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Preliminary Judgments

Geoffrey P. Miller¹

Abstract: This article proposes the preliminary judgment as a means for facilitating the settlement of legal disputes. A preliminary judgment is simply a tentative judicial assessment of the merits of a case or any part of a case, based on the same sorts of information that the courts already consider on motions for summary judgment. The difference between a preliminary judgment and a summary judgment is that the court, in a preliminary judgment, would not be limited to deciding issues with which no reasonable jury could disagree. Instead, the court would provide its own judgment on the merits of the case based on the information provided by the parties. A preliminary judgment, once given, would convert into a final judgment after the expiration of a reasonable period of time. However, the losing party would have the right to object prior to the expiration of the period (with or without explanation), in which case the judgment would be vacated and the case would proceed according to ordinary rules of procedure. Preliminary judgments would increase prospects of success in settlement bargaining by providing litigants with a credible evaluation of case value. Preliminary judgments could offset settlement-defeating party optimism, anchor the parties' discussions on realistic outcomes, focus attention on basic strategic questions, counteract the danger that attorneys will distort settlements, and enhance the willingness of litigants to accept the outcome. Because preliminary judgments would be announced publicly, moreover, they would provide information to guide future conduct. In point of fact, judges already communicate their provisional views on the merits through a variety of pretrial procedures. The preliminary judgment would represent a more direct, honest and systematic approach to practices which until now have been employed in less transparent ways.

Introduction

It is a truth nearly universally acknowledged that something is wrong with settlements.² Even though most cases resolve prior to trial,³ settlement bargaining often

¹ Stuyvesant Comfort Professor of Law, New York University. I would like to thank Daniel Marx for outstanding research assistance, and Jennifer Arlen, Oren Bar-Gill, Maurits Barendrecht, Angelo Dondi, Rochelle Dreyfuss, Chris Guthrie, Samuel Issacharoff, John Leubsdorf, Peter Mennell, Jonathan Molot, Richard Nagareda, Steven Shavell, and Tom R. Tyler for extraordinarily helpful input.

² For general accounts of settlements, see Andrew F. Daughety, Settlement, in 5 B. Bouckaert & G.

does not prevent substantial litigation expenditures.⁴ Sometimes bargaining fails altogether.⁵ Settlements, moreover, do not always achieve satisfactory outcomes. Defendants claim they are forced to settle frivolous lawsuits for exorbitant sums in order to avoid burdensome litigation expenditures⁶ or to limit their exposure to class actions.⁷ Plaintiffs claim that scorched earth defense tactics force them to settle too cheaply.⁸ Both plaintiffs and defendants risk being poorly served by attorneys whose interest is to discourage desirable settlements in hourly cases and encourage undesirable settlements in contingent fee cases.⁹ Even when a controversy is resolved on favorable terms, settlements deny litigants a “day in court” and thus may be experienced as unsatisfying.¹⁰

De Geest, eds., *Encyclopedia of Law and Economics* 95-158 (2000); Bruce Hay & Kathryn Spier, *Settlement of Litigation*, in P. Newman, ed., *The New Palgrave Dictionary of Economics and the Law* 442 (1998); Geoffrey P. Miller, *Settlement of Litigation: A Critical Retrospective*, in Larry Kramer, ed., *Reforming the Civil Justice System* 13 (1996).

³ See H. Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustments* 179 (1970) (only about 4% of claims against insurance companies reached trial); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 *UCLA Law Review* 72, 89 (1983) (about 8% of civil suits filed in state and federal courts went to trial); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 *Journal of Empirical Legal Stud.* 459, 459 (2004) (percentage of federal civil cases tried dropped from 11.5% to 1.8% between 1962 and 2002).

⁴ See Ronald Gilson & Robert Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *Columbia Law Review* 509, 528 (1994) (settlements often do not occur “until years of contention run up large legal fees”); Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 *Judicature* 161, 162-64 (1986) (substantial numbers of cases that are resolved short of trial do so after substantive judicial determinations such as dismissal or a other pre-trial rulings).

⁵ See, e.g., Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 *Journal of Legal Studies* 225, 225 (1982) (trials represent a “breakdown”); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 *Michigan Law Review* 319, 320 (1991) (“A trial is a failure.”). Courts also view settlements as preferable to litigation. See, e.g., *Marek v. Chesney*, 473 U.S. 1, 10 (1985) (“In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants.”) For challenges to the conventional wisdom, see Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry Into the Selection of Settlement and Litigation Under Uncertainty*, 56 *Emory Law Journal* 619 (2006) (presenting litigation and settlement as alternative mechanisms for resolution of disputes); Owen Fiss, *Against Settlement*, 93 *Yale Law Journal* 1073, 1076 (1984) (criticizing settlements on the ground, inter alia, that they favor wealthier litigants).

⁶ See notes 66-71 and accompanying text, *infra*.

⁷ See notes 72-75 and accompanying text, *infra*.

⁸ See notes 78-80 and accompanying text, *infra*.

⁹ See Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 *Journal of Legal Studies* 189, 200-03 (1987).

¹⁰ See notes 96-98 and accompanying text, *infra*.

And because settlements are often confidential and do not generate decisions on the merits, they reduce the supply of information about legal enforcement, thus impairing deterrence and increasing risk.¹¹ We live in a “world of settlements,”¹² it is true, but all is not right with that world.

Courts and policymakers have responded to this litany of complaints with a grab-bag of reforms. Court-annexed mediation,¹³ pre-trial settlement conferences¹⁴ and offer-of-judgment rules¹⁵ encourage the parties to resolve their differences before trial. Other approaches provide trial courts with tools to weed out weak or frivolous cases – sanctions for unsupported court filings,¹⁶ enhanced pleading rules,¹⁷ liberal standards for summary judgment,¹⁸ demand requirements in derivative cases,¹⁹ and stepped-up prerequisites for class certification²⁰ are examples. Yet, despite these initiatives, worries about settlement persist.

This article proposes another approach to reforming settlements, supplemental to those already in place, but different in character – the preliminary judgment.²¹ A

¹¹ See notes 83-94 and accompanying text, *infra*.

¹² Richard A. Nagareda, *Mass Torts in a World of Settlement* (2007); Michael Moffitt, *Pleadings in the Age of Settlement*, 80 *Indiana Law Journal* 727 (2005).

¹³ See, e.g., Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: “The Problem” In Court-Oriented Mediation*, Penn State University/Dickinson School of Law Legal Studies Research Paper No. 01-2008, forthcoming, 15 *George Mason Law Review* __ (2008) (describing court-ordered mediation and calling for enhanced attention by mediators to the real concerns of the parties).

¹⁴ See notes 176-180 and accompanying text, *infra*.

¹⁵ See Danielle M. Shelton, *Rewriting Rule 68: Realizing The Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 *Minnesota Law Review* 865 (2007); Edward F. Sherman, *From “Loser Pays” to Modified Offer of Judgment Rules: Reconciling Incentives to Settle With Access to Justice*, 76 *Texas Law Review* 1863, 1874-75 (1998).

¹⁶ Fed. R. Civ. Pro. 11.

¹⁷ *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2509-10 (2007); *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965-66 (2007).

¹⁸ See note 133 and accompanying text, *infra*.

¹⁹ Fed. R. Civ. Pro. 23.1 (derivative litigation); *Aronson v. Lewis*, 473 A.2d 805, 814-16 (Del. 1984) (Delaware rules on when demand on directors is excused).

²⁰ Fed. R. Civ. Pro. 23 (class actions).

²¹ This paper compares preliminary judgments with other procedures in litigation. I do not consider strategies for resolving disputes outside of litigation, such as administrative proceedings. See, e.g., Richard

preliminary judgment is simply a tentative assessment of the merits of a case or any part of a case, based on the same sorts of information that the courts already consider on motions for summary judgment. The difference between a preliminary judgment and a summary judgment is that the court, in a preliminary judgment, would not be limited to deciding issues with which no reasonable jury could disagree. Instead, the court would provide its own provisional judgment on the merits of the case based on the information provided by the parties. A preliminary judgment, once given, would convert into a final judgment after the expiration of a reasonable period of time – say, thirty days. However, any party against whom a preliminary judgment is issued would have the right to object prior the expiration of the period (with or without explanation), in which case the judgment would be vacated and the case would proceed according to ordinary rules of procedure. Like other threshold rulings,²² the preliminary judgment would then have no preclusive effect in the continuing litigation.

Preliminary judgments offer significant potential benefits. They would provide litigants with a highly credible evaluation of the case, made by a person with the capacity to determine (or, in the case of a jury trial, at least influence) the outcome. They thus could offset excessive optimism by one or both parties which would otherwise prevent settlement.²³ Preliminary judgments could also enhance settlement negotiations by

A. Nagareda, *Mass Torts in a World of Settlement* (2007); Richard A. Nagareda, *Turning from Tort to Administration*, 94 *Michigan Law Review* 899 (1996). Nor do I consider whether market-based approaches to litigation, such as the auctioning of litigation claims, could present advantages compared with preliminary judgments. See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 *University of Chicago Law Review* 1, 105-116 (1991) (calling for auctions of class action claims); Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 *Virginia Law Review* 383 (1989); Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 *Journal of Legal Studies* 329 (1987).

²² See, e.g., *Sole v. Wyner*, 551 U.S. ___, 127 S. Ct. 2188, 2195 (2007).

²³ Preliminary judgments thus implement Robert Bone's suggestion that the judge should "inform the parties of her tentative views about the merits as the case progresses" to help counteract "irrational

anchoring the parties' discussions and focusing the attention of the lawyers and the clients on the question of settlement. They could counteract the danger that attorneys will distort settlement bargaining in order to enhance fees. Because preliminary judgments are made by a judge after provisional review of the evidence, moreover, they offer litigants the satisfaction of a formal adjudication, and thus potentially enhance the willingness of litigants to accept the outcome as legitimate and binding. And because preliminary judgments would be announced publicly, they would provide valuable information to third parties to guide future conduct. In point of fact, judges already use a variety of pretrial procedures as means for communicating their provisional views on the merits. The preliminary judgment, in a sense, would merely represent a more direct, honest and systematic approach to practices that until now have been employed in less transparent ways.

This article is structured as follows. Part I describes the preliminary judgment procedure. Part II describes how the proposal could enhance and improve the settlement process. Part III deals with advantages of preliminary judgments over procedures currently in place. Part IV concludes.

I. The Preliminary Judgment

The preliminary judgment idea is simple and easy to implement. Starting at some point not long after the complaint is filed, and continuing throughout the litigation, either party would be entitled to seek a preliminary judgment on the case as a whole, on any specific claim or defense, or on the defendant's liability. A preliminary judgment motion

optimism.” Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 *Cardozo Law Review* 1961, 2015 (2007).

could be combined with a motion for summary judgment under federal Rule 56²⁴ or its state counterparts. The moving party would support the motion with the same materials as are used in summary judgment motions – documents, pleadings, depositions, answers to interrogatories, admissions, and sworn affidavits from fact or expert witnesses.²⁵ The adverse party would oppose the motion with materials of its own, and could also cross-move for preliminary judgment in its favor. As in the case of motions for summary judgment, the adverse party could request that the court defer ruling on the motion pending further discovery.²⁶

Upon receiving a motion for preliminary judgment and any accompanying memoranda, court would evaluate the documentary material presented by both sides. It would have discretion to order a hearing for taking additional evidence, including oral testimony. The court would then decide whether to adjudicate the motion. If the materials presented are sufficient to enable it to provisionally assess the law or the facts (applying applicable burdens of proof), the court would render a preliminary judgment. A preliminary judgment could declare, for example, that if the materials reviewed were the only evidence introduced at trial, it is more likely than not that the defendant is liable to the plaintiff for damages. Or the court could declare the opposite – that if the materials reviewed were the only evidence introduced at trial, they would not establish liability by a preponderance of the evidence. The court could make similar judgments about defenses, for example by ruling that the defendant would prevail on a theory of contributory negligence if the materials reviewed were the only evidence at trial. Judges

²⁴ Fed. R. Civ. Pro. 56.

²⁵ See Fed. R. Civ. Pro. 56(c).

²⁶ See Fed. R. Civ. P. 56(f) (a party opposing a motion for summary judgment may submit an affidavit stating that the decision should be postponed to permit it to develop more material); *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994) (outlining required contents of affidavit).

could also use the preliminary judgment option to communicate their provisional thinking about questions of law.

At any time prior to the expiration of some specified period (say, thirty days), the party against whom the judgment is rendered could object to the decision, with or without explanation. A timely objection would vacate the judgment and return the parties to the status quo ante. Matters preliminarily adjudicated by the court would then be free of any effect from the preliminary judgment, would not constitute law of the case, and would be subject to inconsistent adjudication as the case progressed. If the party against whom a judgment is rendered fails to object, however, the judgment would become a final, binding disposition at the conclusion of the objection period. Given that the losing party has an absolute right to vacate a preliminary judgment simply by filing a timely objection, no rights of appeal need be given, but if an appeal were allowed, it would be only on the ground that the trial court's assessment of the record was clearly erroneous.²⁷

II. Advantages of Preliminary Judgments

Preliminary judgments have the potential to improve the settlement process in a variety of ways: they can overcome barriers to compromise and also can improve the

²⁷ Preliminary judgments are clearly within the judicial power of Article III of the Constitution. The parties subject to such judgments would be involved in a genuine dispute satisfying the "case or controversy" requirement (if not, the case should be dismissed for reasons having nothing to do with preliminary judgments). U.S. Const. art. III, § 2, cl. 1. The judicial task, on motion for preliminary judgment, would be well within the competence and authority of judges. See *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000) (Article III power extends to resolving disputes that are "traditionally amenable to, and resolved by, the judicial process.") The judge on a preliminary judgment motion would be called on to interpret governing law on the basis of a factual record – the very essence of the judicial function. Similarly, preliminary judgments would not be advisory opinions. They would involve concrete rights of the parties in actual disputes; once issued, they would become final judgments unless objected to by the losing party. See *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 242 (1937) (federal courts have no power to issue opinions based on hypothetical facts, but may adjudicate present rights based upon facts established in the litigation). Judges do not go beyond their constitutional authority when they communicate provisional assessments of the merits of cases properly pending before them. See Part III, *infra*.

accuracy, transparency, and legitimacy of the settlements that do occur.

A. Barriers to Settlement

1. Information Effects

The standard economic theory of litigation identifies excessive optimism by one or both parties as a principal reason why cases fail to settle notwithstanding the substantial savings in litigation costs that the parties could realize by resolving their dispute before trial.²⁸ Cases where the parties accurately assess the ultimate result at trial will not generate litigation, under the standard model, because rational litigants will always settle within a bargaining range equal to the sum of their respective litigation costs.²⁹ But because the ultimate outcome of litigation is difficult to predict, it is rare that both parties arrive at accurate predictions about outcomes.³⁰ Mutual pessimism only increases the range where settlements can occur, and therefore increases rather than decreases the probability of pretrial settlements. But where one or both parties are optimistic, the effect can swamp out the savings in litigation costs that can be achieved by settlement, making pretrial resolution impossible.³¹

²⁸ See Steven Shavell, *Foundations of Economic Analysis of Law* 405 (2004); George S. Lowenstein, Samuel Issacharoff, Colin Camerer & Linda Babcock., *Self-Serving Assessments of Fairness and Pre-Trial Bargaining*, 22 *Journal of Legal Studies* 135, 136-37 (1993); Robert Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 *Ohio State Journal on Dispute Resolution* 243-46 (1993); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 *Journal of Legal Studies* 399, 417-18 (1974); John P. Gould, *The Economics of Legal Conflicts*, 2 *Journal of Legal Studies* 279, 289-291 (1973).

²⁹ See Steven Shavell, *Foundations of Economic Analysis of Law* 401-02 (2004); John P. Gould, *The Economics of Legal Conflicts*, 2 *Journal of Legal Studies* 279, 285-86 (1973); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 *Notre Dame. L. Rev.* 221, 225 (1999).

³⁰ See Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 *UCLA Law Review* 1, 63 (1996) (individual cases are "high-risk . . . unpredictable, and sometimes bizarre"). The uncertainty of litigation is especially pronounced where the law is unclear, or where the judgment requires discretionary fact-finding. See, e.g., Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 *California Law Review* 773, 777, 781 (1995) (stressing uncertainty of jury awards for pain and suffering).

³¹ See Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 *Rand*

Preliminary judgments could counteract the settlement-precluding effect of party optimism. Once a preliminary judgment is issued, the parties would evaluate it and adjust their expectations about the case accordingly. But the adjustments are unlikely to be equal in magnitude, and it is this fact that facilitates settlement. If the judgment favors the plaintiff, the defendant would revalue the case by increasing his estimate of the expected judgment at trial. The plaintiff would also revalue the case upward. But in cases of mutual optimism the defendant's upward adjustment would be greater than the plaintiff's because the parties would have started from different baselines. The result could be that a settlement is possible in cases where no settlement would be possible in the absence of a preliminary judgment.

The same effect would occur if the preliminary judgment favored the defendant, although the direction of the adjustments would be downward. Suppose the court ruled on preliminary judgment that if the evidence at trial were limited to the information presented to the court on motion, the defendant would not be held liable. In such a case the defendant would expect to pay less at trial and accordingly would adjust his estimate of case value downward. The plaintiff would make a similar adjustment. But in the case of mutual optimism the plaintiff's downward adjustment would be greater than the defendant's because the plaintiff was starting from a higher expected value. Again, settlements would be possible which would not be possible in the absence of the procedure.

Journal of Economics 404, 409 (1984); Keith N. Hylton, Asymmetric Information and the Selection of Disputes for Litigation, 22 Journal of Legal Studies 187, 189 (1993). Optimism may be in each party's interest given the possibility that the other party will also be optimistic, see Oren Bar-Gill, The Evolution and Persistence of Optimism in Litigation, 22 Journal of Law, Economics and Organization 490 (2006) (providing a game-theoretic account under which optimism supports credible threats to take the case to trial). However, both parties would be still better off if the effects of optimism could be muted sufficiently to make settlement possible. See *id.* at 492.

The information provided by a preliminary judgment would not be perfect, of course. Judges could and would make errors.³² Most importantly, the possibility of judicial error would be enhanced due to information problems. Some evidence that would be introduced at trial might not be available at the preliminary judgment stage simply because the parties would not have had the chance to uncover it – especially if the motion is adjudicated prior to the completion of discovery. Conversely, some material considered by the judge at the preliminary judgment stage might not be admissible at trial (affidavits, for example, would be considered on motions for preliminary judgment even though they are technically hearsay and therefore generally inadmissible at trial). With a less reliable evidentiary base for decision, judges can be expected to make more errors.

The fact of judicial error due to incomplete information is not, in itself, a reason to reject the preliminary judgment idea. The underdeveloped record is a problem in many contexts where judges make preliminary assessments of the merits.³³ The possibility of error is tolerated because of the needs of the situation and because the judge's decision, being provisional, is always subject to correction as the case progresses.³⁴ Preliminary judgments are no different: they address important needs, including the interest in overcoming barriers to settlements, and they are provisional in the sense that the disadvantaged party can avoid their effect by the simple expedient of filing a timely objection.

Moreover, the chance of error due to an unreliable record should not be

³² On judicial error, see Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 *Cornell Law Review* 777 (2001).

³³ See Part III, *infra* (cataloguing examples under current practice where judges make preliminary merits determinations).

³⁴ See, e.g., *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (explaining that preliminary injunctions employ more relaxed procedures and a less developed evidentiary base because of the need for haste and the fact that such injunctions are not binding at trial).

overstated. Discovery in civil litigation is an incremental process: it is rare for parties to uncover “smoking gun” evidence late in the discovery cycle unless the counterparty has been withholding the information.³⁵ As long as some discovery has been undertaken, the judge will ordinarily have a basis for making a reasonably reliable preliminary assessment. Moreover, the preliminary judgment procedure itself might induce parties to reveal unfavorable information, especially if they know that the facts will come out eventually. Providing the information at the preliminary judgment stage would allow the party to obtain a more accurate picture of his litigation exposure (although at the cost of incorporating that information in the judge’s ruling). Parties might also consider the risk of irritating the judge if their failure to disclose crucial negative information impairs the quality of the judge’s decision. In any event, because the parties are aware that the judge will rule on an incomplete record, they can take this fact into account when deciding whether to object to the judgment, if it is against them, and in evaluating the weight to give the judgment when reassessing the settlement value of the case.

Jury demands also increase the potential for error. Here, the preliminary judgment would only provide the parties with the judge’s view of how a jury would resolve the disputed issues. Judges and juries do not always agree on the evaluation of evidence. Nevertheless, a court’s preliminary judgment in a jury trial case would provide important information to the parties. It reflects the opinion of an expert who will often have conducted many jury trials and who has a good feel for how the jury will behave.³⁶

³⁵ At the beginning of the discovery process, parties are obligated to disclose, inter alia, “the name . . . of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses.” Fed. R. Civ. Pro. 26(a).

³⁶ Empirical studies report reasonably high rates of agreement between judges and juries. See, e.g., Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 58 (1966) (78% judge-jury agreement found in criminal cases), 63 (78% agreement in civil cases); Valerie P. Hans, *Judges, Juries, and Scientific*

Judges also have the ability to influence the jury's fact-finding function, for example by ruling on the admissibility of evidence, selecting jury instructions, granting motions for directed verdict or judgment notwithstanding the verdict, or communicating with the jury by non-verbal means.³⁷ In a jury trial case, the preliminary judgment would enlist the judge as a kind of jury consultant whose views would be available to both parties and incorporated in subsequent settlement bargaining.

The provisional and tentative nature of preliminary judgments could also feed back into the possibility of judicial error. Because the losing side can vacate the preliminary judgment by filing a timely objection, and because the judge is free to change his mind, the judge might not take as much care in rendering the decision as the judge would take if the ruling were sure to be final. Yet the possibility of judicial laziness should not be overstated. If preliminary judgments operate as effective settlement devices, the judge will know this fact, and therefore will understand that his ruling on the motion will have a potentially large effect on the outcome of the litigation. Preliminary judgments, moreover, would usually take the form of written opinions which would be scrutinized by the parties and potentially made available to others. They would therefore have a gravitas that commands attention and respect. Knowing these facts, most judges

Evidence, 16 *Journal of Law and Policy* 19 (2007) (finding a basic similarity of judge-jury decision making in cases with scientific evidence); Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, G. Thomas Munsterman, Stewart J. Schwab & Martin T. Wells, Judge-jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel's *The American Jury*, 2 *Journal of Empirical Legal Studies* 171 (2005). Where judge-jury disagreement exists, it sometimes defies conventional wisdom. See Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 *Cornell Law Review* 1124, 1125-26 (1992) (finding that plaintiffs in product-liability and medical malpractice cases tend to do better in bench trials than in jury trials).

³⁷ See, e.g., Peter David Blanck, *Calibrating the Scales of Justice: Studying Judges' Behavior in Bench Trials*, 68 *Indiana Law Journal* 1119, 1126 (1993) ("In a criminal trial, a trial judge's beliefs or expectations for a defendant's guilt may be manifested either verbally or nonverbally (by facial gestures, body movements, or tone of voice) and can be reflected in a judge's comments on evidence, responses to witness testimony, reactions to counsels' actions, or in rulings on objections.").

would likely take care in rendering decisions. Further, cases of judicial laziness would tend to be self-correcting. If despite the importance of the procedure a judge issued a poorly reasoned or sloppy opinion, the parties would realize this fact and accord less credibility to the judge's views going forward.

Another potential objection to the reliability of the information obtained on preliminary judgment is that the judge might use the procedure as an opportunity to engage in self-interested behavior.³⁸ One might worry that judges could use preliminary judgments as devices for ridding themselves of cases that they do not want to hear.³⁹ This concern, however, does not appear to be well-founded. It would ordinarily be very much in the judge's self-interest to render a competent, well-reasoned, and persuasive opinion on a motion for preliminary judgment. Doing so increases the probability of settlement, and thus reduces the judge's docket pressure and increases litigant satisfaction. Poorly reasoned or biased opinions, on the other hand, are unlikely to offer any real benefits for the judge, because the adversely affected party would likely object to the ruling, nullifying its effect, and because such opinions would not effectively promote settlements that reduce the judge's work load.

A final consideration goes to the interaction between preliminary judgments, on the one hand, and the judge's ultimate decision at trial, on the other. It is possible that a preliminary judgment will unduly influence the judge's assessment of the merits if the

³⁸ Judges, like everyone else, are prone to human foibles and weaknesses. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 *Supreme Court Economic Review* 1 (1993) (judges take factors such as income, leisure, and job satisfaction into account in how they perform their tasks); Geoffrey P. Miller, *Bad Judges*, 83 *Texas Law Review* 431 (2004) (chronicling varieties of judicial error and misconduct).

³⁹ See Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 *Journal of Legal Studies* 627, 631-33 (1994) (judges' decisions may reflect desires such as the wish to avoid work and the desire to obtain interesting cases and to avoid boring ones).

litigation continues. This anchoring effect could be due to the judge's prior analysis having a residual salience that affects her judgment,⁴⁰ to the judge's wish to avoid having to acknowledge that she erred in the initial decision, or to other factors.⁴¹ Yet while anchoring effects are a potential concern, they are no reason for rejecting preliminary judgments. The disadvantaged party would have an opportunity to provide reasons when objecting to the ruling, thus encouraging the judge to reconsider his analysis. Judges display an ability to depart from threshold rulings in other contexts.⁴² Anchoring effects, moreover, are not entirely negative. While they may increase the possibility of error in the ultimate merits ruling, they also enhance the credibility of the preliminary judgment because the parties will believe that, other things equal, the judge is likely to stick to that opinion at trial.

Overall, notwithstanding the fact that preliminary judgments would not be perfectly reliable, they would offer highly credible information to the litigants pertinent to their evaluation of future prospects in the case. For this reason they could be expected to counteract, in some cases, the preclusion of settlement that is created when the optimism of one or both parties overwhelms the benefit of settlement in avoiding

⁴⁰ There is some evidence that decision-makers, given an initial anchor, will fail to make rational adjustments in the face of later-obtained evidence. See, e.g., Edward J. Joyce & Gary C. Biddle, *Anchoring and Adjustment in Probabilistic Inference in Auditing*, 19 *Journal of Accounting Research* 123, 141-143 (1981) (accountants' evaluation of probability of fraud found to be influenced by initial anchoring question); Max H. Bazerman & Margaret A. Neale, *Negotiating Rationally* 27 (1991) (real estate agent evaluations of house values anchored by list price). For discussion of the analogous problem with merits-related rulings on motions to certify a class, see Geoffrey P. Miller, *Review of the Merits in Class Action Certification*, 33 *Hofstra Law Review* 51, 68-69 (2004).

⁴¹ See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 *Cornell Law Review* 777, 791-95 (2001) (reporting on experiment finding anchoring effects among judges).

⁴² Such as when they make a final judgment after having previously evaluated a party's probability of success on motion for preliminary injunction. See, e.g., *Sole v. Wyner*, 551 U.S. ___, 127 S. Ct. 2188, 2192-93 (2007) (plaintiffs obtained preliminary injunction but lost on merits); *Sierra Club v. U.S. Army Corps of Engineers*, 464 F. Supp. 2d 1171, 1191-92, 1228 (M.D. Fla. 2006) (court took a "fresher, deeper" look at the issue after additional briefing and argument, and reversed its preliminary judgment that federal agency had violated the Clean Water Act).

litigation expenses.

2. Bargaining Effects

Another impediment to settlement is the possibility that strategic bargaining may prevent the parties from reaching a compromise even though a bargaining range exists in which it would be advantageous for both to settle.⁴³ The preliminary judgment is likely to help overcome these bargaining problems.

First, and most importantly, motion for preliminary judgment is likely to trigger serious efforts at negotiation. This effect is already well-known for summary judgment motions, which are often the spark that sets settlement discussions in motion.⁴⁴ The effect of a motion for preliminary judgment would likely be even more pronounced. Litigation of the motion for preliminary judgment would inevitably focus the attention of the lawyers, and often their clients as well, on the fundamental issues of the case.

Even if the preliminary judgment motion itself does not stimulate settlement negotiations, the court's ruling is likely to do so. The preliminary judgment would induce both parties to re-assess their valuations of the case, thus focusing attention on the fundamental issues and creating a receptive field in which settlement bargaining can take place. The focusing effect would be particularly strong for the losing party who must decide whether to object to the ruling – a desirable result because under conditions of mutual optimism it is the losing party who must make the greatest adjustment to prior

⁴³ A large literature on strategic bargaining and settlement traces to Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 *Journal of Legal Studies* 225 (1982).

⁴⁴ See, e.g., Sanford F. Young, *Feasible Strategies for Successful Discovery and Winning Dispositive Motions*, 78 *New York State Bar Journal* 10, 16 (2006) (summary judgment motions are “useful devices for stirring up the pot, to induce parties to come to the table and engage in settlement negotiations”); Jonathan Molot, *An Old Judicial Role For a New Litigation Era*, 113 *Yale Law Journal* 27, 44 (2003) (“By forcing parties to focus on the merits of their positions, and by educating parties regarding a suit's likely value, summary judgment opinions can serve some of the same purposes as the settlement conference.”).

beliefs. Because the decision whether to object would ordinarily be made by the client, the context provides an opportunity for lawyers to call the client's attention to the fundamental strategic issues in the case, and thus to persuade the client of the utility of exploring settlement possibilities.⁴⁵

In addition to focusing the attention of attorneys and clients on ultimate strategic questions, the preliminary judgment offers a neutral reason to commence settlement negotiations. In ordinary settings, parties may be deterred from being the first to suggest settlement out of fear that their adversary will interpret their overture as a sign of weakness.⁴⁶ The result is that settlement negotiations may be delayed until late in the day. But because preliminary judgments represent an important juncture in the case, they are a natural point to commence negotiations, and therefore a party is unlikely to prejudice his negotiating stance by initiating discussions.

Preliminary judgments could also mitigate problems once settlement negotiations have started. In normal bargaining situations, parties are likely to start with an extreme proposal out of concern for not transmitting a signal of weakness.⁴⁷ But when parties start off very far apart, it is likely that they will take longer to reach a resolution and possible that they will never do so. Preliminary judgments would reduce these risks. The judge's decision, when announced, would automatically limit the ability of parties to

⁴⁵ For an argument that attorneys, as repeat players, can facilitate settlements that clients acting alone would be unable to achieve, see Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *Columbia Law Review* 509 (1994).

⁴⁶ See Robert Gertner & Geoffrey Miller, *Settlement Escrows*, 24 *Journal of Legal Studies* 87, 90 (1994); Russell Korobkin & Chris Guthrie, *Opening Offers and Out-Of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 *Ohio State Journal on Dispute Resolution* 1, 3-4 (1994); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 *Ohio State Journal on Dispute Resolution* 235, 246-47 (1993).

⁴⁷ A substantial body of research suggests that extreme opening offers are, in fact, a successful litigation strategy. See Russell Korobkin & Chris Guthrie, *Opening Offers and Out-Of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 *Ohio State Journal on Dispute Resolution* 1 (1994).

make extreme demands. Although settlement negotiations would still progress in the usual way, with the plaintiff demanding more and the defendant offering less, the range of disagreement would be significantly constrained by the fact of the judgment. Overall, therefore, the preliminary judgment could assist in overcoming signaling effects that interfere with settlement bargaining.

Preliminary judgments could also help address the “winner’s curse” problem – the fact that parties in an auction tend to shade their bids downward out of fear that if they win the bidding, they will have overpaid because their estimate of the value of the item will be an outlier compared with the views of other bidders.⁴⁸ The settlement of litigation is, in effect, an auction because if successful, it results in the sale of an asset – the plaintiff’s cause of action – to the defendant in exchange for a bid price (the amount of the settlement). Concern about the winner’s curse might conceivably lead the defendant to shade his settlement offer downward out of concern that if the offer is accepted – if he “wins” the auction for the litigation claim – he will thereby have paid too much.⁴⁹ Similar but opposite considerations might induce plaintiffs to stick to unreasonably high settlement demands, out of concern that if their more moderate demands are accepted, they will have sold the release too cheaply.

There are reasons to believe that the winner’s curse problem is not strongly present in settlement negotiations. First, because there are only two bidders in the settlement context the probability of overpayment by the winning bidder is significantly lower than in standard auctions where the winner’s valuation is an outlier compared with the judgment of many other parties. Second, in the bilateral monopoly characterizing

⁴⁸ See Richard H. Thaler, *The Winner’s Curse: Paradoxes and Anomalies of Economic Life* (1994).

⁴⁹ See Michael Abramowicz, *On the Alienability of Legal Claims*, 114 *Yale L.J.* 697, 756 (2005).

settlement negotiations, the parties face risks of underestimation as well as overestimation. The defendant worries, not only that he will offer too much to settle the case, but also that he will offer too little, resulting in the plaintiff “winning” the auction and the case going to a trial where the defendant will lose on the merits at much greater cost. The plaintiff has a similar calculation, worrying not only that he will demand too little and settle the case for less than he could have obtained by harder bargaining, but also that he will demand too much, resulting in a trial where he will lose everything. These concerns tend to offset one another, reducing the chance that winner’s curse problems will preclude successful settlement bargaining. Nevertheless, to the extent the winner’s curse presents a potential impediment to settlement, the preliminary judgment procedure could mitigate this problem by providing superior information about the value of the claims, thus reassuring both parties that a settlement is within the range of reasonable outcomes at trial.

3. Agency Effects

Conflicts of interest between attorneys and clients may also interfere with settlements.⁵⁰ Fee arrangements are the most fertile source of such conflicts.⁵¹ As is well known, attorneys working on an hourly fee basis have an interest in prolonging litigation as long as their hourly rate exceeds the opportunity costs of their time.⁵² Acting solely in their economic self-interest, therefore, they may attempt to dissuade a client from accepting a settlement offer even if the proposed compromise is in the client’s best

⁵⁰ See Geoffrey Miller, *Some Agency Problems in Settlement*, 16 *Journal of Legal Studies* 189 (1987).

⁵¹ See, e.g., Douglas Cumming, *Settlement Disputes: Evidence from a Legal Practice Perspective*, 11 *European Journal of Law and Economics* 249, 253-58 (2001) (identifying incentive effects of different fee structures).

⁵² See Geoffrey Miller, *Some Agency Problems in Settlement*, 16 *Journal of Legal Studies* 189, 203 (1987).

interest. Attorneys working on a contingent fee basis, on the other hand, have an incentive to accelerate settlements in cases exhibiting declining returns to attorney effort.⁵³ Thus a contingency fee attorney, acting solely out of economic self-interest, often has an incentive to persuade clients to accept offers of settlement even when more could be obtained by further litigation.⁵⁴ While the extent of such self-interested attorney behavior is unknown, it probably happens from time to time.⁵⁵ If the incidence is high, the result would be to impair the effectiveness of the underlying legal rules.⁵⁶

Preliminary judgments would help mitigate these agency problems. Attorneys are able to execute self-serving strategies in the settlement context only because the client has inferior information about litigation value. In such cases clients may have no choice but to rely on their counsel's advice, even if the client knows that the attorney is subject to a conflict of interest. But if the client is informed of the litigation value, the client can better evaluate the attorney's recommendation. Preliminary judgments would provide this sort of information. They would constrain the range of trial outcomes that the attorney could plausibly project to the client, and thus would limit the attorney's ability to manipulate the client's information set in order to encourage settlements that favor the lawyer but harm the client.

⁵³ See Geoffrey Miller, *Some Agency Problems in Settlement*, 16 *Journal of Legal Studies* 189 (1987).

⁵⁴ See Geoffrey Miller, *Some Agency Problems in Settlement*, 16 *Journal of Legal Studies* 189 (1987). But see Neil Rickman, *Contingent Fees and Litigation Settlement*, 19 *International Review of Law & Economics* 295, 305 (1999) (early settlement incentive may be offset by attorney's incentives to engage in hard settlement bargaining).

⁵⁵ See, e.g., Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 *University of Chicago Legal Forum* 519, 572 (2003).

⁵⁶ See John Goldberg, *Ten Half-Truths About Tort Law*, 42 *Valparaiso University Law Review* 1221, 1266 (2008) ("Suppose it turns out to be the case that lawyers who recommend settlement to tort plaintiffs consistently do so irresponsibly (for example, only to maximize the profitability of their practices) and thereby deprive clients of opportunities for more substantial and meaningful redress. Then there would be reason to suppose that the dominance of settlement as the mode for resolving tort claims is threatening the point of having tort law.").

4. Psychological Effects

Parties may fail to reach settlement for psychological reasons.⁵⁷ For example, reactive devaluation – the tendency to give insufficient weight to information supplied by someone they dislike⁵⁸ – can impair settlement negotiations because people may fail to take an adversary’s offer seriously. Framing – people’s tendency to evaluate bargaining outcomes based on a reference point⁵⁹ and to dislike perceived losses evaluated from this point more than they like perceived gains – can present problems if the parties have different reference points.⁶⁰ The tendency to evaluate outcomes with respect to reference points also encourages parties to make extreme demands in hopes of anchoring discussions at a favorable figure.⁶¹ Senses of entitlement can also interfere with settlements:⁶² if both parties feel that their positions are morally justified, they may be unwilling to agree to a compromise even though doing so would be in their mutual financial interest.⁶³

Preliminary judgments would address these psychological barriers to conflict

⁵⁷ See Russell Korobkin & Chris Guthrie, Psychological Barriers to Litigation Settlement: An Experimental Approach, 93 Michigan Law Review 107 (1994).

⁵⁸ See Lee Ross & Constance Stillinger, Barriers to Conflict Resolution, 7 Negotiation Journal 389, 392 (1991).

⁵⁹ Empirical research suggests that people tend to evaluate decisions based on “anchors” against which they evaluate gains and losses. See Amos Tversky & Daniel Kahneman, Judgment under Uncertainty: Heuristics and Biases, 185 Science 1124, 1128-30 (1974) (describing anchoring effect).

⁶⁰ See Russell Korobkin & Chris Guthrie, Psychological Barriers to Litigation Settlement: An Experimental Approach, 93 Michigan Law Review 107, 137 (1994) (“Disputants may reject a settlement offer economically sufficient to produce a negotiated settlement if they view it in relation to a reference point that suggests accepting the offer would mean accepting a net loss on the transaction.”).

⁶¹ See Russell Korobkin & Chris Guthrie, Opening Offers and Out-Of-Court Settlement: A Little Moderation May Not Go a Long Way, 10 Ohio State Journal on Dispute Resolution 1, 18-19 (1994) (applying anchoring theory to negotiation setting).

⁶² See Sally Engle Merry & Susan S. Silbey, What do Plaintiffs Want? Reexamining the Concept of Dispute, 9 Justice System Journal 151, 153 (1984) (individual plaintiffs seek “vindication” from the litigation process).

⁶³ See Russell Korobkin & Chris Guthrie, Psychological Barriers to Litigation Settlement: An Experimental Approach, 93 Michigan Law Review 107, 143-144 (1994) (“Individuals seeking to restore equity may allow personal feelings to overcome economically rational calculations when resolving disputes.”).

resolution. Reactive devaluation is unlikely to cause a party to discount information received from the judge in a preliminary judgment ruling, because the judge is not the party's adversary, but rather a neutral figure with no stake in the controversy other than an interest in achieving a prompt and fair resolution of the dispute. Framing effects are reduced because the preliminary judgment provides a common focal point against which framing will occur.⁶⁴ Anchoring effects would also presumably be reduced because the preliminary judgment itself would provide the anchor. Moral entitlement or equity concerns would also be mitigated. If the parties accept the legitimacy of the preliminary judgment then they may be less concerned with establishing the moral superiority of their positions, even when those positions turn out to differ from the views expressed by the judge.⁶⁵

B. Accuracy

So far we have outlined the potential benefits of preliminary judgments at overcoming obstacles to settlement bargaining. A different set of problems concerns the accuracy of settlements that are reached. Inaccuracy can result either from lack of information on the part of one or both parties or from differences in stakes, sophistication, or resources.

1. Information

As noted above, information problems can prevent settlement altogether in cases where optimism by one or both parties swamps out the benefits of avoiding litigation

⁶⁴ With a common focal point in place framing ought to encourage rather than discourage settlements because the parties, being risk-averse with respect to losses, will find it mutually advantageous to agree to a settlement close to the value suggested by the court's opinion.

⁶⁵ Julie MacFarlane, *Why Do People Settle?*, 46 *McGill L.J.* 663, 698 (2001) (noting that procedural fairness might be more important to litigants than distributive justice); John Thibaut et al, *Procedural Justice as Fairness*, 26 *Stan. L. Rev.* 1271 (1974); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 *L. & Soc. Rev.* 51 (1984).

costs. Even if settlement occurs, however, information problems can still affect the result. If either party is unduly pessimistic about his chances, for example, he may be willing to settle the case for an inaccurate amount (too much if the pessimistic party is the defendant or too little if the pessimistic party is the plaintiff). Conversely, if either party is unduly optimistic, he may be able to obtain more in settlement than he could get from a trial because his optimism induces bargaining strategies which capture the lion's share of the gains.

The preliminary judgment procedure would tend to correct for these problems by better informing the parties about the value of the litigation. The unduly pessimistic party would discover that the court thinks his prospects are better than he believed them to be. In consequence he would abandon his pessimistic stance for a more realistic one and bargain harder for outcomes close to the results that would be expected at trial. The unduly optimistic party, disappointed by the court's ruling, would need to reassess his bargaining strategy, and perhaps drop his demand for outcomes that give him far more of a benefit than could be justified by the likely litigation outcome. Even if he does not adjust his demands, his counterparty will be less likely to accede to them in the wake of the preliminary judgment ruling. Overall, therefore, the preliminary judgment would tend to correct for information problems that skew the results of settlement bargaining even when they do not prevent settlements altogether.

2. Nuisance Settlements

A common view, at least in some quarters, is that American litigation is plagued by frivolous lawsuits brought solely to extract a settlement offer.⁶⁶ Although there is

⁶⁶ See, e.g., Lance P. McMillian, The Nuisance Settlement "Problem": The Elusive Truth and a

little evidence that “nuisance” lawsuits are actually a plague on the system,⁶⁷ it is plausible to infer that such cases do in fact occur from time to time given the uncertainty implicit in litigation⁶⁸ and the fact that it is cheap for the plaintiff to file a complaint⁶⁹ but expensive for defendants to comply with discovery demands.⁷⁰ Certainly frivolous litigation should be considered to be a problem if judged by the volume and complexity of efforts that have been made to prevent it.⁷¹

Preliminary judgments could help counteract nuisance suits. By providing a credible analysis that the case lacks value, a preliminary judgment in a nuisance suit would belie the plaintiff’s posturing that the case is meritorious. Because preliminary judgments can be sought early in the litigation, the key threat point of nuisance litigation – the huge discovery costs that the defendant will have to undergo in order to rid itself of the case – can be substantially undermined. Preliminary judgments, moreover, would

Clarifying Proposal, 31 *American Journal of Trial Advocacy* 221, 221 (2007) (characterizing popular view); Randy J. Kozel & David Rosenberg, Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment, 90 *Virginia Law Review* 1849, 1850 n.1 (2004) (“The problem of litigation aimed at obtaining a nuisance-value settlement has long concerned legal policymakers and analysts, though seemingly never more so than in recent years.”). Models of nuisance suits are provided in Robert G. Bone, Modeling Frivolous Suits, 145 *University of Pennsylvania Law Review* 519 (1997); Lucian Arye Bebchuk, Suing Solely to Extract a Settlement Offer, 17 *Journal of Legal Studies* 437 (1988).

⁶⁷ See, e.g., Lance P. McMillian, The Nuisance Settlement “Problem”: The Elusive Truth and a Clarifying Proposal, 31 *American Journal of Trial Advocacy* 221 (2007).

⁶⁸ See Joseph A. Grundfest & Peter H. Huang, The Unexpected Value of Litigation: A Real Options Perspective, 58 *Stanford Law Review* 1267, 1276-77 (2006) (explaining the credibility of nuisance lawsuits as a function of the large variance of information revealed during litigation).

⁶⁹ Under federal notice pleading, the plaintiff merely needs to provide a “short and plain statement of the claim showing the pleader is entitled to relief.” Fed. R. Civ. Pro. 8(a)(2).

⁷⁰ See, e.g., John K. Setear, The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse, 69 *Boston University Law Review* 569 (1989).

⁷¹ These include procedures for dismissal of complaints at the pleading stage or on summary judgment, Fed. R. Civ. P. 12(b), 56; sanctions for frivolous litigation, Fed. R. Civ. P. 11; awards of attorneys fees against offending parties, see *Alyeska Pipeline Services Co. v. Wilderness Society*, 421 U. S. 240, 258-59 (1975) (describing inherent judicial power to award attorneys fees as a sanction for bad-faith litigation tactics); and creative suggestions from academic commentators, see Randy J. Kozel & David Rosenberg, Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment, 90 *Virginia Law Review* 1849, 1853 (2004) (proposing non-enforcement of settlements before relevant claims and defenses are subject to summary judgment review); David Rosenberg & Steven Shavell, A Solution to the Problem of Nuisance Suits: The Option to Have the Court Bar Settlement, 26 *International Review of Law & Economics* 42, 42 (2006) (suggesting the defendants be allowed to make binding pre-commitments not to settle nuisance suits).

place the plaintiff and plaintiff's attorney on notice that the court considers the case to lack merit and therefore would warn them of the potential for sanctions if they persist. Preliminary judgments would also have a potentially beneficial shaming effect. If enough such judgments are rendered against an attorney or his client, defendants could bring to the attention of a future court the fact that these parties have a penchant for frivolous litigation.

Overall, preliminary judgments would not eliminate nuisance litigation. The plaintiff or plaintiff's counsel could still tough it out, object to the judgment, and continue the litigation as if nothing had transpired. Nonetheless, preliminary judgments could, as a practical matter, make it less likely that such cases would be brought.

3. Class Certification

It is often asserted that the certification of a class can, in and of itself, coerce defendants to settle in order to avoid potentially devastating liability,⁷² even though, in other circumstances, they would defend against weak substantive claims.⁷³ Evidence for this claim is found in reports that securities class action settlements are often unrelated to the merits of the substantive claim.⁷⁴ The certification of the class, these studies suggest,

⁷² See, e.g., *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (“Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.”).

⁷³ See, e.g., *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995). The risk of overwhelming liability exposure was one reason for the adoption of Rule 23(f), authorizing discretionary appeals from grants or denials of class certification. See *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). For discussion of the merits of the argument that certification compels defendants to settle, see Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-wide Arbitration and CAFA*, 106 *Columbia Law Review* 1872, 1879-95 (2006); Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 *New York University Law Review* 1357 (2003) (critiquing the analysis in *Rhone-Poulenc*); Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 *Notre Dame Law Review* 1377 (2000) (criticizing *Rhone-Poulenc*).

⁷⁴ Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 *Stanford Law Review* 497 (1991). Alexander’s study has been criticized as well as defended by later work. See, e.g., Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How*

changes the stakes of the litigation by exposing the defendant to much greater risk, resulting in the need to settle regardless of the underlying merits.⁷⁵

Preliminary judgments could address these concerns. A party defending against a certified class could test his belief that the allegations in the complaint are unsubstantiated by seeking a preliminary judgment on liability, damages, or both. If the court agrees with the defendant's reasoning, the coercive effect of the class certification would be substantially mitigated because the anticipated damages would be discounted by a more confident assessment of the plaintiffs' case. On the other hand, if the court rules for the plaintiff, the economic pressure on the defendant to settle would be heightened. But this fact should not be a cause for concern. If the case is meritorious, the values of deterrence and compensation are served if the defendant is required to assume responsibility for the harms caused.⁷⁶

The preliminary judgment could therefore protect defendants against perceived

Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 Yale Law Journal 2053, 2080-84 (1995) (criticizing claim that merits do not matter in securities class action cases); Joel Seligman, *The Merits Do Matter*, 108 Harvard Law Review 438, 448-455 (1994) (same); Tom Baker and Sean J. Griffith, *How the Merits Matter: D&O Insurance and Securities Settlements*, available at SSRN: <http://ssrn.com/abstract=1101068> (concluding that while the merits are considered by liability insurers when evaluating settlement offers in securities cases, non-merits considerations are also important). Much of the contemporary debate focuses on whether the Private Securities Litigation Reform Act, enacted in part to address concerns identified in Alexander's article, has successfully weeded out frivolous suits without also excluding meritorious ones. See Stephen J. Choi, *Do The Merits Matter Less After The Private Securities Litigation Reform Act?*, 23 Journal of Law, Economics, & Organization 598 (2007) (finding evidence that meritorious suits have been weeded out).

⁷⁵ Class certification is not the only context in which differential stakes might distort settlement bargaining. Any time the defendant is subject to the risk of repetitive litigation, the defendant's stakes are likely to exceed those of the plaintiff. Defendants in such cases are exposed to the risk that an unfavorable judgment will induce many more plaintiffs with similar cases to file suit. The problem is exacerbated if the defendant faces a risk of offensive non-mutual collateral estoppel, under which he may be precluded from contesting the findings essential to a judgment against him in an earlier case. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331-32 (1979) (endorsing the use of offensive non-mutual collateral in federal court).

⁷⁶ See *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 145 (2d Cir. 2001), *overruled on other grounds by In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006) ("The effect of certification on parties' leverage in settlement negotiations is a fact of life for class action litigants. While the sheer size of the class in this case may enhance this effect, this alone cannot defeat an otherwise proper certification.").

threats of extortionate settlements due to the magnifying effect of class certification. In addition to being beneficial in its own right, this effect could improve the transparency and fairness of class action procedures by reducing the pressure that judges might otherwise feel to dispose of weak cases by denying class certification even when the plaintiff has set forth a plausible case that the elements of the class action rule have been satisfied.⁷⁷

4. Differential Resources

A commonly heard charge against American litigation is that parties with superior resources and sophistication achieve better results than parties with lower endowments or experience.⁷⁸ Usually these endowment and experience effects separate between plaintiffs and defendants: plaintiffs are more often individuals who lack resources and are inexperienced in litigation while defendants are often organizations with good insurance coverage and considerable sophistication in litigation.⁷⁹

Settlement of litigation, in and of itself, might be seen as a method for redressing the advantages enjoyed by the better-endowed or more experienced party because it avoids costs that the poorer party may be ill-equipped to afford. However, the more sophisticated and better endowed party probably enjoys advantages in settlement negotiations similar to those he possesses in litigation. Moreover, because settlements anticipate the expected judgment at trial, whatever advantages a party would have at trial implicitly transfer over to the settlement context. Owen Fiss, among others, objects to

⁷⁷ Rhone-Poulenc is the poster child here. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995).

⁷⁸ The canonical citation is Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Society Review* 95 (1974).

⁷⁹ See Gillian Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 *Stanford Law Review* 1275, 1322 (2005) (empirical study of federal court litigation).

settlements on these grounds, arguing that settlements are too often skewed in favor of wealthier litigants.⁸⁰

Preliminary judgments would help address the imbalances noted by critics of the settlement process.⁸¹ It is true that people with better resources or more sophistication could prepare more effective preliminary judgment motions, provide better information to the court and make better-crafted arguments. To this extent the advantages enjoyed by wealthier litigants would apply in preliminary judgment motions as in other contexts. However, in certain respects the preliminary judgment process would mitigate the advantages of wealth. The preliminary judgment would interject into the process a decision-maker whose expertise and impartiality can offset, to some extent, differences in wealth or experience.⁸² Moreover, the preliminary judgment could occur early in the litigation, thus reducing the risk that a litigant would be cowed into submission by a wealthier opponent's scorched-earth strategy.

C. Transparency

Critics of settlement object to the non-transparency of the process.⁸³ A principal concern, in this regard, is that settlements do not generate judicial opinions that can serve to guide future conduct.⁸⁴ Precedent is a public good that will be supplied in insufficient

⁸⁰ See Owen Fiss, *Against Settlement*, 93 *Yale Law Journal* 1073, 1076-78 (1984); *Settling for Less: Applying Law and Economics to Poor People*, Note, 107 *Harvard Law Review* 442, 444-51 (1993).

⁸¹ See Owen Fiss, *Against Settlement*, 93 *Yale Law Journal* 1073, 1076 (1984) (“[T]he poorer party may be less able to amass and analyze the information needed to predict the outcome of the litigation, and thus be disadvantaged in the bargaining process.”).

⁸² See Owen Fiss, *Against Settlement*, 93 *Yale Law Journal* 1073, 1077 (1984) (explaining how the judge can lesson distributional inequities by “asking questions, calling his own witnesses, and inviting other persons and institutions to participate as amici”).

⁸³ See Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 *North Carolina Law Review* 927, 927 (2006) (“Invisibility [of settlement terms] defeats the intent of the discrimination statutes; skews empirical studies of discrimination litigation . . . ; and hampers lawyers’ ability to counsel and negotiate on behalf of discrimination claimants.”).

⁸⁴ See, e.g., Owen Fiss, *Against Settlement*, 93 *Yale Law Journal* 1073, 1085 (1984) (“[Settlements]

quantities unless people pay for the benefits received.⁸⁵ In the context of litigation, one form of payment for precedents is the generation of new precedents.⁸⁶ A settlement that fails to generate precedents for the future can thus be seen as expropriating some of the public value of existing precedent for the parties' private benefit.⁸⁷ The result, overall, can be harmful to society. Without an adequate stock of precedents on hand, people will have less information on which to base their primary conduct; and if a dispute arises, will have less ability to settle their conflict.⁸⁸

These problems would be less severe if the settlement were a matter of public record.⁸⁹ Since compromises occur in the "shadow of the law,"⁹⁰ the terms of the settlement may provide useful information for future conduct. But, outside specialized contexts such as class action or derivative litigation, where settlements are subjected to judicial scrutiny in public proceedings,⁹¹ private litigation settlements are rarely public.⁹²

deprive a court of the occasion, and perhaps even the ability, to render an interpretation.").

⁸⁵ Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 *J. Legal Stud.* 307, 338 n.86 (1994); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 *J. Legal Stud.* 235, 261 (1979).

⁸⁶ See Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 *Journal of Legal Studies* 627, 642 (1993). Litigation may serve other public values as well. See Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment On Macey*, 23 *Journal of Legal Studies* 647, 650 (1994).

⁸⁷ See Marc Galanter, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 *Stan. L. Rev.* 1339, 1387 (1994); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 *Notre Dame L. Rev.* 221, 256 (1999); Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 *Ohio State Journal on Dispute Resolution* 241, 246 (1996).

⁸⁸ See Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 *Ohio St. J. on Disp. Resol.* 241, 248-50 (1996).

⁸⁹ See Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 *Chicago-Kent Law Review* 521 (2006) (arguing for enhanced public disclosure of out-of-court settlements).

⁹⁰ The well-worn phrase is from Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *Yale Law Journal* 950 (1979).

⁹¹ For investigations of class action settlements, see, e.g., Theodore Eisenberg & Geoffrey Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 *UCLA Law Review* 1303 (2006); James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 *Stanford Law Review* 411 (2005); Theodore Eisenberg & Geoffrey Miller, *Attorneys' Fees*

And it is common for settlement agreements to include confidentiality provisions prohibiting disclosure of the settlement terms.⁹³ The rationale for these clauses is obvious: they do not harm the plaintiff and they benefit defendants by shielding information that could be useful to potential plaintiffs in future cases. Despite these private benefits, confidentiality agreements prevent settlements from being used to guide decisions by third parties in future cases.⁹⁴

Preliminary judgments would not eliminate the tradeoff between the value of confidentiality in inducing settlements and the costs of confidentiality in masking valuable information. But they would provide a mechanism under which that tradeoff could be made in a more optimal way. At present there is no downside to the parties from including confidentiality clauses in their settlement agreements, so such clauses are routinely observed. The preliminary judgment would change that calculus. By submitting to a public preliminary judgment, the parties obtain the benefit of enhanced

in Class Action Settlements: An Empirical Study, 1 *Journal of Empirical Legal Studies* 27 (2004); Theodore Eisenberg & Geoffrey Miller, The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues, 57 *Vanderbilt Law Review* 1529 (2004); Eric Helland & Alexander Tabarrok, Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets, 19 *Journal of Law Economics & Organization* 517 (2003).

⁹² Traditionally settlements have not been reported, although information on some categories of settlements is now available. See, e.g., Kathryn Zeiler, Charles Silver, Bernard Black, David A. Hyman & William M. Sage, Physicians' Insurance Limits and Malpractice Payments: Evidence From Texas Closed Claims, 1990-2003, 36 *Journal of Legal Studies* S9 (2007) (reporting on closed claim data base for Texas malpractice insurers).

⁹³ See Blanca Fromm, Comment, Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality, 48 *UCLA Law Review* 663, 675-76 (2001); Scott Moss, Illuminating Secrecy: A New Economic Analysis of Confidential Settlements, 105 *Michigan Law Review* 867, 869-70 (2007); Minna J. Kotkin, Invisible Settlements, Invisible Discrimination, 84 *North Carolina Law Review* 927, 929 (2006) (confidentiality agreements "have become the norm" in employment discrimination cases).

⁹⁴ See Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 *Harvard Law Review* 427, 485 (1991) ("[C]onfidentiality ensures that the settlement amount will not be used to encourage the commencement of other lawsuits that never would have been brought"); Christopher R. Drahozal & Laura J. Hines, Secret Settlement Restrictions and Unintended Consequences, 54 *University of Kansas Law Review* 1457, 1458-59 (2006) ("The defendant has an incentive to settle secretly because it does not want information about the dispute to be publicized. The early claimant has an incentive to settle secretly because it can extract a higher settlement payment from the defendant to keep the dispute secret.").

settlement prospects, but must pay the price of disclosing information about their case which can be embodied in a public ruling and used to guide future conduct.⁹⁵ If the harm from the disclosures anticipated in a preliminary judgment is outweighed by the benefit expected from enhanced settlement prospects, the parties, other things being equal, could be expected to utilize the procedure. On the other hand, if the matter is extremely sensitive the parties could refrain from using the procedure and seek to settle the matter without the benefit of the additional information that a preliminary judgment could provide. Overall, preliminary judgments could increase the supply of information available to guide litigants in future cases.

D. Legitimacy

Another objection to settlement is that it deprives people of their “day in court” and thus frustrates expectations of receiving a respectful and attentive official evaluation of grievances.⁹⁶ This disappointment in itself is a cost of settlement. Moreover, people are more likely to accept a resolution of their disputes if they perceive it as having been reached through procedures they experience as fair,⁹⁷ and perceive greater legitimacy to written as opposed to oral decisions.⁹⁸ These psychological factors suggest that settlements may be less durable than litigated judgments because they will command a lower level of acceptance from the affected parties.

⁹⁵ Although preliminary judgments would not have precedential effect, they could still disclose valuable information about how the courts analyze legal and factual issues.

⁹⁶ See, e.g., E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 *Law & Society Review* 953, 953 (1990) (personal injury litigants reported experiencing trial and arbitration procedures as fairer than settlement, apparently because they believed that trials and arbitration hearings gave their case more respectful treatment).

⁹⁷ See Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 *Law and Social Inquiry* 473, 477 (2008).

⁹⁸ See Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 *Georgetown Law Journal* 1283, 1336-1339 (2008) (written opinions help to foster the “public perception that courts are addressing conflicts in an appropriate manner”).

The preliminary judgment could address this downside of settlement. Because it would be rendered only after the parties have had an opportunity to submit evidence and make arguments to the court, each litigant has reason to believe that its side of the story has been heard.⁹⁹ The preliminary judgment opinion, evidencing the court’s careful, written analysis, would represent the sort of respectful treatment that tends to generate acceptance by the affected parties.¹⁰⁰ Although the losing party would still be disappointed, the pain of defeat could be tempered by knowledge that the loss came after a fair process. Moreover, the presence of a tangible document displaying the product of deliberation by an impartial arbiter could materially assist the losing party’s adjustment to the unwanted result, thus enhancing the acceptability and durability of the resolution.¹⁰¹

III. Advantages of Preliminary Judgments over other Procedures

This section evaluates the preliminary judgment procedure in comparison with methods currently used to inform the parties of a judge’s provisional assessment of the merits. At the outset, we may note that the large array of such procedures illustrates that preliminary judgments are not alien to American law. Indeed courts are required to make preliminary judgments all the time.¹⁰² The difference between existing procedures and

⁹⁹ See Brian H. Bornstein & Susan Poser, Perceptions of Procedural and Distributive Justice in The September 11th Victim Compensation Fund, 17 Cornell Journal of Law and Public Policy 75, 82 (2007) (“[P]rocedural fairness is enhanced by giving disputants an opportunity to voice their side of the story.”).

¹⁰⁰ See, e.g., Tom R. Tyler & Robert J. Bies, Beyond Formal Procedures: The Interpersonal Context of Procedural Justice, in Applied Social Psychology and Organizational Settings 77 (John S. Carroll, ed., 1990).

¹⁰¹ See Leslie Gielow Jacobs, Even More Honest than Ever Before: Abandoning Pretense and Recreating Legitimacy in Constitutional Interpretation, 1995 U. Ill. L. Rev. 363, 384 (1995); Chad M. Oldfather, Writing, Cognition, and the Nature of the Judicial Function, 96 Georgetown Law Journal 1283, 1336-38 (2008) (“By providing a reasoned explanation for its decision, a court will, at a minimum, give the parties a basis for concluding that, whether they won or lost, each side received an appropriate hearing of their grievances.”).

¹⁰² In at least one context – patent claim construction – federal courts engage in a procedure with close similarities to the one proposed here – the *Markman* hearing in patent cases. A *Markman* hearing, named after a leading Supreme Court case, *Markman v. Westview Instruments*, 415 U.S. 370 (1996), is a procedure under which a court construes a patent claim in the context of litigation over infringement or

the one recommended here is that preliminary judgments would be more direct, informative, and reliable than other methods.

A. Dispositive Pretrial Motions

Dispositive pretrial motions facilitate settlements by disclosing a court's preliminary views on the merits in the event the motion is denied or granted only in part.¹⁰³ In this respect dispositive pretrial motions have points of similarity as well as contrast with the proposed preliminary judgment procedure.¹⁰⁴

1. Lack of Jurisdiction

Courts sometimes undertake a preliminary inquiry into the merits when deciding motions to dismiss for lack of jurisdiction.¹⁰⁵ In challenges to personal jurisdiction, for example, the court may need to investigate the defendant's business practices in order to identify his minimum contacts with the state.¹⁰⁶ A similar review may be needed in order to assess whether the defendant committed a "tortious act" in the state under the terms of a long-arm statute.¹⁰⁷ Similarly, the court may need to inquire into a variety of merits-

validity of patent rights. Many courts issues "tentative" rulings prior to holding the *Markman* hearing on claim construction. This strategy informs the parties about the issues that the court considers most important, and thus effectively channels the parties' presentation of the background science and other evidence. The procedure also allows the judge to "confirm [his or her] understanding of the record and the governing authorities in a direct dialogue with the attorneys" and to "clear up any misperceptions that might otherwise result in reversible error." Peter S. Menell et al., Patent Case Management Judicial Guide ¶ 5.1.4.5 (draft of September 16, 2008) (on file with the author). I thank Rochelle Dreyfuss for bringing this parallel to my attention.

¹⁰³ Although the parties could settle pending proceedings challenging the grant of the motion, such as appeals or motions to reconsider.

¹⁰⁴ For a wholesale attack on dispositive pretrial rulings, on the ground they exceed the constitutional authority of courts, see Suja Thomas, The Fallacy of Dispositive Procedure, 50 Boston College Law Review __ (forthcoming 2009).

¹⁰⁵ See generally Lonny Sheinkopf Hoffman, Burdens of Jurisdictional Proof, 59 Alabama Law Review 409, 441 (2008); Kevin Clermont, Jurisdictional Fact, 91 Cornell Law Review 973 (2006). The court's analysis of these motions will often involve review of evidence beyond the pleadings. See, e.g., *Patterson v. FBI*, 893 F.2d 595, 603-04 (3d Cir. 1990) (once the defendant has raised the defense of lack of personal jurisdiction, the plaintiff "must respond with actual proofs, not mere allegations").

¹⁰⁶ See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108-16 (1987); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹⁰⁷ See *Nelson v. Miller*, 143 N.E.2d 673, 675, 682 (Ill. 1957), *abrogated by Nelson v. Miller*, 86

related issues when deciding challenges to subject matter jurisdiction.¹⁰⁸ The merits may be relevant, for example, to an analysis of whether the plaintiff has satisfied the amount-in-controversy requirement under the federal diversity jurisdiction.¹⁰⁹ Or the court may need to evaluate whether the plaintiff has set forth a federal claim substantial enough to invoke federal question jurisdiction – again a merits-related inquiry.¹¹⁰

Cases involving proof of jurisdictional fact create opportunities for courts to communicate merits-related information to the parties. But the value of this information is limited. First, there must actually be a dispute on an issue of jurisdiction. Second, the overlap between the matters relevant to jurisdiction and those relevant to the merits will usually be very partial, limiting the value of any information that is disclosed.¹¹¹ Third, the court usually decides questions of jurisdiction early in the litigation, at a time when neither the court nor the parties have much information about the case (although lack of subject matter jurisdiction can be raised at any time).¹¹² Finally, the standard for proof of jurisdictional fact is less demanding than the standard for contested issues at trial, so the court’s evaluation of the relevant evidence may not provide accurate information about how that evidence would be adjudicated by the trier of fact.¹¹³

Ill.2d 431 (1981) (interpreting requirement of jurisdictional proof under “tortious act” long-arm statute); *Wyatt v. Kaplan*, 686 F.2d 276, 280 (5th Cir. 1982) (“the jurisdictional question involves some of the same issues as the merits of the case”).

¹⁰⁸ The party asserting subject matter jurisdiction has the burden of establishing its existence. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

¹⁰⁹ See 12 U.S.C. § 1332(a).

¹¹⁰ See *Bell v. Hood*, 327 U.S. 678, 682-683 (1946) (complaint invoking federal subject matter jurisdiction may be dismissed on jurisdictional grounds if the federal claim is found to be “wholly insubstantial and frivolous”).

¹¹¹ The Supreme Court has indicated, in this regard, that it intends to limit the overlap between jurisdiction and the substantive merits, in federal question cases, to the analysis of whether the federal claim is frivolous or pretextual. See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006) (requirement that employers have a certain number of employees in order to be subject to Title VII held not to be jurisdictional in nature, and thus could not be raised at any time in the litigation).

¹¹² See Fed. R. Civ. P. 12(b)(1)-(2), (h)(3).

¹¹³ See Kevin Clermont, *Jurisdictional Fact*, 91 *Cornell Law Review* 973, 978 (2006) (courts require

2. Failure to State a Claim

Rulings on motions to dismiss for failure to state a claim test the plaintiff's theory of the case. They inform the parties of the court's view as to whether the plaintiff would prevail if the allegations in the complaint are proved at trial. In contrast with rulings on jurisdictional challenges, where the merits issues are often only tangentially implicated, the questions addressed on motion to dismiss for failure to state a claim directly overlap the issues to be adjudicated at trial. Thus when a court denies a motion to dismiss for failing to state a claim, the effect is to provide information to the parties regarding the litigation value of the case: they know that in the judge's opinion the allegations in the complaint are sufficient such that, if proven at trial, they would entitle the plaintiff to relief. The parties, knowing this information, can adjust their assessments of case value accordingly.

Nevertheless, the value of the information so obtained is severely limited. First, the court accepts as true the facts alleged in the complaint.¹¹⁴ There is no opportunity to assess whether the plaintiff will be able to establish his case at trial. Second, the conventional understanding has been that the plaintiff need only provide information sufficient to place the defendant on notice as to the essential nature of the claim.¹¹⁵ These rules, taken in tandem, imply that only a relatively small amount of information can be learned from the denial of motions to dismiss for failure to state a claim. The motion for preliminary judgment would obviously provide significantly greater information to the

only prima facie showing of jurisdictional facts that overlap the merits).

¹¹⁴ See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *overruled by* *Bell Atlantic Corp v. Twombly*, 127 S. Ct. 1955 (2007).

¹¹⁵ See *id.* at 47-48 (1957) (“The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”).

parties than that which can be gleaned from the fact the court denied a motion to dismiss for failure to state a claim.

But the liberal approach to notice pleading is not always observed. Federal Rule 9(b) and its state counterparts require plaintiffs to allege with “particularity” the circumstances constituting fraud and mistake.¹¹⁶ The Private Securities Litigation Reform Act sets forth an even stricter standard: as interpreted in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*¹¹⁷ a securities fraud complaint will survive a motion to dismiss only if a reasonable person would deem the inference of culpable state of mind “cogent and at least as compelling as any opposing inference one could draw from the facts alleged.”¹¹⁸ Even outside the contexts of fraud and mistake, moreover, the trend is away from the most liberal interpretations of notice pleading.¹¹⁹ In *Bell Atlantic Corp. v. Twombly*,¹²⁰ the Supreme Court endorsed stepped-up pleading requirements¹²¹ by requiring that the allegations create a “plausible” inference of a legal violation.¹²²

Heightened pleading standards provide greater information to the parties about the merits of the case. Under *Twombly*, for example, the denial of a motion to dismiss would indicate that the facts alleged establish a plausible inference of liability – highly pertinent information for the litigants. Under *Tellabs*, similarly, denial of a motion to dismiss

¹¹⁶ Fed. R. Civ. Pro. 9(b).

¹¹⁷ 127 S.Ct. 2499 (2007).

¹¹⁸ *Id.* at 2510. For analysis of this standard, see Geoffrey P. Miller, Pleading after *Tellabs*, NYU Law and Economics Research Paper No. 08-16, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121396.

¹¹⁹ See Christopher M. Fairman, The Myth of Notice Pleading, 45 *Arizona Law Review* 987 (2003); Christopher M. Fairman, Heightened Pleading, 81 *Texas Law Review* 553 (2002).

¹²⁰ 127 S. Ct. 1955 (2007).

¹²¹ See Kevin M. Clermont, Litigation Realities Redux, Cornell Law School Research Paper No. 08-006, at 11, available at <http://ssrn.com/abstract=1112274> (characterizing *Twombly* as the Court’s “first unmistakable step backward from the modern conception of notice pleading”).

¹²² *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). Earlier attempts to enhance pleading requirements in federal courts had been unavailing. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

would imply that the inferences of wrongful mental state that can be drawn from the complaint are at least as compelling as any competing inferences of benign motivations.¹²³ Again, this information would be of great interest to the competing parties, and could potentially be a basis for settlement negotiations.

Even under heightened pleading standards, denials of motions to dismiss will provide less information than could be obtained from a ruling on a motion for preliminary judgment. The court under heightened pleading is still required to take as true the allegations in the complaint, and thus cannot assess whether the allegations are true.¹²⁴ Moreover, even under heightened pleading, the court does not decide on the basis of trial-type burdens of proof. *Twombly*, for example, requires only that the inference of liability be “plausible” – leaving open a wide area in which the facts alleged, even if proved at trial, might nevertheless result in a verdict for the defendant.¹²⁵ On motion for preliminary judgment, in contrast, the court would apply the same burden of proof as would be applicable at trial.

Heightened pleading, moreover, is not cost-free. As pleading standards become more rigorous, the plaintiff must invest more resources in order to obtain information necessary to avoid a motion to dismiss. Often, this information could be obtained more cheaply from the defendant during discovery: for example, the plaintiff may need to hire private investigators to ferret out information that could easily be obtained from the

¹²³ Suppose, for example, that the court concludes that the particularized pleading requirement is satisfied by averments that the defendant sold the issuer’s stock at the time he was making false statements to the market. This conclusion, while it does not formally address any merits issue, still provides valuable information that the parties can process in considering the value of the claim for settlement purposes. See, e.g., *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1228-29, 1235 (9th Cir. 2004) (court reverses earlier dismissal partly because CEO and CFO sold very large share blocks for significant profits at the time excessively optimistic statements about the company were made).

¹²⁴ E.g., *Adlridge v. A.T. Cross Corp.*, 284 F.3d 72, 78 (1st Cir. 2002); *Helwig v. Vencor, Inc.*, 251 F.3d 540, 553 (2001); *Chu v. Sabratek Corp.*, 100 F. Supp.2d 815, 820 (N.D. Ill. 2000).

¹²⁵ *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007).

defendant's files in response to a request to produce documents.¹²⁶ Heightened pleading may thus create inefficiency and discourage the filing of legitimate complaints. Even if cases are filed, heightened pleading increases the probability of erroneous dismissals of valid claims.¹²⁷ As pleading standards become more rigorous, moreover, the line between interpreting the complaint and finding facts becomes attenuated, thus creating concern that dismissals will interfere with the guarantee of trial by jury.¹²⁸ Finally, heightened pleading affords greater opportunities for judges to reject cases on improper grounds such as dislike for the litigants or disapproval of the applicable law.¹²⁹

Preliminary judgments would address some of the concerns that underlie heightened pleading. They would deter frivolous claims and mitigate the settlement pressures of class certification, for example.¹³⁰ But preliminary judgments would accomplish these results at a lower cost. They would not require the plaintiff to undertake expensive preliminary investigations. And because the losing party can nullify a preliminary judgment by filing a timely objection, preliminary judgments would not entail significant costs of judicial error, interference with the right to trial by jury, or process manipulation by judges.

3. Summary Judgment

Denials of summary judgment motions can enhance settlement bargaining by

¹²⁶ This is, in fact, a common practice under the PSLRA. Geoffrey Miller, *Pleading After Tellabs*, NYU Law and Economics Research Paper No. 08-16, at 17, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121396.

¹²⁷ Robert G. Bone: *The Economics of Civil Procedure* 155 (2003); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 *J. Legal Stud.* 399, 437 (1973); see Hillary A. Sale, *Judging Heuristics*, 35 *U.C. Davis L. Rev.* 903, 950-51 (2002).

¹²⁸ See Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 *Minn. L. Rev.* 1851 (2008).

¹²⁹ See *The Supreme Court, 2006 Term—Leading Cases*, 121 *Harv. L. Rev.* 305, 314.

¹³⁰ See text accompanying notes 66-75, *supra*.

providing the parties with credible information about case value.¹³¹ Suppose, for example, that the court denies the plaintiff's motion for partial summary judgment on liability. In the wake of such a ruling a plaintiff who hoped to avoid trial on liability no longer has that expectation, and thus will adjust his estimate of litigation value downwards. The defendant will also adjust his expectations downward, but less than the plaintiff because the defendant, being optimistic about his chances, did not expect to lose the motion. The result could be that settlements are possible after summary judgment even though they were not possible before.

Conversely, suppose the court denies a partial summary judgment sought by the defendant – for example, refusing to dismiss claims for treble damages. Now both the plaintiff and the defendant would adjust their estimates of case value upward, with the defendant adjusting more because of his prior optimism. Again, partial summary judgments could enable settlements which would not have been possible in the absence of the procedure.

Despite these beneficial effects, the efficacy of denials of summary judgments as settlement-enhancing devices is limited by the nature of the judicial inquiry. The court is permitted to grant summary judgment only if there is no genuine issue of material fact as to a claim or defense – that is, only if a reasonable jury could not find against the moving party.¹³² To defeat summary judgment, therefore, the non-moving party merely needs to supply the court with a basis sufficient to support the conclusion that a reasonable jury

¹³¹ Cf. Jonathan Molot, *An Old Judicial Role for a New Litigation Era*, 113 *Yale Law Journal* 27, 91 (2003) (summary judgments can be a means for “educating” parties about the merits).

¹³² See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (judge’s inquiry on motion for summary judgment “asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict . . .”).

could rule in his favor. This is not a demanding standard.¹³³ In consequence, while denial of summary judgment does provide information pertinent to settlement, the signal is masked by the fact that the standards for summary judgment and judgment at trial do not overlap.¹³⁴

Empirical evidence suggests that standard for summary judgment may have become more relaxed over time, in the sense that courts are much more willing to grant motions for summary judgment today than in years past.¹³⁵ This relaxation, if real, would enhance the settlement value of summary judgment denials. Denials of summary judgment under relaxed summary judgment standards signal that the non-moving party's claim or defense is reasonably substantial, giving the parties more information on which the base settlement bargaining. Relaxed summary judgment practices thus move summary judgment practice closer to the preliminary judgment idea proposed in this article.

Even relaxed summary judgment standards, however, would supply less

¹³³ See Jonathan Molot, *An Old Judicial Role for a New Litigation Era*, 113 *Yale Law Journal* 27, 45-46 (2003) ("The summary judgment mechanism is capable of terminating only the meritless case. In the vast majority of cases where some factual dispute remains, the summary judgment mechanism is significantly less valuable.").

¹³⁴ Suppose, for example, that the court denies the defendant's motion for summary judgment on liability. Although, as noted, the parties can learn much from this decision, a wide range of inferences as to case value remains open. Observing the denial of summary judgment, the plaintiff may conclude, optimistically, that the case is very strong and the jury is highly likely to rule in his favor at trial. The defendant, observing the same ruling, can conclude, equally optimistically although in the opposite direction, that although a reasonable jury might render a verdict for the plaintiff, the large majority of juries would conclude that liability had not been established. Given these mutually optimistic assessments, the parties may be unable to reach a settlement despite the information that can be gleaned from the summary judgment ruling.

¹³⁵ Dispositions through summary judgment have greatly increased in recent years. See, e.g., Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 *Marquette Law Review* 141, 144 (2000) (finding that summary judgments were much more common in the late 1990s than in the early 1970s); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 *Journal of Empirical Legal Studies* 591 (2004) (documenting enhanced importance of summary judgments as case disposition devices); Arthur R. Miller, *The Pretrial Rush To Judgment: Are the "Litigation Explosion," "Liability Crisis," And Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 *New York University Law Review* 982, 984 (2003) (aptly characterizing summary judgments the "focal point" of modern litigation).

information than preliminary judgments. If the court denies the motion there will still be plenty of opportunities for settlement-precluding optimism: the plaintiff, for example, may see in the court's denial of the defendant's motion evidence that her case is very strong, while the defendant may conclude only that the plaintiff's case is not so insubstantial as to warrant summary judgment against her. Preliminary judgments, in contrast, provide the parties with the court's reasoned assessment about how the case would be resolved at trial. This information is much more specific and less subject to varying interpretations, and therefore would offer substantial greater value in settlement negotiations.

Preliminary judgments, moreover, would accomplish some of the objectives of relaxed summary judgment standards but at lower cost. Relaxed summary judgment standards appear designed to weed out low probability cases in order to relieve docket pressure, reject frivolous suits, and correct for distortions in settlements resulting from differential party stakes.¹³⁶ Preliminary judgments, for reasons already described, could accomplish some of these same objectives by encouraging settlements and deterring frivolous litigation.¹³⁷ At the same time, because the losing party can avoid the effect of a preliminary judgment by the simple expedient of filing a timely objection, preliminary judgments would avoid costs associated with relaxed summary judgment standards: increased possibility of error,¹³⁸ interference with jury trials,¹³⁹ and inappropriate

¹³⁶ See Arthur R. Miller, *The Pretrial Rush To Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 *New York University Law Review* 982, 1044-45 (2003); William Schwarzer, *Summary Judgment and Case Management*, 56 *Antitrust L.J.* 213, 213-14 (1987).

¹³⁷ See Part II(A), (B)(2), *supra*.

¹³⁸ See, e.g., Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial under the Federal Rules of Civil Procedure*, 50 *University of Pittsburgh Law Review* 725, 739-74 (1989) (addressing accuracy concerns); Patricia M. Wald, *Summary Judgment at Sixty*, 76 *Texas Law Review* 1897, 1941 (1998) ("[S]ummary judgment has spread swiftly through the underbrush of undesirable cases,

dismissal of cases because of docket pressures¹⁴⁰ or other reasons.¹⁴¹

B. Interlocutory Rulings

Non-dispositive pretrial rulings can also provide the parties with the judge's preliminary assessment of case merits.

1. Preliminary Injunctions

Courts provide information about the merits of a case when they rule on motions for preliminary injunction¹⁴² because the standard for granting preliminary relief includes an evaluation of probability of success on the merits.¹⁴³ Merits issues may also be interwoven with the inquiry into irreparable harms associated with granting and denying

taking down some healthy trees as it goes.”).

¹³⁹ See John Bronsteen, *Against Summary Judgment*, 75 *George Washington Law Review* 522, 522, 547-550 (2007) (pointing to “strong evidence” that summary judgment violates the Seventh Amendment right to jury trial); Arthur R. Miller, *The Pretrial Rush To Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 *New York University Law Review* 982, 1077-1134 (2003) (exploring interaction between summary judgment motions and right to jury trial); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 *Virginia Law Review* 139 (2007) (arguing that current standards for summary judgment violate text and purpose of Seventh Amendment jury trial right).

¹⁴⁰ See John Bronsteen, *Against Summary Judgment*, 75 *George Washington Law Review* 522, 541-43 (2007) (docket pressure encourages judges to dismiss cases on summary judgment motions); Arthur R. Miller, *The Pretrial Rush To Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 *New York University Law Review* 982, 1041-42 (2003) (calling for appellate review of summary judgment dispositions in order to prevent their use as an “inappropriate docket-clearing mechanism”).

¹⁴¹ Hidden pro-defendant bias is another possibility, since defendants are the principal beneficiaries of the enhanced use of summary judgments. See Samuel Issacharoff & George Loewenstein, *Second Thoughts about Summary Judgment*, 100 *Yale Law Journal* 73, 92 (1990) (survey of 140 contested summary judgment motions found that 122 were made by defendants and only 18 were made by plaintiffs); Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 *Wake Forest Law Review* 71 (1999) (claiming that judges misuse summary judgment to dismiss hostile work environment claims).

¹⁴² See Fed. R. Civ. Pro. 65 (authorizing federal district courts to issue preliminary injunctions pending trial on the merits). For discussions of the standards for preliminary relief, see Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 *Washington & Lee Law Review* 109 (2001); Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 *University of Chicago Law Review* 197 (2003); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 *Harvard Law Review* 525 (1978). The record reviewed on motion for preliminary injunction is less developed but also broader than the formal record of admissible evidence at trial. See *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (a preliminary injunction is customarily granted on the basis of procedures that are “less formal and evidence that is less complete than in a trial on the merits”).

¹⁴³ E.g., *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

preliminary relief, since the court may be required to evaluate questions going to the damages that would be assessed at trial.¹⁴⁴ Rulings on preliminary injunctions can thus serve some of the function of preliminary judgments – they provide the parties with the court’s tentative evaluation of the likely outcome of the case or part of the case based on the information available at the time of the ruling.¹⁴⁵

But preliminary injunctions are not adequate substitutes for preliminary judgments. First, they are only infrequently available. Where no party can plausibly claim irreparable harm, there is no chance to obtain a preliminary ruling on the merits through the preliminary injunction procedure. Second, preliminary injunctions are sought in exigent circumstances in which the moving party claims that it will suffer irreparable harm if the injunction is not granted. In such circumstances, the court’s review of the merits may not reflect the deliberation needed to convey reliable information to the parties. Finally, the signal as to the strength of the merits claims is likely to be obscured by the interaction between the question of merits relief and other relevant inquiries, such

¹⁴⁴ An example is *Port City Properties v. Union Pacific R. Co.*, 518 F.3d 1186, 1190-91 (10th Cir. 2008). The plaintiff sought a preliminary injunction requiring the defendant railroad to continue serving the track servicing the plaintiff’s warehouse. The appeals court upheld the denial of the preliminary injunction on the ground that the plaintiff had failed to establish irreparable harm if the injunction were denied. The court pointed to testimony that that rail deliveries were only a small part of the warehouse’s business, that loss of those deliveries was not going to cause the company to fail, and that the defendant had made efforts to mitigate the loss of direct deliveries to the warehouse. This testimony, which went to irreparable harm at the preliminary injunction stage, would have been equally relevant to the question of damages if the plaintiff prevailed on his claim of breach of contract.

¹⁴⁵ See, e.g., *Sammartano v. First Judicial District Court*, 303 F.3d 959, 970 (9th Cir. 2002) (appellants established a probability of success on challenge to court rule prohibiting displays of biker gang insignia); *Northwest Airlines v. IAM*, 712 F. Supp. 732, 739 (D. Minn. 1989) (enjoining sympathy strike on the ground that the moving party had a “high probability of success on the merits”); *In re Advanced Marketing Services Inc.*, 360 B.R. 421, 426 (Bankr. D. Del. 2007) (creditor failed to demonstrate probability of success on the merits because the goods in question were subject to senior security interests); *Stratton Group, Ltd. v. Chelsea National Bank*, 54 F.R.D. 227, 228 (S.D.N.Y. 1972) (noting the “paucity of evidence” to support the allegations in the complaint).

This benefit would be lost if the courts adopted the proposal of Professors Brooks and Schwartz that grant or denial of preliminary injunction should be based on moving party’s willingness to post a bond to cover the counterparty’s costs. See Richard R.W. Brooks & Warran Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 *Stanford Law Review* 381, 408 (2005).

as the balance of harms to the parties and the nature of the public interest.¹⁴⁶ Although the complex inquiry required under the summary judgment procedure may sometimes induce courts to provide information as to the strength of the merits claims – by weighing the probability of success against the other factors, for example¹⁴⁷ – in many cases the parties will not know how the various factors pertinent to the motion contributed to the ultimate decision.¹⁴⁸

2. Class Certification

Class certification provides another opportunity for courts to convey information about the merits.¹⁴⁹ It will often be the case that the inquiry into whether the proponent of certification has satisfied the requirements of the class action rule will overlap with merits issues.¹⁵⁰ Suppose, for example, that a securities fraud plaintiff seeks to satisfy the “predominance” requirement of Rule 23(b)(3) through use of a fraud-on-the-market presumption of reliance.¹⁵¹ It is commonly thought that under *Basic v. Levinson* the

¹⁴⁶ See, e.g., *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999) (relevant factors on motion for summary judgment are “(1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.”).

¹⁴⁷ See, e.g., *Blackwelder Furniture Company of Statesville, Inc. v. Seilig Manufacturing Co.*, 550 F.2d 189, 195 (4th Cir. 1977) (“The importance of a probability of success increases as the probability of irreparable injury diminishes . . .”).

¹⁴⁸ The interference with the signal is especially strong in jurisdictions that do not require an explicit balancing between likelihood of success on the merits and other factors. See, e.g., *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300-01 (7th Cir. 1997); *International Kennel Club of Chicago, Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1084 (7th Cir. 1988) (requiring only that the moving party establish that the chance of success on the merits is better than negligible).

¹⁴⁹ The inquiry at class certification is discretionary and can involve examination of materials available at summary judgment, including the pleadings, answers to interrogatories, depositions, representations of counsel, documents as to which the court can take judicial notice, affidavits, and expert witness testimony. See *DeMarco v. Robertson Stephens Inc.*, 228 F.R.D. 468, 470, 474 (S.D.N.Y. 2005) (accepting expert witness testimony on motion for class certification).

¹⁵⁰ See Geoffrey Miller, *Review of the Merits in Class Action Certification*, 33 *Hofstra Law Review* 51 (2004); Robert G. Bone and David S. Evans, *Class Certification and the Substantive Merits*, 51 *Duke Law Journal* 1251 (2002).

¹⁵¹ Fed. R. Civ. P. 26(b)(3) (“A class action maybe be maintained if . . . questions of law or fact common to class members predominate over any questions affecting only individual remembers . . .”).

fraud-on-the-market presumption is available only if the security in question traded in an efficient market.¹⁵² In contested cases, therefore, the plaintiff may be required to establish, at the certification stage, that the market in question possessed the necessary efficiency – a showing which directly overlaps important merits issues of liability and damages.¹⁵³ Recent decisions establish, at least in most federal circuits, that the court must inquire into the merits at class certification if doing so is necessary in order to address whether the requirements of Rule 23 have been met.¹⁵⁴

Class certification decisions that investigate the merits provide some of the benefits of a preliminary judgment procedure. In cases such as the ones just mentioned, the court's conclusions on class certification are very relevant to the ultimate issues in the case. These conclusions would be of great interest to the parties in valuing the case, and thus could materially facilitate settlement negotiations. However, class certification decisions are also subject to serious limitations as settlement-inducing devices. The intersection between the substantive merits and the requirements for class certification is contingent on the facts and circumstances of each case. Moreover, the courts in these cases review the substantive merits, not for purpose of evaluating the strength of the claims *per se*, but rather in order to assess whether the requirements of Rule 23 are met. Even when the court does report on its conclusions, therefore, the parties will be required to disentangle the court's evaluation of the merits from its assessment of how that

¹⁵² *Basic, Inc. v. Levinson*, 485 U.S. 224, 246-48 & n.27 (1988).

¹⁵³ See *In re Initial Public Offering Securities Litigation*, 471 F.3d 24, 41-42 (2d Cir. 2006) (holding that the court must look into the merits-related issue of the efficiency of the market at the time of class certification). Or a court may require that to obtain the benefit of the presumption of reliance, the plaintiff must establish that the defendant's statement actually moved the market, again a showing that directly overlaps merits issues. See *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 266-69 (5th Cir. 2007).

¹⁵⁴ Decisions from 2001 established this point in the Third and Seventh Circuits. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 168-69 (3d Cir. 2001); *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001).

evaluation affects the issue of class certification.¹⁵⁵ For these reasons, even in class cases, the preliminary judgment device would offer a superior means for informing the parties about the value of the case.

3. Discovery

Courts sometimes make preliminary investigations into the merits when adjudicating discovery disputes. Consider the crime-fraud exception to the attorney-client privilege. To determine whether the exception applies, the court may need to inquire into the nature of the alleged attorney misconduct, an inquiry which is likely to overlap the substantive merits of the case.¹⁵⁶ Having made such an inquiry, the court is free – within limits – to inform the parties of the results of her investigation, even if those

¹⁵⁵ Other attempts to address merits issues at the stage of class certification are worth noting, even though neither has held up over time. In *Eisen v. Carlisle & Jacquelin*, 54 F.R.D. 565, 567 (S.D.N.Y. 1972), *rev'd*, 391 F.2d 555 (2d Cir. 1973), *vacated by* 417 U.S. 156 (1974), the district court apportioned the costs of notice among the parties according to its assessment of the probable outcome. This rule, had it held up, would have functioned nearly as the equivalent of a preliminary judgment rule in the class action context. However, the Supreme Court rejected the idea. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (“[N]othing in either the language or history of Rule 23 . . . 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 .”).

In *re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995), presented a similar concept, although one adopted for very different reasons. The Seventh Circuit in that case rejected the trial court’s plan for adjudicating a class action brought by hemophiliacs who had contracted HIV/AIDS from blood transfusions, in part because of the “demonstrated great likelihood that the plaintiffs’ claims, despite their human appeal, lack legal merit.” *Id.* at 1299. A broad reading of the opinion would suggest that a court should consider the substantive merits of a case at the time it decides whether to certify a class – a rule which again would have instituted the effect of a preliminary judgment procedure for class action litigation. However, *Rhone-Poulenc* decision has not been so interpreted, and probably should be considered, with respect to its admonition to inquire into the substantive merits, as a function of the mandamus procedure used to obtain appellate jurisdiction in that case, a procedure no longer needed given the availability of discretionary appellate review of certification orders under Rule 23(f). See Lee H. Rosenthal, *Back in the Court’s Court*, 74 UMKC L. Rev. 687, 704 (2006); Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(F)*, 41 Wm. & Mary L. Rev. 1531, 1557-61; Stephen D. Susman, *Class Actions: Consumer Sword Turned Corporate Shield?*, 2003 U. Chi. Legal F. 1, 1-2 (2003).

¹⁵⁶ See, e.g., *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 95-96 (3d Cir. 1992) (trial court had to inquire into the merits in order to ascertain whether counsel for defendant had been involved in alleged fraud which also was central feature of litigation on the merits).

results bear directly on the merits of the case.¹⁵⁷

Qualified privilege issues involve even greater overlap with the substantive merits because they require the court to balance the harms associated with disclosure and confidentiality. Thus, the court may assess the “seriousness” of the litigation when adjudicating claims of deliberative process privilege.¹⁵⁸ Similarly, courts faced with assertions of work product privilege must evaluate the relevance and importance of the information being sought – an inquiry that again can overlap the merits.¹⁵⁹

Even ordinary discovery disputes not involving claims of privilege may involve examination of the substantive merits. Rule 26 permits automatic discovery of non-privileged information “relevant” to any party’s claim or defense.¹⁶⁰ Courts interpreting this rule must therefore investigate the relevance of information being sought in a contested discovery demand – an inquiry that is intertwined with the merits because to investigate relevance the court must look into the nature of the claim or defense. In cases such as these the court’s ruling on the discovery dispute can provide information about litigation value. In *Chenoweth v. Schaaf*, for example, a medical malpractice plaintiff sought discovery of the defendant physicians’ financial condition.¹⁶¹ Even though the complaint alleged that the malpractice was outrageous in nature, the court denied discovery on the ground that punitive damages were not a substantial possibility – an

¹⁵⁷ However, the trial court must not become so involved in the merits as to raise doubts about his objectivity. See *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97-98 (3d Cir. 1992). In *Haines*, the trial court made the necessary assessments but “expressed them in such an intemperate way that no litigant who was the target of them could feel that anything approaching a fair trial was coming.” Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 Marq. L. Rev. 295, 317 (1995).

¹⁵⁸ *Melzer v. Board of Education*, 176 F.R.D. 71, 73 (E.D.N.Y. 1997).

¹⁵⁹ See Fed. R. Civ. P. 26(b)(3) (work product privilege); *Hickman v. Taylor*, 329 U.S. 495, 511-14 (1947) (setting forth standards for work-product privilege).

¹⁶⁰ Fed. R. Civ. P. 26(b)(1). For good cause shown, the court may order broader discovery into any matter “relevant to the subject matter” involved in the action. *Id.*

¹⁶¹ 98 F.R.D. 587, 588 (W.D. Pa. 1983) (mem.).

obvious venture into the merits.¹⁶² Based on this ruling, it is unlikely that punitive damages would have been a realistic issue for discussion during settlement negotiations.

Even when the court does not address the substantive merits in ruling on discovery motions, the parties may still infer information going to the judge's view of the case. If the judge rules that the party seeking discovery has engaged in a "fishing expedition," for example, the litigants can surmise that the court entertains an unfavorable, or at least quite narrow, view of the case.¹⁶³ If on the other hand the judge allows the plaintiff to delve into the defendant's files, the parties may infer that the court views the case as substantial, or at least as broad-ranging in scope.

Although discovery disputes offer information about case value that can assist the parties in settlement discussions, the information so obtained will inevitably be partial and unpredictable. There must actually be a discovery dispute that requires judicial investigation of the merits. Even when such a dispute arises, the merits issues pertinent to resolving the dispute may not go to fundamental issues in the case. The judge's evaluation of the merits, moreover, will often be so intertwined with other, non-merits questions that the parties can draw only impressionistic information about case value from the court's disposition of the dispute. For these reasons, the preliminary judicial assessment of the merits that can be obtained during discovery disputes is not an effective substitute for the proposed preliminary judgment motion.

4. Sanctions

¹⁶² *Id.* at 589-90.

¹⁶³ See, e.g., *Miller v. Pancucci*, 141 F.R.D. 292, 296 (C.D. Cal. 1992) (in case alleging that the police had exercised excessive force in arresting the plaintiff, the court declined the discovery of documents relating to misuse of firearms or equipment, racism, or prejudice); *McDougal-Wilson v. Goodyear Tire & Rubber Co.*, 232 F.R.D. 246, 252 (E.D.N.C. 2005) (refusing, in employment discrimination case, to order production of documents pertinent to disciplinary actions for all employees under supervision of plaintiff's supervisors).

Federal Rule 11 authorizes federal district courts to penalize attorneys or parties responsible for court filings which lack evidentiary support.¹⁶⁴ A motion for sanctions under the rule may therefore require the court to inquire into whether the plaintiff's allegations were supported by evidence.¹⁶⁵ Although often the question will be whether the party had made an adequate investigation,¹⁶⁶ the inquiry will also encompass whether the facts that could have been found, had the accused party conducted an appropriate investigation, would be sufficient to support the statement in dispute.¹⁶⁷ Thus, the court's ruling will sometimes provide the parties with information about how the court views the merits of the case.

The motion for sanctions, however, is not an adequate means for obtaining the information that could be provided in a motion for preliminary judgment. First, the

¹⁶⁴ See Fed. R. Civ. Pro. 11(b) (providing, inter alia, that parties filing pleadings in court must certify, to the best of their knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery" and "the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information"). Unlike the standards for motion to dismiss or motion for summary judgment, which are designed to ensure that judicial fact-finding does not usurp the province of the jury, the inquiry under Rule 11 is free-flowing and discretionary, and judges use varying standards to determine whether a violation has occurred. See, e.g., Beverly Dyer, *A Genuine Ground in Summary Judgment for Rule 11*, 99 *Yale Law Journal* 411, 422-25 (1989).

¹⁶⁵ Although federal courts are sometimes reluctant to penalize attorneys and parties under the rule, see Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 *U. Miami L. Rev.* 267, 328 n.297; Robert Mednick & Jeffrey J. Peck, *Proportionality: A Much Needed Solution to the Accountants' Legal Liability Crisis*, 28 *Val. U. L. Rev.* 867, 914 n.163 (1994), it is available as a litigation threat, especially for defendants who claim that the complaint is frivolous. Congress, in the Private Securities Litigation Reform Act, nudged the courts to exercise their Rule 11 authority more vigorously in securities fraud cases, requiring the district courts to make specific findings of compliance with the rule at the time of any final adjudication or settlement and impose sanctions if violations are found. 15 U.S.C. § 78u-4(c). See *Simon DeBartolo Group, L.P. v. The Richard E. Jacobs Group, Inc.*, 186 F.3d 157, 166-67 (2d Cir. 1999) (PSLRA gave "teeth" to Rule 11).

¹⁶⁶ E.g., *DE Technologies, Inc. v. Dell Inc.*, 2006 WL 467984, at *4 (W.D.Va. 2006).

¹⁶⁷ See, e.g., *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986), *abrogated on other grounds* by *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) ("Of course, the conclusion drawn from the research undertaken must itself be defensible. Extended research alone will not save a claim that is without legal or factual merit from the penalty of sanctions."); *Hill v. Norfolk & Western Railway Co.*, 814 F.2d 1192, 1201-02 (7th Cir. 1987) ("All the relevant 'conduct' is laid out in the briefs themselves; neither the mental state of the attorney nor any other factual issue is pertinent to the imposition of sanctions for such conduct.").

motion nearly always occurs after the legal or factual issues on which the motion is based have been clarified. Thus the court's ruling typically provides little information that the parties do not otherwise possess. Second, sanctions motions are contentious procedures, and therefore not ones that recommend themselves to attorneys who hope to maintain good relationships with their adversaries with a view towards settlement.¹⁶⁸ Third, federal courts tend to circumscribe the inquiry under Rule 11 in order to prevent the sanctions motions from becoming a form of satellite litigation. Thus, sanctions will usually be denied if the party against whom the motion is made can show that the allegations in the complaint were based on "some evidence," even if the evidence is flimsy and contradictory evidence is more persuasive,¹⁶⁹ and even if the attorney possessed only indirect or inferential evidence of a violation.¹⁷⁰ The courts, moreover, attempt to police the divide between sanctions rulings and the merits in order to prevent the Rule 11 motion from being used as a substitute for the motion to dismiss.¹⁷¹ These factors, taken together, severely limit the capacity of sanctions motions for providing the parties with information about case value that can assist in the settlement process. The proposed preliminary judgment procedure would not be subject to similar limitations.

C. Judicial Involvement in Settlement

Judges and their delegates provide preliminary assessments of the merits when they become personally involved in settlement negotiations, either by way of mediation or formal settlement conferences.

¹⁶⁸ See Georgene Vairo, Rule 11 and the Profession, 67 *Fordham L. Rev.* 589, 627-28, 647 (1998) (describing the "Rambo-like use of Rule 11 by too many lawyers").

¹⁶⁹ See, e.g., *Brubaker v. City of Richmond*, 943 F.2d 1363, 1377 (4th Cir. 1991).

¹⁷⁰ See, e.g., *id.*

¹⁷¹ See *Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006, 1014 (2d Cir. 1986) (reversing sanctions on the ground that the district court had improperly used the sanction motion as a vehicle for ruling on the merits).

1. Mediation

Court-ordered mediations are one context in which information about case value is communicated. Much depends, in this respect, on the mediator's style. Some mediators content themselves with seeking areas of flexibility in the parties' bargaining positions.¹⁷² Others take a more activist stance which can include frank assessments of the merits.¹⁷³ Activist mediation presents an analog to the preliminary judgment idea since the mediator is giving the parties direct information about the central issues in the case.

There is some evidence that parties value the function of a mediator in providing information about case value.¹⁷⁴ Many mediators are former judges, for example.¹⁷⁵ Judicial experience is a good qualification for mediators because judges have reputations for integrity and impartiality that the parties find attractive. But judicial experience may provide another value as well. Former judges can speak from personal experience to how judges are likely to view the case. They are well situated to provide credible preliminary assessments of the case value.

Mediation, however, does not emulate the benefits of the preliminary judgment.

¹⁷² See Rita Lowery Gitchell & Andrew Plattner, *Mediation: A Viable Alternative to Litigation for Medical Malpractice Cases*, 2 DePaul J. Health Care L. 421, 433-34 (1999); Florence Yee, Note, *Mandatory Mediation: The Extra Dose Needed to Cure the Medical Malpractice Crisis*, 7 Cardozo J. Conflict Resol. 393, 416, n.120 (2006).

¹⁷³ See Rita Lowery Gitchell & Andrew Plattner, *Mediation: A Viable Alternative to Litigation for Medical Malpractice Cases*, 2 DePaul J. Health Care L. 421, 430-31 (1999); Florence Yee, Note, *Mandatory Mediation: The Extra Dose Needed to Cure the Medical Malpractice Crisis*, 7 Cardozo J. Conflict Resol. 393, 416, n.120 (2006).

¹⁷⁴ See Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. Rev. 1871, 1887 n.88 (explaining how parties often inquire into the "going rate" of torts and contract cases).

¹⁷⁵ Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 Harv. Negot. L. Rev. 253, 281 (2006); Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. Disp. Resol. 247, 264 (2000) ("Each day in the field, many mediators do engage in what might be termed evaluative behavior, and evaluative-style mediators, particularly former judges, appear in strong demand as mediators.").

Although some mediators offer their assessments on the merits, many do not. Even if the mediator does engage in merits analysis, the opinion on offer is only that of the mediator – perhaps a well-informed, neutral party, but not the judge charged with resolving the dispute if settlement bargaining fails. Mediators may sometimes channel the views of the judge, but the parties cannot be sure of this, especially because norms of mediation discourage communications between mediators and judges during the course of settlement bargaining.¹⁷⁶ Mediation, moreover, often takes place only late in the process after the parties have completed most or all discovery.¹⁷⁷ Thus even if mediation is successful at inducing a settlement, it often does not prevent large pretrial expenditures.

The preliminary judgment motion is not subject to these limitations. The procedure would call on the trial court to address the central issues at issue in the litigation. The opinion being provided on preliminary judgment is not from a former judge, however well-qualified, but rather is that of the person charged with resolving the dispute. Preliminary judgments, moreover, may be made at any time. The court could adjudicate preliminary judgment motions whenever it concludes that the information before it is sufficiently developed to allow a tentative merits judgment. Thus preliminary judgments can potentially save on litigation costs that may not be avoidable with mediation.

2. Settlement Conferences

¹⁷⁶ See Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 *Marquette Law Review* 79, 83-84 (2001) (“[T]he challenge of communicating with an adversary, the presence of a neutral intermediary, and the potential for information informally reaching a judge all make confidentiality especially important for mediation.”); Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 *Ohio State Journal on Dispute Resolution* 239, 240-43 (2002) (“The importance of confidentiality is axiomatic in mediation.”).

¹⁷⁷ See Julie MacFarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 *J. Disp. Resol.* 241, 245-46; Rosselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 *Ohio St. J. on Disp. Resol.* 641, 650-51 (revealing that 73% of surveyed counsel had commenced discovery by the time they entered mediation).

Judges often provide litigants with cogent information about the value of their cases at pretrial conferences.¹⁷⁸ In federal courts, such conferences are governed by Rule 16, which lists “facilitating settlement” as one of its goals.¹⁷⁹ There is evidence that judges take the task of facilitating settlements seriously. A substantial majority of judges who responded to a nationwide survey in 1980 described their posture in settlement conferences as “interventionist.”¹⁸⁰ Although perhaps such survey results should be viewed with caution, there is no doubt that many courts play a forceful role in settlement conferences. That role, at times, will include providing the parties with clear indications of the judge’s views about the case¹⁸¹ and also specific recommendations for settlement.¹⁸²

Settlement conferences offer significant opportunities for courts to inform parties of their view of the merits of the case, and therefore can be effective means for inducing compromise. However, settlement conferences also have significant disadvantages. First, they occur only late in the litigation, usually after discovery has been completed, and therefore, even if they are successful at inducing the parties to settle, they will not avoid pretrial expenditures.¹⁸³ Second, the settlement conference places the judge in the

¹⁷⁸ On pretrial conferences, see generally Judith Resnik, Procedure as Contract, 80 *Notre Dame Law Review* 593, 613 (2005) (discussing evolution of pretrial conference into important venue for settling disputes); Robert F. Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 *California Law Review* 770 (1981).

¹⁷⁹ Fed. R. Civ. Pro. 16(a)(5).

¹⁸⁰ John Paul Ryan, Allan Ashman, Bruce D. Sales & Sandra Shane-Dubow, *American Trial Judges: Their Work Styles and Performance* 177 (1980).

¹⁸¹ An example is the Agent Orange case, in which the trial judge forcefully expressed his belief during settlement negotiations that plaintiffs could not make out their case for liability. See Peter Shuck, *Agent Orange on Trial* 160-61 (1987).

¹⁸² See Helen W. Gunnarsson, Making The Most of Settlement Conferences, 94 *Illinois Bar Journal* 178 (2006) (“[S]ome judges employ an evaluative approach to mediation [at settlement conferences], giving the parties the opinion that a case should settle for certain terms . . .”).

¹⁸³ See Pauline H. Tesler, Collaborative Law: A New Paradigm for Divorce Lawyers, 5 *Psychol. Pub. Pol’y & L.* 967, 968 n.8 (1999) (“[C]ourt-based settlement conference ordinarily takes place after preparations for trial are complete, frequently with trial only a week or two away.”).

uncomfortable position of mediating a dispute that she may subsequently be called on to adjudicate. Third, active participation in settlement negotiations demands skills far removed from the traditional function of adjudication.¹⁸⁴ Settlement conferences also present the danger of judicial overreaching.¹⁸⁵ Because these conferences occur in private, and usually off the record, they are not subject to the checks that restrain judicial behavior in other contexts. There is “no meaningful opportunity for litigants to control judicial behavior, no meaningful standard of law to cabin judicial leeway, and no meaningful opportunity for appellate review.”¹⁸⁶ The result is not only a danger of abuse, but also lower rates of party satisfaction.¹⁸⁷

Preliminary judgments would not be subject to these problems. Preliminary judgments do not require the judge to act as an active case manager. Instead, a judge asked to render a preliminary judgment would be acting in his or her traditional judicial role of evaluating the evidence and the law and rendering a judgment. Because preliminary judgments are public acts, moreover, courts could not use the process as a covert way to bully the parties into settlements they do not desire. Even if the court

¹⁸⁴ See Jonathan Molot, *An Old Judicial Role for a New Litigation Era*, 113 *Yale Law Journal* 27, 90-94 (2003) (critiquing settlement conferences on the ground they require judges to engage in managerial activities far removed from the traditional judicial function).

¹⁸⁵ See Jonathan Molot, *An Old Judicial Role for a New Litigation Era*, 113 *Yale Law Journal* 27, 93 (2003) (“Although a litigant certainly is free to refuse to settle on terms he or she knows to be unfair, a litigant asked by a judge to settle a case has strong incentives to agree to a settlement and thereby avoid trying the case -- or proceeding with discovery -- before a potentially hostile judge.”); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 *U.C. Davis Law Review* 41 (1995) (criticizing judicial discretion in pretrial case management for creating a risk of arbitrary power).

¹⁸⁶ Jonathan Molot, *An Old Judicial Role for a New Litigation Era*, 113 *Yale Law Journal* 27, 93 (2003).

¹⁸⁷ See Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 *Marquette Law Review* 295, 320 (1995) (“[A] plaintiff at trial is not likely to feel that the trial will be fair if the presiding judge has already told that party, face to face, that the case is worthless.”); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 *Law & Society Review* 953, 980-86 (1990) (presenting empirical evidence suggesting that people are not as satisfied with resolutions achieved through settlement conferences as when the case is resolved by other means).

attempted such behavior, the losing party could avoid the effect of the preliminary judgment by the simple expedient of making a timely objection. Accordingly, while settlement conferences can offer significant value to the parties if properly conducted, the preliminary judgment idea offers significant advantages as an additional settlement tool.

IV. Conclusion

This paper has argued that courts should implement a preliminary judgment procedure under which the parties could obtain the judge's provisional views on the merits of the case at a relatively early stage of the litigation. Simple to implement and easy to administer, preliminary judgments could help overcome obstacles to settlement bargaining such as party optimism, strategic behaviors, agency costs, and psychological issues. Preliminary judgments would enhance the accuracy of settlements by providing the parties with superior information and by counteracting distortions introduced by nuisance suits, class certification, and differences in sophistication and bargaining power. Because they would be decided in writing by an authoritative adjudicator after opportunity for deliberation, preliminary judgments would potentially command greater acceptance and be perceived as more legitimate than other strategies for encouraging out-of-court settlements.

Preliminary judgments are not alien to American litigation. On the contrary, they are ubiquitous. Many common procedures allow the courts to express provisional assessments of merits issues – including dispositive pretrial motions (motions to dismiss and motions for summary judgment), interlocutory rulings (preliminary injunctions, class certification, evidentiary rulings, and motions for sanctions), and judicial participation in settlement negotiations. But compared with preliminary judgments, these procedures are

subject to significant limitations that interfere with their effectiveness at facilitating early, accurate, and satisfactory settlements of disputes.

Would parties make use of the preliminary judgment procedure? The evidence suggests that they would. Parties in litigation provide clear indications that they desire reliable information about case value. The popularity of summary judgment is one indication, but there are others: early neutral evaluations,¹⁸⁸ focus groups and mock trials,¹⁸⁹ summary jury trials,¹⁹⁰ and jury consultants all provide information about case value.¹⁹¹ Preliminary judgments would simply offer another means, potentially more effective and less expensive, for obtaining information that could materially assist the parties in settlement negotiations.

Preliminary judgments are no panacea for problems in American litigation. But they could be a useful addition to the menu of current options. If authorized, preliminary injunctions would likely be a popular and effective means for achieving quicker, fairer, cheaper, and more reliable resolutions of legal disputes.

¹⁸⁸ See, e.g., Kenneth B. Germain, *The Use of Subject-Savvy Early Neutral Evaluators to Suggest Solutions to Significant Trademark/Trade Dress Disputes in Ex Parte and Inter Partes Situations*, SN053 ALI-ABA 75 (2008) (describing early neutral evaluation procedures).

¹⁸⁹ See Kathleen M. McKenna, *Current Developments in Federal Civil Practice 2008*, 772 PLI/Lit 293, 326-29 (2008) (full-blown mock trial can cost between ten and fifteen thousand dollars a day).

¹⁹⁰ See, e.g., *In re the Cincinnati Enquirer*, 94 F.3d 198, 199 (1994) (describing how the summary jury trial functions to facilitate settlement).

¹⁹¹ See Franklin Strier & Donna Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, its Impact on Trial Justice & What, if Anything, to do About it*, 1999 Wisconsin Law Review 441 (1999) (documenting impact of trial consultants).