

IN THE
SUPREME COURT OF MISSOURI

NO. SC88531

STATE ex rel. THE COCA-COLA COMPANY,

Relator,

v.

THE HONORABLE W. STEPHEN NIXON,
Judge of the Circuit Court of Jackson County, Missouri, at Independence,

Respondent.

Proceeding in Prohibition from the Circuit Court of Jackson County
Honorable W. Stephen Nixon
Circuit Court Judge

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.
AS *AMICUS CURIAE* IN SUPPORT OF RELATOR

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INTEREST OF THE AMICUS CURIAE

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 123 corporate members and several hundred sustaining members representing a broad cross-section of American and international product manufacturers. PLAC seeks to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983 PLAC has filed over 800 briefs as amicus curiae in both state and federal courts, including this court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.

The issues before this Court are of vital importance to PLAC's corporate members. As manufacturers of products sold, used, or consumed in Missouri, PLAC's members face putative class action litigation in this State under the Missouri Merchandising Practices Act, §407.010 *et seq.* ("MPA"), as well as other statutory and common law causes of action. They therefore have a substantial interest in ensuring that trial courts in this State conduct the proper analysis in reviewing a plaintiff's motion for class certification and limit the grant of certification to those cases in which the requirements of the applicable class action rule are in fact met. In addition, PLAC's members have a strong interest in Missouri appellate courts' providing appropriate and meaningful interlocutory review of class certification decisions before parties are forced

to incur the increased expense, burden, inconvenience, and potential exposure attendant to class action litigation.

Class action jurisprudence in Missouri has only rather recently begun to develop. This Court, therefore, has had little opportunity to provide guidance in this rapidly growing area of the law. The number of putative class actions being filed in Missouri is increasing. PLAC respectfully submits that the body of law from the Missouri Court of Appeals is now more than sufficient to allow this Court to observe and address significant inconsistencies in some of the Court of Appeals' statements of black letter law, as well as some unique deviations from the now well-established law of class actions in other jurisdictions. PLAC, therefore, respectfully requests that this Court provide to the lower courts a roadmap for orderly and deliberate review of class certification petitions in the trial courts and provide guidance for meaningful consideration of petitions for interlocutory review in the appellate courts. The principles of rigorous analysis leading to meaningful review apply equally in both levels of Missouri's courts. The pending case of *State ex rel. The Coca-Cola Co. v. The Honorable W. Stephen Nixon* affords this Court an opportunity to explain the process it expects Missouri courts to follow. PLAC respectfully states that the time is right and the need is urgent.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Coca-Cola Company (“Coca-Cola”) seeks a permanent writ of prohibition in this case directing the trial court to vacate its February 9, 2006, Order certifying a class of all Missouri consumers of fountain diet Coke®. The trial court’s Order was adopted *verbatim* from the proposed order submitted by plaintiff — indeed, the Order states, just below the court’s signature, “Respectfully submitted by: Edgar Law Firm LLC . . . Attorneys for Plaintiff.” The Order contains no findings of fact, no reference to the voluminous record submitted by the parties, and only bare statements that the requirements of Supreme Court Rule 52.08 are satisfied. Yet this cursory Order dramatically changed the stakes in the litigation, certifying a class that all other courts faced with the issue have determined to be patently unascertainable.

The certification orders here and in other cases, such as *Gutzler v. General Motors Corp.*, No. 03-CV-208786 (Mo. Cir. Ct. Jackson County), represent an increasing trend on the part of Missouri trial courts to presumptively certify a class with the expectation that the appellate court will take a closer look and reverse if appropriate. This casual approach to the dictates of Rule 52.08 ignores the pivotal nature of a class certification determination and the substantial impact it has on both the parties and the court, and has unquestionably led to the grant of class status to claims that do not meet Rule 52.08’s requirements. The amendments by this court and by the General Assembly providing for discretionary interlocutory review of certification rulings, along with the ever-present authority of this court to issue writs when necessary, reflect an understanding of the need to maintain checks and balances so as to save litigants — plaintiffs and defendants alike

— the expense, burden, and inconvenience of improvidently-granted certification. Since those amendments, however, Missouri appellate courts have reversed only one grant of class certification, thereby implicitly, and in some cases, explicitly, denying that the trial courts must apply rigorous scrutiny to requests for certification. Compounding this lack of demand for proper scrutiny, the appellate courts have afforded even greater deference to trial court rulings than is appropriate.

In this brief, PLAC provides concrete examples of this lax approach, and respectfully requests that this Court advise both the trial courts and the Court of Appeals in this State as to their respective roles under Rule 52.08 so that only those claims that meet its prerequisites are certified. Specifically, trial courts should be required to conduct the “rigorous analysis” of class claims that is mandated by federal courts under the federal counterpart to Rule 52.08, which includes any factual or legal determinations that pertain to a Rule 52.08 requirement. In addition, PLAC submits that this Court should provide more precise guidance to the Court of Appeals as to what constitutes an abuse of the trial court’s discretion under Rule 52.08. The most obvious example of abuse is when the trial court has not engaged in a rigorous analysis and therefore has not exercised its informed discretion. The decision to certify must not be arbitrary. Furthermore, because certification involves findings of fact, conclusions of law, and the application of law to facts, the Court should also make clear that a trial court abuses its discretion when it makes an error of law or a clearly erroneous factual finding, or when it misapplies the law to the facts. Defining the roles of both the trial and appellate courts

will clarify standards in a rapidly growing area of law, and benefit both plaintiffs and defendants in class action litigation.

ARGUMENT

I. TO DECIDE WHETHER THE PREREQUISITES FOR CLASS CERTIFICATION ARE MET, THE TRIAL COURTS OF THIS STATE MUST CONDUCT A RIGOROUS ANALYSIS, WHICH INCLUDES ANY NECESSARY LEGAL AND FACTUAL DETERMINATIONS.

Both this Court and the General Assembly have recognized the significance of interlocutory review of an order granting or denying class certification. Section 512.020(3), providing for discretionary interlocutory review of class certification, went into effect August 28, 2004. Effective January 1, 2006, this Court amended Supreme Court Rule 52.08 to add section (f) to the same effect, and implemented Rule 84.035 to supply the procedural framework for pursuing such review. The legislature's decision to carve out an exception to the final judgment rule and allow immediate review of certification orders implicitly recognizes that a certification ruling will likely be the "defining moment" in a class action. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001) (discussing Rule 52.08(f)'s counterpart, Fed. R. Civ. P. 23(f)).

Even before legislative recognition, this Court acknowledged in *Beatty v. Metropolitan St. Louis Sewer District*, 914 S.W.2d 791, 794-95 (Mo. banc 1995):

"The impact of certification of a lawsuit as a class action is readily apparent. Individuals who did not initiate the litigation and who will have little or no practical control over the litigation nonetheless will be bound by its result. The potential increase in exposure to the defendant and the

additional increase in the burden and cost of litigation to all parties may well overwhelm the substantive merits of the dispute.”

See also State ex rel. American Family Mut. Ins. Co. v. Clark, 106 S.W.3d 483, 489-90 (Mo. banc 2003) (“there ... is potential for class actions to be used oppressively — where, for instance, the cost of settling a group of marginal claims is more attractive to a defendant than the expense of litigating the merits”) (Wolff, J., concurring).

Other courts have likewise noted that certification of a class dramatically ups the ante through the exponential increase in the scope, expense, and burden of discovery and trial, as well as in the defendant’s potential exposure, thereby creating intense pressure on the defendant to settle. As the Seventh Circuit stated in *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999), one of the “reasons Rule 23(f) came into being” is that “a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff’s probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere.” *See also Newton*, 259 F.3d at 163-64 (“An order granting certification ... may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability”); *Oscar Private Equity Inv. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007) (referring to the “*in terrorem* power of certification”); *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 17 & n.20 (1st Cir. 2005) (referring to “the high stakes in the class-certification decision” and citing a 2005 Federal Judicial Center study stating that “certified class actions settled ninety percent of the time”).

So, too, have courts observed that, in some instances, “denial of class status sounds the death knell of the litigation, because the representative plaintiff’s claim is too small to justify the expense of litigation.” *Blair*, 181 F.3d at 834 (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978)). *See also Newton*, 259 F.3d at 163 (“An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation”).

Since the enactment of §512.020(3), the appellate courts of this State have issued six published opinions reviewing class certification decisions.^{1/} Only one of those decisions, *Green v. Fred Weber, Inc.*, No. ED 89176, ___ S.W.3d ___, 2007 WL 2033320 (Mo. App. E.D. July 17, 2007), reversed a circuit court’s order certifying a class. In another of those six decisions, *Meyer ex rel. Coplin v. Fluor Corp.*, No. ED 86616, 2006 WL 996540 (Mo. App. E.D. Apr. 18, 2006), the Court of Appeals affirmed an order denying class status, but this Court reversed in *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712 (Mo. banc 2007). All other appellate opinions providing interlocutory review pursuant to §512.020(3) and/or Rule 52.08(f) have affirmed orders granting class certification. *Hale v. Wal-Mart Stores, Inc.*, No. WD 66162, __S.W.3d __,

^{1/} There is also at least one unpublished opinion, issued in *Vandyne v. Allied Mortgage Capital Corp.*, No. ED 87843, 2006 WL 3490344 (Mo. App. E.D. Dec. 5, 2006). This Court sustained the defendant’s application for transfer in *Vandyne* on March 20, 2007.

2007 WL 1672261 (Mo. App. W.D. June 12, 2007); *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151 (Mo. App. W.D. 2006); *Doyle v. Fluor Corp.*, 199 S.W.3d 784 (Mo. App. E.D. 2006); *Craft v. Philip Morris Cos.*, 190 S.W.3d 368 (Mo. App. E.D. 2005).

The weight of affirmances, however, is not the point. Although the revisions to §512.020 and Rule 52.08 have led to only one reversal of an order certifying a class, that statistic, standing alone, does not necessarily demonstrate that those revisions have been ineffective or misapplied by the courts, particularly given the relatively small number of cases granted interlocutory review. But the language in the opinions themselves reveals that guidance from this Court is necessary to ensure that both the trial courts making certification determinations in the first instance and the appellate courts reviewing them not only give lip service to, but actually apply the well-established standards that provide a balanced approach — one that recognizes the significant impact that a certification decision has on both parties.

Missouri appellate courts profess that in interpreting Rule 52.08, they consider federal cases interpreting its federal counterpart, Fed. R. Civ. P. 23, relevant.^{2/} *See, e.g., Dale*, 204 S.W.3d at 161 (“Rule 23 and Rule 52.08 are essentially identical. As such, it is well settled that federal interpretations of Rule 23 are relevant in interpreting Rule 52.08”); *Craft*, 190 S.W.3d at 376 (“Because Missouri Rule 52.08 and Fed. R. Civ. P. 23 are identical, we may consider federal interpretations of Rule 23 in interpreting Rule 52.08”); *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 377 n.5 (Mo. App. W.D. 1997)

^{2/} Rule 23 is reproduced in relevant part in Appendix B for the Court’s convenience.

(referring to the “substantively identical provisions” of Rule 52.08 and Rule 23; in determining whether certification of temporary settlement class was appropriate, “we will rely heavily on cases interpreting the provisions” of Rule 23).

The Missouri General Assembly is even more direct. Section 407.025.3 of the MPA, pursuant to which plaintiff here brings one of her claims, states that “[a]n action may be maintained as a class action in a manner consistent with Rule 23 of the Federal Rules of Civil Procedure and Missouri rule of civil procedure 52.08 to the extent such state rule is not inconsistent with the federal rule.” Thus, in putative class actions brought under the MPA, to the extent that any discrepancies exist between Rule 23 and Rule 52.08, Rule 23 is controlling.

Despite the professed reliance on Rule 23 case law and the statutory mandate that it be followed in MPA actions, however, not one published Missouri opinion has expressly adopted one of the most fundamental principles associated with that rule: a class may be certified only “if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.”^{3/} *General Tel. Co. of Southwest v.*

^{3/} Although no Missouri court has stated that trial courts are required to conduct a rigorous analysis as to whether Rule 52.08’s requirements are met, two courts have made note that the trial court determined after “rigorous analysis that the resources of both the plaintiffs and the judiciary can be conserved through class certification, without diluting [defendant’s] procedural safeguards.” *Clark*, 106 S.W.3d at 489; *Craft*, 190 S.W.3d at 383.

Falcon, 457 U.S. 147, 161 (1982). *Falcon* is seminal and is followed uniformly by the federal courts. The Court in *Falcon* reversed a certification order based on the district court’s “failure to evaluate carefully the legitimacy of the named plaintiff’s plea that he is a proper class representative under Rule 23(a).” *Id.* at 160. The Court noted its previous observation in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978), that “the class determination generally involves considerations that are ‘enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.’” 457 U.S. at 160 (internal citation omitted). The Court added, “Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff’s claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.” *Id.*

The federal courts of appeals have repeatedly echoed *Falcon*’s requirement that district courts must conduct a rigorous analysis of whether the requirements of class certification have been met. *See, e.g., Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006); *Beck v. Maximus, Inc.*, 457 F.3d 291, 297 (3d Cir. 2006); *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 33 & n.3 (2d Cir. 2006) (quoting *Falcon* and adding, “We see no reason to doubt that what the Supreme Court said about Rule 23(a) requirements applies with equal force to all Rule 23 requirements, including those set

forth in Rule 23(b)(3)"); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318 (4th Cir. 2006).^{4/}

In Missouri, however, appellate courts have not insisted that trial courts engage in a rigorous analysis of whether the requirements of Rule 52.08 are satisfied. In fact, some have effectively prohibited such an analysis by stating that in considering certification, the trial court should assume the plaintiff's allegations to be true. In *Hale*, for example, the court declared, "In class certification determination, the named plaintiffs' allegations are accepted as true." __ S.W.3d __, 2007 WL 1672261, at *8 (citing *Craft*, 190 S.W.3d at 377).

The court in *Craft* stated that in some circumstances a trial court may:

"consider certain evidence relating to the merits to determine whether the prerequisites for class certification have been met. But, '[t]he court must look only so far as to determine whether, given the factual setting of the case, if the plaintiff[']s general allegations are true, common evidence

^{4/} Rule 23(a) lists the numerosity, commonality, typicality, and adequacy of representation prerequisites to certification found in its identical Missouri counterpart, Rule 52.08(a). Rule 23(b)(3) is identical to Rule 52.08(b)(3), requiring the trial court to find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *See* Appendix B.

could suffice to make out a prima facie case for the class.’ *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005).” 190 S.W.3d at 377.

Both *Hale* and *Dale* cite this language in *Craft*, but without attribution to *Blades*. See *Hale*, 2007 WL 167226, at *3; *Dale*, 204 S.W.3d at 179.

The courts in *Craft*, *Hale*, and *Dale* appear to have misinterpreted the Eighth Circuit’s reference to taking the plaintiff’s “general allegations” as true as an admonition against making *any* factual inquiry. But it is clear from the context of *Blades* that the Eighth Circuit was *not* directing district courts to accept a plaintiff’s specific factual allegations as true. To the contrary, the *Blades* Court advised that in considering Rule 23(b)(3)’s requirement that common questions predominate over individual ones, “a court must conduct a limited preliminary inquiry, looking behind the pleadings. ... The preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case.” *Blades*, 400 F.3d at 566-67 (citations and text omitted). The Eighth Circuit affirmed the denial of certification, noting that the trial court’s obligation to resolve disputes “extends to the resolution of expert disputes concerning the import of evidence.” *Id.* at 575. In referring to the plaintiffs’ “general” and “basic” allegations, *id.*, the Court plainly meant those assertions that provide the framework of the cause of action. See *In re IPO Sec. Litig.*, 471 F.3d at 38 (describing *Blades* as representative of “strong line of authority” that supports “a requirement of findings that Rule 23 requirements are met”).

Contrary to the approach in *Hale*, *Dale*, and *Craft*, federal courts have emphatically declared that a district court may not accept a plaintiff’s allegations

uncritically but instead must conduct the rigorous analysis required under Rule 23. In *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675-77 (7th Cir. 2001), for example, the Seventh Circuit cautioned that “[p]laintiffs cannot tie the judge’s hands by making allegations relevant to both the merits and class certification,” and added:

“The proposition that a district judge must accept all of the complaint’s allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it. The reason why judges accept a complaint’s factual allegations when ruling on motions to dismiss under [Fed. R. Civ. P.] 12(b)(6) [the federal counterpart to Rule 55.27(a)(6)] is that a motion to dismiss tests the legal sufficiency of a pleading. Its *factual* sufficiency will be tested later – by a motion for summary judgment under Rule 56, and if necessary by trial. By contrast, an order certifying a class usually is the district judge’s last word on the subject; there is no later test of the decision’s factual premises

...

“A motion under Rule 12(b)(6) is unique in requiring the district judge to accept the plaintiff’s allegations; we see no reason to extend that approach to Rule 23, when it does not govern even the other motions authorized by Rule 12(b).”

The Court in *Szabo* further recognized that:

“Certifying classes on the basis of incontestable allegations in the complaint moves the court’s discretion to the plaintiff’s attorneys – who

may use it in ways injurious to other class members, as well as ways injurious to defendants. Both the absent class members and defendants are entitled to the protection of independent judicial review of the plaintiff's allegations" *Id.* at 677.

Similarly, in *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 359 (4th Cir. 2004), the Fourth Circuit held that in relying on the plaintiffs' "mere assertions," the district court abdicated its responsibility under Rule 23:

"If it were appropriate for a court simply to accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order, frustrating the district court's responsibilities for taking a 'close look' at relevant matters, *Amchem [Prods., Inc. v. Windsor]*, 521 U.S. [591,] 615 [1997], ... for conducting a 'rigorous analysis' of such matters, *Falcon*, 457 U.S. at 161, ..., and for making 'findings' that the requirements of Rule 23 have been satisfied, *see* Fed. R. Civ. P. 23(b)(3)." 368 F.3d at 365.

See also Bell v. Ascendant Solutions, Inc., 422 F.3d 307, 312 (5th Cir. 2005) ("the suggestion that a court must accept mere allegations of market efficiency is demonstrably at odds ... with a district court's duty, rooted in the text of rule 23(b)(3), to 'find[]' that common issues predominate before certifying a class") (alteration in original).

Dale and Craft, as well as this Court's opinion in *Meyer*, all cite to the Supreme Court's statement in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), "find[ing]

nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” *Meyer*, 220 S.W.3d at 715; *Dale*, 204 S.W.3d at 178; *Craft*, 190 S.W.3d at 377. In *Eisen*, the Supreme Court held that the trial court had erred in ruling that because the plaintiffs were likely to succeed on the merits of their claims, the defendants should be required to bear 90% of the cost of notice to the class. *Eisen* pre-dated by eight years the Court’s statements in *Falcon* mandating a rigorous analysis under Rule 23 and authorizing trial courts to probe beyond the pleadings.

Based in part on the context in which *Eisen* was decided, as well as the Court’s subsequent pronouncements in *Falcon*, the overwhelming majority of federal appellate courts — for whom, after all, *Eisen* is controlling authority — have concluded that *Eisen* does not preclude a district court from resolving factual disputes in order to make the findings required by Rule 23. See, e.g., *Oscar Private Eq. Inv. v. Allegiance Telecom, Inc.*, 487 F.3d at 268 (“*Eisen* did not drain Rule 23 of all rigor”); *Bell*, 422 F.3d at 311 (“*Eisen* ... offers no support for the view that a district court must accept, on nothing more than pleadings, allegations of elements central to the propriety of class certification”); *Szabo*, 249 F.3d at 677.

In *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996), for instance, the Fifth Circuit described *Eisen* as standing only “for the unremarkable proposition that the strength of a plaintiff’s claim should not affect the certification decision.” However, to determine whether the requirements of rule 23 have been met, “[g]oing beyond the pleadings is necessary, as a court must understand the claims,

defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.” *Id.* (quoted in part in *Meyer*, 220 S.W.3d at 716).

Likewise, the Second Circuit in *IPO* dismissed the notion that *Eisen* should curb a trial court’s analysis of factual issues pertaining to the requirements of Rule 23, by noting that “[t]he oft-quoted statement from *Eisen* was made in a case in which the district judge’s merits inquiry had nothing to do with determining the requirements for class certification.” 471 F.3d at 33. Recognizing that the statement in *Eisen* “has sometimes been taken out of context” and applied when a merits inquiry concerns or overlaps with a Rule 23 requirement, the Second Circuit described *Eisen* as “properly understood to preclude consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement.” *Id.* at 34, 41. After reviewing its own precedent and cases from other circuits, the Second Circuit concluded that a district court is obligated to make a determination that each Rule 23 requirement has been met before it certifies a class, and that that obligation includes resolving any underlying factual disputes that bear on a Rule 23 requirement. *Id.* at 40-41.

These decisions are emblematic of the growing number of federal cases that have emphasized, in effect, that “actual, not presumed, conformance with Rule 23(a) remains ... indispensable” to class certification. *Falcon*, 457 U.S. at 160. But even standing alone they demonstrate that the court in *Hale* was simply off base in purporting to detect a “trend” towards giving Rule 23 “a liberal construction.” 2007 WL 1672261, at *2. The *Hale* court relied on *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989), which was

decided eighteen years ago and therefore does not stand as authority for any current trend in class action law. Moreover, the Fourth Circuit’s observation in 1989 of “a movement towards a more liberal use of Rule 23” was limited to “the mass tort context,” which fits neither *Hale* nor this case. *Id.* at 734.

Actually, the current majority view among federal courts of appeals — as evidenced by cases decided in this millennium — is in favor of a “more demanding inquiry at the class-certification stage” that requires “whatever legal and factual inquiries are necessary to an informed determination of the certification issues.” *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d at 5-6 (citing cases from the Third, Fourth, Fifth, Seventh, Eleventh, and D.C. Circuits). *See also In re IPO Sec. Litig.*, 471 F.3d at 41 (Second Circuit aligned itself with decisions from Third, Fourth, Fifth, Seventh, and Eighth Circuits “that have required definitive assessment of Rule 23 requirements, notwithstanding their overlap with merits issues”).

This Court implicitly acknowledged in *Meyer* that *Eisen* does not bar a trial court from looking beyond the pleadings to determine the proper elements of the cause of

action alleged by the plaintiff. 220 S.W.3d at 715-16.^{5/} This Court has also observed that the “requirements of [Rule 52.08] are not merely technical or directory, but mandatory.” *Beatty*, 914 S.W.2d at 795. The *Hale* court’s statement that the plaintiff’s allegations should be accepted as true, and *Hale*’s reliance on the class certification standards in *Craft*, demonstrate that the lower courts are in need of further, more explicit direction from this Court as to the need for rigorous analysis. This case provides the vehicle, and the law is sufficiently developed in the lower appellate courts for this Court to take concrete steps to give them that direction.

To ensure that the mandatory requirements of Rule 52.08 (as well as Rule 23 in cases brought under the MPA) are satisfied, PLAC respectfully requests that this Court instruct trial courts to engage in a rigorous analysis and resolve any underlying factual disputes relevant to the class certification requirements. Given the deference afforded on appeal to trial court certification determinations, a rigorous analysis is particularly necessary to avoid appellate rubber-stamping of arbitrary rulings. *See Vizena v. Union Pac. R.R.*, 360 F.3d 496, 503 (5th Cir. 2004).

^{5/} That conclusion stands in sharp contrast to the result in *Craft*. There, the court determined that it need consider only the elements of the plaintiff’s cause of action pleaded in the petition to determine whether they were susceptible to common proof, and disregarded additional elements the defendant argued that the plaintiff class would also be required to prove — actual reliance and deception — simply because plaintiff had not pleaded them. 190 S.W.3d at 384-85.

Requiring a rigorous analysis will position Missouri courts with the majority of federal courts, as explained above. This benefits all litigants, potential plaintiffs and defendants alike. The interests of unnamed class members will be protected by requiring trial courts to probe behind the pleadings before determining that the class action rules are satisfied. *See Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d at 318. It will also properly recognize the pivotal nature of a certification ruling by helping to limit class status, with its attendant increase in litigation costs and potential exposure, to those cases that are truly appropriate for class litigation.

II. THIS COURT SHOULD PROVIDE GUIDANCE TO THE APPELLATE COURTS OF THIS STATE BY IDENTIFYING MORE SPECIFICALLY THE CIRCUMSTANCES IN WHICH A TRIAL COURT SHOULD BE DEEMED TO HAVE ABUSED ITS DISCRETION.

As both this Court and the Court of Appeals have stated, orders granting or denying class certification are reviewed for an abuse of discretion. *See, e.g., Meyer*, 220 S.W.3d at 715; *Hale*, 2007 WL 1672261, at *2. Federal courts apply the same standard. *See, e.g., Beck v. Maximus, Inc.*, 457 F.3d at 295. This Court's guidance is needed, however, to identify more precisely the circumstances in which the circuit courts should be deemed to have abused their discretion.

Some Missouri appellate opinions have described very broadly the level of deference they should accord to a certification order: "This court will find an abuse of discretion only if the circuit court's 'ruling is so arbitrary and unreasonable as to shock one's sense of justice and indicate a lack of careful consideration.'" *Hale*, 2007 WL

1672261, at *2 (quoting *Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405, 410 (Mo. App. 2000)); *see also Dale*, 204 S.W.3d at 164; *Doyle*, 199 S.W.3d at 787. Even under this expansive and somewhat hazy standard, this Court should instruct that a “lack of careful consideration,” and thus an abuse of discretion, exists where the trial court fails to show it conducted the required rigorous analysis. In *Gutzler v. General Motors Corp.*, No. 03-CV-208786 (Mo. Cir. Ct., Jackson County), for example, the trial court admittedly punted the “ultimate decision” on class certification to the appellate court; unfortunately, however, the Western District denied the defendant’s petition for leave to appeal. Similarly, here, the trial court’s adoption *verbatim* of plaintiff’s proposed order, which is devoid of findings of fact and consists only of unsupported legal conclusions, leaves the strong impression that the court failed to roll up its sleeves to make sure that the requirements of Rule 52.08 and Rule 23 (applicable to plaintiff’s MPA claim) were satisfied.

The certification orders in *Gutzler* and this case exemplify a growing trend in Missouri trial courts to afford a presumption of legitimacy to a petition for certification, certify the class, and let the appellate courts sort it out. Without the required analysis, a trial court’s ruling is not an informed exercise of discretion but simply an arbitrary and capricious act not susceptible of meaningful appellate review. *See Vizuna*, 360 F.3d at 503; *Local Joint Executive Bd. Of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1161 (9th Cir. 2001).

In addition to deeming the failure to conduct a rigorous analysis as a *per se* abuse of discretion, this Court should use the opportunity presented by this litigation to identify

other concrete situations in which an abuse can occur in the certification process. Unlike other exercises of discretion by a trial judge — for example, review of a post-trial motion for remittitur of a damage award — the discretion afforded under Rule 52.08 must be exercised within the framework of that rule. That is, the court must be satisfied that all of the Rule’s requirements are met. And, as demonstrated above, a certification decision may require findings of fact and conclusions of law (*e.g.*, determining what elements comprise the cause of action alleged by the plaintiffs) by the trial court, in addition to the application of law to facts. *See In re PolyMedica Corp. Sec. Litig.*, 432 F.3d at 4-5; *In re IPO Sec. Litig.*, 471 F.3d at 40-41.

PLAC’s suggested approach has been followed by many federal courts that have delineated when an abuse of discretion occurs for each type of determination. For example, as the Second Circuit explained in *Parker v. Time Warner Entertainment Co, L.P.*, 331 F.3d 13, 18 (2d Cir. 2003):

“A district court vested with discretion to decide a certain matter is ‘empowered to make a decision — of *its* choosing — that falls within a range of permissible decisions. A district court ‘abuses’ or ‘exceeds’ the discretion accorded to it when (1) its decision rests on an error of law ... or a clearly erroneous factual finding, or (2) its decision — though not necessarily the product of a legal error or a clearly erroneous factual finding — cannot be located within the range of permissible decisions” (alteration in original).

See also Newton, 259 F.3d at 165 (abuse of discretion occurs if decision “rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact” (citation omitted); *Thorn*, 445 F.3d at 317-18 (*per se* abuse of discretion occurs when district court makes an error of law or clearly errs in its factual findings; discretion must be exercised within framework of Rule 23).

The decisions in *Parker*, *Newton*, *Thorn*, and other federal cases recognize that the ultimate decision whether to certify a class under Rule 23 should be made only after a trial court has made the necessary factual findings, undergone the required legal analysis, and applied the law to the facts. PLAC respectfully submits that this Court should make clear that because a determination under Rule 52.08 involves the same multi-faceted process, an abuse of discretion occurs when the decision to grant or deny class status is supported by a clearly erroneous finding of fact, an error of law, or an impermissible application of law to the facts. Providing that specificity will allow appellate courts to identify more precisely those instances in which the trial court’s determination should be reversed, and will promote more consistent and uniform results than the vague and overly subjective “shock one’s sense of justice” standard.

In addition to failing to identify all situations in which a trial court may abuse its discretion in the certification process, some Missouri appellate courts have also improperly described their role by proclaiming, “[w]e will err on the side of upholding certification in cases where it is a close question” because Rule 52.08(c)(1) provides for the possibility of decertification before a decision on the merits. *Dale*, 204 S.W.3d at 164 (quoted in *Hale*, 2007 WL 1672261, at *2). “Erring” on the side of certification — in

effect, calling a tie in favor of plaintiffs — eviscerates the burden these same cases purport to assign to the plaintiff to prove that Rule 52.08’s requirements are satisfied. *See, e.g., Dale*, 204 S.W.3d at 164-65.

The Western District in *Dale* and *Hale* appears to be saying that even if a plaintiff does *not* carry his or her burden of proving that the requirements of Rule 52.08 are satisfied, the trial court’s ability to decertify at some later point in time relieves the plaintiff of that burden. But that conclusion ignores reality. Once the trial court’s decision to certify has received the imprimatur of the appellate court, the trial court is likely to be reluctant, to say the least, to reverse course. Moreover, once a certification order has been blessed by the appellate court, the machinery of certification is set in motion. The parties will grapple with and resolve issues regarding proper class notice, notice will be sent, and discovery will often be expanded on a class-wide basis. The pressures attendant to class certification—increased costs and increased exposure—thus come to bear with full force almost immediately, and an eleventh-hour decertification cannot unravel the damage caused by a precipitous certification order. When an appellate court determines that a would-be class representative has come close but failed to carry his or her burden, the proper response is to deny certification so that neither the parties nor the court will be forced to expend resources in litigating claims that are ultimately determined to be inappropriate for class treatment.

CONCLUSION

In sum, PLAC requests this Court to rule: (a) that Missouri trial courts must engage in a rigorous analysis to determine whether the requirements of Rule 52.08(a) are

met; (b) that in the course of that analysis trial courts should resolve any factual or legal disputes central to the requirements of that rule; and (c) that Missouri appellate courts should conclude that a trial court has abused its discretion if its certification ruling does not indicate that the trial court conducted the required rigorous analysis, or if it rests on an error of law, a clearly erroneous factual finding, or a misapplication of law to the facts. Because the Order here plainly indicates that the trial court did not engage in any independent review but merely rubber-stamped the plaintiff's proposed order, this Court should hold that the trial court abused its discretion in certifying a class, and reverse the Order.

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CERTIFICATE REQUIRED BY SUPREME COURT RULE 84.06(c)

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Rule 84.06(b)(1). The foregoing brief contains 6,947 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(g) has been scanned for viruses and is virus-free.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Brief of the Product Liability Advisory Council, Inc. as *Amicus Curiae* in Support of Relator, as well as a diskette formatted in Word XP were mailed first class, postage pre-paid, on this 27th day of August, 2007, to:

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