accompanying text.

[43] 618 F.3d 679 (7th Cir. 2010), discussed *infra* notes 243–72.

[44] *See infra* notes 273–306 and accompanying text.

[45] *See infra* notes 243–57 and accompanying text.

[46] *See infra* notes 265–72 and accompanying text.

[47] *See infra* notes 273–306 and accompanying text.

[48] 131 S. Ct. 2179 (2011).

[49] 133 S. Ct. 1184 (2013).

[50] 134 S. Ct. 2398 (2014).

[51] *See infra* notes 141–42, 148–50, 205–07, 214–16, 227–29, 231, 232 and accompanying text.

[52] The year 1982 was selected as the start point because Judge Posner took the oath of office on December 4, 1981. *See Chronology of Judges in the Seventh Circuit*, LIBRARY OF THE U.S. COURTS OF THE SEVENTH CIRCUIT (Apr. 8, 2014), http://www.lb7.uscourts.gov/JUDGES%20CHRONOLOGY%2004.07.14%20w-o%20political%20affiliations.pdf [hereinafter *Seventh Circuit Chronology*].

[53] *See infra* note 315 and accompanying text.

twenty-eight authored by all the other Seventh Circuit judges combined.[54]

Likewise intriguing were the panels presided over by Judges Easterbrook or Posner that granted petitions to appeal and then retained the appeals for decision rather than surrendering them for reassignment.[55] To be sure, the Easterbrook or Posner opinions written in these instances typically offered an efficiency rationale for reaching the merits — the appeal could be resolved quickly based on the comprehensive briefs filed in connection with the petition.[56] While plausible as far as it goes, this rationale fails to take into account the arguable appearance of impropriety that arises from the retention. Indeed, when deciding to grant a petition, the motions panel may develop a view concerning how the appeal should be resolved. Retaining the appeal for decision puts the motions panel in the position of being able to turn their ideal resolution into an actuality.[57]

Yet another noteworthy strategy involved Judges Easterbrook and Posner's cornering the market on the authorship of the first seventeen Rule 23(f) opinions in their circuit.[58] What they did violates no statutory norm, but it raises the question, on which I remain agnostic, as to whether they acquired greater influence over the evolution of Rule 23(f), as well as major questions of class action law, than any two judges should have had. Recently, some scholars have argued in favor of specialization by circuit judges on efficiency grounds when the subject area presents the complexity of, say, tax or antitrust.[59] But Rule 23(f), a single, circumscribed procedural rule that any competent judge should be able to interpret and apply, cannot readily be analogized to these fields.

I. *BASIC INC. V. LEVINSON* AND THE INITIAL FAILURE OF LOWER COURT ENGAGEMENT

This Part lays the foundation for the Parts to follow. It begins with why Rule 10b-5's reliance element makes class certification difficult

[54] *See id.*

[55] *See infra* notes 178–80, 319–20 and accompanying text.

[56] *See infra* note 321 and accompanying text.

[57] *Cf.* Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the U.S. Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1589 n.294 (2000) (discussing the strategic aspects of retaining an appeal for decision after granting permission to appeal under Rule 23(f)).

[58] *See infra* notes 169–77 and accompanying text.

[59] *See infra* note 328 and accompanying text.

and then turns to the solutions that courts have generated in response. The most comprehensive such solution came from the Supreme Court's watershed decision in *Basic*.[60] But the lower courts did not fully engage with the questions that *Basic* left unanswered until the twenty-first century was well under way.

A. The Traditional Rule 10b-5 Claim and Its Lack of Amenability to Class Certification

Section 10(b) and Rule 10b-5 operate as the leading anti-fraud weapon in the federal securities laws, applicable regardless of the size of the issuer.[61] As originally contemplated by their drafters, these provisions were enforceable only by the Securities & Exchange Commission and the Department of Justice.[62] Beginning in 1946, however, courts recognized an implied private action under the statute and Rule that is now established "beyond peradventure."[63] The elements of that action, drawn from an amalgam of statutory text, legislative history, policy considerations, and tort law,[64] include a "material" misrepresentation or omission with a "connection" to the purchase or sale of the security, a causative link between the misrepresentation or omission and each plaintiff's investment decision ("reliance"), a causative link between the misrepresentation or omission and the loss for which damages are sought ("loss causation"), and scienter.[65]

In the case of a class action, the court must determine whether the plaintiffs have met the certification requirements of Rule 23 of the

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[60] 485 U.S. 224 (1988).

[61] *See* DONNA M. NAGY, RICHARD W. PAINTER & MARGARET V. SACHS, SECURITIES LITIGATION AND ENFORCEMENT: CASES AND MATERIALS 23 (3d ed. 2011).

[62] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729-30 (1975) ("Section 10(b) of the 1934 Act does not by its terms provide an express civil remedy for its violation. Nor does the history of this provision provide any indication that Congress considered the problem of private suits under it at the time of its passage."); *see also id.* at 737 (noting that "[w]hen we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn").

[63] Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983); *see also* Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2303 (2011) (describing the private action as "settled").

[64] *See* NAGY, PAINTER & SACHS, *supra* note 61, at 24-26 (discussing the amalgam of considerations that courts bring to bear in interpreting Rule 10b-5).

[65] *See* Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005) (listing the elements); *see also* Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1317-18 (2011) (same).

FRCP.[66] The court's certification decision is typically make-or-break for everyone involved. If certification is denied, the members of the might-have-been class may lose the opportunity to recover because they lack the resources to sue individually.[67] On the other hand, if certification is granted, the defendants may be driven to settle rather than risk a financially disastrous judgment at a class trial.[68]

For Rule 10b-5 plaintiffs, the most troublesome certification requirement tends to be the one that mandates the "predominance" of common legal and factual issues over individual ones.[69] The predominance requirement cannot readily be harmonized with Rule 10b-5's reliance element, which calls upon each plaintiff to establish her own reliance on the fraud.[70]

B. The Affiliated Ute *Solution*

The Supreme Court lessened this difficulty somewhat with its 1972 decision in *Affiliated Ute Citizens of Utah v. United States*.[71] There the Court presumed that the plaintiffs had relied on the fraud in a case involving omissions,[72] apparently on the theory that reliance on the absence of something tends to be difficult to prove.[73] But when the allegations involve misrepresentations, either solely or in significant

[66] *See generally* 7A WRIGHT ET AL., *supra* note 31, §§ 1759–1783 (discussing these requirements).

[67] *See* FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment (observing that "[a]n order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing along, is far smaller than the costs of litigation").

[68] *See id.* (observing that "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability").

[69] *See* FED. R. CIV. P. 23(b)(3). For discussion of the predominance requirement, see 7A WRIGHT ET AL., *supra* note 31, §§ 1777–1784. *See also id.* § 1781.1 (discussing the predominance requirement in the specific context of securities class actions).

[70] *See* Basic Inc. v. Levinson, 485 U.S. 224, 242 (1988).

[71] 406 U.S. 128 (1972).

[72] *See id.* at 153-54. The *Affiliated Ute* Court made no explicit reference to the existence of a presumption of reliance. *See id.* Yet a consensus developed, now well-established, that the Court created one. *See, e.g.*, Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 159 (2008) (describing *Affiliated Ute* as giving rise to a presumption of reliance).

[73] *See, e.g.*, Joseph v. Wiles, 223 F.3d 1155, 1162 (10th Cir. 2000) (calling it "unrealistic" to require the plaintiff to show what he would have done had the facts been different).

measure, the *Affiliated Ute* presumption becomes inapposite, leaving most would-be Rule 10b-5 class actions to wither on the vine.[74]

C. The Fraud-Created-the-Market Solution

To provide an alternative solution to the reliance problem, some lower courts have upheld an additional presumption of reliance as part of a claim of "fraud-created-the-market" — i.e., a claim of pervasive fraud enabling the marketing of securities that could otherwise not have been marketed at any price.[75] In general, however, the solution has not caught fire, in significant measure because of the uncertainty surrounding what constitutes true unmarketability.[76] Even where accepted, the fraud-created-the-market claim can carry the day in only a negligible subset of would-be Rule 10b-5 class actions, given the unusualness of the required underlying facts.[77]

D. The Basic *Solution*

In *Basic*,[78] the Supreme Court provided a more comprehensive solution in the form of an alternative Rule 10b-5 claim known as

74 *See, e.g.*, *In re* Interbank Funding Corp. Sec. Litig., 629 F.3d 213, 219 (D.C. Cir. 2010) (noting that "[n]o court of appeals has applied the *Affiliated Ute* presumption in a case involving a claim that primarily alleges affirmative misrepresentations").

75 *See, e.g.*, T.J. Raney & Sons, Inc. v. Fort Cobb, Okla. Irrigation Fuel Auth., 717 F.2d 1330 (10th Cir. 1983) (affirming certification of a class seeking to allege "fraud-created-the-market" based on the entitlement of its members to rely on the legality of a municipal bond issuance); Shores v. Sklar, 647 F.2d 462, 469-70 (5th Cir. 1981) (en banc) (holding that the plaintiff can recover if he shows that the defendants marketed securities "not entitled to be marketed"); *see also* Regents of Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc., 482 F.3d 372, 391-92 (5th Cir. 2007) (reaffirming *Shores*, but finding it inapplicable under the circumstances); Ross v. Bank S., N.A., 885 F.2d 723, 730, 735-37 (11th Cir. 1989) (en banc) (holding that the plaintiffs failed to show lack of marketability, assuming arguendo the cognizability of a claim for "fraud-created-the-market"). *But see* Malack v. BDO Seidman, LLP, 617 F.3d 743,749-55 (3d Cir. 2010) (rejecting fraud-created-the-market in all its varieties).

76 *See generally* NAGY, PAINTER & SACHS, *supra* note 61, at 174 n.1 (discussing possible definitions of "unmarketable").

77 For the required underlying facts, see *supra* note 76 and accompanying text. *See generally* Michael J. Kaufman & John M. Wunderlich, *Fraud Created the Market*, 63 ALA. L. REV. 275 (2012) (arguing that recognition of a fraud-created-the-market claim is particularly appropriate in cases involving bonds or manipulative practices); Zachary M. Johns, Note, *Avoiding the Parade of Horribles: A Revised and Unified Fraud-Created-the-Market Theory of Presumptive Reliance Under Rule 10b-5*, 2012 U. ILL. L. REV. 1299 (arguing that a fraud-created-the-market claim should be allowed only in a narrow set of circumstances).

78 Basic Inc. v. Levinson, 485 U.S. 224 (1988).

"fraud-on-the-market" that took the following shape.[79] Plaintiffs who bought or sold securities in an efficient market are presumed to have relied directly on the securities price[80] and thereby indirectly on any public fraud that distorted the price.[81] The presumption not only turns reliance into a common issue that predominates over any individual ones,[82] but also serves as an element of the claim,[83] a function which, as we will see, carries substantial consequences.[84] Fostering the Court's acceptance of this claim was scholarship by Easterbrook and Posner rationalizing it on the basis of the efficient capital markets hypothesis[85] — the idea that the price of a security trading in an efficient market reflects all public information (including misinformation).[86] In addition, Judge Easterbrook had written an

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[79] *Cf.* Asher v. Baxter Int'l Inc., 377 F.3d 727, 731-32 (7th Cir. 2004) (distinguishing between a traditional Rule 10b-5 claim and a fraud-on-the-market claim).

[80] *See Basic*, 485 U.S. at 248 n.27. The latter footnote suggests that the presumption also has a materiality prerequisite. *See id.* Thereafter, the Court held that such a prerequisite exists but that it does not attach at the certification stage. *See* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1199 (2013). For further discussion of *Amgen*, see *infra* notes 278–90 and accompanying text.

[81] *See* Peil v. Speiser, 806 F.2d 1154, 1161 (3d Cir. 1986) (noting that "[i]n an open and developed market, the dissemination of material misrepresentations or withholding of material information typically affects the price of the stock, and purchasers generally rely on the price of the stock as a reflection of its value"); *see also Basic*, 485 U.S. at 244 (citing *Peil*, 806 F.2d at 1161).

[82] *See Basic*, 485 U.S. at 241-47.

[83] *Cf.* Chavin v. McKelvey, 25 F. Supp. 2d 231, 238 (S.D.N.Y. 1998) (granting motion to dismiss fraud-on-the-market claim due to absence of public fraud); Stat-Tech Liquidating Trust v. Fenster, 981 F. Supp. 1325, 1345-46 (D. Colo. 1997) (granting summary judgment on fraud-on-the-market claim because of the plaintiff's failure to establish market efficiency).

[84] *See infra* notes 100–105 and accompanying text.

[85] *See generally supra* note 10 and accompanying text.

[86] The efficient capital markets hypothesis received full articulation with the publication of Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383 (1970). The incorporation of this perspective into corporate law began later in the decade. *See* Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. PA. L. REV. 851, 916 (1992).

The efficient capital markets hypothesis comes in three versions — weak, semi-strong, and strong:

> Under the weak form, an efficient market is one in which historical price data is reflected in the current price of the stock, such that an ordinary investor cannot profit by trading stock based on the historical movements in stock price. Under the semi-strong form, an efficient market is one in which all publicly available information is reflected in the market price of the stock, such that an investor's efforts to acquire and analyze public

opinion upholding the fraud-on-the-market claim only the year before.[87]

The *Basic* Court emphasized the defendants' entitlement to rebut the presumption: "Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance."[88] For example, the defendants can overcome the plaintiffs' evidence concerning the efficiency of the market or the existence of a "public" fraud.[89] Or, they can show that the fraud did not fool the market.[90]

E. *The Lower Courts' Failure to Engage with the Questions Left Open by* Basic

As might be expected of a Supreme Court decision of its scope and magnitude, *Basic* left critical questions unanswered. These included how to evaluate the plaintiffs' market efficiency evidence,[91] whether the plaintiffs must prove materiality at the certification stage,[92] and

> information (about the company, the industry, or the economy, for instance) will not produce superior investment results. Finally, under the strong form, an efficient market is one in which stock price reflects not just historical price data or all publicly available information, but all possible information — both public and private.

In re PolyMedica Corp. Sec. Litig., 432 F.3d 1, 10 n.16 (1st Cir. 2005). It is the semi-strong version that gives rise to the fraud-on-the-market claim. *See, e.g.*, Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*), 134 S. Ct. 2398, 2420 (2014) ("[T]he Court relied upon the 'semi-strong' version of [the efficient capital markets hypothesis], which posits that the average investor cannot earn above-market returns (*i.e.*, 'beat the market') in an efficient market by trading on the basis of publicly available information.").

87 *See* Flamm v. Eberstadt, 814 F.2d 1169, 1179-80 (7th Cir. 1987).

88 Basic Inc. v. Levinson, 485 U.S. 224, 248 (1988).

89 *Id.*

90 *Id.* Alternatively, they can show that a specific plaintiff "traded or would have traded despite his knowing the statement was false." *Id.*

91 *Cf. id.* at 248 n.28 (noting that "we do not intend conclusively to adopt any particular theory of how quickly and completely publicly available information is reflected in market price").

92 The Court suggested that the presumption has a materiality prerequisite when it made the following statement: "Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action." *Id.* at 247; *cf. id.* at 248 n.27 (indicating that there was a materiality prerequisite in the view of the appeals court). But the Court did not address whether such a prerequisite, assuming there is one, attaches at the certification stage or only at trial (or summary judgment). It confronted that question in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*,

whether the defendants can mount a rebuttal at that stage instead of waiting until later in the litigation.[93]

The questions left open by *Basic* did not quickly become lower court fodder, in contrast to the questions left pending in the wake of other major Supreme Court securities opinions.[94] Indeed, prior to the twenty-first century, there appear to have been no reported opinions addressing the plaintiffs' need to prove materiality at the certification stage[95] or the defendants' right at that stage to show that the market had not been fooled.[96] Nor did there appear to be much circuit court activity regarding how to measure market efficiency at the certification stage.[97]

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133 S. Ct. 1184 (2013), discussed *infra* notes 278–90 and accompanying text.

93 The Court's discussion of rebuttal says nothing about when it can occur. *See Basic*, 485 U.S. at 248-49.

94 For example, consider *Janus Capital Group, Inc. v. First Derivative Traders*, which examined who qualifies as the "maker" of a fraudulent statement. *See* Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302-03 (2011). The lower courts quickly engaged with *Janus*'s uncertainties. *See, e.g.*, Donald C. Langevoort, *Lies Without Liars?* Janus Capital *and Conservative Securities Jurisprudence*, 90 WASH. U. L. REV. 933, 954-64 (2013) (discussing the ways in which the lower courts have thus far applied *Janus* to SEC filings). Consider also *Morrison v. National Australia Bank Ltd.*, which addressed the international reach of Rule 10b-5. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, at 255-73 (2010). The lower courts quickly engaged with *Morrison*'s uncertainties as well. *See, e.g.*, David He, Note, *Beyond Securities Fraud: The Territorial Reach of U.S. Laws After* Morrison v. N.A.B., 2013 COLUM. BUS. L. REV. 148, 170-87 (discussing the ways in which the lower courts have thus far applied *Morrison* to off-exchange transactions).

95 The twenty-first century circuit court decisions addressing this question have included *Schleicher v. Wendt*, 618 F.3d 679, 687 (7th Cir. 2010) (rejecting a materiality prerequisite), *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 484 (2d Cir. 2008) (endorsing a materiality prerequisite), and *In re* PolyMedica Corp. Sec. Litig., 432 F.3d 1, 8 n.11 (1st Cir. 2005) (same). The Supreme Court resolved the split of authority in *Amgen*, 133 S. Ct. at 1188-89, discussed *infra* notes 278–90 and accompanying text.

96 For a twenty-first century decision addressing this question, see *In re Salomon*, 544 F.3d at 484 (allowing the defendants to rebut at the certification stage by showing that the market had not been fooled), *abrogated by Amgen*, 133 S. Ct. at 1203-04.

97 For illustrative twenty-first century decisions addressing this question, see *In re PolyMedica*, 432 F.3d at 14 (holding that "an efficient market is one in which the market price of the stock *fully reflects all* publicly available information") and *Bell v. Ascendant Solutions, Inc.*, 422 F.3d 307, 309-14 (5th Cir. 2005) (affirming denial of certification for lack of showing of market efficiency where issuer's stock traded on the NASDAQ and additional indices of efficiency were also present). *Cf.* Binder v. Gillespie, 184 F.3d 1059, 1054-65 (9th Cir. 1999) (on appeal from final order, affirming decertification of class partly on the ground that the plaintiffs failed to satisfy factors indicating market efficiency identified by a federal district court in a summary judgment case).

The non-engagement had two explanations. One involved the Supreme Court's landmark decision in *Eisen v. Carlisle & Jacquelin*,[98] while the other concerned the limited opportunities for appealing certification orders.[99]

1. The Impact of *Eisen v. Carlisle & Jacquelin*

At issue in *Eisen* was whether the trial court could hold a pre-certification merits hearing to determine which side should bear the costs of notifying the members of the class.[100] Disallowing the hearing, the Supreme Court stated as follows: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[101] This language clearly prohibits a judge from granting certification because of the strength of the plaintiffs' underlying case (or from denying certification because of the weakness of that case). But what about the right of the judge to conduct a merits inquiry when the merits overlap with a predominance inquiry? Although *Eisen* itself did not involve such an overlap, some lower courts read the opinion expansively and held that it restricted merits inquiries even in the overlap situation.[102]

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98 Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

99 For discussion of these limited opportunities, see *infra* notes 106–19 and accompanying text.

100 *Eisen*, 417 U.S. at 177. Also at issue was whether identifiable class members had to be notified on an individual basis concerning their right to exclude themselves and related matters. *Id.* at 173-76. The Court held that individual notice constituted "an unambiguous requirement of Rule 23." *Id.* at 176.

101 *Id.* at 177.

102 *See, e.g.*, Sirota v. Solitron Devices, Inc., 673 F.2d 566, 571 (2d Cir. 1982) (distinguishing between "very basic merits determinations" that are permitted at the certification stage and "not so basic" ones that are not permitted) (securities case); Szabo v. Bridgeport Machs., Inc., 199 F.R.D. 280, 284 (N.D. Ind. 2001) (noting that "the substantive allegations in the complaint are accepted as true for purposes of the class motion") (state law fraud and breach of warranty case), *vacated*, 249 F.3d 672 (7th Cir. 2001); Prof'l Adjusting Sys. of Am., Inc. v. Gen. Adjustment Bureau, Inc., 64 F.R.D. 35, 38 (S.D.N.Y. 1974) (describing the judge making the certification decision as being entitled to "survey the factual scene on a kind of sketchy relief map, leaving for later view the myriad of details that cover the terrain") (antitrust case); *cf.* Krueger v. N.Y. Tel. Co., 163 F.R.D. 433, 440-41 (S.D.N.Y. 1995) (granting certification without undertaking merits inquiry that overlapped inquiry into whether common issues existed as required by Rule 23(a)(2) of the FRCP) (age discrimination case). For further discussion of *Szabo*, see *infra* notes 186–95 and accompanying text.

Among the claims affected by the expansive reading of *Eisen* was fraud-on-the-market,[103] since the presumption of reliance serves both as an element of the claim and as a basis for certification.[104] Applying the expansive reading, some courts granted certification without ascertaining whether the plaintiffs had established market efficiency or were otherwise entitled to the presumption of reliance.[105]

2. The Limited Avenues for Appealing Certification Orders

Questions involving fraud-on-the-market tend to arise at the certification stage, but certification orders are not appealable as of right.[106] Today, under Rule 23(f), these orders can be appealed with the circuit court's permission, thereby allowing a plaintiff dissatisfied with such an order to seek appellate review rather than to abandon the class action litigation altogether.[107]

To be sure, in the world as it existed prior to Rule 23(f),[108] a permissive appeal could be sought pursuant to 28 U.S.C. § 1292(b).[109] But that provision requires the approval of both the trial court and the circuit court, as well as the presence of a controlling question of law as to which there is a substantial ground for a difference of opinion.[110] Permission to appeal on this basis is thus rarely granted.[111]

Another conceivable solution was to appeal or cross-appeal from a later final judgment, which judgment would encompass the earlier

103 For illustrative additional subject areas affected, see *supra* note 102.

104 *See supra* notes 82–83 and accompanying text.

105 *See, e.g.*, Gariety v. Grant Thornton, LLP, 368 F.3d 356, 364 (4th Cir. 2004) (referring to the trial court's "refusal to look beyond the complaint" in deciding whether the plaintiff had made a sufficient showing of efficiency for certification purposes); West v. Prudential Sec., Inc., 282 F.3d 935, 935, 938 (7th Cir. 2002) (noting that the trial court had certified a class in a case involving non-public fraud without determining whether it was appropriate to extend the presumption to such circumstances).

106 *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 467-69 (1978) (holding that a certification order is appealable neither as a final judgment nor as an exception to the final judgment rule).

107 Rule 23(f) did not become effective until *Basic* was more than ten years old. *See supra* note 14.

108 For a comprehensive discussion of the pre-Rule 23(f) world, see Solimine & Hines, *supra* note 57, at 1535-37, 1546-67.

109 28 U.S.C. § 1292(b) (2012).

110 For discussion of these requirements, see 16 WRIGHT ET AL., *supra* note 31, § 3929.

111 *See, e.g.*, Camacho v. P.R. Ports Auth., 369 F.3d 570, 573 (1st Cir. 2004) (observing that appeals allowed pursuant to 28 U.S.C. § 1292(b) are "hen's-teeth rare").

certification order.[112] This was the road taken by the defendants in *Basic* itself.[113] But that road was often strewn with rocks. A denial of certification might lead the plaintiffs to abandon the litigation due to an inability to finance individual lawsuits,[114] and a grant might prompt the defendants to settle rather than risk a huge verdict.[115] In neither instance would there be a final judgment from which an appeal could be taken.

Finally, there was the possibility of petitioning for mandamus.[116] While a few courts were willing to overturn certification orders on this basis,[117] a far larger number resisted doing so.[118] This resistance had its roots in the "exceptional" nature of the mandamus remedy, the requisite palpability of the trial court's error, and the availability of an appeal following a final judgment.[119]

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112 *See, e.g.*, Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996) (noting that "[t]he general rule is that 'a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated'" (quoting Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994))).

113 The trial court in *Basic* certified the class and then granted the defendants' motion for summary judgment on materiality grounds. *See* Levinson v. Basic Inc., No. C79-1220, 1984 WL 1152, at *5 (N.D. Ohio Aug. 3, 1984). Then the Sixth Circuit affirmed the grant of certification and reversed the grant of summary judgment. *See* Levinson v. Basic Inc., 786 F.2d 741, 751 (6th Cir. 1986). Ultimately, the Supreme Court affirmed the grant of certification and vacated the summary judgment. *See* Basic Inc. v. Levinson, 485 U.S. 224, 249-50 (1988).

114 *See supra* note 67 and accompanying text.

115 *See supra* note 68 and accompanying text.

116 *See generally* Jordon L. Kruse, Comment, *Appealability of Class Certification Orders: The 'Mandamus Appeal' and A Proposal to Amend Rule 23*, 91 NW. U. L. REV. 704, 719 (1997) ("With no judicial exceptions to the final judgment rule available and the statutory exceptions providing limited effectiveness, the desperate party will undoubtedly turn to Section 1651 and the writ of mandamus.").

117 *See, e.g.*, *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1074 (6th Cir. 1996) ("[C]lass certification is generally not the kind of subject matter for which mandamus relief is available on the grounds that class certification decisions are reviewable on direct appeal. However, on the extraordinary facts of this case [this court] find[s] that the district judge's disregard of class action procedures was of such severity and frequency so as to warrant its issuance here."); *In re* Temple, 851 F.2d 1269 (11th Cir. 1988) (granting a writ of mandamus and reversing the certification order); *In re* Bendectin Prods. Liab. Litig., 749 F.2d 300 (6th Cir. 1984) (same); *see also In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1304 (7th Cir. 1995). *Rhone* is discussed *infra* notes 129–58 and accompanying text.

118 *See* Solimine & Hines, *supra* note 57, at 1562.

119 *See, e.g.*, *In re* NLO, Inc., 5 F.3d 154, 159-60 (6th Cir. 1993) (discussing availability of later appeal and lack of huge error by trial court); *In re* Catawba Indian Tribe of S.C., 973 F.2d 1133, 1138 (4th Cir. 1992) (noting that the trial court's order was a "far cry" from an abuse of discretion); *In re* Allegheny Corp., 634 F.2d 1148

In short, the questions that *Basic* left unresolved seemed destined to remain so unless and until such time as appeals of certification orders became more widely available. When that time arrived, it allowed not only fraud-on-the-market, but also the expansive reading of *Eisen*, to receive sustained attention from the circuit courts.

II. JUDGE POSNER'S EFFORTS IN CONNECTION WITH RULE 23 OF THE FRCP

Any proposed amendment to the FRCP must first pass muster with the Advisory Committee on Civil Rules ("the Committee"), an amalgam of judges, practitioners, and legal academics appointed by the United States Judicial Conference.[120] From 1991 through 1997, the Committee had under consideration a number of amendments to Rule 23.[121] One of them involved the addition of Rule 23(f),[122] which granted the circuit courts discretion to hear appeals from certification orders[123] without the restrictions that had long hobbled permissive appeals under 28 U.S.C. § 1292(b).[124] Judge Posner's opinion in *Rhone* came less than a month after a meeting of the Committee at which members supporting and opposing Rule 23(f) articulated their positions.[125] In the view of its opponents, Rule 23(f) was likely to be

(8th Cir. 1980) (noting lack of extraordinariness and lack of clear error by trial court).

120 *See supra* note 31 and accompanying text.

121 *See* Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 TENN. L. REV. 97, 102 (2001) (describing the crucial period as between 1991 and 1997). For the then-Reporter's discussion of the amendments under consideration, see Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 33-35 (1996).

122 The addition of Rule 23(f) became possible in 1992 following Congress's enactment of 28 U.S.C. § 1292(e). *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506, 4506 (codified at 28 U.S.C. § 1292(e) (1994)). That section allows opportunities for appealing interlocutory orders to be expanded by amending the FRCP. *See id.*

123 For early drafts of Rule 23(f), see Cooper, *supra* note 121, at 67, 73. The proposal to add Rule 23(f) had been on the table since at least 1993. *See Proposed Amendments to Rule 23*, 16 CLASS ACTION REP. 640, 642 (1993) (draft of proposed Rule 23(f)).

124 For discussion of those restrictions, see *supra* notes 109–11 and accompanying text. The Committee Note to Rule 23(f) acknowledges and examines the omission of these restrictions. *See* FED. R. CIV. P. 23(f) advisory committee's note to 1998 amendment.

125 *See* EDWARD H. COOPER, ADVISORY COMMITTEE ON CIVIL RULES: MEETING MINUTES, FEBRUARY 16 AND 17, 1995 (1995), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/min-cv2.htm.

exploited primarily by defendants with weak substantive arguments in order to foment delay.[126]

This Part shows the ways in which Judge Posner communicated to the Committee his support for the Rule 23(f) proposal[127] as well as for another change to Rule 23 that the Committee ultimately rejected. The latter change would have inserted language into the Rule allowing the strength of the plaintiff's underlying case to serve as a factor in the certification decision, thereby overriding the holding of *Eisen*.[128]

A. In re Rhone-Polenc Rorer, Inc.

Judge Posner used his opinion in *Rhone*[129] as his vehicle for communicating with the Committee.[130] The *Rhone* litigation pitted hemophiliacs who had contracted HIV against drug manufacturers whose products had allegedly caused their infection.[131] After the trial court granted certification,[132] the defendants pursued what in all likelihood was their only means of obtaining immediate review — a writ of mandamus in the Seventh Circuit.[133] Their petition was

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[126] *See id.* Another reason for caution about the addition of the Rule 23(f) proposal in the view of some on the Committee was that such an addition had value mainly as a means of obtaining judicial review of other changes to Rule 23 that were then being contemplated. If the other changes did not materialize, then, on this view, the need for Rule 23(f) became less clear. *See* EDWARD H. COOPER, ADVISORY COMMITTEE ON CIVIL RULES: MEETING MINUTES, NOVEMBER 9 AND 10, 1995 (1995), [hereinafter NOV. MEETING MINUTES], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/min-cv11.htm.

[127] The argument made in this Part, namely, that Judge Posner intentionally communicated his support for the Rule 23(f) proposal in his opinion in *Rhone*, is distinct from the argument made elsewhere that his opinion had the *effect* of moving the proposal forward. *See, e.g.*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 733 (2013) (describing the *Rhone* decision as "[a] critical event leading to Rule 23(f)"); Linda S. Mullenix, *Professor Ed Cooper: Zen Minimalist*, 46 U. MICH. J.L. REFORM 661, 669 (2013) [hereinafter *Zen Minimalist*] (noting that *Rhone* "clearly provided the impetus for Committee action"); Solimine & Hines, *supra* note 57, at 1592 n.308 (referring to *Rhone* as "a decision that, in part, drove the adoption of Rule 23(f)").

[128] *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). *Eisen* is discussed *supra* notes 100–105 and accompanying text.

[129] *In re* Rhone-Polenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).

[130] *See supra* note 127 (distinguishing the argument made in this Part regarding Judge Posner's intent in his *Rhone* opinion from the argument made elsewhere regarding the effect of that opinion).

[131] *See* Wadleigh v. Rhone-Polenc Rorer, Inc., 157 F.R.D. 410, 413-14 (N.D. Ill. 1994) (granting certification), *rev'd on writ of mandamus sub nom. In re Rhone*, 51 F.3d 1293.

[132] *Id.* at 427.

[133] Possibly they could have sought permission to appeal pursuant to 28 U.S.C.

referred to a panel that included then-Chief Judge Posner, who, over a strong dissent, granted it and reversed the certification order.[134]

B. Rhone *and the Proposal to Add Rule 23(f)*

While not mentioning the pending Rule 23(f) proposal directly, Judge Posner managed to make three clear, if implicit, arguments in its favor. As we will see, it would have been exceedingly difficult, if not impossible, to make one of the arguments explicitly and that argument might have emerged too far into the open if he had been overt about the others.[135]

First, he offered a compelling depiction of the predicament faced by the defendants who petitioned for mandamus: They could either risk devastating liability at a class trial or settle for an exorbitant amount and thereby forego the final order needed for an appeal of the certification order said to be so rife with flaws as to qualify as "usurpative."[136] His portrayal of their predicament spoke eloquently to the need for Rule 23(f), which would have offered them a solution had it been on the books.[137]

Second, he highlighted the defendants' victories in twelve of the thirteen individual trials that had been held to date, deducing that they probably had strong substantive arguments.[138] He thus countered

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§ 1292(b), an option discussed *supra* notes 109–11 and accompanying text. One commentator has suggested that the defendants made such an attempt but were rebuffed by the trial court. *See* Kruse, *supra* note 116, at 728.

[134] *See In re Rhone*, 51 F.3d at 1304. The dissenter was Judge Rovner. *See id.* (Rovner, J., dissenting). For illustrative extensive treatments of this wide-ranging opinion, see Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1369-79 (2003); Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. REV. 527, 577-84 (2002).

[135] Circumspection was apparently no disadvantage in communicating with the Committee, which read with great care the contemporaneous case law relevant to their work. *Cf.* Mullenix, *Zen Minimalist*, *supra* note 127, at 669 (noting that the Committee's response to *Rhone* illustrates "the very real synergy between the Advisory Committee and current developments in the judicial arena").

[136] He equated such settlements with "blackmail," borrowing phraseology used by Judge Henry J. Friendly in a book published more than twenty years earlier. *See In re Rhone*, 51 F.3d at 1298-99 (quoting HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

[137] For commentary on Rule 23(f), see *infra* note 159.

[138] *See In re Rhone*, 51 F.3d at 1299. The Committee took note of this emphasis. *See* EDWARD H. COOPER, ADVISORY COMMITTEE ON CIVIL RULES: MEETING MINUTES, APRIL 18 AND 19, 1996 (1996) [hereinafter APR. MEETING MINUTES], *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cv4-1896.htm.

the position expressed by certain Committee members that only defendants with flimsy arguments would likely avail themselves of Rule 23(f).[139]

Third, he intensified the consequences likely to result if the Committee rejected Rule 23(f). In the event of such a rejection, *Rhone* would no doubt have prompted a barrage of mandamus petitions seeking to subject certification orders to appellate review.[140] Judge Posner gave those petitions an added leg-up by suggesting that the orders routinely inflicted irreparable injury on the losing parties: "[Certification] orders *often, perhaps typically*, inflict irreparable injury on the defendants (just as orders denying class certification *often, perhaps typically*, inflict irreparable injury on the members of the class)."[141] By aiding and abetting the widespread use of mandamus, he undermined a central feature of the writ that the Supreme Court had repeatedly underscored — its extraordinariness.[142] Having placed mandamus at greater risk than it would have been without his opinion, he then left it to the Committee to wrestle with what to do. To have said all this out loud would no doubt have courted a grant of certiorari.[143]

The Committee seemed clearly to have understood that its disposition of the Rule 23(f) proposal carried implications that had been exacerbated by *Rhone*. Immediately before voting unanimously in favor of the proposal,[144] the members discussed the "recent cases" that

[139] *See supra* note 126 and accompanying text.

[140] *Cf. In re* Med. Sys., Inc., 75 F.3d 1069, 1090 (6th Cir. 1996) (granting mandamus to overturn a certification order partly in reliance on *Rhone*).

[141] *In re Rhone*, 51 F.3d at 1295 (emphasis added).

[142] *See, e.g.*, Kerr v. U.S. Dist. Court for N. Dist. of Cal., 426 U.S. 394, 402-03 (1976) ("A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress."); Will v. United States, 389 U.S. 90, 95 (1967) ("[I]t is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."). In her dissent, Judge Rovner argued that Judge Posner's approach undermined the writ's extraordinariness. *See In re Rhone*, 51 F.3d at 1304-05 (Rovner, J., dissenting). To be sure, Judge Posner himself at least acknowledged the extraordinary nature of the writ. *See id.* at 1294 (majority opinion); *cf.* Kruse, *supra* note 116, at 728 (describing Judge Posner as having given "lip service" to the extraordinariness of mandamus before "disregard[ing] it completely").

[143] *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 4.5, at 250 (10th ed. 2013) (noting that "[a] direct conflict between the decision of the court of appeals of which review is being sought and a decision of the Supreme Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari").

[144] *See* COOPER, APR. MEETING MINUTES, *supra* note 138.

had used mandamus to overturn certification orders, one being *Rhone* itself[145] and the other a case that had followed in *Rhone*'s wake.[146] The view was expressed that, if adopted, Rule 23(f) would preserve mandamus as "a special instrument."[147]

C. Rhone *and the Proposal to Override* Eisen

Judge Posner held the certification order to be "usurpative" partly because of its failure to take account of the seeming weakness of the plaintiffs' case in chief.[148] This holding collided frontally with *Eisen*,[149] which read Rule 23 to prohibit the strength of the plaintiffs' case from driving the decision whether to certify.[150] It is inconceivable that this learned judge, known to write his own opinions,[151] was unaware of this prohibition.[152]

Context, however, is everything. It seems reasonable to assume that Judge Posner disregarded *Eisen* in order to alert the Committee to his antipathy to it and thereby to prompt an amendment that would allow the merits to be considered.[153] Had he made his antipathy explicit, he would not only have undermined his holding concerning the usurpativeness of the certification order but also significantly increased the likelihood that the Supreme Court would grant certiorari and take him to task for his lack of deference to its rulings.[154]

[145] For some explicit references to *Rhone* in the Committee Minutes, see *id.*; and COOPER, NOV. MEETING MINUTES, *supra* note 126.

[146] *See In re* Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996).

[147] *See* COOPER, APR. MEETING MINUTES, *supra* note 138.

[148] *See In re* Rhone-Polenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (noting that "the plaintiffs' claims, despite their human appeal, lack legal merit").

[149] 417 U.S. 156 (1974).

[150] For discussion of *Eisen*, see *supra* notes 100–105 and accompanying text.

[151] *See* Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (and Should We Care)?*, 32 FLA. ST. U. L. REV. 1077, 1080 & n.6, 1081 (2005) [hereinafter *Which Judges Write*].

[152] *Cf.* Bieneman v. City of Chicago, 838 F.2d 962, 964 (7th Cir. 1988) (per curiam) (noting, with Judge Posner on the panel, that "the propriety of class certification does not depend on the outcome of the suit" and citing *Eisen*).

[153] To some extent, at least, his seeking to capture the Committee's attention with respect to one proposal lends credence to his doing so with respect to another.

[154] *See* SHAPIRO ET AL., *supra* note 143, § 4.5, at 250 (noting that "[a] direct conflict between the decision of the court of appeals of which review is being sought and a decision of the Supreme Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari").

He succeeded in getting the Committee's attention. Indeed, upon recognizing *Rhone*'s failure to follow *Eisen*,[155] the Committee pondered whether to endorse an *Eisen* override.[156] In the end, however, it decided against proceeding in this direction.[157] Had there been an override of *Eisen*, it would have put to rest the expansive reading of that decision that had long stood in the way of full judicial engagement with fraud-on-the-market issues.[158]

Rule 23(f) ran the remainder of its gauntlet and became effective on December 1, 1998.[159] In the years since, it has played a pivotal role in the evolution of fraud-on-the-market by allowing circuit courts to engage with fraud-on-the-market issues that would otherwise have escaped appellate review.[160]

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[155] *See, e.g.*, COOPER, APR. MEETING MINUTES, *supra* note 138 (observing that the *Rhone* decision provides "support for required consideration of the merits"); COOPER, NOV. MEETING MINUTES, *supra* note 126 (noting that "[a]lthough the *Rhone-Poulenc* decision in the Seventh Circuit does not say so expressly, it turns in part on an estimate of the probably merits of the class claim").

[156] The language that would allow the merits to be considered first appeared as Rule 23(b)(1)(3)(E) in the November 1995 draft. *Compare* Cooper, *supra* note 121, at 68 (text of November 1995 draft), *with id.* at 64-67 (text of preceding February draft).

[157] *See* COOPER, APR. MEETING MINUTES, *supra* note 138.

[158] *See supra* notes 102–05 and accompanying text.

[159] *See supra* note 14 and accompanying text. For discussion of Rule 23(f), see 7B WRIGHT ET AL., *supra* note 31, § 1802.2; Solimine & Hines, *supra* note 57, 1535-36; Aimee G. Mackay, Comment, *Appealability of Class Certification Orders Under Federal Rule of Civil Procedure 23(f): Toward A Principled Approach*, 96 NW. U. L. REV. 755, 772 (2002).

[160] *See, e.g.*, Conn. Ret. Plans & Trust Funds v. Amgen Inc., 660 F.3d 1170, 1175 (9th Cir. 2011), *aff'd*, 133 S. Ct. 1184 (2013) (rejecting a materiality prerequisite to certification as well as a truth-on-the-market defense to certification); *In re* DVI, Inc. Sec. Litig., 639 F.3d 623 (3d Cir. 2011), *abrogated by Amgen*, 133 S. Ct. 1184 (rejecting a loss causation prerequisite to certification but permitting the defendant to defeat certification by showing a lack of materiality); Schleicher v. Wendt, 618 F.3d 679 (7th Cir. 2010) (rejecting materiality and loss causation prerequisites to certification); Regents of the Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc., 482 F.3d 372 (5th Cir. 2007) (upholding, as a prerequisite to certification, a showing as to the defendants' primary liability); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24 (2d Cir. 2006) (examining the application of Rule 23's certification requirements to a fraud-on-the-market case); *In re* PolyMedica Corp. Sec. Litig., 432 F.3d 1 (1st Cir. 2005) (addressing the standard for measuring market efficiency); Gariety v. Grant Thornton, LLP, 368 F.3d 356 (4th Cir. 2004) (directing the trial court to consider further the sufficiency of the showing as to market efficiency and primary liability).

III. JUDGES EASTERBROOK AND POSNER AND THE INITIAL RULE 23(F) OPINIONS

The Seventh Circuit issued seventeen reported Rule 23(f) opinions during the Rule's first nine years on the books, *every single one of which* was written by Judge Easterbrook or Judge Posner.[161] This Part explains how they came to corner the market on these opinions ("the initial Rule 23(f) opinions"). It then examines the ones with special relevance for fraud-on-the-market.

A. A Brief Primer on Rule 23(f) Opinions

Rule 23(f) authorizes each circuit court to "permit an appeal from an order [of a district court] granting or denying class action certification . . . if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered."[162] A petition for permission to appeal is assigned first to a motions panel, which, if it grants the petition, typically surrenders the appeal for reassignment to a merits panel.[163] Most petitions, however, are denied by unpublished order.[164]

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161 Judge Easterbrook's opinions include: Asher v. Baxter Int'l Inc., 505 F.3d 736 (7th Cir. 2007); Murray v. GMAC Mortg. Corp., 434 F.3d 948 (7th Cir. 2006); Gates v. Towery, 430 F.3d 429 (7th Cir. 2005); Allen v. Int'l Truck & Engine Corp., 358 F.3d 469 (7th Cir. 2004); *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002); West v. Prudential Sec., Inc., 282 F.3d 935 (7th Cir. 2002); Szabo v Bridgeport Machs., Inc., 249 F.3d 672 (7th Cir. 2001); Jefferson v. Ingersoll Int'l Inc., 195 F.3d 894 (7th Cir. 1999); Gary v. Sheahan, 188 F.3d 891 (7th Cir. 1999); Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (7th Cir. 1999).

Judge Posner's opinions include: *In re* Household Int'l Tax Reduction Plan, 441 F.3d 500 (7th Cir. 2006); *In re* Allstate Ins. Co., 400 F.3d 505 (7th Cir. 2005); Carnegie v. Household Int'l, Inc., 376 F.3d 656 (7th Cir. 2004); Dechert v. Cadle Co., 333 F.3d 801 (7th Cir. 2003); Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910 (7th Cir. 2003); *In re* Bemis Co., 279 F.3d 419 (7th Cir. 2002); Isaacs v. Sprint Corp., 261 F.3d 679 (7th Cir. 2001).

162 FED. R. CIV. P. 23(f). The final sentence of Rule 23(f) provides as follows: "An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders." *Id.*

163 *See, e.g.*, Bolden v. Walsh Constr. Co., 688 F.3d 893, 895 (7th Cir. 2012) (noting that the Rule 23(f) petition was previously granted by a motions panel); *Regents*, 482 F.3d at 379 (same); Chiang v. Veneman, 385 F.3d 256, 264 (3d Cir. 2004) (same).

164 *See* Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 284 (2008) (noting that "only 10% of the 'decisions' accepting or rejecting a Rule 23(f) petition are available by searching published or electronically available opinions"); Workshop, *Tools for Ensuring that Settlements Are "Fair, Reasonable, and Adequate*," 18 GEO. J. LEGAL ETHICS 1197, 1213

Reported Rule 23(f) opinions come in three varieties — those from merits panels to which the appeal is assigned after a motion panel grants the petition;[165] a few from motions panels that explain why the petition was denied;[166] and those from motions panels that grant the petition and also decide the appeal ("combination opinions").[167] Combination opinions appear to be confined almost exclusively to the Seventh Circuit.[168]

B. *The Assignments of the Initial Rule 23(f) Opinions*

The task of assigning opinions falls to the panel's presiding judge — the member in active service with the greatest number of years on the court.[169] When Rule 23(f) became effective at the end of 1998, Judges

(2005) ("The vast majority of our rulings on 23(f) motions are not published." (quoting Judge Diane P. Wood)).

Occasionally a motions panel will issue a reported opinion explaining its denial of a petition. For examples, see *infra* note 166.

165 *See* cases cited *supra* note 163.

166 *See, e.g.*, Arnold Chapman v. Wagener Equities Inc., 747 F.3d 489, 493 (7th Cir. 2014) (denying petition for leave to appeal, citing numerous delays caused by plaintiffs and lack of merit of the case); Gelder v. Coxcom Inc., 696 F.3d 966, 969 (10th Cir. 2012) (denying immediate review because none of the concerns justifying an interlocutory appeal were present); *In re* Delta Airlines, 310 F.3d 953, 962 (6th Cir. 2002) (denying permission to appeal because an appeal would not serve the purposes envisioned by Rule 23(f)).

167 *See, e.g.*, Reliable Money Order, Inc. v. McKnight Sales Co., 704 F.3d 489, 496-502 (7th Cir. 2013) (granting permission to appeal while also denying plaintiff's motion to dismiss and affirming class certification); McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 488, 492 (7th Cir. 2012) (granting permission to appeal and reversing the denial of class certification); Isaacs v. Sprint Corp., 261 F.3d 679, 681-82 (7th Cir. 2001) (granting leave to appeal and reversing the order granting certification).

168 The grounds for this conclusion are as follows. Emory Law School Professor Richard D. Freer collected 102 decisions through 2007 adjudicating appeals permitted pursuant to Rule 23(f). *See* Richard D. Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 35 W. ST. U. L. REV. 13, 29-46 (2007). Besides those from the Seventh Circuit, there were very few opinions of the combination variety — two from the First Circuit and one each from the Fourth and Eighth Circuits. *See* Tilley v. TJX Co., Inc., 345 F.3d 34 (1st Cir. 2003); Glover v. Standard Fed. Bank, 283 F.3d 953 (8th Cir. 2002); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138 (4th Cir. 2001); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288 (1st Cir. 2000). Interestingly, and perhaps significantly, the author of both *Tilley* and *Waste* was Judge Bruce Selya, who is widely cited outside his own circuit. *See* Choi & Gulati, *An Empirical Ranking*, *supra* note 2, at 50, 53, 56. Moreover, the same can be said of the author of *Lienhart*, Judge Karen Williams. *See id.* at 53.

169 *See* 28 U.S.C. § 45(a) (2012). If the current chief judge is a member of the panel, then it is she who presides. *See id.*

Easterbrook and Posner were already among the Seventh Circuit's most senior active members.[170] As a result, one or the other was the presiding judge on all but one of the panels that issued the initial Rule 23(f) opinions.[171] When presiding, Judge Posner assigned all such opinions either to himself or Easterbrook, to whom he was senior.[172] When Judge Easterbrook presided, he assigned them only to himself.[173] These assignments are summarized in Table 1.[174]

170 *See Seventh Circuit Chronology*, *supra* note 52.

171 The only initial Rule 23(f) opinion issued by a panel over which neither Easterbrook nor Posner presided was *Jefferson v. Ingersoll International Inc.*, 195 F.3d 894 (7th Cir. 1999). The presiding judge was John Coffey, who assigned the opinion to Judge Easterbrook. Judge Coffey joined the Seventh Circuit in 1982, whereas Judge Easterbrook joined the court in 1985. *See Seventh Circuit Chronology*, *supra* note 52.

172 *See Seventh Circuit Chronology*, *supra* note 52. Judge Posner may have assigned to himself the opinion in *In re Household International Tax Reduction Plan*, 441 F.3d 500 (7th Cir. 2006), because of his authorship of a previous opinion in the same litigation. *See* Matz v. Household Int'l Tax Reduction Inv. Plan, 388 F.3d 570, 572 (7th Cir. 2004).

Also worthy of note is Judge Posner's authorship of the opinion in *Richardson Electronics, Ltd. v. Panache Broadcasting of Pennsylvania, Inc.*, 202 F.3d 957 (7th Cir. 2000), which, in the course of denying an appeal sought pursuant to 28 U.S.C. § 1292(b), addressed the interface between the latter and Rule 23(f).

173 Judge Easterbrook may have assigned to himself the opinion in *Asher v. Baxter International, Inc.*, 505 F.3d 736 (7th Cir. 2007), because of his authorship of a previous opinion in the same litigation. *See* Asher v. Baxter Int'l, Inc., 377 F.3d 727, 728 (7th Cir. 2004).

174 After 2007, authorship of Rule 23(f) opinions in the Seventh Circuit became more widely shared. *See, e.g.*, Abbott v. Lockheed Martin Corp., 725 F.3d 803 (7th Cir. 2013) (opinion by Judge Diane Wood in an ERISA case); Messner v. Northshore Univ. HealthSystem, 669 F.3d 802 (7th Cir. 2012) (opinion by Judge David F. Hamilton in an antitrust case); Ross v. RBS Citizens, N.A., 667 F.3d 900 (7th Cir. 2012) (opinion by Judge Michael S. Kanne in a Fair Labor Standards Act case), *vacated*, 133 S. Ct. 1722 (2013); Kartman v. State Farm Mut. Auto. Ins. Co., 634 F.3d 883 (7th Cir. 2011) (opinion by Judge Diane S. Sykes in an insurance case).

Table 1. Presiding Judges of Panels Issuing Reported Rule 23(f) Opinions, 1999–2007[175]

Case	Year	Presiding Judge	Opinion By
Blair v. Equifax Check Servs., Inc.	1999	Posner	Easterbrook
Gary v. Sheahan	1999	Easterbrook	Easterbrook
Jefferson v. Ingersoll Int'l Inc.	1999	Coffey	Easterbrook
Szabo v Bridgeport Machs., Inc.	2001	Posner	Easterbrook
Isaacs v. Sprint Corp.	2001	Posner	Posner
In re Bemis Co.	2002	Posner	Posner
West v. Prudential Sec., Inc.	2002	Easterbrook	Easterbrook
In re Bridgestone/Firestone, Inc.	2002	Easterbrook	Easterbrook
Mejdrech v. Met-Coil Sys. Corp.	2003	Posner	Posner
Dechert v. Cadle Co.	2003	Posner	Posner
Allen v. Int'l Truck & Engine Corp.	2004	Easterbrook	Easterbrook
Carnegie v. Household Int'l, Inc.	2004	Posner	Posner
Gates v. Towery	2004	Easterbrook	Easterbrook
In re Allstate Ins. Co.	2005	Posner	Posner
Murray v. GMAC Mortg. Corp.	2006	Easterbrook	Easterbrook
In re Household Int'l Tax Reduction Plan	2006	Posner	Posner
Asher v. Baxter Int'l Inc.	2007	Easterbrook	Easterbrook

These opinions likely held allure because of the opportunities that they presented to shape the procedure governing Rule 23(f) as well as to decide major questions of class action law.[176] To be sure, it is also possible that Judges Easterbrook and Posner wrote these opinions because the other panel members were averse to doing so, but it is by no means immediately obvious what would prompt that aversion.[177]

175 For the full citations to these cases, see *supra* note 161.

176 *See, e.g.*, Murray v. GMAC Mortg. Corp., 434 F.3d 948 (7th Cir. 2006) (highlighting the fundamentals of consumer class actions); Carnegie v. Household Int'l, Inc., 376 F.3d 656 (7th Cir. 2004) (discussing transformation of a settlement class into a litigation class); Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910 (7th Cir. 2003) (highlighting the fundamentals of pollution class actions); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672 (7th Cir. 2001) (discussing the viability of expanded reading of Supreme Court's *Eisen* decision); Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894 (7th Cir. 1999) (discussing the method for classifying actions that seek both injunctive relief and damages); Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (7th Cir. 1999) (establishing the framework for identifying worthwhile Rule 23(f) petitions).

177 Rule 23(f) is a relatively confined, reasonably straightforward provision that would seem to fall readily within the grasp of any competent judge. For commentary on the Rule, see *supra* note 159. Moreover, there is the fact that a wide variety of Seventh Circuit judges have been writing Rule 23(f) opinions after 2007. *See supra* note 174.

C. The Panels that Issued the Initial Rule 23(f) Opinions

A judge must be a member of the panel issuing an opinion in order to be eligible to write it.[178] How was it that all the panels that issued the initial Rule 23(f) opinions included either Judge Easterbrook or Judge Posner? The answer involves the nature of the panels. As Table 2 shows, eleven of the seventeen — more than sixty percent — were motions panels that granted permission to appeal and then retained the appeal for decision.

Table 2. Initial Rule 23(f) Opinions, By Opinion Type[179]

Denials of Petitions by Motions Panels		**Adjudication of Appeals by Merits Panels**	
Gary		*Bridgestone*	*Asher*
Bemis		*Dechert*	*Gates*
Adjudication of Appeals by Motions Panels			
Blair	*Jefferson*	*Szabo*	*Murray*
Isaacs	*West*	*Mejdrech*	*Household*
Allen	*Carnegie*	*Allstate*	

If the motions panels had instead surrendered the appeals for reassignment to merits panels, the prevailing pattern in every other circuit,[180] some percentage of the merits panels would almost certainly not have included Judge Easterbrook or Judge Posner. That in turn would have diminished the number of Rule 23(f) opinions that they would have been eligible to write.

D. The Initial Rule 23(f) Opinions with a Bearing on Fraud-on-the-Market

The initial Rule 23(f) opinions carried substantial significance for fraud-on-the-market's evolution. This significance was driven both by the opinions as a group as well as by three specific combination

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[178] *See* 28 U.S.C. § 46(c) (2012).

[179] For the full citation to these cases, see *supra* note 161.

[180] For the basis for this conclusion, see *supra* note 168 and accompanying text.

opinions. The three opinions were all by Judge Easterbrook, two of them written with Judge Posner on the panel.[181]

1. The Opinions as a Group

A number of the initial Rule 23(f) opinions promoted active use of the Rule by virtue of their emphasis on the importance of the issues presented[182] or their citation of multiple reasons for granting an appeal.[183] Moreover, the two opinions denying permission to appeal did not offset this thrust, since each denial rested on an insurmountable obstacle — the elapse of the filing period[184] or the inapplicability of Rule 23 to the Equal Employment Opportunity Commission.[185]

2. *Szabo v. Bridgeport Machines, Inc.*

At issue in *Szabo* was the expansive reading of *Eisen*,[186] pursuant to which the judge must avoid a merits inquiry that overlaps with a certification inquiry.[187] The underlying lawsuit had been brought by tools purchasers against a manufacturer for authorizing fraud for use by its dealer-agents across the country.[188]

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[181] The three opinions are those in *West v. Prudential Securities, Inc.*, 282 F.3d 935 (7th Cir. 2002), *Szabo*, 249 F.3d 672, and *Blair*, 181 F.3d 832. Judge Posner was a member of the panels in both *Szabo* and *Blair*. *See Szabo*, 249 F.3d at 673; *Blair*, 181 F.3d at 833.

[182] *See, e.g.*, *In re* Allstate Ins. Co., 400 F.3d 505, 506 (7th Cir. 2005) (addressing a "novel and important issue" involving certification under Rule 23(b)(2) of the FRCP); Carnegie v. Household Int'l, Inc., 376 F.3d 656, 658 (7th Cir. 2004) (addressing "novel" and "important" issues involving the transformation of a settlement class into a litigation class and the application of judicial estoppel to class actions); *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1016 (7th Cir. 2002) (addressing choice of law rule with "import to other suits"); *West*, 282 F.3d at 937 (addressing "novel and potentially important" fraud-on-the-market issue); Jefferson v. Ingersoll Int'l, Inc., 195 F.3d 894, 897 (7th Cir. 1999) (addressing the "important" and "unresolved" issue of the interface between Rule 23(b)(2) of the FRCP and money damages).

[183] *See, e.g.*, *Bridgestone/Firestone*, 288 F.3d at 1015-16 (citing differences in state law that may proceed as nationwide class actions); *West*, 282 F.3d at 937 (granting appeal to review an expansion of the fraud on the markets doctrine and class action as a way to litigate securities action to completion); *Szabo*, 249 F.3d at 675 (citing two reasons for granting appeal: (1) high dollar amount; and (2) to resolve conflict among district courts).

[184] *See* Gary v. Sheahan, 188 F.3d 891, 893 (7th Cir. 1999).

[185] *See In re* Bemis Co., 279 F.3d 419, 421 (7th Cir. 2002).

[186] Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[187] *See supra* notes 102–03 and accompanying text.

[188] *See Szabo*, 249 F.3d at 674. There was also a claim for breach of warranty. *See id.*

The question whether the manufacturer had authorized the fraud implicated the cause of action, but it was likewise relevant to the predominance inquiry. If there had been such an authorization, the applicable fraud law would come from the manufacturer's home state, which offered a single set of rules that would allow common legal issues to predominate.[189] If there had not been an authorization, however, the fraud law would be drawn from all the states in which the dealers operated, rendering predominance impossible.[190]

The trial court granted certification without inquiring into whether the authorization had occurred.[191] In its view, *Eisen* prohibited the inquiry because of the relationship to the merits.[192]

On behalf of a panel that included Judge Posner,[193] Judge Easterbrook reversed the certification order in an opinion that decisively rejected the expansive reading of *Eisen*:

> [N]othing in . . . Rule 23, or the opinion in *Eisen*, prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers. Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification.[194]

This perspective soon took hold in other circuits, which became able to engage with fraud-on-the market in ways that had previously exceeded their grasp.[195]

3. *Blair v. Equifax Check Services, Inc.*

At issue in *Blair* was a certification order in a federal consumer action.[196] Judge Easterbrook's opinion offered a framework for

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189 *See id.*

190 *See id.*

191 *See id.* at 677.

192 *See id.*

193 *See id.* at 673.

194 *Id.* at 677.

195 *See, e.g.*, Regents of the Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc., 482 F.3d 372, 381 & n.8 (5th Cir. 2007) (relying on *Szabo* as well as on decisions that relied on *Szabo*); *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 38-41 (2d Cir. 2006) (discussing *Szabo* and the decisions that it spawned and concluding that "[w]e . . . align ourselves with *Szabo*, *Gariety*, and the other decisions discussed above . . ."); Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004) (quoting *Szabo* and noting that "[a]t bottom, we agree with the conclusion reached by the Seventh Circuit . . .").

196 Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 835-36 (7th Cir. 1999).

identifying worthwhile Rule 23(f) petitions.[197] His framework became a model for the other circuits.[198]

To exemplify the legal issues that ought to merit the circuit courts' attention, Judge Easterbrook turned to doctrines that facilitate Rule 10b-5 class actions:

> Class certifications . . . have induced judges to remake some substantive doctrine in order to render the litigation manageable. See Hal S. Scott, *The Impact of Class Actions on Rule 10b–5*, 38 U. CHI. L. REV. 337 (1971). *This interaction of procedure with the merits justifies an earlier appellate look*.[199]

Those doctrines include the presumptions of reliance for "pure omissions"[200] and for cases in which fraud "creates" the market,[201] but by far the foremost exemplar is fraud-on-the-market, the barely concealed target towards which circuit courts were invited to direct their energies.[202]

By calling for a "look" at these doctrines,[203] Judge Easterbrook was quite clearly exhorting the circuits to trim them back. To be sure, it is possible that he intended only to dangle fraud-on-the-market as red meat and thereby to induce the other circuits to make full use of the power that Rule 23(f) vested in them.[204]

To justify taking a hard line on Rule 10b-5 class actions, Judge Easterbrook invoked their tendency to precipitate *in terrorem* settlements of the sort depicted by Judge Posner in *Rhone*:

> [A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in

[197] *See id.* at 833-35.

[198] *See* Chamberlan v. Ford Motor Co., 402 F.3d 952, 958 (9th Cir. 2005) (noting that in *Blair*, "the Seventh Circuit articulated fundamental principles that have been echoed by other circuits"); 16 WRIGHT ET AL., *supra* note 31, § 3931.1 (noting that "other circuits have followed essentially the same paths" as those laid down in *Blair*).

[199] *See Blair*, 181 F.3d at 834 (emphasis added).

[200] *See supra* notes 71–74 and accompanying text.

[201] *See supra* notes 75–77 and accompanying text.

[202] *See supra* notes 78–90 and accompanying text.

[203] *See supra* note 199 and accompanying text.

[204] In this respect he may have been seeking to counter the view that interlocutory review should be reserved for exceptional situations. *Cf.* Chamberlan v. Ford Motor Co., 402 F.3d 952, 955, 959-60 (9th Cir. 2005) (noting that "[w]e begin with the premise that Rule 23(f) review should be a rare occurrence").

> big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere. *In re Rhone–Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), observes . . . that class actions can have this effect on risk-averse corporate executives (and corporate counsel) . . . . *Empirical studies of securities class actions imply that this is common.*[205]

It is remarkable that this passage, coming from a renowned securities expert widely understood to write his own opinions,[206] omits any reference to the PSLRA and the SLUSA, major statutes enacted for the very purpose of combating the *in terrorem* settlements at issue.[207] On the books for almost four years, the PSLRA gave the defendants multiple tools for obtaining early dismissals and put control of the actions in the hands of the largest investors.[208] Available for about a year, the SLUSA prevented the plaintiffs from making an end-run around the PSLRA by filing their securities class actions in state court.[209] Nor were the PSLRA and the SLUSA mentioned indirectly through the medium of the cited law review articles, since all of them were published before the statutes were enacted.[210]

Why did Judge Easterbrook fail to acknowledge these statutes? The answer is likely linked to why he focused on securities class actions in the first place. Whether he did so to urge the circuit courts to restrict those actions[211] or instead to generate frequent use of Rule 23(f),[212] he would have undercut his goal by acknowledging the PSLRA and the SLUSA's ameliorative effects. He may also have doubted their effectiveness, possibly on the ground that they failed to do enough to

205 Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999) (emphasis added). The journal citations offered in support consisted of the following: Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 505-14 (1991); Reinier Kraakman et al., *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733 (1994); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55 (1991). Judge Easterbrook made very similar comments in an opinion three years later. *See infra* note 232 and accompanying text.

206 *See* Choi & Gulati, *Which Judges Write*, *supra* note 151, at 1080-81 n.6.

207 *See* NAGY, PAINTER & SACHS, *supra* note 61, at 10; *see also* Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1, 32-34 (1998).

208 *See* NAGY, PAINTER & SACHS, *supra* note 61, at 10.

209 *See id.* at 18.

210 The PSLRA and the SLUSA were enacted, respectively, in 1995 and in 1998. *See supra* notes 40–41.

211 *See supra* note 204 and accompanying text.

212 *See supra* note 205 and accompanying text.

bar the filing of frivolous cases.[213] Standing alone, however, such doubts, assuming he had them, seem insufficient to account for the failure to mention major pieces of legislation directed at the problem under discussion.

Likewise noteworthy was the short shrift that Judge Easterbrook gave to *Eisen*'s bar on merits-driven certification orders.[214] Indeed, he went so far as to observe that those orders might be permissible: "[O]ne of the fundamental *unanswered* questions is whether judges should be influenced by their tentative view of the merits when deciding whether to certify a class . . . ."[215] To be sure, he may have meant only to try to keep the fires burning for a future override of *Eisen*, perhaps at the behest of his fellow panel member, Judge Posner, who, it will be recalled, had tried to precipitate such an amendment four years earlier.[216] But by juxtaposing an assault on *Eisen* with one on fraud-on-the-market, he invited, whether intentionally or unintentionally, the use of a lax approach to the former to accomplish a constriction on the latter.

4. *West v. Prudential Securities, Inc.*

At issue in *West v. Prudential Securities, Inc.* was a certification order in a fraud-on-the-market case.[217] Judge Easterbrook used the opinion to reinforce the themes advanced in *Blair* — the denigration of *Eisen* and fraud-on-the-market and disregard for the PSLRA and the SLUSA.[218]

The underlying lawsuit grew out of a stockbroker's false tip to eleven customers about a specific public company.[219] The lawsuit was not filed on behalf of the customers alone, because, as Judge Easterbrook noted, that would have put them at risk of prosecution for insider trading.[220] The lawsuit was instead filed on behalf of all who had bought stock in the company in question during the time the tip circulated.[221] The tip had not been publicized,[222] but the plaintiffs

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[213] *Cf.* Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 914.

[214] For discussion of that bar, see *supra* note 102 and accompanying text.

[215] Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 835 (7th Cir. 1999) (emphasis added).

[216] *See supra* notes 148–58 and accompanying text.

[217] *See* West v. Prudential Sec., Inc., 282 F.3d 935, 936-37 (7th Cir. 2002).

[218] For discussion of *Blair*, see *supra* notes 196–216 and accompanying text.

[219] *See West*, 282 F.3d at 936.

[220] *See id.* at 936-37.

[221] *See id.* at 937.

argued that it had nonetheless become known to the market through the medium of increasing demand.[223] The trial judge granted certification without examining the substance of the plaintiffs' argument.[224]

Judge Easterbrook faulted the trial judge for failing to confront the plaintiffs' argument as *Szabo* required.[225] Confronting this argument himself, he rejected it as unsubstantiated and reversed the certification order.[226]

Judge Easterbrook's seemingly unexceptionable reversal arguably does not give *Eisen* its due. Recall that the threat of an insider trading prosecution removed the prospect of a traditional Rule 10b-5 claim with its attendant individual reliance issues.[227] With those individual reliance issues firmly out of the picture, the predominance of common reliance issues was a virtual given, leaving the lack of publicity to pose a problem only in connection with whether a fraud-on-the-market claim had been stated.[228] By treating the defect in the claim as one involving certification, Judge Easterbrook undercut the necessity of distinguishing between certification defects and merits defects, thereby emasculating the distinction lying at the heart of *Eisen*.[229]

What would prompt Judge Easterbrook to conflate the two defects? In all likelihood, he did so because he could not resist the opportunity to dispose of an ultimately frivolous action, for which a trial date had already been set.[230]

Judge Easterbrook reaffirmed his previous denigration of fraud-on-the-market by taking aim at *Basic* itself: "The district court did not identify any causal link between non-public information and securities prices, let alone show that the link is as strong as the one deemed sufficient (*by a bare majority*) in *Basic* (*only four of the six Justices who*

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222 *See id.*

223 *See id.* at 939.

224 *See id.* at 938.

225 *See id.* at 938-39 (citing *Szabo* and noting that "[t]ough questions must be faced and squarely decided, if necessary by holding hearings and choosing between competing perspectives").

226 *See id.* at 938-40.

227 *See supra* note 220 and accompanying text.

228 The presumption of reliance is an element of the claim as well as a solution to the predominance problem. *See supra* notes 82–83 and accompanying text.

229 *See supra* notes 100–102 and accompanying text.

230 *See West*, 282 F.3d at 937-38. No doubt compounding the irresistibleness was his apparent lack of regard for *Eisen* in the first place. *See supra* notes 214–16 and accompanying text.

participated in that case endorsed the fraud-on-the-market doctrine)."[231] The two parentheticals, highlighted here for emphasis, served no apparent purpose other than to disparage *Basic* and intimate its vulnerability.

As he had in *Blair*, he omitted reference to the PSLRA and the SLUSA under circumstances that made his presentation less than accurate. That is, using much the same language that he had before, he lambasted *in terrorem* settlements in securities class actions without mentioning that such settlements had been targeted by the PSLRA and the SLUSA.[232]

5. Reaping What You Sow

Only after the *Blair*, *West*, and *Szabo* opinions were on the books did the other circuit courts begin applying Rule 23(f) to fraud-on-the-market.[233] A number of these courts placed obstacles in the path of plaintiffs seeking certification, including requiring them to prove loss causation,[234] materiality,[235] and the existence of a primary (rather than

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[231] *See West*, 282 F.3d at 938 (emphasis added).

[232] Judge Easterbrook's precise language was as follows:

> [S]ome scholars believe that the settlements in securities cases reflect high risk of catastrophic loss, which together with imperfect alignment of managers' and investors' interests leads defendants to pay substantial sums even when the plaintiffs have weak positions. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991); Reinier Kraakman, Hyun Park & Steven Shavell, *When Are Shareholder Suits in Shareholder Interests?*, 82 GEO. L.J. 1733 (1994); Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 J.L. ECON. & ORG. 55 (1991). The strength of this effect has been debated, see Joel Seligman, *The Merits Do Matter*, 108 HARV. L. REV. 438 (1994), but its existence is established.

Id. at 937. For the analogous language in *Blair*, see *supra* note 205 and accompanying text. While the *West* version contains the addition of Professor Seligman's law review article, it, like the others, was written before the enactment of the PSLRA and the SLUSA.

[233] Prior to *West*, two circuits applied Rule 23(f) in securities cases where the issues did not involve fraud-on-the-market. *See* Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 162 (3d Cir. 2001) (focusing on whether the plaintiffs had satisfied the predominance requirement in an action alleging the failure of brokers to satisfy their duty of best execution); Berger v. Compaq Computer Corp., 257 F.3d 475, 477-78 (5th Cir. 2001) (focusing on the adequacy of the class representatives in the wake of the PSLRA).

[234] *See, e.g.*, Oscar Private Equity Invs. v. Allegiance Telecom, Inc., 487 F.3d 261 (5th Cir. 2007) (requiring proof of loss causation), *abrogated by* Erica P. John Fund, Inc. v. Halliburton Co. (*Halliburton I*), 131 S. Ct. 2179 (2011).

a secondary) violation.[236] Equally important, these courts did not inquire into whether these obstacles could be squared with *Eisen*'s ban on merits-driven certification orders.[237] While causality is never simple, it seems reasonable to suppose that these opinions were fueled at least in part by Judge Easterbrook's denigration of *Basic* and *Eisen* and his depiction of a securities class action crisis that stood untamed by the PSLRA and the SLUSA.[238]

IV. JUDGE EASTERBROOK TURNS THE TABLES

This Part explores Judge Easterbrook's remarkable change in perspective that emerged from his 2010 opinion in *Schleicher v. Wendt*.[239] After examining that opinion and seeking to explain the seeming shift that it represents, attention turns to *Schleicher*'s influence on the Supreme Court's engagements with fraud-on-the-market in *Halliburton I*,[240] *Amgen*,[241] and *Halliburton II*.[242]

[235] *See, e.g.*, *In re* Salomon Analyst Metromedia Litig., 544 F.3d 474, 481 (2d Cir. 2008) (requiring the plaintiffs to prove materiality at the certification stage), *abrogated by* Amgen Inc. v. Conn. Ret. Plans and Trust Funds, 133 S. Ct. 1184 (2013); *In re* PolyMedica Corp. Sec. Litig., 432 F.3d 1, 7 n.11 (1st Cir. 2005) (same), *abrogated by Amgen*, 133 S. Ct. 1184.

[236] *See, e.g.*, Regents of the Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc., 482 F.3d 372, 386 (5th Cir. 2007) (requiring the plaintiffs to prove the defendant's commission of a primary violation at the certification stage); Gariety v. Grant Thornton, LLP, 368 F.3d 356, 369-70 (4th Cir. 2004) (same).

[237] *See* cases cited *supra* notes 234–36. *But cf. Oscar*, 487 F.3d at 268-70 (attempting to square *Eisen* with the imposition of a loss causation prerequisite on the ground that the latter served as a double check on the market's efficiency). The Supreme Court thereafter rejected the latter argument as follows: "Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory." *Halliburton I*, 131 S. Ct. at 2186.

[238] *See supra* notes 196–232 and accompanying text; *cf.* J. Mark Ramseyer, *Not-So-Ordinary Judges in Ordinary Courts: Teaching* Jordan v. Duff & Phelps, Inc., 120 HARV. L. REV. 1199, 1209 (2007) (examining a majority opinion by Judge Easterbrook and the opinion written by Judge Posner in dissent, and reaching the conclusion that "the bench . . . is not a place for men and women with the independence and sophistication of these two men. Such judges can muddy the law by trying to fix bad precedent, and worsen the law by setting interventionist examples for their far less talented peers").

[239] Schleicher v. Wendt, 618 F.3d 679 (7th Cir. 2010) (discussing a new emphasis to securities class action cases).

[240] *Halliburton I*, 131 S. Ct. at 2184.

[241] Amgen Inc. v. Conn. Ret. Plans and Trust Funds, 133 S. Ct. 1184, 1197 (2013).

[242] 134 S. Ct. 2398, 2410 (2014).

A. Schleicher v. Wendt

At issue in *Schleicher* was whether fraud-on-the-market plaintiffs must prove loss causation and materiality in order to obtain certification.[243] The trial court ruled that they did not[244] and the defendants sought to appeal. A motions panel had granted an interlocutory review,[245] following which the appeal was referred to a merits panel that included then-Chief Judge Easterbrook.[246] In his opinion affirming the trial court's ruling, Judge Easterbrook not only threw in his lot with fraud-on-the-market and *Eisen* but also placed the PSLRA and the SLUSA at center stage.[247]

1. Placing the PSLRA and the SLUSA at Center Stage

Recall that Judge Easterbrook had previously rationalized his antagonism towards securities class actions by invoking the specter of *in terrorem* settlements.[248] In discussing those settlements, he made no mention of the PSLRA and the SLUSA, thereby implying that the settlements persisted unchecked.[249]

In *Schleicher*, on the other hand, he not only acknowledged the PSLRA and the SLUSA but explained that a reduction of *in terrorem* settlements was their reason for being:

> Congress has been concerned about the potential for class certification to create pressure for settlement . . . .[T]he means that Congress chose to deal with settlement pressure were to require more at the pleading stage and to ensure that litigation occurs in federal court under these special standards, rather than state court under looser ones. The pleading requirement is one aspect of the Private Securities Litigation Reform Act . . . and the federal-forum rule is part of the Securities Litigation Uniform Standards Act . . . .[250]

Going further, he held that courts were obliged to defer to Congress's solution for *in terrorem* securities class action settlements

[243] *Schleicher*, 618 F.3d at 686-87.
[244] *See* Schleicher v. Wendt, No. 1:02-cv-1332-DFH-TAB, 2009 WL 761157, at *10 (S.D. Ind. Mar. 20, 2009).
[245] *See Schleicher*, 618 F.3d at 683.
[246] *See id.* at 681.
[247] *See infra* notes 248–64 and accompanying text.
[248] *See supra* notes 205, 232 and accompanying text.
[249] *See supra* notes 207–210, 232 and accompanying text.
[250] *Schleicher*, 618 F.3d at 686.

instead of making their own "further adjustments."[251] Thus, a judicially created loss causation prerequisite to certification, he concluded, could not be squared with the principle of separation-of-powers.[252]

To be sure, Judge Easterbook did not explain precisely why the courts could not act, even if Congress had also. One possibility was that, in the course of enacting the PSLRA in particular, Congress had decided to leave *Basic* alone after giving consideration to a legislative override.[253]

2. Making the Case for Fraud-on-the-Market

Recall that Judge Easterbrook had previously denigrated fraud-on-the-market for receiving the support of only four of the six *Basic* Justices[254] and had called upon the circuit courts to give it "a look."[255] Contrast his opinion in *Schleicher*, where, when referring to *Basic*, he portrayed its teachings as ironclad: "A court of appeals can't revise principles established by the Supreme Court."[256] Moreover, he rejected a loss causation prerequisite in part on the ground that *Basic* did not call for it.[257]

In addition, in *Schleicher*, he championed the fraud-on-the-market claim from the standpoint of economics, an area of study in which he ranks as a luminary.[258] He explained that the claim rested on the semi-strong version of the efficient capital markets hypothesis, which enjoys strong scholarly support and does not require stock prices to reflect fundamental value.[259] Thus, he continued, the fraud-on-the-market claim is undermined neither by the existence of inaccurate prices[260] nor by the presence in the market of long or short sellers: "A

251 *Id.*

252 *See id.*

253 This was the argument thereafter made by Justice Ginsburg in *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1200-02 (2013), discussed *infra* notes 278–90 and accompanying text.

254 *See supra* note 231 and accompanying text.

255 *See supra* note 199 and accompanying text.

256 *Schleicher*, 618 F.3d at 683.

257 *Id.* at 685-86.

258 *See, e.g.*, Gulati & Sanchez, *supra* note 2, at 1166 (noting that Judge Easterbrook was a distinguished academic as well as a leading figure in the "Chicago School" of law and economics).

259 *Schleicher*, 618 F.3d at 685; *see also supra* note 86 (describing the three versions of the efficient market hypothesis).

260 *See Schleicher*, 618 F.3d at 685.

person buys stock (goes long) because he think the current price too low and expects it to rise; a person sells short . . . because he thinks the price too high and expects it to fall."[261]

3. Being Faithful to *Eisen*

In *Eisen*, the Supreme Court held that the plaintiffs cannot be required to prove the merits of their case as a condition of certification. Prior to *Schleicher*, Judge Easterbrook undercut *Eisen* by depicting its holding as an open question.[262] In addition, he ignored *Eisen* in order to dispose quickly of a frivolous case.[263] In *Schleicher*, on the other hand, he embraced *Eisen* to explain his refusal to condition certification on the proof by the plaintiff of loss causation and materiality.[264]

B. Possible Explanations for the Turnabout

What accounts for Judge Easterbrook's change in perspective? A number of factors may have been at work. One is that in the more than eight years that had elapsed since the publication of his earlier opinions,[265] he may have become persuaded that the PSLRA and the SLUSA represented an effective counterweight to *in terrorem* settlements. Perhaps in part for that reason, moreover, he may have been distressed by the obstacles to certification that other circuits had imposed.[266]

On the other hand, his change in perspective may have been more apparent than real, with his previous criticism of fraud-on-the-market intended largely as hyperbole aimed at precipitating energetic use of Rule 23(f) rather than as an actual call to arms against it.[267] On this view, when *Schleicher* presented him with an opportunity to prune

[261] *Id.* at 684.

[262] *See supra* note 215 and accompanying text.

[263] *See supra* notes 227–30 and accompanying text.

[264] *Schleicher*, 618 F.3d at 686-88.

[265] *Compare* West v. Prudential Secs., Inc., 282 F.3d 935, 937-38 (7th Cir. 2002) (disparaging fraud-on-the-market, implicitly failing to give *Eisen* its due, and neglecting the constraints imposed by the PSLRA and the SLUSA), *with* the court's decision eight years later in *Schleicher v. Wendt*, 618 F.3d at 683, 686-88 (7th Cir. 2010) (extoling fraud-on-the-market and *Eisen* and emphasizing constraints imposed by the PSLRA and the SLUSA).

[266] *See supra* notes 233–38 and accompanying text.

[267] *See supra* note 204 and accompanying text.

fraud-on-the-market back, he offered principled reasons for putting the shears away.

Regardless of which explanation comes closer to the truth, an additional consideration likely to have affected the opinion was the then-pending certiorari petition in *Halliburton I*,[268] filed after the argument in *Schleicher*[269] and still awaiting disposition when the opinion in that case was issued.[270] The petition urged the Supreme Court to resolve a split between two circuits as to whether loss causation should serve as a prerequisite to certification in fraud-on-the-market cases.[271] Given the circuit split, which his own opinion would soon deepen, Judge Easterbrook could have quite reasonably written in anticipation of a Supreme Court audience.[272] To package his views most attractively for the Court's consumption, he may have felt obliged to defer to its opinions in *Basic* and *Eisen* as well as to acknowledge the enactments of Congress.

C. Schleicher *in the Supreme Court*

All three of the Supreme Court's recent fraud-on-the-market opinions reflect Judge Easterbrook's opinion in *Schleicher* to some extent. Moreover, the impact of *Schleicher* appears to have grown with each successive opinion.

1. *Halliburton I*

At issue in *Halliburton I* was whether the plaintiffs must prove loss causation as a prerequisite to certification in fraud-on-the-market cases.[273] Writing for a unanimous Court, Chief Justice John Roberts

[268] *See* Petition for a Writ of Certiorari, Erica P. John Fund, Inc. v. Halliburton Co. (*Halliburton I*), 131 S. Ct. 2179 (2011) (No. 09-1403), 2010 WL 2007735.

[269] The *Halliburton I* certiorari petition was filed on May 13, 2010. *See id.* The argument in *Schleicher* took place on September 22, 2009. *See Schleicher*, 618 F. 3d at 679.

[270] The decision date in *Schleicher* was August 20, 2010. *See supra* note 265. The Supreme Court granted certiorari in *Halliburton I* on January 7, 2011. *See* Erica P. John Fund, Inc. v. Halliburton Co., 131 S. Ct. 856 (2011).

[271] *See* Petition for a Writ of Certiorari, *supra* note 268, at 12-32.

[272] *Compare* SHAPIRO ET AL., *supra* note 143, § 4.4, at 243 (noting that "[t]he Supreme Court often, but not always, will grant certiorari where the decision of a federal court of appeals, as to which review is sought, in direct conflict with a decision of another court of appeals on the same matter of *federal* law"), *with id.* § 4.4(b), at 247 (noting the especial significance of a split of authority that envelops more than two circuits).

[273] *See Halliburton I*, 131 S. Ct. at 2183.

held that they need not do so.[274] He cited Judge Easterbrook's opinion in *Schleicher* only once, in connection with the existence of a circuit split,[275] but his reasoning suggests that he may have been more influenced by it than the one citation might suggest. Indeed, in addition to sharing Judge Easterbrook's view that imposing a loss causation prerequisite could not be squared with *Basic*,[276] he displayed no inclination to impose such a prerequisite for the purpose of curtailing *in terrorem* settlements, a phenomenon to which he made no reference.[277]

2. *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*

At issue in *Amgen* was whether the plaintiffs should have to prove materiality as a condition of certification.[278] There was a split of authority on the question, with the prerequisite supported by several circuits[279] and opposed by the Seventh Circuit, through Judge Easterbrook's opinion in *Schleicher*.[280]

Whether proof of materiality should serve as a condition of certification was more complicated than whether proof of loss causation should do so. Unlike loss causation, which received no mention in *Basic*'s discussion of fraud-on-the-market,[281] materiality

[274] *Id.* at 2186.

[275] *See id.* at 2184.

[276] *Compare id.* at 2186 (observing that a loss causation prerequisite "contravenes *Basic*'s fundamental premise"), *with* Scheicher v. Wendt, 618 F.3d 679, 685-86 (7th Cir. 2010) (invoking *Basic* as ground for rejecting a loss causation prerequisite).

[277] There was the possibility at the time that this represented Chief Justice Roberts's unstated acceptance of Judge Easterbrook's separation of powers argument. Later events support the accuracy of that inference. *See infra* notes 305–06 and accompanying text.

[278] *See* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1191 (2013).

[279] *See supra* note 235 and accompanying text.

[280] *See Schleicher*, 618 F.3d at 685.

[281] The Supreme Court's decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), came seven years before the enactment of the PSLRA, which made proof of loss causation a statutory requirement in Rule 10b-5 cases. *See* 15 U.S.C. § 78u-4(b)(4) (2012). The *Basic* decision might still have mentioned loss causation, however, since a number of pre-PSLRA courts had required it to be proved as a matter of federal common law. *See, e.g.*, Harris v. Union Elec. Co., 787 F.2d 355, 366 (8th Cir. 1986) ("To satisfy the causation element, the plaintiffs were required to show 'some causal nexus' between [defendant's] conduct and the plaintiffs' loss."); Bennett v. U.S. Trust Co. of N.Y., 770 F.2d 308, 313 (2d Cir. 1985) ("To establish causation, the plaintiff must show 'both *loss causation* — that the misrepresentations or omissions caused the economic harm — and *transaction causation* — that the violations in question caused the [plaintiff] to engage in the transaction in question.'" (quoting *Schlick v. Penn-Dixie*

received many.[282] The question was whether those references involved the merits only (rendering materiality irrelevant to certification) or encompassed the certification stage as well (indicating the opposite).[283] The *Amgen* Court divided 6–3.[284]

Writing for the Court, Justice Ruth Bader Ginsburg concluded that *Basic*'s materiality references pertained exclusively to the merits, a conclusion which, she noted, comported with the one reached in *Schleicher*.[285] But she did not leave matters there. Adopting Judge Easterbrook's separation-of-powers argument and quoting his phraseology, she held that "[w]e do not think it appropriate for the judiciary to make its own further adjustments by reinterpreting Rule 23 to make likely success on the merits essential to class certification in securities-fraud suits."[286] Moreover, going a step beyond Judge Easterbrook, she made explicit why judicial responses could not supplement the legislative ones: When enacting the PSLRA, Congress immunized *Basic* from judicial whittling by deciding to leave it intact after contemplating its override.[287]

A word is in order about Justice Samuel Alito's concurrence. Claiming that the efficient capital markets hypothesis had lost the support of economists, he invited challenges to fraud-on-the-market on this basis.[288] Especially given the antipathy to the hypothesis expressed by Justice Clarence Thomas's dissent, in which Justices

Cement Corp., 507 F.2d 374, 380 (2d Cir. 1974))); Hatrock v. Edward D. Jones & Co., 750 F.2d 767, 773 (9th Cir. 1984) (requiring plaintiffs to prove both transaction causation and loss causation).

282 *See Basic*, 485 U.S. at 246 (noting that "[r]ecent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations"); *id.* at 247 (noting that "nearly every court that has considered the proposition has concluded that where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed"); *id.* (noting that "[b]ecause most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations may be presumed for purposes of a Rule 10b-5 action"); *id.* at 248 n.27 (indicating that the circuit court had conditioned the presumption on the plaintiffs' proof of materiality).

283 *See Amgen*, 133 S. Ct. at 1195.

284 Joining Justice Ginsburg's majority opinion were Chief Justice Roberts and Justices Breyer, Sotomayor, Kagan, and Alito. *Id.* at 1190. Justice Alito also wrote a separate concurrence, discussed *infra* note 288 and accompanying text. Dissenting were Justices Scalia, Thomas, and Kennedy. *Amgen*, 133 S. Ct. at 1190.

285 *See Amgen*, 133 S. Ct. at 1197 (citing *Schleicher*, 618 F.3d at 687).

286 *Id.* at 1201 (quoting *Schleicher*, 618 F.3d at 686).

287 *See id.*

288 *See id.* at 1204 (Alito, J., concurring).

Anthony Kennedy and Antonin Scalia joined,[289] court observers speculated that the Court might soon agree to consider whether fraud-on-the-market should remain in place.[290]

3. *Halliburton II*

That speculation proved prescient. After the Supreme Court's decision in *Halliburton I*, the case returned to the trial court, which granted certification while declining to consider the defendants' evidence concerning the fraud's lack of impact on the security's price.[291] On appeal of that order, the Fifth Circuit affirmed.[292] In a petition for certiorari, the defendants renewed their arguments about price impact and also posed the question invited by Justice Alito in his concurrence in *Amgen* — whether the fraud-on-the-market claim should be modified, if not eliminated, due to the putatively diminished status of the efficient capital markets hypothesis.[293] The Supreme Court granted certiorari on November 15, 2013,[294] and argument was heard on March 5, 2014.[295]

In his anti-climactic opinion for the Court on June 23, 2014, Chief Justice Roberts dashed the hopes of securities class action opponents by giving *Basic* and fraud-on-the-market a decisive endorsement.[296] He likewise declined to condition certification on the plaintiffs' proof of price impact.[297] To be sure, he upheld the defendants' right to prove a lack of price impact at the certification stage.[298] But the extent to which this right will operate as a boon for the defendants remains unclear.[299]

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[289] *See id.* at 1208 n.4 (Thomas, J., dissenting).

[290] *See, e.g.*, Steven Kaufhold, *Opinion Analysis: Plaintiffs Need Not Establish Materiality to Obtain Certification of Securities Class Actions*, SCOTUSBLOG (Mar. 1, 2013, 6:36 PM), http://www.scotusblog.com/2013/03/opinion-analysis-plaintiffs-need-not-establish-materiality-to-obtain-certification-of-securities-class-actions (noting that Justice Alito's concurrence in *Amgen*, combined with Justice Thomas's dissent, "provides a preview of a potentially much more significant battle to come").

[291] *See* Erica P. John Fund, Inc. v. Halliburton Co., 718 F.3d 423, 427 (5th Cir. 2013).

[292] *See id.* at 426.

[293] *See* Petition for a Writ of Certiorari at 11-32, Halliburton Co. v. Erica P. John Fund, Inc. (*Halliburton II*), 134 S. Ct. 2398 (2014) (No. 13-317), 2013 WL 4855972.

[294] Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 636 (2013).

[295] *Halliburton II*, 134 S. Ct. at 2398.

[296] *See id.* at 2408-13.

[297] *See id.* at 2413-14.

[298] *See id.* at 2414-17.

[299] *See, e.g.*, James D. Cox, *The Mist of* Halliburton II, CLS BLUE SKY BLOG (June 30, 2014), http://clsbluesky.law.columbia.edu/2014/06/30/the-mist-of-halliburton-ii/ (noting

The bulk of the Chief Justice's endorsement of the fraud-on-the-market claim came directly or indirectly from Judge Easterbrook. One major critique of the claim involved the prevalence of inaccurate prices in ostensibly "efficient markets."[300] To rebut that criticism, Roberts quoted Easterbrook, enhancing the authority of the quotation by invoking Easterbrook's name:

> "That the . . . price [of a stock] may be inaccurate does not detract from the fact that false statements affect it, and cause loss," which is "all that Basic requires." *Schleicher v. Wendt*, 618 F.3d 679, 685 (7th Cir. 2010) (Easterbrook, C.J.).[301]

Another major critique was that so-called "value investors," also known as long or short sellers, put no stock in the existence of efficient markets and instead proceed on the basis of the inaccuracy of the present price.[302] To refute this criticism, Chief Justice Roberts drew again upon Judge Easterbrook, querying, "how else could the market correction on which his profit depends occur?"[303] This query puts in question form the answer supplied by Judge Easterbrook in *Schleicher* in response to the same criticism.[304]

Consider also the significance that Chief Justice Roberts attached to the enactment of the PSLRA and the SLUSA. Borrowing the same page from Easterbrook's book that Justice Ginsburg had borrowed previously,[305] he depicted these statutes as Congress's response to *in*

that *Halliburton II* is limited to cases of securities traded in an 'efficient market' yet provides no guidance on what constitutes an efficient market, thus leaving its application uncertain); Merritt B. Fox, Halliburton II: *Who Won and Who Lost All Depends on What Defendants Need to Show to Establish No Impact on Price*, CLS BLUE SKY BLOG (June 30, 2014) http://clsbluesky.law.columbia.edu/2014/06/30/halliburton-ii-who-won-and-who-lost-all-depends-on-what-defendants-need-to-show-to-establish-no-impact-on-price/ ("Whether [the] Supreme Court decision in [*Halliburton II*] was a victory for plaintiffs or for defendants remains to be seen.").

300 *Halliburton II*, 134 S. Ct. at 2410.

301 *Id.*; *cf.* Choi & Gulati, *An Empirical Ranking*, *supra* note 2, at 58-59 (noting that mentioning the name of the author of the opinion offers further credibility for the proposition for which the judge is cited).

302 *Halliburton II*, 134 S. Ct. at 2410-11.

303 *Id.* at 2411.

304 *See* Schleicher v. Wendt, 618 F.3d 679, 684 (7th Cir. 2010) (noting that "[a] person buys stock (goes long) because he thinks the current price too low and expects it to rise; a person sells short (sells today and promises to cover in the market and deliver the shares in the future) because he thinks the price too high and expects it to fall").

305 *See supra* note 286 and accompanying text.

terrorem settlements, a response to which the courts should defer rather than seek to complement.[306]

V. JUDICIAL SUPERSTARS AND THEIR STRATEGIES

This Part takes a closer look at the strategies that Judges Easterbrook and Posner appear to have employed. All of these strategies open up broad new avenues for exploring the behavior of the superstar judges.

A. A Strategy for Moving the Law — Portraying Precedent With Less than Full Accuracy

As earlier Parts of this Article have shown, Judges Easterbrook and Posner sometimes enhanced their arguments by ignoring precedent.[307] Recall, for example, that to explain his reversal of a grant of certification, Judge Posner cited the weakness of the plaintiffs' substantive case.[308] That rationale disregards *Eisen*,[309] which read Rule 23 to prohibit the merits from driving the certification decision.[310] Judge Posner appears to have taken this path as a way to signal the Advisory Committee on Civil Rules that it should consider amending Rule 23 to allow the merits to be considered.[311] Recall also that Judge Easterbrook likewise on two occasions gave *Eisen* short shrift.[312] Recall finally that Judge Easterbrook, once with Judge Posner on the panel and once without, failed to mention the PSLRA and the SLUSA when discussing the problem of *in terrorem* settlements in securities class actions.[313] In so doing, he made the problem appear worse than it was and the need for judicial intervention seem greater than it was.[314]

There is evidence that these few examples do not stand alone. Consider the results of a Westlaw search for reported signed Seventh Circuit majority opinions since 1982, which, in the view of a dissent or concurrence, misstated precedent.[315] There have been fifty-seven

306 *Halliburton II*, 134 S. Ct. at 2413.

307 *See supra* Parts II, IV.

308 *See supra* note 148 and accompanying text.

309 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974).

310 *See supra* notes 100–02 and accompanying text.

311 *See supra* notes 153–54 and accompanying text.

312 *See supra* notes 214–16, 227–29.

313 *See supra* notes 207–10, 232 and accompanying text.

314 *See supra* notes 207–10, 232 and accompanying text.

315 The approach taken was to find dissents or concurrences that included the word "precedent" and then to eliminate those that used it for reasons other than to

such majority opinions, twenty-nine of them written by Judge Easterbrook or Judge Posner, with twenty-eight authored *by all the other Seventh Circuit judges combined*. The data are set forth in Table 3.

Table 3. Authors of Majority Opinions Charged By Dissents or Concurrences with Misstating Precedent, 1982–Present

Bauer	1	Evans	2	Manion	3	Tinder	0
Coffey	4	Fairchild	1	***Posner***	***15***	Williams	2
Cuddahy	3	Flaum	3	Ripple	0	Wood, Jr.	3
Cummings	1	Hamilton	1	Rovner	1	Wood	0
Easterbrook	***14***	Kanne	3	Sykes	0		

There are several possible explanations for the data. First, perhaps some of the other judges initially drafted majority opinions containing incomplete statements of precedent but thereafter corrected them before publication after a fellow panel member flagged the problem informally. Those judges might reasonably fear that leaving the misstatements in the opinions would trigger questions about their competency. In contrast, Judges Easterbrook and Posner might regard themselves as insulated from competency questions and thus be more inclined to disregard a colleague's criticisms.[316]

Another possible explanation is that the purported misstatements by Judges Easterbrook and Posner arose in opinions in which they sought to change the law. If so, at least some of the objections to the misstatements may have been proxies for objections to the changes themselves.

Majority opinions that portray precedent incompletely are worrisome because of their capacity to mislead. That worrisomeness does not disappear when another panel member writes separately to flag the incompleteness, since the separate opinion may not receive

criticize the accuracy of the majority opinion's depiction of it. Majority opinions written by federal district court judges sitting by designation were excluded. The year 1982 was the starting point because Judge Posner took the oath of office on December 4, 1981. *See supra* note 52.

[316] The data raise a host of fascinating questions about who is willing to challenge the superstar judges. Do they tend to be repeat players or do they instead represent a broad cross-section of the court? Moreover, cross-section or not in other respects, to what extent (if at all) do the challengers skew senior, white, and male? Finally, what, if any, generalizations can be made about the third panel member who does not join the dissent or concurrence?

the attention that it deserves. Moreover, there may not be a separate opinion in the first place. Indeed, no one wrote separately to object to Judge Easterbrook's diminishments of *Eisen* or his failure to mention the PSLRA and the SLUSA when discussing the problem of *in terrorem* securities class action settlements.[317] These misstatements appear to have fueled the willingness of other circuits not only to erect obstacles to certification in fraud-on-the-market cases but in addition to do so in a manner that failed to take *Eisen* into account.[318]

B. Strategies for Acquiring Opportunities to Change the Law

1. Retaining an Appeal After Granting the Petition to Appeal

As Part III of this Article has shown, motions panels over which Judges Easterbrook and Posner presided sometimes granted Rule 23(f) petitions to appeal and then retained the appeals for decision instead of surrendering them for reassignment.[319] The effect was to greatly increase the number of Rule 23(f) opinions that each of them was eligible to write.[320]

Judges Easterbrook and Posner typically presented an efficiency rationale for reaching the merits — namely, that the briefs filed in connection with the petition were comprehensive enough to allow the panel to dispose of the appeal without further delay.[321] While plausible as far as it goes, this rationale fails to take account of the arguable appearance of impropriety that the retention creates. Indeed, when deciding to grant a petition, the motions panel may develop a view about how the appeal should be resolved. Retaining the appeal for

[317] *See supra* notes 196–232 and accompanying text.

[318] *See supra* notes 234–37 and accompanying text.

[319] *See supra* notes 178–80 and accompanying text.

[320] *See supra* notes 178–80 and accompanying text.

[321] *See* Murray v. GMAC Mortg. Corp., 434 F.3d 948, 951 (7th Cir. 2006); Carnegie v. Household Int'l, Inc., 376 F.3d 656, 658 (7th Cir. 2004); Allen v. Int'l Truck & Engine Corp., 358 F.3d 469, 470 (7th Cir. 2004); West v. Prudential Sec., Inc., 282 F.3d 935, 937-38 (7th Cir. 2002); Isaacs v. Sprint Corp., 261 F.3d 679, 681 (7th Cir. 2001); Jefferson v. Ingersoll, Int'l, Inc., 195 F.3d 894, 897 (7th Cir. 1999); Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 838 (7th Cir. 1999); *see also In re* Household Int'l Tax Reduction Plan, 441 F.3d 500, 501 (7th Cir. 2006) (lacking indication of precise reasoning for retaining the appeal); *In re* Allstate Ins. Co., 400 F.3d 505, 506 (7th Cir. 2005) (same); Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 910 (7th Cir. 2003) (same); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 675 (7th Cir. 2001) (same).

decision enables the motions panel to make that resolution the law of the circuit.[322]

To put the matter differently, a motions panel that selects itself as the merits panel engages in a species of non-random panel selection, efficiency considerations to the contrary notwithstanding. While there is no federal statute affirmatively mandating panel randomization,[323] all the circuits select panels on this basis[324] and the law review literature portrays the practice of randomized panels as deeply entrenched and widely assumed.[325]

2. Cornering the Market on the Authorship of Certain Opinions

As Part III of this Article has shown, Judges Easterbrook and Posner used their discretion as presiding judges to assign themselves or each other the initial Rule 23(f) opinions.[326] The worrisome feature of this concentration, on which I take no position, is that they may have acquired more power to shape the law of Rule 23(f) — or class action law in general — than any two judges should have had.

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322 *See supra* note 57 and accompanying text.

323 *Cf.* 28 U.S.C. § 137 (2012) (noting that "[t]he business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court").

324 *See* J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1069-78 (2000); *see also* Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative than Others?*, 45 LAW & SOC'Y REV. 171, 179 (2011) (noting practice of randomly selected panels across the circuits); Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals* 17-26 (Duke Law Sch. Pub. Law & Legal Theory Series, Paper No. 2015-1, 2014), *available at* http://ssrn.com/abstract=2520980 (examining whether panel assignments are random and discovering evidence to the contrary).

325 *See, e.g.*, Joshua B. Fischman, *Estimating Preferences of Circuit Judges: A Model of Consensus Voting*, 54 J.L. & ECON. 781, 792 (2011) ("An important feature of the data, consistent with a central assumption of the model, is that cases are randomly assigned to panels."); Michael Hasday, *Ending the Reign of Slot Machine Justice*, 57 N.Y.U. ANN. SURV. AM. L. 291, 291 (2000) ("Federal appellate courts employ a random assignment system to select the circuit judges who will serve on any particular three-judge panel."); Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 216-17 (1999) (noting that random assignment of cases to panels "has become a 'hallmark' of the system").

326 One of the opinions was assigned to Judge Easterbrook by Judge Coffey, the presiding judge of the panel. *See supra* note 171 and accompanying text. Moreover, Judge Easterbrook and Judge Posner each also wrote a Rule 23(f) opinion in connection with litigation as to which they had previously written an opinion. *See supra* notes 172–73.

The traditional view has been that circuit judges are generalists and that opinion assignments should proceed in accordance with that norm.[327] Recently some scholars have argued on efficiency grounds that the generalist norm should give way when a panel member possesses special expertise in the subject area at hand, say tax or antitrust.[328] But unlike the vast and complex tax and antitrust fields, Rule 23(f) is not a subject area where special expertise is germane. It is a single, circumscribed procedural rule that any competent judge should be able to interpret and apply.[329]

Substantial scrutiny has been devoted to the significance of the opinion assignments of the late Chief Justice Warren Burger — both the opinions he retained for himself as well as those that he gave to others.[330] Attention to the assignment practices of the superstar judges can not only shed light on judicial behavior but also help to explain why legal doctrine has evolved as it has.[331]

3. Operating as a Team

As Parts III and IV of this Article have shown, Judges Easterbrook and Posner appear to have operated as something of a team when it came to Rule 23(f).[332] In addition to assigning Rule 23(f) opinions

[327] *See, e.g.*, Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1667 (2009) (noting that "Americans typically think of judges as generalists" and considering the implications of growing judicial specialization); Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 520-22 (2008) (noting the traditional preference for generalist judges).

[328] *See, e.g.*, Cheng, *supra* note 327, at 561 (concluding that opinion specialization on the federal circuit courts "is a desirable practice worthy of praise and further consideration"); *see also* Baum, *supra* note 327, at 1676-78 (discussing the efficiency argument).

[329] For commentary on Rule 23(f), see *supra* note 159.

[330] *See, e.g.*, Timothy Johnson et al., *Passing and Strategic Voting on the U.S. Supreme Court*, 39 LAW & SOC'Y REV. 349, 351 (2005) (noting Chief Justice Burger's conference voting strategies while on the Supreme Court); Wahlbeck, *supra* note 12, at 1730 (discussing Justice William O. Douglas's objection to the assignment by Chief Justice Burger of the opinion in *Roe v. Wade* to Justice Harry Blackmun); Philip Craig Zane, *An Interpretation of the Jurisprudence of Chief Justice Warren Burger*, 1995 UTAH L. REV. 975, 979-80 (discussing different interpretations of Chief Justice Burger's voting and numerous concurring opinions).

[331] *Cf.* Baum, *supra* note 327, at 1681-83 (calling for research into the impact of judicial specialization).

[332] In other contexts they were not invariably in agreement. *Cf.* M. Todd Henderson, *Deconstructing* Duff and Phelps, 74 U. CHI. L. REV. 1739, 1740 (2007) (documenting dissents by Judge Easterbrook from opinions by Judge Posner and vice versa).

only to themselves and each other,[333] they each authored combination opinions,[334] a practice that was not the norm in other circuits.[335]

In studying the superstar judges, the possibility of an alliance, be it time-specific or long-standing, circumscribed by subject-area or otherwise, should be borne firmly in mind. Other individuals, on or off the bench, may have aided and abetted their achievements. The history of the judiciary is studded with well-known partnerships, including those between Justices William J. Brennan, Jr. and Thurgood Marshall[336] as well as among the anti-New Deal Justices known as the "Four Horsemen."[337] There were also alliances, respectively, between the renowned Second Circuit Judge Henry J. Friendly and Harvard Law School Professor Louis Loss[338] and between Judges Friendly and Posner.[339]

CONCLUSION

Understanding the evolution of fraud-on-the-market requires taking account of the outsized contributions of Judges Easterbrook and Posner. Moreover, their contributions can be understood only by considering the strategies that these two esteemed jurists employed to

[333] *See supra* note 175 and accompanying text.

[334] For the definition of this term, see *supra* note 167 and accompanying text.

[335] *See supra* note 168 and accompanying text.

[336] *See* JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 260 (1994) (describing the extent to which Justice Marshall voted the same way as Justice Brennan did and referring to the two of them as "almost a hyphenated entity").

[337] Supreme Court Justices Pierce Butler, James C. McReynolds, George Sutherland, and Willis Van Devanter are considered the "Four Horsemen" and are known for their conservative views. *See, e.g.*, Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559 (1997) (arguing that the "Four Horsemen" were actually "closet liberals," contrary to the narrative of the traditional scholarship on these judges); Samuel R. Olken, *Justice Sutherland Reconsidered*, 62 VAND. L. REV. 639, 642-43 (2009) (reinterpreting the personal beliefs undergirding Justice Sutherland's jurisprudence on economic liberty).

There was also an initial alignment between the late Chief Justice Warren Burger and Associate Justice Harry Blackmun, who were sometimes referred to as "the Minnesota Twins." *See* Stephen L. Wasby, *Justice Harry A. Blackmun in the Burger Court*, 11 HAMLINE L. REV. 183, 196-98 (1988) (describing the initial Burger-Blackmun alignment and the reasons for its subsequent disintegration).

[338] *See* Margaret V. Sachs, *Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation*, 50 SMU L. REV. 777, 794-808 (1997).

[339] *See* William Domnarski, *The Correspondence of Henry Friendly and Richard A. Posner 1982–86*, 51 AM. J. LEGAL HIST. 395, 399-400 (2011) (discussing the relationship and communication between Judge Friendly and Judge Posner through the lens of their letters).

bring them to life. This Article has identified some of those strategies and has endeavored to provide a larger context for evaluating them.

Legal academics appear to be more comfortable contemplating the strategies that operate on the Supreme Court level than on the federal circuit court level.[340] We need to overcome our hesitancy about the latter. Not only will our familiarity with those strategies deepen our insights about when and why the law changes. Equally important, it will enable us to better understand the superstar judges, major architects of legal doctrine.

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340 *See supra* note 12 and accompanying text.