PRELIMINARY JUDGMENTS

*Geoffrey P. Miller**

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. The losing party, however, 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 the prospects of success in settlement bargaining by providing litigants with a credible evaluation of case value: they 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.

* Robert B. and Candace J. Haas Visiting Professor, Harvard Law School; 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, William Rubenstein, Steven Shavell, and Tom R. Tyler for extraordinarily helpful input.

INTRODUCTION

It is a truth nearly universally acknowledged that something is wrong with settlements.[1] Even though most cases resolve prior to trial,[2] settlement bargaining often does not prevent substantial litigation expenditures.[3] Sometimes bargaining fails altogether.[4] 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 expenditures[5] or to limit their exposure to class actions.[6] Plaintiffs claim that scorched-earth defense tactics force them to settle too cheaply.[7] 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.[8] Even when a controversy is resolved on favorable terms, settlements deny litigants a "day in court" and thus may feel unsatisfying.[9] And because settlements are often confidential and do not generate decisions on the merits, they reduce the supply of information

1. For general accounts of settlements, see Andrew F. Daughety, *Settlement*, *in* 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 95, 154–55 (Boudewijn & Gerrit De Geest eds., 2000); Bruce Hay & Kathryn Spier, *Settlement of Litigation*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 442, 442–51 (Peter Newman ed., 1998); Geoffrey P. Miller, *Settlement of Litigation: A Critical Retrospective*, *in* REFORMING THE CIVIL JUSTICE SYSTEM 13, 13–14 (Larry Kramer ed., 1996).

2. *See* H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 179 (1970) (only about 4 percent of claims against insurance companies reached trial); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (percentage of federal civil cases tried dropped from 11.5 percent to 1.8 percent between 1962 and 2002); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983) (about 8 percent of civil suits filed in state and federal courts went to trial).

3. *See* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 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 number of cases that are resolved short of trial but after substantive judicial determinations such as dismissal or other pretrial rulings).

4. *See, e.g.*, Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL. STUD. 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 MICH. L. REV. 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 Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) (criticizing settlements on the ground that, inter alia, they favor wealthier litigants); Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619, 620 (2006) (presenting litigation and settlement as alternative mechanisms for resolution of disputes).

5. *See infra* notes 72–78 and accompanying text.

6. *See infra* notes 79–85 and accompanying text.

7. *See infra* notes 86–90 and accompanying text.

8. *See* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 197–203 (1987).

9. *See infra* notes 104–09 and accompanying text.

about legal enforcement, thus impairing deterrence and increasing risk.[10] We live in a "world of settlements,"[11] it is true, but all is not right with this world.

Courts and policymakers have responded to this litany of complaints with a grab bag of reforms. Court-annexed mediation,[12] pretrial settlement conferences,[13] and offer-of-judgment rules[14] 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,[15] enhanced pleading rules,[16] liberal standards for summary judgment,[17] demand requirements in derivative cases,[18] and stepped-up prerequisites for class certification[19] 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.[20] A 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

10. *See infra* notes 91–103 and accompanying text.

11. RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007); Michael Moffitt, *Pleadings in the Age of Settlement*, 80 IND. L.J. 727, 728 (2005).

12. *See, e.g.*, Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 864 (2008) (describing court-oriented mediation and calling for enhanced attention by mediators to the real concerns of the parties).

13. *See infra* notes 190–94 and accompanying text.

14. *See* Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 MINN. L. REV. 865, 869–70 (2007); Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1874–75 (1998).

15. *E.g.*, FED. R. CIV. P. 11.

16. *See, e.g.*, Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–53 (2009); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322–34 (2007); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–58 (2007).

17. *See infra* note 144 and accompanying text (showing that summary judgment may not help achieve settlement).

18. FED. R. CIV. P. 23.1 (derivative litigation); *see* Aronson v. Lewis, 473 A.2d 805, 814–16 (Del. 1984) (providing Delaware rules on when demand on directors is excused).

19. FED. R. CIV. P. 23(a)–(b) (class action certification requirements).

20. This Article 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.*, NAGAREDA, *supra* note 11, at viii; Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 901 (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* Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383, 383 (1989); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 105–16 (1991) (calling for auctions of class action claims); Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329, 329 (1987).

after the expiration of a reasonable period of time—say, thirty days. Any party against whom a preliminary judgment is issued, however, 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. Like other threshold rulings,[21] 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.[22] Preliminary judgments could also enhance settlement negotiations by anchoring the parties' discussions and focusing the attention of the lawyers and the clients on the question of settlement. Because preliminary judgments are made by a judge after a provisional review of the evidence, moreover, they offer litigants the satisfaction of a formal adjudication and thus potentially enhance their willingness 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 could be combined with a motion for summary judgment under Federal Rule 56[23] or its state counterparts. The moving party would support the

21. *See, e.g.*, Sole v. Wyner, 551 U.S. 74, 83–84 (2007).

22. 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 optimism." Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2015 (2007).

23. FED. R. CIV. P. 56.

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.[24] 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.[25]

Upon receiving a motion for preliminary judgment and any accompanying memoranda, the 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 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.[26]

24. *See id.* 56(c).

25. *Id.* 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); *see also* Paddington Partners v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994) (outlining required contents of affidavit).

26. 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

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 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.[27] 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.[28] But because the ultimate outcome of litigation is difficult to predict, it is rare that both parties arrive at accurate predictions about outcomes.[29] 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 optimis-

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* Vt. Agency of Natural Res. v. United States *ex rel*. Stevens, 529 U.S. 765, 774 (2000) (stating that 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 Ins. 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 infra* Part III.

27. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 405 (2004); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 289–91 (1973); George S. Lowenstein et al., *Self-Serving Assessments of Fairness and Pre-Trial Bargaining*, 22 J. LEGAL STUD. 135, 136–37 (1993); Robert Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 243–46 (1993); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417–18 (1974).

28. *See* SHAVELL, *supra* note 27, at 401–02; Gould, *supra* note 27, at 285–86; Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 225 (1999).

29. *See* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 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 CAL. L. REV. 773, 777, 781 (1995) (stressing uncertainty of jury awards for pain and suffering).

tic, the effect can swamp out the savings in litigation costs that can be achieved by settlement, making pretrial resolution impossible.[30]

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 preliminary 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 the 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.

The information provided by a preliminary judgment would not be perfect, of course. Judges could and would make errors.[31] 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 techni-

30. *See* Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 409 (1984); Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 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 J.L. ECON. & ORG. 490 (2005) (providing a game-theoretic account under which optimism supports credible threats to take the case to trial). Both parties, however, would be still better off if the effects of optimism could be muted sufficiently to make settlement possible. *See id.* at 492.

31. On judicial error, see Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001).

cally hearsay and therefore generally inadmissible at trial.[32] 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 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 its 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.

The presence of a jury can 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

32. *See* FED. R. EVID. 802.

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

34. *See, e.g.*, Univ. of Tex. 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).

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. P. 26(a)(1)(c)(i).

often have conducted many jury trials and who has a good feel for how the jury will behave.[36] 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 nonverbal 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 her 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 her 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 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

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, 63 (1966) (78 percent judge-jury agreement found in criminal cases and 78 percent agreement in civil cases); Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel's* The American Jury, 2 J. EMPIRICAL LEGAL STUD. 171, 183 (2005); Valerie P. Hans, *Judges, Juries, and Scientific Evidence*, 16 J.L. & POL'Y 19, 43 (2007) (finding a basic similarity of judge-jury decision making in cases with scientific evidence). 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 L. REV. 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 IND. L.J. 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.").

38. Judges, like everyone else, are prone to human foibles and weaknesses. *See* Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 431–32 (2004) (chronicling varieties of judicial error and misconduct); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else*

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 workload.

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 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 her 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.

Does), 3 SUP. CT. ECON. REV. 1, 39 (1993) (judges take factors such as income, leisure, and job satisfaction into account in how they perform their tasks).

39. *See* Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 631 (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).

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.*, MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 27 (1992) (real estate agent evaluations of house values anchored by list price); Edward J. Joyce & Gary C. Biddle, *Anchoring and Adjustment in Probabilistic Inference in Auditing*, 19 J. ACCT. RES. 123, 141–43 (1981) (accountants' evaluation of probability of fraud found to be influenced by initial anchoring question). 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 L. REV. 51, 68–69 (2004).

41. *See* Guthrie et al., *supra* note 31, at 791–95 (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. 74, 78–81 (2007) (plaintiffs obtained preliminary injunction but lost on merits); Sierra Club v. U.S. Army Corps of Eng'rs, 464 F. Supp. 2d 1171, 1191–92, 1228 (M.D. Fla. 2006) (court took a "fresh, deeper" look at the issue after additional briefing and argument, and reversed its preliminary judgment that federal agency had violated the Clean Water Act).

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 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, a 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 reassess 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 beliefs.[45] 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.[46]

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43. A large literature on strategic bargaining and settlement traces to Cooter et al., *supra* note 4.

44. *See, e.g.*, Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 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."); Sanford F. Young, *Feasible Strategies for Successful Discovery and Winning Dispositive Motions*, 78 N.Y. ST. B.J. 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").

45. *See* Bone, *supra* note 22, at 2015.

46. For an argument that attorneys, as repeat players, can facilitate settlements that clients acting alone would be unable to achieve, see Gilson & Mnookin, *supra* note 3, at 538.

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.[47] 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 her 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.[48] 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.[49] Preliminary judgments would reduce these risks. The judge's decision, when announced, would automatically limit the ability of parties to 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.[50] 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 (i.e., the amount of the settlement). Concern about the winner's curse might conceivably lead the defendant to shade her settlement offer downward out of concern that if the offer is accepted—if she "wins" the auction for the litigation claim—she will thereby have paid too

47. Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 62 (1992); *see* Robert H. Gertner & Geoffrey P. Miller, *Settlement Escrows*, 24 J. LEGAL STUD. 87, 89–90 (1995); *cf.* Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. ON DISP. RESOL. 1, 3–4 (1994) (low initial settlement offer is less likely to result in settlement than no settlement offer); Mnookin, *supra* note 27, at 246–47 (proposing that offerees tend to devalue settlement offers because the offers originate with an opponent).

48. A substantial body of research suggests that extreme opening offers are, in fact, a successful litigation strategy. *See* Korobkin & Guthrie, *supra* note 47, at 16.

49. *See* Bundy, *supra* note 47, at 41.

50. *See* RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 50–51 (1992).

much.[51] Similar 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 of the claim 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 settlement negotiations, the parties face risks of underestimation as well as overestimation.[52] The defendant worries, not only that she will offer too much to settle the case, but also that she 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 she will demand too little and settle the case for less than she could have obtained by harder bargaining, but also that she will demand too much, resulting in a trial where she 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.[53] Fee arrangements are the most fertile source of such conflicts.[54] 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.[55] 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 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.[56] Thus a contingency fee attorney, acting solely out of economic self-interest, often has an incentive to

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

52. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 567 (6th ed. 2003).

53. *See generally* Miller, *supra* note 8.

54. *See, e.g.*, Douglas J. Cumming, *Settlement Disputes: Evidence from a Legal Practice Perspective*, 11 EUR. J.L. & ECON. 249, 253–58 (2001) (identifying incentive effects of different fee structures).

55. *See* Miller, *supra* note 8, at 203.

56. *Id.* at 198–202.

persuade clients to accept offers of settlement even when more could be obtained by further litigation.[57] While the extent of such self-interested attorney behavior is unknown, it probably happens from time to time.[58] If the incidence is high, the result would be to impair the effectiveness of the underlying legal rules.[59]

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.[60] 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.

4. Psychological Effects

Parties may fail to reach settlement for psychological reasons.[61] For example, reactive devaluation—the tendency to give insufficient weight to information supplied by someone they dislike[62]—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 point and to dislike perceived losses evaluated from this point more than they like perceived gains[63]—can present problems if the

57. *Id.* at 200–01. *But see* Neil Rickman, *Contingent Fees and Litigation Settlement*, 19 INT'L REV. L. & ECON. 295, 304–05 (1999) (early settlement incentive may be offset by attorney's incentives to engage in hard settlement bargaining).

58. *See* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 572.

59. *See* John C. P. Goldberg, Lecture, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 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.").

60. *See* A. Mitchell Polinsky & Daniel L. Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 AM. L. & ECON. REV. 165, 166 (2003).

61. *See* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 109–10 (1994).

62. *See* Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389, 394–95 (1991).

63. 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 the anchoring effect).

parties have different reference points.[64] 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.[65] Senses of entitlement can also interfere with settlements:[66] 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.[67]

Preliminary judgments would address these psychological barriers to conflict 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.[68] 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.[69]

B. Accuracy

So far I 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.

64. *See* Korobkin & Guthrie, *supra* note 61, at 137 ("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.").

65. *See* Korobkin & Guthrie, *supra* note 47, at 18–19 (applying anchoring theory to negotiation setting).

66. *See* Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153 (1984) (individual plaintiffs seek "vindication" from the litigation process).

67. *See* Korobkin & Guthrie, *supra* note 61, at 143–44 ("Individuals seeking to restore equity may allow personal feelings to overcome economically rational calculations when resolving disputes.").

68. 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.

69. *See* 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, 1287–88 (1974); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 51 (1984).

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 costs.[70] Even if settlement occurs, however, information problems can still affect the result. If either party is unduly pessimistic about her chances, for example, she 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, she may be able to obtain more in settlement than she could get from a trial because her optimism induces bargaining strategies that capture the lion's share of the gains.[71]

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 her prospects are better than she believed them to be. In consequence she would abandon her 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 her bargaining strategy and perhaps drop her demand for outcomes that give her far more of a benefit than could be justified by the likely litigation outcome. Even if she does not adjust her demands, her 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.[72] Although there is little evidence that "nuisance" lawsuits are actually a plague on the system,[73] it is plausible to infer that such cases do in fact occur from time to time given the uncertainty implicit in liti-

70. *See* Bar-Gill, *supra* note 30, at 491.

71. *See id.* at 491–92.

72. *See, e.g.*, Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 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."); Lance P. McMillian, *The Nuisance Settlement "Problem": The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221, 221 (2007) (characterizing popular view). Models of nuisance suits are provided in Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437, 437 (1988); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520–25 (1997).

73. *See, e.g.*, McMillian, *supra* note 72, at 520.

gation[74] and the fact that it is cheap for the plaintiff to file a complaint[75] but expensive for defendants to comply with discovery demands.[76] 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.[77]

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 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.[78] Preliminary judgments would also have a potentially beneficial shaming effect. If enough such judgments are rendered against an attorney or her 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[79] can, in and of itself, coerce defendants to settle in order to avoid potentially devastating

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

75. 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. P. 8(a)(2). Notice pleadings, however, may be changing as will be discussed *infra* Part III.A.2.

76. *See, e.g.*, John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569, 581–82 (1989).

77. 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, *id.* 11; awards of attorneys' fees against offending parties, *see* Alyeska Pipeline Servs. Co. v. Wilderness Soc'y, 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* Kozel & Rosenberg, *supra* note 72, at 1853 (proposing nonenforcement 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 INT'L REV. L. & ECON. 42, 42 (2006) (suggesting that defendants be allowed to make binding precommitments not to settle nuisance suits).

78. For a discussion of the similarities between sanctions and preliminary judgments, see *infra* Section III.B.4.

79. *See* FED. R. CIV. P. 23.

liability,[80] even though, in other circumstances, they would defend against weak substantive claims.[81] Evidence for this proposition is found in reports that securities class action settlements are often unrelated to the merits of the substantive claim.[82] The certification of the class, these studies suggest, 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.[83]

Preliminary judgments could address these concerns. A party defending against a certified class could test her 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

80. *See, e.g.*, Blair v. Equifax Check Servs., 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.").

81. *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*, 181 F.3d at 834. For discussion of the merits of the argument that certification compels defendants to settle, see Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1378–81 (2000) (criticizing *Rhone-Poulenc*); Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration and CAFA*, 106 COLUM. L. REV. 1872, 1879–95 (2006); Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1369–80 (2003) (critiquing the analysis in *Rhone-Poulenc*).

82. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 499–500 (1991). Alexander's study has been criticized as well as defended by later work. *See, e.g.*, Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. PA. L. REV. 755, 757–63 (2009) (concluding that while the merits are considered by liability insurers when evaluating settlement offers in securities cases, nonmerits considerations are also important); Joel Seligman, *The Merits Do Matter: A Comment on Professor Grundfest's* "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority," 108 HARV. L. REV. 438, 453–55 (1994) (disagreeing with Alexander because courts dismiss many nonmeritorious claims before settlement and subsequent studies have shown that securities settlement amounts vary greatly); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2080–84 (1995) (criticizing Alexander's claim that merits do not matter in securities class action cases and adding that certain features of securities laws make similar settlements likely). 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 J.L. ECON. & ORG. 598, 600–02 (2007) (finding evidence that meritorious suits have been weeded out).

83. 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. *See* Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want,"* 12 OHIO ST. J. ON DISP. RESOL. 253, 291 (1997). The problem is exacerbated if the defendant faces a risk of offensive nonmutual 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 nonmutual collateral estoppel in federal court).

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.[84]

The preliminary judgment could therefore protect defendants against perceived 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.[85]

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.[86] 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.[87]

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. The more-sophisticated and better-endowed party, however, probably enjoys advantages in settlement negotiations similar to those she 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 settlements on these grounds, arguing that settlements are too often skewed in favor of wealthier litigants.[88]

84. *See In re* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 145 (2d Cir. 2001) ("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.").

85. *Rhone-Poulenc* is the poster child here. *Rhone-Poulenc*, 51 F.3d at 1298. *But see* Hay & Rosenberg, *supra* note 81, at 1378–81.

86. The canonical citation is Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 95 (1974).

87. *See* Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Case*s, 57 STAN. L. REV. 1275, 1322 (2005) (empirical study of federal court litigation).

88. *See* Fiss, *supra* note 4, at 1076–78; Note, *Settling for Less: Applying Law and Economics to Poor People*, 107 HARV. L. REV. 442, 444–51 (1993).

Preliminary judgments would help address the imbalances noted by critics of the settlement process.[89] 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. Yet, 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.[90] 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 nontransparency of the process.[91] A principal concern, in this regard, is that settlements do not generate judicial opinions that can serve to guide future conduct.[92] Precedent is a public good that will be supplied in insufficient quantities unless people pay for the benefits received.[93] In the context of litigation, one form of payment for precedents is the generation of new precedents.[94] 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.[95] 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.[96]

89. *Cf.* Fiss, *supra* note 4, at 1076 ("[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.").

90. *Cf. id.* at 1077 (explaining how the judge can reduce distributional inequities by "asking questions, calling his own witnesses, and inviting other persons and institutions to participate as amici").

91. *See* Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 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.").

92. *See, e.g.*, Fiss, *supra* note 4, at 1085 ("[Settlements] deprive a court of the occasion, and perhaps even the ability, to render an interpretation.").

93. 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).

94. *See* Macey, *supra* note 39, at 642. Litigation may serve other public values as well. *See* Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 650 (1994).

95. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1387 (1994); Lederman, *supra* note 28, at 256; Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 246 (1996).

96. *See* Weinstein, *supra* note 95, at 248–50.

These problems would be less severe if the settlement were a matter of public record.[97] Because compromises occur in the "shadow of the law,"[98] 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,[99] private litigation settlements are rarely public.[100] And it is common for settlement agreements to include confidentiality provisions prohibiting disclosure of the settlement terms.[101] 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.[102]

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

97. *See* Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 521 (2006) (arguing for enhanced public disclosure of out-of-court settlements).

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

99. For investigations of class action settlements, see generally 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 STAN. L. REV. 411 (2005); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004); Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303 (2006); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529 (2004); Eric Helland & Alexander Tabarrok, *Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets*, 19 J.L. ECON. & ORG. 517 (2003).

100. Traditionally settlements have not been reported, although information on some categories of settlements is now available. *See, e.g.*, Kathryn Zeiler et al., *Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims, 1990–2003*, 36 J. LEGAL. STUD. S9 (2007) (reporting on closed claim data from Texas malpractice insurers).

101. *See* Kotkin, *supra* note 91, at 929 (confidentiality agreements "have become the norm" in employment discrimination cases); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 869–70 (2007); Blanca Fromm, Comment, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 675–76 (2001).

102. *See* Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 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."); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 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 . . . .").

the benefit of enhanced 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.[103] 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.[104] 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.[105] People also perceive greater legitimacy in written as opposed to oral decisions.[106] 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.

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.[107] 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.[108] Although the losing

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

104. *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 & SOC'Y REV. 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).

105. *See* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 477 (2008).

106. *See* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1336–39 (2008) (written opinions help to foster the "public perception that courts are addressing conflicts in an appropriate manner").

107. *See* Brian H. Bornstein & Susan Poser, *Perceptions of Procedural and Distributive Justice in the September 11th Victim Compensation Fund*, 17 CORNELL J.L. & PUB. POL'Y 75, 82 (2007) ("[P]rocedural fairness is enhanced by giving disputants an opportunity to voice their side of the story.").

108. *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, 86–88 (John S. Carroll ed., 1990).

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.[109]

III. ADVANTAGES OF PRELIMINARY JUDGMENTS OVER OTHER PROCEDURES

This Part 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, I 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.[110] The difference between existing procedures and the one recommended here is that preliminary judgments would be more direct, informative, and reliable than other procedures.

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.[111] In this respect dispositive pretrial motions

109. *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; Oldfather, *supra* note 106, at 1336–38 ("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.").

110. 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*, 517 U.S. 370 (1996), is a procedure under which a court construes a patent claim in the context of litigation over infringement or validity of patent rights. Many courts issue "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., FED. JUDICIAL CTR., PATENT CASE MANAGEMENT JUDICIAL GUIDE ¶ 5.1.4.5 (draft of September 16, 2008) (on file with author). I thank Rochelle Dreyfuss for bringing this parallel to my attention.

An analogous procedure at the state level is found in California Court Rule 3.1590, which requires judges of that state to issue tentative decisions that become final "unless within ten days either party specifies controverted issues or makes proposals not covered in the tentative decision." CAL. CT. R. 3.1590(c). A key difference between the California tentative judgment procedure and the one discussed here is that the former applies only after the judge has heard all the evidence. The California procedure thus operates more as a means for preventing judicial error than as a settlement-inducing mechanism.

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

have points of similarity as well as contrast with the proposed preliminary judgment procedure.[112]

1. Lack of Jurisdiction

Courts sometimes undertake a preliminary inquiry into the merits when deciding motions to dismiss for lack of jurisdiction.[113] 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 forum.[114] A similar review may be needed in order to assess whether the defendant committed a "tortious act" in the forum under the terms of a long-arm statute.[115] Likewise, the court may need to inquire into a variety of merits-related issues when deciding challenges to subject matter jurisdiction.[116] The merits may be relevant, for example, to an analysis of whether the plaintiff has satisfied the amount-in-controversy requirement under federal diversity jurisdiction.[117] 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.[118]

Cases involving proof of jurisdictional facts 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.[119] Third, the court usually decides questions of jurisdiction early in the liti-

112. For a wholesale attack on dispositive pretrial rulings, on the ground they exceed the constitutional authority of courts, see Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 760–61 (2009).

113. *See* Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 976–77 (2006); Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 ALA. L. REV. 409, 441 (2008). 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").

114. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108–16 (1987); Int'l Shoe Co. v. Washington, 326 U.S. 310, 312–15 (1945).

115. Wyatt v. Kaplan, 686 F.2d 276, 280 (5th Cir. 1982) ("[T]he jurisdictional question involves some of the same issues as the merits of the case."); *see* Nelson v. Miller, 143 N.E.2d 673, 675, 682 (Ill. 1957), *abrogated by* Green v. Advance Ross Elecs. Corp., 427 N.E.2d 1203, 1206–08 (1981) (interpreting requirement of jurisdictional proof under "tortious act" long-arm statute).

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

117. *See* 28 U.S.C. § 1332(a) (2006).

118. *See* Bell v. Hood, 327 U.S. 678, 682–83 (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").

119. 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).

gation, 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).[120] Finally, the standard for proof of jurisdictional facts 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.[121]

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.[122] 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 with the issues to be adjudicated at trial. Thus when a court denies a motion to dismiss for failure 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.[123] There is no opportunity to assess whether the plaintiff will be able to establish her 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.[124] 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 parties than that which can be gleaned from the fact that 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

120. *See* FED. R. CIV. P. 12(b)(1)–(2), (h)(3).

121. *See* Clermont, *supra* note 113, at 978 (courts require only prima facie showing of jurisdictional facts that overlap the merits).

122. FED. R. CIV. P. 12(b)(6).

123. *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957), *overruled by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

124. *See id.* at 47–48 ("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.").

with "particularity" the circumstances constituting fraud and mistake.[125] The Private Securities Litigation Reform Act sets forth an even stricter standard: as interpreted in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,[126] 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."[127] Even outside the contexts of fraud and mistake, moreover, the trend is away from the most liberal interpretations of notice pleading.[128] In the recent *Twombly* and *Ashcroft* cases,[129] the Supreme Court endorsed stepped-up pleading requirements[130] by requiring that the allegations create a "plausible" inference of a legal violation.[131]

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 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.[132] 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, however, 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.[133]

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125. FED. R. CIV. P. 9(b).

126. 551 U.S. 308 (2007).

127. *Id*. at 314. For analysis of this standard, see Geoffrey P. Miller, *Pleading after* Tellabs, 2009 WIS. L. REV. 507, 510–12.

128. *See* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 551–52 (2002); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003).

129. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 129 S. Ct. 1927 (2009).

130. *See* Kevin M. Clermont, *Litigation Realities Redux* 11 (Cornell Law Sch. Legal Studies Research Paper Series, Research Paper No. 08-006, 2008), *available at* http://ssrn.com/abstract=1112274 (characterizing *Twombly* as the Court's "first unmistakable step backward from the modern conception of notice pleading").

131. *Twombly*, 550 U.S. at 570. 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).

132. 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) (reversing 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).

133. *E.g.*, Aldridge v. A.T. Cross Corp., 284 F.3d 72, 78 (1st Cir. 2002); Helwig v. Vencor, Inc., 251 F.3d 540, 553 (6th Cir. 2001); Chu v. Sabratek Corp., 100 F. Supp. 2d 815, 819–20 (N.D. Ill. 2000).

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.[134] 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 defendant's files in response to a request to produce documents.[135] 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.[136] 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.[137] 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.[138]

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.[139] 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.

134. *Twombly*, 550 U.S. at 555–56.

135. This is, in fact, a common practice under the Private Securities Litigation Reform Act. *See* Miller, *supra* note 127, at 523–24.

136. *See* ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 155 (2003); Posner, *supra* note 27, at 437; Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903, 950–51, 1854–55 (2002).

137. Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1854–55 (2008).

138. *See The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 314 (2007).

139. *See supra* text accompanying notes 72–85.

3. Summary Judgment

Denials of summary judgment motions[140] can enhance settlement bargaining by providing the parties with credible information about case value.[141] 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 had hoped to avoid trial on liability no longer has that expectation, and thus will adjust her estimate of litigation value downwards. The defendant will also adjust her expectations downward, but less than the plaintiff because the defendant, being optimistic about her 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 her 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.[142] To defeat summary judgment, therefore, the nonmoving party merely needs to supply the court with a basis sufficient to support the conclusion that a reasonable jury could rule in her favor. This is not a demanding standard.[143] 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.[144]

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140. *See* FED. R. CIV. P. 56.

141. *Cf.* Molot, *supra* note 44, at 91 (summary judgment can be a means for "educating" parties about the merits).

142. *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").

143. *See* Molot, *supra* note 44, at 45–46 ("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.").

144. 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 opti-

Empirical evidence suggests that the standard for summary judgment may have become more relaxed over time, in the sense that courts are more willing to grant motions for summary judgment today than in years past.[145] 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 nonmoving party's claim or defense is reasonably substantial, giving the parties more information on which to 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 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.[146] Preliminary judgments, for reasons already described, could accomplish some of these same objectives by encouraging settlements and deterring frivolous litigation.[147] 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

mistic assessments, the parties may be unable to reach a settlement despite the information that can be gleaned from the summary judgment ruling.

145. Dispositions through summary judgment have greatly increased in recent years. *See, e.g.*, Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 592–94 (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 N.Y.U. L. REV. 982, 984 (2003) (aptly characterizing summary judgments as the "focal point" of modern litigation); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 144 (2000) (finding that summary judgments were much more common in the late 1990s than in the early 1970s).

146. *See* Miller, *supra* note 145, at 1044–45; William W. Schwarzer, *Summary Judgment and Case Management*, 56 ANTITRUST L.J. 213, 213–14 (1987).

147. *See supra* Parts II.A, II.B.2.

possibility of error,[148] interference with jury trials,[149] and inappropriate dismissal of cases because of docket pressures[150] or other reasons.[151]

B. Interlocutory Rulings

Nondispositive 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 injunction[152] because the standard for granting preliminary relief includes an evaluation of probability of success on the merits.[153] Merits issues may also be interwoven with the inquiry into irreparable harms associated with granting and denying preliminary relief, because the court may be required to evaluate questions related to the damages that would be assessed at trial.[154] Rulings on pre-

148. *See, e.g.*, Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 755–74 (1989) (addressing accuracy concerns); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1941 (1998) ("[S]ummary judgment has spread swiftly through the underbrush of undesirable cases, taking down some healthy trees as it goes.").

149. *See* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 522, 547–50 (2007) (pointing to "strong evidence" that summary judgment violates the Seventh Amendment right to jury trial); Miller, *supra* note 145, at 1077–1134 (exploring the interaction between summary judgment motions and the right to jury trial); Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (arguing that the current standards for summary judgment violate both the text and purpose of the Seventh Amendment right to a jury trial).

150. *See* Bronsteen, *supra* note 149, at 541–43 (docket pressure encourages judges to dismiss cases on summary judgment motions); Miller, *supra* note 145, at 1041–42 (calling for appellate review of summary judgment dispositions in order to prevent their use as an "inappropriate docket-clearing mechanism").

151. Hidden pro-defendant bias is another possibility, because defendants are the principal beneficiaries of the enhanced use of summary judgments. *See* Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 72 (1999) (claiming that judges misuse summary judgment to dismiss hostile work environment claims); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 92 (1990) (survey of 140 contested summary judgment motions found that 122 were made by defendants and only 18 were made by plaintiffs).

152. *See* FED. R. CIV. P. 65 (authorizing federal district courts to issue preliminary injunctions pending trial on the merits). For discussions of the standards for preliminary relief, see generally Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109 (2001); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978); Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197 (2003). The record reviewed on motion for preliminary injunction is less developed but also broader than the formal record of admissible evidence at trial. *See* Univ. of Tex. 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.").

153. *E.g.*, Ashcroft v. ACLU, 542 U.S. 656, 666 (2004); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

154. An example is *Port City Properties v. Union Pacific Railroad 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 rail deliveries were only a small part of

liminary 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.[155]

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 as the balance of harms to the parties and the nature of the public interest.[156] Although the complex inquiry required under the preliminary injunction 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 example[157]—in many cases the parties will not know how the various factors pertinent to the motion contributed to the ultimate decision.[158]

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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.

155. *See, e.g.*, Sammartano v. First Judicial Dist. 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); Nw. Airlines v. IAM, Dist. Lodge 143, 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"); Stratton Group, Ltd. v. Chelsea Nat'l Bank, 54 F.R.D. 227, 228 (S.D.N.Y. 1972) (noting the "paucity of evidence" to support the allegations in the complaint); *In re* Advanced Mktg. Servs. 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).

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

156. *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").

157. *See, e.g.*, Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 195 (4th Cir. 1977) ("The importance of probability of success increases as the probability of irreparable injury diminishes . . . .").

158. 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); Int'l Kennel Club of Chi., 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).

2. *Class Certification*

Class certification provides another opportunity for courts to convey information about the merits.[159] 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.[160] Suppose, for example, that a securities fraud plaintiff seeks to satisfy the "predominance" requirement of Federal Rule 23(b)(3)[161] through use of a fraud-on-the-market presumption of reliance. It is commonly thought that under *Basic v. Levinson* the fraud-on-the-market presumption is available only if the security in question traded in an efficient market.[162] 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.[163] 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.[164]

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. Class certification decisions, however, are also subject to serious limitations as settlement-inducing devices. The intersection between the substantive merits and the requirements for class certification[165] is contingent on the facts and circumstances of each case. Moreover, the courts in these cases review the substantive merits, not for the purpose of evaluating the strength of the

159. 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).

160. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1266 (2002); Miller, *supra* note 40, at 68–69.

161. FED. R. CIV. P. 23(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 . . . .").

162. Basic Inc. v. Levinson, 485 U.S. 224, 246–48 & n.27 (1988).

163. *See In re* Initial Pub. Offering Sec. Litig., 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 Invs. v. Allegiance Telecom, Inc., 487 F.3d 261, 266–70 (5th Cir. 2007).

164. 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 Machs., Inc., 249 F.3d 672, 677 (7th Cir. 2001).

165. FED. R. CIV. P. 23(a).

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 evaluation affects the issue of class certification.[166] For these reasons, even in class action 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.[167] Having made such an inquiry, the court is free—within limits—to inform the parties of the results of its investigation, even if those results bear directly on the merits of the case.[168]

Qualified privilege issues involve even greater overlap with the substantive merits because they require the court to balance the harms

166. Other attempts to address merits issues at the stage of class certification are worth noting, even though none has held up over time. In *Eisen v. Carlisle & Jacquelin*, 54 F.R.D. 565, 567 (S.D.N.Y. 1972), *rev'd*, 479 F.2d 1005 (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 approach, had it held up, would have functioned nearly as the equivalent of a preliminary judgment rule in the class action context. The Supreme Court, however, rejected the idea. *Eisen*, 417 U.S. at 177 ("[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. 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. The *Rhone-Poulenc* decision, however, 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 (2000); Stephen D. Susman, *Class Actions: Consumer Sword Turned Corporate Shield?*, 2003 U. CHI. LEGAL F. 1, 1–2.

167. *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).

168. The trial court, however, must not become so involved in the merits as to raise doubts about its objectivity. *See id.* at 97–98. 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).

associated with disclosure and confidentiality. Thus, the court may assess the "seriousness of the litigation" when adjudicating claims of deliberative process privilege.[169] 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.[170]

Even ordinary discovery disputes not involving claims of privilege may involve examination of the substantive merits. Federal Rule 26 permits automatic discovery of nonprivileged information "relevant to any party's claim or defense."[171] 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.[172] 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 obvious venture into the merits.[173] 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.[174] 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

169. Melzer v. Bd. of Educ., 176 F.R.D. 71, 73 (E.D.N.Y. 1997).

170. *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).

171. 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.*

172. Chenoweth v. Schaaf, 98 F.R.D. 587, 588 (W.D. Pa. 1983) (mem.).

173. *Id*. at 589–90.

174. *See, e.g.*, 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); 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).

evaluation of the merits, moreover, will often be so intertwined with other, nonmerits 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

Federal Rule 11 authorizes federal district courts to penalize attorneys or parties responsible for court filings which lack evidentiary support.[175] A motion for sanctions under the rule may therefore require the court to inquire into whether the plaintiff's allegations were supported by evidence.[176] Although the question often will be whether the party had made an adequate investigation,[177] 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.[178] 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 motion nearly always occurs after the legal or

175. *See* FED. R. CIV. P. 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 that "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 motions to dismiss or motions 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 L.J. 411, 421–25 (1989).

176. Although federal courts are sometimes reluctant to penalize attorneys and parties under the rule, *see* 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. Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 328 n.297 (1996). 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) (1)–(2) (2006); *see* Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 166–67 (2d Cir. 1999) (PSLRA "put 'teeth' in Rule 11").

177. *E.g.*, DE Techs., Inc. v. Dell Inc., No. Civ.A. 7:04CV00628, 2006 WL 467984, at *4 (W.D. Va. Feb. 28, 2006).

178. *See, e.g.*, Hill v. Norfolk & W. Ry. 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."); Zaldivar v. City of L.A., 780 F.2d 823, 831 (9th Cir. 1986) ("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.").

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.[179] 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.[180] 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,[181] and even if the attorney possessed only indirect or inferential evidence of a breach of duty by the defendant.[182] 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.[183] 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 can provide preliminary assessments of the merits when they become personally involved in settlement negotiations, either by way of mediation or formal settlement conferences.

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.[184] Others take a more activist stance, which can include frank assessments of the merits.[185] Activist mediation presents an analog to the preliminary judgment idea be-

179. *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").

180. *See, e.g.*, Brubaker v. City of Richmond, 943 F.2d 1363, 1374 (4th Cir. 1991). *But see* Vairo, *supra* note 179, at 598 (finding overuse of Rule 11 led to an "avalanche of 'satellite litigation'").

181. *See, e.g.*, *Brubaker*, 943 F.2d at 1377.

182. *See, e.g.*, *id*.

183. *See* Kamen v. AT&T 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).

184. *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, 416–17 n.120 (2006).

185. *See* Gitchell & Plattner, *supra* note 184, at 430–31; Yee, *supra* note 184, at 416–17 n.120.

cause 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.[186] Many mediators are former judges, for example.[187] 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 to how judges are likely to view the case from personal experience. They are well situated to provide credible preliminary assessments of the case value.

Mediation, however, does not emulate the benefits of the preliminary judgment. 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.[188] Mediation, moreover, often takes place only late in the process after the parties have completed most or all discovery.[189] 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 may be made at any time; the court could adjudicate preliminary judgment motions whenever it concludes that the information be-

186. *See* Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1887 n.88 (1997) (explaining how parties often inquire into the "going rate" of torts and contract cases).

187. 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 ("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.").

188. *See* Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 240–43 (2002) ("The importance of confidentiality is axiomatic in mediation."); Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 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.").

189. *See* Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 244–45; 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 (2002) (revealing that 73 percent of surveyed counsel had commenced discovery by the time they entered mediation).

fore it is sufficiently developed to allow a tentative merits judgment. Thus preliminary judgments can potentially prevent litigation costs that may not be avoidable with mediation.

2. Settlement Conferences

Judges often provide litigants with cogent information about the value of their cases at pretrial conferences.[190] In federal courts, such conferences are governed by Rule 16, which lists "facilitating settlement" as one of its goals.[191] 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.[192] 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 case[193] and also specific recommendations for settlement.[194]

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. But 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.[195] Second, the settlement conference places the judge in the 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.[196] Settlement conferences also present the danger of judicial overreaching.[197] Because these conferences occur in pri-

190. On pretrial conferences, see generally Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 613 (2005) (discussing the evolution of pretrial conference into important venue for settling disputes).

191. FED. R. CIV. P. 16(a)(5).

192. JOHN PAUL RYAN ET AL., AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE 177 (1980).

193. 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 H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 160–61 (1987).

194. *See* Helen W. Gunnarsson, *Making the Most of Settlement Conferences*, 94 ILL. B.J. 178, 180 (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 . . . .").

195. *See* Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 967, 968 n.8 (1999) ("[A] court-based settlement conference ordinarily takes place after preparations for trial are complete, frequently with trial only a week or two away.").

196. *See* Molot, *supra* note 44, at 90–94 (critiquing settlement conferences on the ground they require judges to engage in managerial activities far removed from the traditional judicial function).

197. *See id.* at 93 ("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

vate, 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."[198] The result is not only a danger of abuse, but also lower rates of party satisfaction.[199]

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 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 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 value to the parties if properly conducted, the preliminary judgment idea offers significant advantages as an additional settlement tool.

IV. CONCLUSION

This Article argues 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 dis-

judge."); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 63–64 (1995) (criticizing judicial discretion in pretrial case management for creating a risk of arbitrary power).

198. Molot, *supra* note 44, at 93.

199. *See* Lind et al., *supra* note 104, at 980–86 (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); Longan, *supra* note 168, at 320 ("[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.").

positive 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,[200] focus groups and mock trials,[201] summary jury trials,[202] and jury consultants all provide information about case value.[203] 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.[204] If authorized, preliminary judgments would likely be a popular and effective means for achieving quicker, fairer, cheaper, and more reliable resolutions of legal disputes.

200. *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* (ALI-ABA Course of Study 2008), *available at* SN053 ALI-ABA 75 (Westlaw) (describing early neutral evaluation procedures).

201. *See* Kathleen M. McKenna, Jury Trial Issues, *in* CURRENT DEVELOPMENTS IN FEDERAL CIVIL PRACTICE 2008, at 293, 326–29 (2008), *available at* 772 PLI/Lit 293 (Westlaw) (full-blown mock trial can cost between ten and fifteen thousand dollars a day).

202. *See, e.g.*, *In re* Cincinnati Enquirer, 94 F.3d 198, 199 (6th Cir. 1996) (describing how the summary jury trial functions to facilitate settlement).

203. *See generally* Franklin Strier & Donna Shestowsky, *Profiling the Profilers: A Study of the Trial Consulting Profession, Its Impact on Trial Justice and What, if Anything, to Do About It*, 1999 WIS. L. REV. 441 (documenting impact of trial consultants).

204. Presumably such authorization would take the form, at the federal level, of a rule adopted pursuant to the Rules Enabling Act, 28 U.S.C. §§ 2072–2074 (2006).