Class Action Watch

SEPTEMBER 2007

Omission in FACTA Might Be Windfall for Plaintiff's Bar

by Ted Frank

In 2003, Congress passed the Fair Credit Transactions Act (FACTA), with the goal of preventing identity theft. The Act restricts information that can be printed on electronically-generated credit-card receipts: "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction."[1] "Willful" violation of FACTA entitles a plaintiff to recovery between $100 and $1000, plus punitive damages (if the violation was knowing) and attorney's fees.[2] Unlike many other statutes with statutory damages,[3] there is no cap on total recovery under FACTA. Thus, in a class action, damages for a "willful" violation could be in the hundreds of millions.

FACTA took effect on December 4, 2006. For reasons not in the record of any of the cases, much of the retail industry interpreted the statute to permit the printing of credit card and debit card receipts that included three to five of the last digits of the credit card *and* the expiration date. Plaintiffs argue that the printing of the expiration date alone violated the ambiguous statute and, with no dispositive court or regulatory ruling on the meaning of "or," and millions of potential violations occurring every day in the first weeks after FACTA took effect, such an opportunity has attracted the entrepreneurial trial bar. The Chicago law firm of Edelman, Combs, Latturner & Goodwin, LLC[4] has been advertising for clients to bring class actions;[5] Los Angeles firm Spiro Moss Barness LLP has filed more than forty lawsuits.[6]

There are state law precedents to both the federal law and the litigation. For example, Ohio has a similar law, which passed and took effect in 2004.[7] An entrepreneurial lawyer, John Ferren, and his client, Nathaniel Burdge, brought a series of suits. Burdge "purposely made purchases at stores that were printing his expiration date on his receipt in order to recoup statutory damages totaling at least $12,800."[8] But Ohio's law required a plaintiff to be "a person injured by a violation."[9] Courts found that Burdge's deliberately seeking out credit card receipts suggested profit-seeking, rather than injury, rejected his suit and sanctioned him and his attorney $3,000.[10] Burdge had

continued page 15

New Jersey and Missouri Supreme Courts Reject Lead Paint Public Nuisance Claims

by Mark Behrens & Christopher Appel

In June of 2007, the Missouri and New Jersey Supreme Courts issued important rulings rejecting public nuisance claims in mass actions against former lead paint and pigment manufacturers. The courts' decisions may have a significant influence on courts deciding similar lead paint cases and in other cases where plaintiffs may seek to avoid traditional products liability and class certification requirements through government-sponsored public nuisance claims.

continued page 8

INSIDE

FROM THE

EDITOR

The Federalist Society publishes *Class Action Watch* periodically to apprise both our membership and the public at large of recent trends and cases in class action litigation that merit attention.

Defined as a civil action brought by one or more plaintiffs on behalf of a large group of others who have a common interest, the class action lawsuit is both criticized and acclaimed. Critics say that such actions are far too beneficial to the lawyers that bring them; in that the attorney fees in settlements are often in the millions, while the individuals in the represented group receive substantially less. Proponents of the class action lawsuit see them as a mechanism to consolidate and streamline similar actions that would otherwise clog the court system, and as a way to make certain cases attractive to plaintiffs' attorneys.

Future issues of *Class Action Watch* will feature other articles and cases that we feel are of interest to our members and to society. We hope you find this and future issues thought-provoking and informative. Comments and criticisms about this publication are most welcome. Please e-mail: info@fed-soc.org.

ALI Principles and Litigation Trends

by James Beck

Most people know the American Law Institute (ALI) as an organization founded by the giants of the legal profession, which produced the "Restatements of the Law." There is more to the ALI than just the Restatements, however. More recently, the organization has invested in so-called "Principles" projects, which are more reform-based than the Restatements.

Because the Principles projects involve ideas about what the law "should" be, they have more potential to be controversial, and tend more to reflect the views of the Reporters responsible for them.[1] The current ALI "Principles of the Law of Aggregate Litigation" ("PLAL"), now in its second "Discussion Draft," bears watching for precisely these reasons. If adopted in something close to its current form, the PLAL would put the ALI's prestige squarely behind an unprecedented expansion of aggregated "big litigation"—class actions, mostly, but other forms of aggregation as well.[2]

The current PLAL are very favorably inclined towards the aggregation and resolution of litigation in large units. In many ways, (I have counted at least thirty), the PLAL proposes to change or add to existing law so as to encourage and expand the availability of class actions and other forms of aggregate litigation. Many of these alterations would require amendment of procedural rules or overturning of existing precedent to go into effect.

I. The Impact of Big Litigation?

Almost all litigation has either the intent or the effect of forcing the targeted defendant to change something it is doing. This can be direct, as with an effort to enjoin the defendant to act differently, or indirect, *e.g.* making the challenged conduct uneconomical through imposition of money damages. Whenever litigation is aggregated, the stakes for the defendant are raised in direct proportion to the extent of the aggregation. Most defendants, especially corporate ones, are risk-averse—they do not like to bet the company on one roll of the litigation dice.[3] Thus, claims that on an individualized basis are easily defensible, even so weak that they would never be clogging up the legal system in the first place, become incalculably more dangerous when thousands or millions of them are joined together in a monolithic whole.

An appropriate cautionary tale, which occurred long enough ago that most of its ramifications have become apparent through time: the *Agent Orange* litigation over alleged injuries from defoliants used by the government during the Vietnam War. As individual cases, *Agent Orange* lawsuits were meritless. The government itself, as a sovereign exercising its powers to wage war, was immune from suit. Against the manufacturers of the defoliant who found themselves in the litigation cross-hairs, it was simply impossible for a plaintiff to prove causation, either as to product identification (specifying which defendant's product actually caused a plaintiff's injury) or medically, since exposure to dioxin at the concentrations at issue (another problem of proof) were not scientifically proven to cause the conditions alleged.[4] Individually, such cases certainly could not have survived summary judgment, and most would have been dismissed immediately for failure to specify the responsible defendant. A federal district court, however, decided to aggregate some 600,000 individual

"claims" as a class action. In an instant, the defendants' potential exposure increased by six orders of magnitude. That increased risk had value, and the defendants settled for over $200 million dollars, a huge amount in the mid-1980s.[5]

The aggregation itself, however, was on shaky ground. The only way to certify a class was to ignore accepted choice of law principles by using non-existent "national consensus" law. Being before Rule 23 was amended to permit interlocutory appeals of class certification orders,[6] the ruling was only belatedly disapproved on appeal.[7] The damage, however, had been done, and the defendants could not go back and reclaim what the aggregation had forced them to give away in settlement. As it was, the only way the *Agent Orange* defendants were willing to settle was to purchase "peace" by including the potential claims of many thousands of persons who may have been exposed, but who had not yet been injured. Thus, the so-called "futures problem" emerged in aggregate litigation. Where a person has yet to suffer any injury, it is questionable whether there is even a justiciable claim—particularly in federal court.[8] It is certainly almost impossible to give effective notice to uninjured people who have no reason to pay attention to litigation they have no reason to believe involves them.

Given the passage of time, inevitably some of the *Agent Orange* "future" claims matured—at least arguably. Actually injured now, these persons objected to being bound by a settlement in which they had no part. They were successful, and more than a decade after the fact the *Agent Orange* settlement was overturned for its pervasive lack of procedural due process as to future claimants.[9] The defendants, the ones who had paid over $200 million dollars for peace, got neither peace nor their money back.[10]

continued page 17

More Searching Fact-Based Scrutiny of Proposed Class Actions Reaches Securities and Antitrust Actions

by Brian D. Boyle & Julia A. Berman

Blackmail settlements,"[1] "*in terrorem* power"[2] in the hands of class counsel—these are the consequences of improvident class certification decisions, according to courts that have despaired at lax enforcement of Rule 23 prerequisites. These labels stem from the knowledge that the decision to certify immediately ups the ante in class litigation, placing "hydraulic" pressure on defendants to resolve even unmeritorious claims before trial.[3] Indeed, a Federal Judicial Center study found that settlements resulted in nearly 90% of cases in which the courts had certified a class.[4]

Over the last twenty years, courts in product liability and mass tort actions have begun to check inappropriate use of the class device by scrutinizing the evidence relevant to the purported class claims to determine whether it is of "classwide" dimension—that is, whether it tends to advance or rebut the claims of all putative class members simultaneously.[5] Until recently, however, evidence-focused review of proposed classes in the antitrust and securities realms has been the exception, rather than the rule. That has changed over the past couple of years. Recent decisions in the Second, Fifth and Eighth Circuits exemplify the new approach, exploring the quantum of proof that plaintiffs seeking certification should be required to muster on factual elements crucial to class treatment. Thus, these decisions can offer important insights for class actions generally.

I. Common Groundwork

The legal standard for class certification is the same across legal disciplines; regardless of the content of a plaintiff's complaint, every purported class must meet the requirements of Rule 23. As a practical matter, however, the courts' application of Rule 23 has varied widely with the subject-matter of the complaint, with securities and antitrust classes being given considerably less scrutiny than others.[6]

In *Eisen v. Carlisle & Jacquelin*[7], the Court held that "nothing in 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." However, in two subsequent decisions, *Coopers & Lybrand v. Livesay*[8] and *Gen. Tel. Co. of the Sw. v. Falcon*,[9] the Court indicated that "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." The Court in *Falcon* further instructed trial courts to conduct a "rigorous" analysis to ensure that the putative class satisfied Rule 23's requirements.[10] While a close look at these cases reveals that they need not conflict with each other at all, it is easy to see how these apparently conflicting directives could have resulted in inconsistent applications by the lower courts.

In *Eisen*, the Court faced an unusual situation—the merits inquiry there arose not in the context of evaluating whether plaintiffs' claims turned on common proof, but in relation to Rule 23's notice requirements.[11] Providing the required notice was prohibitively expensive for the plaintiff.[12] Wanting to avoid effectively ending a potentially meritorious lawsuit, but reasoning that it would be unfair to impose notice costs on defendants if the suit lacked merit, the district court examined whether the plaintiff could demonstrate "a strong likelihood of success on the merits"—if the plaintiff could make such a showing, the court would shift the costs of notice to the defendants.[13] Ultimately, the plaintiff succeeded in making this showing, and the court shifted ninety percent of the notice costs.[14] On appeal, the Second Circuit held that the district court had no authority to conduct this merits inquiry, and the Supreme Court agreed.[15] In that context—examining whether the district court had the authority to conduct a preliminary-injunction-like analysis of whether the plaintiff could prevail—the Supreme Court pronounced in oft-cited language that "nothing in either the language or history of Rule 23" permits "a preliminary inquiry into the merits of a suit."[16] While this holding did not address a merits inquiry that overlapped with Rule 23's various requirements, many courts (discussed below) thereafter interpreted it to extend to such situations.

In contrast, *Livesay* and *Falcon* dealt directly with the role of the merits in analyzing whether a putative class meets Rule 23's prerequisites to certification. In *Livesay*, the Court considered the nature of the decision to certify or decertify a class in order to determine whether it was the kind of holding which was immediately appealable.[17] In its analysis, the Court discussed the extent to which class decisions necessitate examining the factual and legal issues involved in an action. Quoting from *Federal Practice and Procedure*, the Court listed "obvious examples" of determinations under Rule 23 which were "intimately involved with the merits of the claim"—these included typicality, adequacy, and the presence of common questions of law and fact.[18] The Court further indicated that "[t]he more complex determinations required in Rule 23(b)(3) class actions entail even greater entanglement with the merits."[19]

Subsequently, in *Falcon*, the Court again emphasized that "actual, not presumed, conformance with Rule 23(a) remains… indispensable."[20] There, the Court found that the district court had certified an overbroad class in a

continued page 22

Fluid Recovery: Manufacturing "Common" Proof in Class Actions?

by Jessica D. Miller & Nina Ramos

As the Class Action Fairness Act (CAFA) moves toward its third anniversary, plaintiffs' attorneys continue their efforts to preserve aggregate litigation in a post-CAFA age. Without doubt, CAFA has put the squeeze on traditional plaintiff class action strategies. No longer can plaintiffs simply file a class action in a favored state court jurisdiction and be assured of certification. Nor can they use the leverage of unfavorable state courts to extract settlements of meritless claims. Instead, plaintiffs must now pursue most class action litigation in federal courts, which have, as a general matter, been far more skeptical of such cases than their state court counterparts, and have taken seriously Fed. R. Civ. P. 23's requirement that class actions can only be certified if each class member can prove his/her claims using the same evidence. Because this standard is difficult, if not impossible, to satisfy in the vast majority of product liability cases, product liability class actions are generally disfavored in federal court.

The result is that plaintiffs' attorneys have begun to look for new and creative ways to convince federal judges that product liability cases can be tried on a classwide basis. These innovative strategies have included: strategic alliances with state attorneys general, who can bring aggregate litigation without having to worry about the requirements of Rule 23 or CAFA's jurisdictional provisions; proposed "issues trials" that ostensibly segregate common issues for trials that are divorced from any one plaintiff's actual experiences; and consolidated, multi-plaintiff trials—widely recognized as prejudicial to defendants—in receptive state courts (since CAFA only expanded jurisdiction over such cases if more than 100 plaintiffs are involved). This article addresses yet another tactic that has been employed by plaintiffs' attorneys in an effort to overcome the due process-based requirements of Rule 23: fluid recovery.

Fluid recovery seeks to demonstrate causation on a classwide basis through the use of statistics. The Second Circuit is currently reviewing the question whether "fluid recovery" is a legitimate means of proving causation on a classwide basis or an impermissible statistical end-run around Rule 23's predominance requirement. In *Schwab*

v. Phillip Morris, the Second Circuit will decide whether Judge Weinstein of the Southern District of New York properly certified a class of smokers claiming economic injury as a result of defendants' allegedly deceptive practices in marketing light cigarettes. Specifically, the appellate court's review will likely focus on whether Judge Weinstein abused his discretion in holding that common issues predominated because both causation and injury could be proven on a classwide basis using expert testimony.

I. The Rise of Fluid Recovery As a Theory of Proof

The term "fluid recovery" is generally used to refer to a variety of equitable procedures designed to allow a group of plaintiffs to recover based on alleged "aggregate" damages suffered by the class as a whole—rather than the harm suffered by each individual plaintiff.[1] Fluid recovery most often concerns the process of determining whether a defendant's conduct caused injury to an entire group of people, calculating the worth of that group injury on an aggregate basis, and then distributing the "classwide" recovery to individual class members through an equitable process.[2] Thus, under a fluid recovery system, a defendant may be forced to compensate an entire group of plaintiffs without any one of those plaintiffs having to prove that she or he was actually injured or that his or her injury occurred as a result of the defendant's conduct.

There are three steps to fluid recovery. First, the defendant's total liability to the entire group is calculated by a jury in a single, class-wide adjudication, normally based on expert testimony or statistical evidence that the defendant's conduct caused injury to the group generally, as well as the amount of the group's damages. That amount is paid into a class fund. Second, individual class members are able to collect a portion of the fund by proving the amount of their specific damages through a non-jury "proof of claim" process. Finally, the leftover money in the fund is distributed equitably by the court to a cause that the court believes is in the interest of the class members. The theory behind fluid recovery was that a class action could be tried to assess the defendant's liability to the "class as a whole," without first forcing plaintiffs to go through the costly and time-consuming process of identifying the individuals who make up that class. But courts rejected even this limited use of fluid recovery. For example, in *Eisen v. Carlisle & Jacquelin*, plaintiffs attempted to use a theory of fluid recovery to

continued page 9

Has the Eleventh Circuit Set a New Standard for Federal Diversity Jurisdiction?

by Kenneth J. Reilly & Frank Cruz-Alvarez

On April 11, 2007, the Eleventh Circuit Court of Appeals issued its decision in *Lowery v. Alabama Power Co.*[1] Unless it is withdrawn or revised, *Lowery* may significantly delay a defendant's ability to remove a case to federal court absent a "clear statement" by the plaintiff establishing the necessary jurisdictional amount in controversy.

Lowery involved the removal of a "mass action" under the Class Action Fairness Act ("CAFA"), which permits removal of "mass actions" when at least one plaintiff is diverse from any one defendant, and the aggregate value of the plaintiffs' claims is at least $5,000,000.[2] Here, the claims were brought by 400 plaintiffs against fourteen manufacturers alleging that the defendants discharged particulates and gases into the atmosphere and the ground water, which caused them to "suffer personal injuries, physical pain and mental anguish, and the loss of the use and enjoyment of their property."[3] Because at least one plaintiff was diverse from one defendant, CAFA's "minimal diversity" requirement was met.

Among other issues raised by plaintiffs in support of their motion to remand, they argued that defendants had failed to establish the requisite amount in controversy to maintain federal diversity jurisdiction (*i.e.,* defendants failed to demonstrate that plaintiffs' aggregate claims exceeded $5,000,000, which required a showing that each plaintiff's claim exceeded $12,500) and sought to have the case remanded back to Alabama Circuit Court.[4] In the Eleventh Circuit, as in most circuits, "where the damages are unspecified, the removing party bears the burden of establishing the jurisdictional amount by a preponderance of the evidence."[5] As such, defendants sought to meet their burden with the type of evidence that has routinely been deemed sufficient to meet the "preponderance of the evidence" standard: (a) plaintiffs' initial complaint which sought $1.25 million in damages per plaintiff; (b) the fact that the case involved 400 plaintiffs requesting unlimited punitive damages; and (c) judgments in "similar" mass tort cases.[6] The district court, however, dismissed defendants'

evidence as insufficient, and found that they had failed to establish federal diversity jurisdiction. The district court entered an order remanding the case back to Alabama Circuit Court. Defendants took an appeal pursuant to CAFA.[7]

On appeal, the Eleventh Circuit acknowledged its prior adoption, in *Tapscott*, of the "preponderance of the evidence" standard for establishing the jurisdictional amount in removal actions.[8] Nonetheless, the court questioned the correctness of the prior precedent, and, without expressly overruling *Tapscott* and its progeny, indicated a more stringent burden for establishing the amount in controversy in removed actions.[9] The court held that the amount in controversy is only established "[i]f the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them…."[10] Otherwise, "the court must remand."[11] Moreover, the court held that any "factual information establishing the jurisdictional amount must come from the plaintiff."[12] The court's holding suggests that anything short of an admission by plaintiff will require that the case be remanded. In fact, the court noted that it was "highly questionable whether a defendant could ever file a notice of removal on diversity grounds in a case... where the defendant... has only bare pleadings containing unspecified damages... without seriously testing the limits of compliance with Rule 11."[13] Applying this higher "clear statement" standard, the court rejected defendants' evidence on the amount in controversy, and affirmed the District Court's order remanding the case back to Alabama Circuit Court.

The court also considered whether it was appropriate to remand the case to the federal district court to give the defendants an opportunity to conduct post-removal discovery into the amount in controversy. Contrary to established Eleventh Circuit and United States Supreme Court precedent,[14] the court held that post-removal discovery on amount in controversy is never appropriate, and a district court does not have the discretion to grant such discovery.[15] A motion for rehearing is pending.

The court's holding in *Lowery*, if not reversed or limited on rehearing, could significantly delay a defendant's ability to remove a case to federal court in those instances where the jurisdictional amount is not readily deducible from the complaint, and the defendant is unable to identify a "clear statement" from the plaintiff on the amount in controversy. Moreover, plaintiffs will contend that this "clear statement" standard should be interpreted as essentially eliminating a district court's ability to examine circumstantial evidence, such as the nature of the claim(s), the number of plaintiffs involved, the type(s) of damages sought, and judgments obtained in similar actions, to determine if the amount in controversy meets the jurisdictional limit. Arguably, the court's holding does not go that far.

Despite the new "clear statement" standard that the court purports to establish in *Lowery*, the panel does not (and could not) overrule any of the court's prior decisions addressing amount in controversy, including the court's decision in *Williams v. Best Buy*.[16] In *Williams*, the court held that the amount in controversy is satisfied when it is "facially apparent" from the complaint that the amount in controversy exceeds the jurisdictional requirement.[17] The holdings in these two cases seem to be at odds, and how the court will ultimately resolve these apparent inconsistencies will remain unknown until the pending motion for rehearing is decided. Arguably, the court can reconcile *Williams* and *Lowery* because even under *Lowery*, the amount in controversy can be satisfied if the plaintiff does not allege a specific amount in damages, but there are sufficient factual allegations from which it is readily deducible that the amount in controversy is satisfied. Regardless, until the issue is conclusively decided, defendants should continue to rely on *Williams* as the standard for assessing the amount in controversy in those instances where the plaintiff's factual allegations make it "facially apparent" that the amount in controversy exceeds the jurisdictional amount.[18]

Furthermore, the "clear statement" standard as articulated by the court is incompatible with the notice-pleading standard found in most states. That is to say, in most states all a plaintiff is required to plead with respect to damages (and, typically, all that *is* plead) is that the value of the case exceeds the state court jurisdictional amount.[19] As such, in some instances, defendants will not be able to initially remove a case. Rather, defendants will have to engage in expensive and time consuming "amount in controversy" discovery (*e.g.,* interrogatories and requests for admission) in order to establish that a plaintiff's claims meet or exceed the jurisdictional amount. Presumably, once a plaintiff's discovery responses demonstrate that a plaintiff's claims meet the jurisdictional amount, then the defendant will be able to remove the case. Needless to say, this presupposes that plaintiffs do not engage in gamesmanship by delaying meaningful discovery responses past the one year "deadline" set forth in 28 U.S.C. § 1446(b).

As such, the court's decision to limit a defendant's ability to remove cases only in those instances where "the jurisdictional amount is... stated on the face of the

[removing] documents..., or readily deducible from them" could dictate that jurisdiction will be decided by the artfulness of a plaintiff's pleadings and discovery responses in state court for one year.[20] If successful on both fronts, plaintiffs may preclude defendants from meeting this new "clear statement" standard, and in effect make their cases removal-proof. This result would be contrary to the intent of 28 U.S.C. § 1332 and CAFA.

In sum, *Lowery* could potentially delay a defendant's ability to remove a case to federal court, even where the "preponderance of the evidence" demonstrates that federal jurisdiction is proper. Its effects are already being felt in the Eleventh Circuit.[21]

** Kenneth J. Reilly is a Partner, and Frank Cruz-Alvarez is an Associate, in the Miami office of Shook, Hardy & Bacon, LLP.*

Endnotes

1 483 F.3d 1184 (11th Cir. 2007).

2 *See* 28 U.S.C. § 1332(d)(11); *see also Lowery*, 483 F.3d at 1198 ("CAFA does not apply exclusively to class actions certified under Rule 23 or state analogues. CAFA's mass action provisions extend federal diversity jurisdiction to certain actions brought individually by large groups of plaintiffs.")

3 *See Lowery*, 483 F.3d at 1187-88.

4 *Id.* at 1189.

5 *Id.* at 1208 (citing Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, which adopted the preponderance of the evidence standard in the removal context).

6 *Id.* at 1189.

7 28 U.S.C. § 1453(c)(1) (allows appeal of district court order granting remand to state court when the case falls within the ambit of CAFA).

8 *See Lowery*, 483 F.3d at 1209.

9 *Id.* at 1210-11.

10 *Id.* at 1211.

11 *Id.*

12 *Id.* at 1213.

13 *Id.*, 483 F.3d at 1215, n.63.

14 *See, e.g.,* Gibbs v. Buck, 307 U.S. 66 (1939); Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978); U.S. Catholic Conference v. Abortion Rights Mobilization, 487 U.S. 72 (1988); Martin v. Franklin Capital Corp., 546 U.S. 132 (2005).

15 *Id.* at 1215-19.

16 269 F.3d 1316 (11th Cir. 2001).

17 *Id.* at 1319.

18 *See* Cargill v. Turpin, 120 F.3d 1366, 1286 (11th Cir. 1997) ("The law of [the Eleventh Circuit] is 'emphatic' that only the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision.").

19 *E.g.*, Florida Circuit Court jurisdictional amount is $15,000; Alabama Circuit Court jurisdictional amount is $3,000.

20 28 U.S.C. § 1446(b) states that "a case may not be removed on the basis of [diversity] jurisdiction... more than 1 year after commencement of the action.

21 *See, e.g.,* Constant v. Int'l House of Pancakes, Inc., 487 F. Supp. 2d 1308 (N.D. Ala. 2007); Jackson v. Peoples South Bank, 2007 U.S. Dist. LEXIS 47062 (M.D. Ala. June 27, 2007); Ellis Motor Cars, Inc. v. Westport Ins. Corp., 2007 U.S. Dist. LEXIS 48517 (M.D. Ala. July 5, 2007).

MO & NJ Supreme Courts Reject Lead Paint Public Nuisance Claims

Continued from page 1

In *City of St. Louis v. Benjamin Moore & Company*, a divided Missouri Supreme Court rejected a public nuisance claim brought by St. Louis to recover costs the city incurred as part of a program to abate or remediate lead paint in private residences.[1] The city admitted that it could not identify the manufacturer of any lead paint allegedly present at, or abated from, the properties. A majority of the court held, "Absent product identification evidence, the city simply cannot prove actual causation." The court also rejected the city's argument that its status as a governmental entity, or the public nature of the injury, should set the city's claim apart from other public nuisances or subject the city to a lesser causation standard. The court said the traditional tort law requirement of causation "applies with equal force to public nuisance cases brought by governmental entities for monetary damages accrued as an alleged result of the public nuisance."

Days after the *City of St. Louis* decision, the New Jersey Supreme Court, in *In re Lead Paint Litigation*, rejected consolidated complaints by twenty-six state municipalities and counties seeking to recover from former lead paint manufacturers and distributors the costs of detecting and removing lead paint from homes and buildings, of providing medical care to residents affected with lead poisoning, and of developing programs to educate residents about the hazards of lead paint exposure.[2] The court said the government entities' claims "would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance."[3]

The court reached its decision after thoroughly examining the historical underpinnings of the tort of public nuisance and analyzing legislative enactments governing both lead paint abatement programs and products liability claims. First, the court explained, "a public nuisance, by definition, is related to conduct, performed in a location within the actor's control, which has an adverse effect on a common right." In the subject appeal, however, the conduct that created the problem was the poor maintenance of the premises by their owners —neither the location nor the conduct was within the defendants' control. Second, "a public entity which proceeds against the one in control of the nuisance may only seek to abate, at the expense of the one in control of the nuisance." Because the governmental entities sought damages rather than abatement, their claims "f[e]ll outside the scopes of remedies available **to** a public entity plaintiff." Third, under the tort of public nuisance, "a private party who has suffered special injury may seek to recover damages to the extent of the special injury and, by extension, may also seek to abate." The court said that even if the governmental entities could proceed in the manner of private plaintiffs, they could not identify any special injury. Rather, all of the injuries identified by the plaintiffs were general to the public at large. The court, quoting two federal appellate court opinions, concluded that if it were to ignore the fundamental legal underpinnings for public nuisance claims and find a cause of action to exist, "nuisance law 'would become a monster that would devour in one gulp the entire law of tort." This is not something the New Jersey Supreme Court was willing to permit.

** Mark Behrens and Christopher Appel are attorneys with Shook, Hardy & Bacon, LLP.*

Endnotes

1 226 S.W.3d 110 (Mo. 2007).

2 924 A.2d 484 (N.J. 2007).

3 *See also* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rationale Boundaries on a Rational Tort*, 45 Washburn L.J. 541 (2006).

Fluid Recovery: Manufacturing "Common" Proof?

Continued from page 5

certify a class of securities traders alleging antitrust claims against several limited partnerships.[4] The named plaintiff in *Eisen* could not identify individual class members, and was unwilling to undertake the cost to provide potential class members with proper notice.[5] Plaintiffs argued, and the district court accepted, that the court should hold a preliminary hearing on defendants' theoretical liability to the "class as a whole." Once defendants were found preliminarily liable, plaintiffs would be able to recover the amount necessary to identify individual class members and proceed with a full classwide trial.[6]

On appeal, the Second Circuit reversed, holding that the proposed fluid recovery plan violated the basic tenets of federal class action law. The Second Circuit criticized the district court's use of fluid recovery, noting that "[i]t is clear to us that, with or without these innovations, the notice provided by amended Rule 23 to be given 'to all members (of the class) who can be identified through reasonable effort' cannot be given, as [plaintiff] refuses to pay or put up any bond to cover this expense."[7] Moreover, the court held that it was unfair to require defendants to pay the cost of notice based only on a preliminary finding of liability, noting that "if defendants prevail on the merits, they will be unable to recover any amounts expended by them for this purpose."[8] Thus, the court held that "[e]ven if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law."[9] Accordingly, the court dismissed the case as a class action, noting that "the 'fluid recovery' concept and practice [is] illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper."[10]

While some other courts have declined to follow the Second Circuit's outright rejection of fluid recovery as a means to deal with manageability problems inherent in large class actions, virtually all of the courts that have found fluid recovery to be a valid tool for assessing relief in a class action have done so only in the settlement context, where the defendant has agreed to pay damages.[11]

II. Fluid Recovery Case-in-Point: *Schwab vs. Phillip Morris*

Despite the lack of widespread acceptance of fluid recovery as a legitimate means of establishing notice, product liability plaintiffs have not abandoned fluid recovery as a theory of classwide proof. Indeed, class action plaintiffs' attorneys have recently embraced fluid recovery as a solution to another problem that has plagued their attempts to certify product liability class actions in federal court: the difficulty of establishing causation and damages on a classwide basis. In *Schwab v. Phillip Morris USA, Inc.*, plaintiffs convinced a federal district court judge to accept this argument.[12]

On September 25, 2006, Judge Weinstein of the Eastern District of New York certified a nationwide class of tens of millions of plaintiffs who purchased light cigarettes from the time they were put on the market in 1971 to the present. According to plaintiffs, who alleged RICO claims against the cigarette manufacturers, "they, and a class consisting of tens of millions of smokers, were induced by fraud to buy a kind of cigarettes" and "suffered financial damage because they did not get what they thought they were getting—a more valuable, safer cigarette."[13] In an effort to avoid the individualized nature of their RICO claims—*i.e.*, the requirement for each plaintiff to show that she or he relied on the alleged fraud in purchasing the cigarettes at issue—plaintiffs presented an expert who had used "a well respected measure of consumer reliance" to determine "that health concerns were a substantial contributing factor in 90.1% of consumers' decisions to purchase 'light' cigarettes."[14] In addition, plaintiffs presented evidence that "defendants deceived and misled the FTC and public health authorities—the only other possible sources of information about 'light' cigarettes."[15] In light of this evidence, the district court determined that "reliance by many, if not all, of the plaintiffs was reasonable in the totality of the circumstances, particularly given the lack of sophistication on such health matters of many, if not most, smokers, combined with the allegedly voluminous distortions and omissions by defendants concerning the dangers of 'light' cigarettes."[16] As a result, the trial court held that a jury could determine reliance as to the "class as a whole."

Plaintiffs also claimed—again based only on expert witness testimony—that "the aggregate difference between what the plaintiffs paid for the 'light' cigarettes (the purchase price) and their much lower value to consumers as nonsafer cigarettes (true value) was $144 billion."[17] In essence, plaintiffs asserted that they could prove damages on a classwide basis simply by presenting an expert to determine the difference in cost between the likely number of "light" cigarettes sold to the class during the class period and the price of less-expensive, regular cigarettes that the class members probably would have purchased, absent the defendants' alleged misrepresentation. The district court accepted this argument, despite the fact that the

plaintiffs' model for proving damages unfairly assumed that no class member would have continued to purchase "light" cigarettes if defendants had provided more or different health information. Of course, this assumption failed to take into account each class member's loyalty to his or her preferred type of cigarette based on taste, habit, societal influences, brand recognition, and advertising. For example, there is at least some possibility that a cigarette user who smoked Camel Lights for five years would have continued to smoke Camel Lights even after learning that they carry the same health risks as less-expensive Camel Regulars. Indeed, if all smokers would have stopped purchasing light cigarettes upon learning of the allegedly withheld information, then the publicity regarding the many "light" cigarette lawsuits brought in recent years would have forced the tobacco companies to take these cigarettes off the market.

In certifying the RICO action, Judge Weinstein accepted plaintiffs' theory of statistical aggregation and fluid recovery, finding that "[e]very violation of a right should have a remedy in court, if that is possible" and, as a result, "a class action should not be frustrated by a large number of small claims."[18] According to Judge Weinstein, the "question" presented in the case is "whether the American legal system, faced with an alleged massive fraud, must throw up its hands and conclude that it has no effective remedy for what at this stage of the litigation must be a huge continuing violation of consumers' rights."[19] Because the American legal system's "watchword has been... 'no right without a remedy,'" Judge Weinstein concluded that "the answer is that modern civil procedure, scientific analysis, and the law or large numbers used by statisticians provide a legal basis for a practical and effective remedy."[20] As a result, Judge Weinstein decided that the trial court may simply side-step individualized issues relating to reliance, causation or damages that would ordinarily make a class action uncertifiable simply by determining defendants' liability, on an aggregate basis, to the class as a whole.

Judge Weinstein's certification order in *Schwab* is currently pending before the Second Circuit—the very same court that expressly rejected the use of fluid recovery in *Eisen* as "illegal… and wholly improper."[21] It is likely that the Second Circuit will once again refuse to allow the application of this "innovative" procedure to evade the requirements of Rule 23. Indeed, almost immediately upon receiving petitioners' request for interlocutory review in *Schwab*, the Second Circuit took the unusual step of ordering a stay of all trial court proceedings in the case until review was complete, a strong indication that the appellate court intends to reverse the certification order.[22]

III. Fluid Recovery: Contrary to Fundamental Legal Principles?

While critics of the tobacco industry have hailed Judge Weinstein's ruling as bold and innovative, fluid recovery is generally recognized as an improper method for assessing liability in class action cases (regardless of how popular or unpopular the defendant is). First, fluid recovery allows judges to misuse Rule 23—intended to be only a procedural rule—in a manner that waters down the substantive law applicable to class action plaintiffs' claims. Second, fluid recovery violates class action defendants' due process rights by robbing them of their right to a fair trial.

A. Fluid Recovery Improperly Weakens Substantive Law To Facilitate Class Certification

While courts have a certain degree of flexibility in designing methods to adjudicate class actions, that flexibility is strictly limited in one critical way: regardless of the *method* of proof a plaintiff proposes for adjudicating a class action, the court cannot eliminate the *substantive requirement* that classwide liability must be established for plaintiffs to prevail on their claims.[23] Under a statute known as the Rules Enabling Act, federal rules like Rule 23, which are promulgated by judges, must be purely procedural; if a judicially promulgated rule affects substantive law, it would encroach on the powers of Congress, and would therefore be invalid.

The Rules Enabling Act has important ramifications for class actions and the notion advanced by plaintiffs' lawyers that class actions should be used as a tool to promote social justice and police corporate America. In fact, class actions are not a "tool of justice," but merely an aggregated procedure to try cases together where doing so satisfies the requirements of Rule 23, and would thus be fair and efficient. When courts begin to use Rule 23's class action mechanism to impose different or greater liability on defendants in the class action context than the same defendant would face in an individual lawsuit, they are straying into substantive law and thus running afoul of the Enabling Act.[24] For this reason, courts have recognized that class action rules cannot "alter the required elements which must be found to impose liability and fix damages."[25] In other words, a class trial is only proper if it will prove that *all* class members satisfy all substantive elements of their claims.

Fluid recovery violates this fundamental rule by disconnecting a defendant's liability from the individual class members' claims.[26] Under a fluid recovery system, plaintiffs are no longer required to prove a defendant's liability as to each individual class member. Instead, the named plaintiff need only show that the defendant

is generally liable to the entire class based on statistical evidence or expert testimony.[27] Thus, plaintiffs can establish liability based only on generalized proof not tied to the facts of any particular plaintiff's case, even if the plaintiffs' claims involve different facts.

As a result, even though some class members' cases may be fatally flawed (including plaintiffs who cannot establish all of the elements of their cause of action, or whose claims are susceptible to individualized defenses, such as the statute of limitations), those flaws will never be uncovered during a fluid recovery trial. In short, the use of fluid recovery substantially reduces plaintiffs' burden of proof in class actions, allowing many plaintiffs to recover without ever having to prove the basic elements of their claims.

B. Fluid Recovery Denies Class Action Defendants A Fair Day In Court

Fluid recovery is also of great concern because its use undermines a defendant's due process right to a fair trial. The Due Process Clause guarantees every party in litigation the "opportunity to present his case and have its merits fairly judged." This guarantee includes the right to present a defense to each and every claim being asserted against a defendant, and this requirement applies with equal force in the context of a class action.[28] The Seventh Amendment, on the other hand, guarantees that any civil suit placing more than twenty dollars in controversy must be adjudicated under a procedure which preserves "the substance of the common-law right of trial by jury" and contains those aspects of the jury trial process "which are regarded as fundamental, as inherent in and of the essence of the system[.]"[29] Thus, any procedure for adjudicating claims must (1) provide the defendant with a meaningful opportunity to be heard on each claim asserted against it under the Due Process Clause; and (2) afford the defendant with the essence of a common-law jury trial for each claim being litigated under the Seventh Amendment. Fluid recovery does not satisfy either of these requirements. As noted above, plaintiffs have attempted to use fluid recovery plans to adjudicate causation and damages on an aggregate basis, notwithstanding differences between individual class members and the merits of each class member's claims. In product liability cases, however, class members' claims vary significantly.

To take just one example, in a failure-to-warn claim, the timing, substance, and duration of the warnings received by individual class members is likely to be anything but uniform. And this says nothing about the infinite variations that will affect a consumer's decision to buy—or not to buy—a product, even if the manufacturer *did* adequately warn about that product's alleged risks. For example, a class member who is already at risk for the injuries alleged to be caused by a particular product may not purchase that product if adequately warned, knowing that the chances of injury are already high. Another class member who is not at risk for the alleged injury may buy the product anyway, deciding that she or he can accept a small increase in risk. Similarly, some class members will have a history of ignoring warnings and using dangerous products. Those plaintiffs will have a much weaker failure-to-warn case than a class member who is adamant about avoiding risks and pays careful attention to product warnings. Fluid recovery contains no allowance for such distinctions, even though common sense requires the conclusion that a more or less random sample of consumers, with highly varied medical histories, dietary and other habits, will have very different claims.

Unconcerned with such fundamental differences, fluid recovery determines liability based on "aggregate damages" to an amorphous group, rather than the worth, based on individualized issues, of each individual class member's claim. Fluid recovery is thus unavoidably imprecise, "and persons may benefit from group remedies even though they were not victims of defendant's unlawful actions."[30]

Under fluid recovery, the defendants may be forced to pay "compensation" to class members who are not entitled to it, without ever being given the chance to show that those "overcompensated" class members' claims lack merit. No defendant in a fluid recovery scheme is afforded an "opportunity to be heard at a meaningful time and in a meaningful manner."[31] Indeed, many courts have found fluid recovery plans unconstitutional on precisely this basis.[32]

In addition, fluid recovery does not provide class action defendants a fair jury trial on each claim being asserted against them, because no single plaintiff is ever required to prove that his or her alleged injury was actually caused by defendants' conduct. Instead, the determination that each individual class member was injured by the defendant's actions—and the amount of that class member's damages—become matters of statistical inquiry, with conclusions derived from estimates drawn from samples of users. Thus, defendants are never given the opportunity to prove that some users would have used the product at issue even if they had known about the alleged defect—including users who generally do not read product warnings and users who purchased a product because of its packaging or because of their familiarity with the brand. In short, the fluid recovery method for adjudicating liability and damages is more akin to a theoretical "trial by average," where it is determined

that the defendant's actions would probably have harmed the "average consumer," but never established that the defendant actually harmed any real consumer.

This type of "trial by statistic," which uses aggregate statistical estimation instead of individual proof, by its nature undermines a defendant's right to a fair trial. It is inherently inequitable to allow plaintiffs to establish that a defendant's actions caused each plaintiff's injury, based merely on a mathematical showing that it is statistically probable that the defendant's actions could cause injury.[33] In a now-famous law review article, Professor Laurence Tribe illustrated the fallacy of treating general statistical evidence as conclusive proof.[34] As Tribe noted, the fact that a defendant owns most of the blue buses in town does not alone suffice to prove that the defendant caused the injury to a plaintiff injured by a blue bus. The same is true with regard to fluid recovery plans. Evidence that a defendant's actions caused a sample (or percentage) of product users to use a defective product and sustain injury does not prove conclusively that everyone who used the product sustained injury as a result of the manufacturer's actions.

As Tribe noted, the use of statistical proof is even less persuasive where the defendant could prove through non-statistical evidence that the defendant did not actually cause the alleged injury.[35] In fluid recovery plans, however, defendants are generally precluded from presenting individualized, non-statistical evidence to prove that they did not cause a specific plaintiff's alleged injuries. As a result, defendants are essentially presumed guilty of the allegations asserted against them based on a mathematical theory—*i.e.*, owning most of the blue buses—and afforded no opportunity to rebut the charges using real evidence.

IV. Is Fluid Recovery Contrary to Consumers' Interests?

Plaintiffs' lawyers generally argue that fluid recovery is a necessary and fair way to redress wrongs that might otherwise be ignored by the court system. According to its proponents, fluid recovery can compensate large groups of individuals who have each suffered limited, or even nominal, damages, for tort wrongs. Without the ability to use aggregate proof, plaintiffs argue, there would be no way to obtain justice when corporations engage in fraudulent activity that only has a minor effect on each individual consumer (rendering individual lawsuits economically unfeasible). In sum, fluid recovery has been advanced as a means to help private plaintiffs' lawyers police corporate activity and promote justice for American consumers.

While this rationale for fluid recovery may seem superficially attractive, fluid recovery threatens to undermine basic legal protections, over-compensate consumers and their lawyers and deter innovation and growth among American companies. The practical effect of fluid recovery in the mass tort context is to make it easier for plaintiffs to prevail in a class action, as opposed to an individual lawsuit. Accordingly, acceptance of fluid recovery will lead to the filing, and ultimate certification, of many more class actions in which class members who have suffered no harm as a result of the defendant's misconduct will be able to receive compensatory damages. Defendants will bear untold costs as a result of defending class suits waged by hundreds to thousands of individuals whose claims will never be tested. And many companies will be forced into settlement—despite the fact that many, if not most, class members' claims are baseless—in order to avoid potentially fatal classwide judgments.[36]

Such an outcome may be viewed as desirable in certain contexts—such as the tobacco litigation—where there is general public acceptance that raising the cost of the product at issue, and thereby deterring its use, ultimately inures to the public's benefit. However, if plaintiffs' attorneys are allowed to take on the role of regulators by certifying class action suits against product manufacturers without any evidence that class members were actually harmed by the products at issue, there will be many negative ramifications for American consumers and the domestic economy.

First, allowing plaintiffs to circumvent Rule 23's strict predominance requirement would ultimately increase the costs that consumers are forced to pay for products manufactured by American companies. As set forth above, acceptance of fluid recovery would lead to certification of many more class actions in U.S. courts. Moreover, because fluid recovery essentially forces such defendants to litigate cases on an unfair playing field—relieving plaintiffs of the need to prove each element of their claims and often robbing defendants of the ability to present plaintiff-specific defenses—it is almost certain that defendants would frequently lose (or settle) these cases regardless of their merit. The increased occurrence of multimillion dollar class action verdicts and settlements would inevitably result in increased costs to product manufacturers. These costs would then run directly to consumers, who would be forced to pay higher prices for products.[37]

If fluid recovery becomes an acceptable method of proof in class action cases, it would also turn private plaintiffs' lawyers into private corporate regulators. These attorneys would be able to hold up corporations

by identifying a practice that "deceived" consumers and finding an expert willing to opine that some percentage of plaintiffs were affected in some manner by the practice. Very few defendants would risk trial in those circumstances (indeed, their fiduciary obligation to their shareholders may prevent them from doing so even if they are outraged by the allegations). Thus, the overwhelming majority of such cases would settle, with 30% of the proceeds going to the attorneys. Such a system of wealth transfer would not only hurt the U.S. economy and the millions of Americans who invest in U.S. companies through 401(k) plans and other investment plans, but would do so for highly dubious lawsuits that even plaintiffs contend result in nominal damages to individual class members. To make matters worse, the promise of money would obviously impair the objectivity of the lawyers bringing these suits. With the right expert in hand, every practice of every American corporation could no doubt be portrayed as deceptive.

Allowing plaintiffs' attorneys to proceed in this manner is thus "no different from permitting self-appointed 'police officers' to roam the streets, set up speed traps, pull over drivers (whether or not they were speeding), and give them the option of either (1) spending a few nights in jail, or (2) resolving the problem by paying the police officer (for personal benefit) whatever he demands."[38] Nobody would seriously suggest such a system of traffic cops because of the risks of corruption, self-interest and improper incentives; the same concerns apply to policing corporate America.

CONCLUSION

A fundamental tenet of our legal system is that a private plaintiff must prove each element of his or her claims, including causation and injury, to recover on a lawsuit. Fluid recovery compromises this principle by allowing plaintiffs in class actions to establish liability without being forced to account for the myriad differences among class members' claims, and improperly uses the class action device to achieve a substantive end by watering down injury and causation requirements. Fluid recovery also threatens defendants' Due Process and jury trial rights, since they must defend themselves against an aggregate statistic, rather than individual claims. Even worse, fluid recovery would promote a private enforcement system made up of self-styled private attorneys general engaged in a game of high-stakes blackmail with American industry.

Federal agencies—rather than the plaintiffs' bar—should be regulating commercial industries and ensuring that products marketed and sold to the public are safe. If existing remedies do not adequately compensate consumers or deter corporate wrongdoing, Congress, rather than the courts, should provide a solution.[39]

* *Jessica D. Miller is a Partner, and Nina Ramos is an Associate, in the Washington, D.C. office of O'Melveny & Myers, LLP.*

Endnotes

1 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 13:56 (4th ed. 2002).

2 *Id.*

3 *Id. See also* Philip E. Karmel & Peter R. Paden, *Toxic Torts: Fluid Recovery in Class Action Litigation*, 236 N.Y. L.J. 3, 3 (2006).

4 479 F.2d 1005 (2d Cir. 1973).

5 *Id*. at 1008.

6 *Id.* at 1018 (noting that the "idea" behind the district court's fluid recovery plan was that damages to "the 'class as a whole' will be assessed and the defendants, it seems to be assumed, will promptly pay this huge sum into court. This sum is supposed to constitute the 'gross damages' to the 'class as a whole.' With the money in hand... we are to have the real notices soliciting the filing of claims, the processing of these claims, the fixing of counsel fees and the payment of the general expenses of administration.").

7 *Id*. at 1008.

8 *Id*.

9 *Id*. at 1018.

10 *Id. See also* Van Gemert v. Boeing Co., 553 F.2d 812, 815 (2d Cir. 1977) (reaffirming, four years after *Eisen*, that the use of fluid recovery as a means to circumvent Rule 23 requirements to certify a class is improper).

11 *See, e.g*., Beecher v. Able, 575 F.2d 1010 (2d Cir. 1978); West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970); Jones v. Nat'l Distiller, 556 F. Supp. 2d 355 (S.D.N.Y. 1999); Powell v. Georgia-Pacific Corp., 119 F.3d 703 (8th Cir. 1997); In re Motorsports Merch. Antitrust Litig., 160 F. Supp. 3d 1392 (N.D. Ga. 2001); Colson v. Hilton Hotels Corp., 59 F.R.D. 324 (N.D. Ill. 1973).

12 449 F. Supp. 2d 992 (E.D.N.Y. 2006)

13 *Schwab*, 449 F. Supp. 2d at 1019.

14 Supplemental Reply Brief of Plaintiffs at 5, Schwab v. Phillip Morris USA, Inc., 449 F. Supp. 2d 992 (E.D.N.Y. 2006) (No. 04-CV-1945).

15 *Schwab*, 449 F. Supp 2d at 1049.

16 *Id*.

17 Karmel & Paden, *supra* note 3, at 3.

18 *Schwab*, 449 F. Supp. 2d at 1020.

19 *Id*. at 1022.

20 *Id*.

21 *Eisen*, 479 F.2d at 1018.

22 *See* Order, McLaughlin v. Philip Morris USA, Inc., 06-4666-cv (2d Cir. Nov. 16, 2006).

23 *See Eisen*, 479 F.2d at 1014 ("Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation"); Amchem Prods. v. Windsor, 521 U.S. 591, 620 (1997) (noting that Rules Enabling Act "limits judicial inventiveness" with respect to Rule 23).

24 *Eisen*, 479 F.2d at 1017.

25 Cimino v. Raymark Indus., 151 F.3d 297, 312 (5th Cir. 1998).

26 *Id.* at 1014, 1018; Windham v. Am. Brands, Inc., 565 F.2d 59, 66 (4th Cir. 1977); *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974).

27 *See Windham*, 565 F.2d at 66; Kline v. Coldwell, Banker & Co., 508 F.2d 226, 236 & n.8 (9th Cir. 1974); *In re* Hotel, 500 F.2d at 90.

28 *See, e.g.*, Arch v. Am. Tobacco Co., 175 F.R.D. 469, 489 n.21 (E.D. Pa. 1997), *aff'd sub nom.* Barnes v. Am. Tobacco Co., 161 F.3d 127 (3d Cir. 1998).

29 Colgrove v. Battin, 413 U.S. 149, 156-57 & n.11 (1973).

30 Conte & Newberg, *supra* note 1, at § 13:56.

31 Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (internal quotation omitted).

32 *Eisen*, 479 F.2d at 1017-18 (stating that "fluid recovery" procedure which ignored variation in individual class member claims in favor of analyzing damages on an aggregate, "class as a whole" basis would be an "unconstitutional violation of the requirement of due process of law"); *Kline*, 508 F.2d at 236 (noting that "fluid recovery" plan cannot "foreclose the right of each defendant to assert his defenses before a jury if one is requested"); Al Barnett & Son, Inc. v. Outboard Marine Corp., 64 F.R.D. 43, 55 (D. Del. 1974) (holding that "individual questions arising from damage claims can not be solved by allowing damages... in the form of a fluid recovery because average awards erode due process").

33 Indeed, in *Cimino v. Raymark Industries, Inc*., 151 F.3d 297 (5th Cir. 1998), the United States Court of Appeals for the Fifth Circuit explicitly rejected the use of "sample" and "extrapolation" cases, concluding that "[e]ven in the context of a class action, individual causation and individual damages must still be proved individually." *Id*. at 319 (internal quotation marks omitted).

34 *See* Lawrence Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329 (1971).

35 *See id.* at 1340-41.

36 Court after court has recognized that class certification significantly increases the pressure on defendants to settle meritless cases. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) ("In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not."); John C. Kleefeld, *Class Actions as Alternative Dispute Resolution*, 39 Osgoode Hall L.J. 817, 827-28 (2001) ("in the class action context... certification is everything."). Indeed, "class certification may be the backbreaking decision that places 'insurmountable pressure' on a defendant to settle, even where the defendant has a good chance of succeeding on the merits." Regents of the Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372 (5th Cir. 2007); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (noting that many class action defendants facing the possibility of a sizable class judgment "may not wish to roll these dice.... [t]hey will be under intense pressure to settle," even if plaintiffs cases are weak); Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999) (certification of a class "can put considerable pressure on [a] defendant to settle, even when the plaintiff's probability of success on the merits is slight" because "a grant of class status can propel the stakes of a case into the stratosphere").

37 *See* Willett v. Baxter Int'l, Inc., 929 F.2d 1094, 1100 n.20 (5th Cir. 1991).

38 John H. Beisner, et al., *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1443 (2005).

39 *In re* Hotel, 500 F.2d at 92.

Omission in FACTA Might Be Windfall for Plaintiff's Bar

Continued from page 1

previously unsuccessfully litigated an identical claim against a movie theater.[11] The Ohio courts do not appear to have considered whether the state law was preempted by federal law.

The federal law does not have the "person injured by a violation" limitation, however. Section 1681n(a) states "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer." A negligent violation only entitles a customer to actual damages.[12]

A recent Supreme Court case, *Safeco v. Burr*, addressed the meaning of willfulness under § 1681n(a).[13] The Fair Credit Reporting Act, 15 U.S.C. § 1681m(a) (FCRA), requires notice to a consumer subjected to "adverse action" based in whole or in part on information contained in a consumer credit report. (An "adverse action" in this context is any "increase in any charge for... any insurance, existing or applied for.")[14] Insurance companies have found that credit reports accurately predict insurance claims rates, and perform "credit scoring" on applicants to determine insurance rates. Respondents applied to Safeco for auto insurance, and received offers of initial rates higher than the best rates possible, but Safeco sent no "adverse action" notice; a class action alleged willful violation of the FCRA. The district court held that a single, initial insurance rate was not "adverse action," and granted summary judgment for Safeco. The Ninth Circuit reversed, and further held that a party willfully fails to comply with FCRA if it acts in reckless disregard of a consumer's FCRA rights.[15]

The Supreme Court reversed. While it found that Safeco's offer of initial rates was "adverse action," it found that Safeco's conduct was not willful because its reading of the ambiguous statute (which had yet to be interpreted by the FTC or Court of Appeals) was not objectively unreasonable. But the Court also held that "[w]illful failure covers a violation committed in reckless disregard of the notice obligation."[16] Plaintiffs seek class certification in FACTA cases over the question of willfulness, and the vague standards of *Safeco* present obvious dangers to defendants. A fast food restaurant or supermarket may face $100 to $1000 in damages for a transaction where there is a gross margin of a dollar or two.

In a number of FACTA cases, Judge Walter of the Central District of California has rejected class certification for FACTA cases, thus limiting the ability of the plaintiffs' bar to threaten astronomical damages. In the first such case, *Spikings v. Cost Plus, Inc.*, plaintiffs sought to certify a nationwide class of 3.4 million members against a defendant whose net worth was $316 million and whose net sales revenues were $20 million/year.[17] The minimum statutory damages would have put the defendant out of business. This threat was sufficient for the court to deny certification, especially where the defendant had immediately acted to correct its printing of the expiration date on credit-card receipts. Moreover, the availability of individual actions for actual damages plus attorneys' fees meant that a class action was not needed to vindicate individual rights. Finally, and perhaps most importantly, in terms of precedent, the danger that certification would create the potential for attorney abuse of the class action procedure would be an undesirable result and encourage unnecessary litigation.

Plaintiffs have responded tactically to such dismissals. In a case against U-Haul,[18] plaintiffs attorney Farris Ain of the Herbert Hafif Law Offices in Claremont, California, has sought to certify a class limited to customers who rented in four California stores, in the alternative to a statewide class.[19] A multiplicity of such suits would still be profitable for plaintiffs' attorneys, but the smaller individual cases' damages would avoid one of the rationales for refusing certification in *Spikings*. But Judge Walter did not countenance to workaround of *Spikings*. On August 15, he rejected class certification. *First*, individualized questions predominated over common questions because of the need of individualized factual determinations as to which customers qualified as "consumers" under the statute and received a FACTA-violative "receipt." *Second*, with an unlimited size of the class, damages sought would range from $115 million to $1.15 billion. Such "ad absurdum" damages would be "enormous and completely out of proportion to any harm suffered by the plaintiff" and thus violate due process.[20] But even limiting the class to four stores, there would be nearly 29,000 transactions, with damage figures ranging from 20 to 200% of the defendant's net income. Moreover, piecemeal class certification would defeat the efficiency purposes of class actions. The court went on to repeat the other rationales in *Spikings* for denying class certification.

With the possibility of a lottery-sized damages award motivating the losing plaintiffs, the Ninth Circuit will surely see one of these class certification denials on appeal. In similar circumstances, a Judge Easterbrook

opinion rejected flexibility in Rule 23 to bar certification of class actions just because the damages were wildly disproportionate.[21] In Judge Easterbrook's view, the appropriate role of the judicial branch is to enforce the statute as written, absurd results of disproportionate damages and all, and then impose constitutional limits on the judgment. This interpretation of Rule 23 seems uncharacteristically naïve, given that Judge Easterbrook is also the author of *In re Bridgestone/Firestone, Inc.*, where he recognized the dynamic that a single action can force a defendant into settling an unmeritorious case, rather than risk bankruptcy from an astronomical, but mistaken, judgment.[22] But perhaps Easterbrook's opinion reflects the fact that the due process argument was not addressed (and thus perhaps not raised) in *Murray*. Still, if Judge Easterbrook's view about the scope of Rule 23 carries the day in the Ninth Circuit over that of Judge Walter, Congress would need to act rapidly to prevent small and medium businesses from being punitively bankrupted by FACTA and similar statutes.

** Ted Frank is a Resident Fellow at the American Enterprise Institute (AEI), and Director of the AEI Legal Center for the Public Interest.*

Endnotes

1 15 U.S.C. § 1681c(g).

2 15 U.S.C. § 1681n(a).

3 *See, e.g.,* 15 U.S.C. §1692k(a)(2) (Fair Debt Collection Practices Act) (capping class damages at lower of $500,000 or 1% of net worth of debt collector); 15 U.S.C. §1640(a)(2)(B) (Truth in Lending Act) (same); 15 U.S.C. §1693m(a)(1) (Electronic Fund Transfer Act) (capping class damages at $500,000).

4 If the name of the law firm sounds familiar, it is because it is the successor to the similarly named one that negotiated the infamous *Hoffman v. BancBoston* class action settlement where class members lost money to pay attorneys' fees. Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348 (7th Cir. 1996).

5 Walter Olson, "Turn those credit slips into gold," Overlawyered.com (blog), http://www.overlawyered.com/2007/05/turn_those_credit_slips_into_g.html (May 10, 2007).

6 Robin Sidel, *Retailers Whose Slips Show Too Much Attract Lawsuits*, Wall St. J., Apr. 28, 2007.

7 Ohio R.C. 1345.18.

8 Burdge v. Supervalu Holdings, Inc., No. C-060194, 2007 WL 865483 (Ohio Ct. App. Mar. 23, 2007).

9 Ohio R.C. 1345.18.

10 *Supervalu Holdings*, *supra* note 8.

11 Burdge v. Kerasotes Movie Theaters, No. CA2006-02-023, 2006 WL 2535762 (Ohio Ct. App. Dec. 5, 2006). In a telling example of the "Pigs get fed, hogs get slaughtered" saying, Burdge had originally settled the case for $2525, but decided to demand more, and lost the case at the trial-court level and on appeal on the same lack-of-injury grounds as in *Supervalu Holdings*. *Id.*

12 15 U.S.C. § 1681o(a).

13 No. 06-84 (June 4, 2007).

14 15 U.S.C. § 1681a(k)(1)(B)(i).

15 Spano v. Safeco, 140 Fed. Appx. 746 (9th Cir. 2005).

16 Safeco v. Burr, *supra* note 13. The Court also held, in a parallel case, *GEICO v. Edo*, No. 06-100, that GEICO's conduct of offering a neutral rate based on a credit score was not an "adverse action."

17 Case No. 06-cv-8125-JFW (C.D. Cal. May 29, 2007).

18 Evans v. U-Haul Co. of Calif. Inc., No. 07-cv-2097-JFW (C.D. Cal. Aug. 15, 2007).

19 Matthew Hirsch, *Plaintiffs Attorneys Think Globally, Act Locally in Financial Privacy Cases*, The Recorder, Aug. 27, 2007.

20 *Evans*, *supra* note 18, citing London v. Wal-Mart Stores, Inc., 340 F.3d 1246, 1255 n. 5 (11th Cir. 2003) (citing Kline v. Coldwell Banker & Co., 508 F.2d 226 (9th Cir. 1974) (Truth-in-Lending Act)).

21 Murray v. GMAC Mortgage Corp., 434 F.3d 948 (7th Cir. 2006). *Murray* is also notable because the Seventh Circuit endorsed the notion that a "professional" plaintiff who brings many suits can be an appropriate class representative, though the Court did not expressly address the "typicality" requirement of the class representative in Rule 23(a)(3).

22 288 F.3d 1012, 1015–16 (7th Cir. 2003).

ALI Principles and Litigation Trends

Continued from page 3

II. How ALI's Principles of Aggregate Litigation Would Foster and Encourage More and Larger Lawsuits

The PLAL is not reticent about the nature of what is being proposed. The Reporters confirm that the PLAL in many ways "consciously break[] from much of the terminology and organization of existing law with regard to aggregation through class actions."[11] What this means is that those parts of the current class action rules—such as "predominance," "superiority," and equivalent state law requirements— that have tended to restrict the availability of the class action device (particularly in cases involving money damages)[12] are subject to revision as "overly formalistic."[13]

As stated in the PLAL, the listed "objects" of aggregate proceedings are, in cases involving money damages:[14]

- maximizing the net value of the group of claims;
- compensating each claimant appropriately; and
- enabling claimants to voice their concerns and obtain legal vindication.[15]

For "indivisible" (injunctive) claims, the listed "objects" are:

- obtaining a judicial resolution of the legality of the challenged conduct;
- stopping challenged conduct from continuing; and
- enabling persons aligned with the aggregations to voice their concerns and facilitating... further relief that protects the rights of affected persons.[16]

The PLAL thus makes it quite obvious that the "objects" it pursues for aggregate litigation are those sought by the plaintiffs in such litigation, such as "maximizing the net value" of the claims and "stopping challenged conduct" by defendants.

The rest of the PLAL seeks to expand use of aggregated proceedings in a pro-plaintiff manner. In place of the familiar analytical framework of the present class action rules, the PLAL is organized in favor of "finality, fidelity, and feasibility"—terms borrowed from a 2006 law review article.[17] These terms do not track any procedural rule enacted by any jurisdiction, however. And while the law review article focused solely on a subcategory of aggregated litigation, (monetary damages), the PLAL would expand them to encompass any type of aggregated litigation. This attempt to impose the same model on all aggregated litigation distorts the intended purpose of "finality, fidelity, and feasibility," which was to place further limits upon class certification:

> Class actions seeking damages under Rule 23(b)(3) would thus be permissible only if they were a superior method of feasibly adjudicating both the similar and dissimilar aspects of class members' claims to judgment under the substantive law governing claims and defenses.[18]

These three principles were to "set minimum parameters for rules guiding judicial discretion in assessing the similarity and dissimilarity of individual claims in a putative class action."[19] The numerous illustrations of "red flags," which the law review article provides, precluding aggregation under the original use of "finality, fidelity, and feasibility",do not find their way into the PLAL.[20] Instead, the PLAL pulls these three principles out of their limited context and uses them to create a test for aggregation based upon "material advancement" of the litigation process.[21] "Material advancement," however, is not a test of class certification; it is a test of predominance. As stated in the case upon which the PLAL relies:

> The defendants' main contention is that... the common issues of fact and law these claims involve do not *predominate* over the individualized issues involved that are specific to each plaintiff.... Whether an issue predominates can only be determined after *considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action*.... Put simply, if the addition of more plaintiffs to a class requires the presentation of significant amounts of new evidence, that strongly suggests that individual issues are important. If, on the other hand, the addition of more plaintiffs leaves the quantum of evidence introduced by the plaintiffs as a whole relatively undisturbed, then common issues are likely to predominate.[22]

"Material advancement," in the context of evaluating the nature of the proofs required in aggregated litigation as part of the predominance test makes sense. Claims that are factually diverse such that their joint litigation does not "materially advance" their adjudication are plainly not going to present predominately similar issues.

Expanding "material advancement" into the primary test for aggregation itself, however, creates a tautology in favor of aggregating everything, since the PLAL defines "material advancement" in terms of both the "resolution of common issues in the aggregate" and in terms of "marketability"—that is, whether lawyers would be willing to take on a representation.[23] By virtue of these definitions, aggregation would become the norm

rather than the exception. First, they put rabbit in hat, since any issue decided commonly obviously need not be revisited. Second, economics dictates that the larger the amount in the dispute, the more likely a lawyer will take the case. Aggregation, by definition, makes litigation more "marketable."

Section 2.03 also seeks to abolish the predominance requirement for class certification *sub silentio* by greatly expanding the scope of "single issue" class certification.[24] Single issue certification has traditionally been unusual—an exception rather than a rule—because courts have viewed it as a "procedural tool to sever common issues for trial and not as a vehicle to reach certification."[25] The PLAL itself acknowledges that issue certification currently operates only in a "more limited" fashion, "within the larger constellation" of the entire matter at suit.[26] To allow certification of a single issue by itself, without any comparison to the individualized issues posed by all of the rest of the litigation, "would eviscerate the predominance requirement... the result would be automatic certification in every case where there is a common issue."[27]

That result is precisely what the PLAL seeks to achieve. "Aggregate treatment is thus possible when a trial would allow for the presentation of evidence sufficient to demonstrate the validity of all claims with respect to a common issue."[28] Thus, "a defendant's negligence" in an environmental pollution case would become a separately triable common issue.[29] Likewise, the PLAL applies the same "material advancement" test to the issue-specific dividing line between "liability" and "remedy."[30] Of twelve relevant illustrations, eight allow issue aggregation.[31] The result is, again, that issue certification would become the norm.

In justifying its expansive view of single-issue certification, the PLAL uses the metaphor of "carv[ing] at the joint," from the *Rhone-Poulenc Rorer* case.[32] That opinion did not apply the metaphor, however, either to support or to reject issue certification. Rather, the court used it in declaring unconstitutional the aggregate bifurcation of trial in such a way that would have different juries examining the same issue of the defendant's fault in violation of the Seventh Amendment.[33] The PLAL proposes overruling *Rhone Poulenc* (and numerous other cases) on precisely this point, and effectively reducing Seventh Amendment protections for defendants in the context of aggregated litigation to a "historical artifact."[34]

PLAL's treatment of the medical monitoring cause of action deserves special attention. Medical monitoring is a controversial cause of action, and quite a few courts have refused to recognize it altogether.[35] Even in those jurisdictions that have adopted it, many courts under a variety of circumstances have declined to certify medical monitoring class actions because of the numerous individualized elements present in this sort of claim.[36] Nonetheless, the PLAL treats medical monitoring claims, under certain circumstances, as models of an "indivisible" claim that is not only suitable for aggregated treatment but subject to *mandatory, non-opt-out* class certification.[37]

The PLAL also raises questions about the limits of judicial power, authorizing "cy pres" or "fluid recovery" settlements.[38] If the claimed damages are so minimal that it is uneconomical to identify how much money is owed deserving class members, it should be a red flag that litigation is an inefficient way to handle the situation, and that administrative enforcement is a preferred avenue. The PLAL would allow courts to give such funds away to charities that they (or class plaintiffs' counsel) select.[39]

In addition to these major, conceptual reworkings of the law, the PLAL, as currently drafted, advocates changing the law in many other ways that would eliminate existing barriers to the creation, management, and settlement of claims on an aggregated basis:

A. In the interest of broadening the scope of aggregate litigation, the PLAL would prohibit defendants from defeating aggregation by conceding the common issues.[40] The effect of this provision would be to force parties to engage in litigation and discovery concerning issues that are actually not in serious dispute.

B. The PLAL exhorts courts to experiment with "creative" procedural arrangements in pursuit of aggregating litigation.[41] Such creativity, however, has a history of threatening defendants' procedural and substantive rights.[42] Moreover, the history of aggregate litigation demonstrates that procedural "advances" generate their own traffic. Loosening procedural constraints to facilitate more litigation only produces more litigation.

C. The PLAL seems to consider all single-point environmental pollution cases to be appropriate class certification, at least as to individual "common" issues.[43] While the PLAL purports to define commonality as "the determination of a common issue as to one claimant should resolve the same issue as to all other claimants,"[44] single source pollution cases are notorious exceptions, since to prove one claimant's injuries that claimant need only prove his or her own exposure to the pollutant—not that of every other member of the purported class.

D. Under PLAL, at least some aspects of virtually every product liability case would be capable of being litigated,

since claims for breach of warranty are commonplace in such litigation, and the "merchantability" of a product is used as an example of a "common" issue that can be appropriately litigated in aggregated fashion.[45] This result would be a reversal of current law, since another comment to PLAL concedes, "the class action has fallen into disfavor as a means of resolving mass-tort claims."[46]

E. The PLAL would require parties opposing class certification to bear the burden of proof on conflict of law[47]—a reversal of current precedent, under which the proponent of class certification bears the burden of proving all elements that support the aggregation of litigation.[48]

F. The PLAL also gives textual treatment to the widely rejected[49] choice of law argument (almost never seen outside of class action litigation) that the governing law should be the law of a defendant's principal place of business.[50]

G. The PLAL advocates overturning current Supreme Court precedent in order to allow the conduct of aggregated trials in the context of multi-district litigation, thus enabling more pressure on defendants to settle.[51]

H. Contrary to almost all recent precedent, which holds that punitive damages can be decided only for persons before the court, and only in connection with their particular compensatory damages,[52] the PLAL continues to take the position that punitive damage claims may be decided on an aggregate, class-wide basis.[53] Recent (post-State Farm) cases rejecting this approach include: *In re* Chevron Fire Cases, 2005 WL 1077516, at *14-15 (Cal. App. May 6, 2005) (unpublished).

I. The PLAL takes widely divergent views of due process rights, depending upon whether those rights belong to defendants—in which case they are but an "admonition" or "reminder" in a comment[54]—or whether those rights belong to plaintiffs in which case they are mandatory black-letter law.[55]

J. The PLAL facilitates the conduct of aggregate litigation by authorizing courts in non-binding consolidations (mostly MDL situations) to order non-consenting plaintiffs to pay "common costs" to other plaintiff lawyers whom they have not retained.[56] This practice has never received appellate approval.[57]

K. The PLAL would resuscitate a failed proposal to amend the Federal Rules to create a new type of class action—presumably more palatable where certification is of doubtful propriety—requiring class members affirmatively to "opt-in."[58]

L. The PLAL rejects existing precedent[59] and would allow class action plaintiffs to refile identical class actions in other jurisdictions after initially failing in federal court and losing on appeal.[60] The collateral estoppel analysis is inconsistent with the PLAL's recognition in another context that the "contingent fee lawyer is a real party in interest" in aggregate litigation.[61]

M. Perpetuating a peculiar legal doctrine that encourages filing of meritless class actions, the draft advocates allowing unsuccessful class actions to toll the running of the statute of limitations for all class members.[62]

N. The PLAL would abolish the current constitutional due process right to individualized notice of class action proceedings as too expensive.[63]

O. To facilitate settlements of aggregate litigation (thus increasing the incentive to bring such claims in the first place) the PLAL would overturn current Supreme Court precedent and allow settlement of class actions even though individual issues predominate.[64]

P. Even though defendants are not responsible for the improper actions of opposing class counsel and owe no litigation-related duties to litigation opponents, the PLAL would impose *upon defendants* part of legal fees incurred by successful objectors to class settlements.[65]

Q. PLAL admits the constitutional problems of providing notice to uninjured "future" claimants, but takes an approach, "inconsistent" with current Supreme Court precedent,[66] that guardians *ad litem* are sufficient enough to allow aggregated disposition of such future claims.[67]

III. Expansion of Aggregated Litigation and Current Legal Trends

In advocating dozens of legal changes, all of which are intended to increase the frequency of class actions and other forms of aggregated litigation, the ALI is swimming against the current for reduction, rather than expansion, of aggregated litigation. In the federal court system, since *Ortiz v. Fibreboard Corp*.,[68] and *Amchem Products, Inc. v. Windsor*,[69] the courthouse door has definitively slammed shut against class actions in personal injury and product liability actions. *Ortiz* and *AmChem* have been on the books now for a decade, and during that decade not a single contested personal injury/product liability class action has survived appeal.[70]

Congress has concurred in this federal trend away from class actions. In 2005 it passed the Class Action Fairness Act, designed to force a wide range of putative class actions into the federal system, with the expectation that these class actions would be governed by the increasingly restrictive federal precedents.[71]

States are also joining this trend. State class actions have been pruned significantly in Texas, where the state supreme court explicitly adopted as "essential" "a cautious approach to class certification," rejecting its former "approach of certify now and worry later."[72] In Illinois, the state supreme court has held that "the class action device is unsuitable for mass tort personal injury cases,"[73] and has taken steps to strengthen the predominance element generally.[74] The notorious Mississippi rule that used to allow hundreds of plaintiffs to join together in mass aggregations in lieu of class actions (which Mississippi does not recognize) has been abolished.[75]

CONCLUSION

Those who are interested in measuring the costs and benefits of aggregated litigation would do well to pay close attention to the progress of the PLAL through the ALI's process of consideration and approval. As it currently stands, the PLAL would put the ALI on record as supporting a fundamental reordering of how litigation is conducted in this country.

** James Beck is Counsel in the Mass Torts and Product Liability Group at Dechert, LLP. He has been an elected member of the American Law Institute since May 2006.*

Endnotes

1 "Reporters" are the persons (almost always law professors) charged with actually drafting the language of an ALI project.

2 The current draft of the PLAL, like all ALI publications, is available for purchase from the Institute. *See* http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=80.

3 *See In re Rhone-Poulenc*, 51 F.3d 1293, 1298-99 (7th Cir.) (discussing roll of increased risk in bringing about "blackmail settlements" in class action litigation), *cert. denied*, 516 U.S. 867 (1995)

4 *See In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1267 (E.D.N.Y. 1985) and *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y.1984) (both discussing at length the impossibility of proving causation).

5 *See In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396 (E.D.N.Y. 1985) (discussing settlement).

6 *See* Fed. R. Civ. P. 23(f).

7 In *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 182-83 (2d Cir. 1987), the validity of the class certification order was considered in the context of determining the "fairness" of the settlement in light of the chances that the aggregation itself would be struck down.

8 *E.g.,* Redish & Kastenek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. Chi. L. Rev. 545 (2006) (addressing justiciability of "future" claims in the context of class actions).

9 Stephenson v. Dow Chem. Co., 273 F.3d 249 (2d Cir. 2001), *aff'd by equally divided court*, 539 U.S. 111 (2003).

10 For claims that as individual actions would certainly had been subject to quick dismissal for lack of causation a Westlaw search limited to judicial opinions shows 107 separate "*Agent Orange*" entries in the district court (between 1979 and 2005), twenty-two in the Second Circuit, and a "History" that's over three Westlaw screens long.

11 PLAL §1.03, reporters notes to comment b.

12 *See* Fed. R. Civ. P. 23(b)(3), and equivalent state rules.

13 PLAL §1.02, reporters' notes to comment u.

14 PLAL §1.05.

15 *Id.* It should be noted that the "objects" as stated are in terms of "include but are not limited to."

16 *Id*.

17 *See* Erbsen, *From Predominance to Resolvability: A New Approach to Regulating Class Actions*, 58 Vand. L. Rev. 995 (2006), discussed at PLAL §1.03, comment b and accompanying reporters' notes.

18 *Id*. at 1081.

19 *Id*. at 1024.

20 *Id*. at 1028-30.

21 PLAL §2.03, comment a (citing Klay v. Humana, Inc., 382 F.3d 1241, 1254-55 (11th Cir. 2004)).

22 Klay v. Humana, Inc., 382 F.3d 1241, 1254-55 (11th Cir. 2004) (citations, quotation marks, and parentheticals omitted) (emphasis added).

23 PLAL §2.03, comment a.

24 Fed. R. Civ. P. 23(c)(4) provides that "[w]hen appropriate [] an action may be brought or maintained as a class action with respect to particular issues."

25 *E.g.,* Castano v. American Tobacco Co., 84 F.3d 734, 745 n. 21 (5th Cir. 1996); *In re N. Distr. of Calif. Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 856 (9th Cir. 1982); Blain v. Smithkline Beecham Corp., 240 F.R.D. 179, 190 (E.D. Pa. 2007); Arch v. American Tobacco Co., 175 F.R.D. 469, 496 (E.D. Pa. 1997).

26 PLAL §2.04, comment b.

27 *Castano*, 84 F.3d at 745 n.21 (citing Fed. R. Civ. P. 23(b)(3)).

28 PLAL §2.03, comment c.

29 PLAL §2.03, comment d.

30 PLAL §2.04.

31 *Id.*

32 PLAL §2.03, comment c & accompanying reporters' notes (quoting *Rhone-Poulenc Rorer*, 51 F.3d at 1302.

33 *Rhone-Poulenc Rorer*, 51 F.3d at 1302-03.

34 PLAL §2.04 reporters' notes to comment b; §2.11, comment c; §2.11, reporters' notes to comment a.

35 Citing highest courts in the jurisdiction only: Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 242, 442 (1997); Hinton v. Monsanto Corp., 813 So.2d 827, 830-32 (Ala. 2001); Mergenthaler v. Asbestos Corp., 480 A.2d 647, 651 (Del. 1984); Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 852-56 (Ky. 2002); Henry v. Dow Chem. Co., 473 Mich. 63, 701 N.W.2d 684, 686 (2005); Paz v. Brush Engineered Materials Inc., 949 So.2d 1, 3-6, 9 (Miss. 2007); Badillo v. Am. Brands, Inc., 16 P.3d 435, 440-41 (Nev. 2001).

36 *E.g.,* Barnes v. Am. Tobacco Co., 161 F.3d 127, 142-43 (3d Cir. 1998); *In re Baycol Products Litigation*, 218 F.R.D. 197, 212 (D. Minn. 2003), Lockheed Martin Corp. v. Super. Ct., 63 P.3d 913, 926-27 (Cal. 2003); Buynie v. Airco, Inc., 2007 WL 2275013, at *8-9 (N.J. Super. A.D. Aug 10, 2007).

37 PLAL §2.05 & illustrations 1-5.

38 PLAL §3.07.

39 PLAL §3.06, illustration 2.

40 PLAL §2.03, comment d.

41 PLAL §2.03, comment e

42 *E.g., In re* Simon II Litig., 407 F.3d 125, 138-39 (2d Cir. 2005); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 320 (5th Cir. 1998); *Rhone-Poulenc Rorer*, 51 F.3d at 1297; *Castano*, 84 F.3d at 750-51; *In re* Fibreboard Corp., 893 F.2d 706, 711-12 (5th Cir. 1990);

43 PLAL §2.04, illustration 4.

44 PLAL §2.03, comment a.

45 PLAL §2.04, illustrations 9 and 12.

46 PLAL §1.02, comment w.

47 PLAL §2.06, comments a & f.

48 *E.g.,* Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 321 (4th Cir. 2006) ("we have stressed in case after case that it is not the defendant who bears the burden of showing that the proposed class does not comply with Rule 23, but that it is the plaintiff who bears the burden of showing that the class does comply"); Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 601 (5th Cir. 2006); Trevizo v. Adams, 455 F.3d 1155, 1162 (10th Cir. 2006); Chiang v. Veneman, 385 F.3d 256, 264 (3d Cir. 2004); Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1187 (11th Cir. 2003); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1079 (6th Cir. 1996).

49 For recent cases refusing to apply the law of the defendant's place of business, *see* Rowe v. Hoffman-La Roche Inc., 917 A.2d 767, 775-76 (N.J. 2007); Kelley v. Eli Lilly & Co., 2007 WL 1238789, at *2-3 (D.D.C. April 27, 2007); Bearden v. Wyeth, 482 F. Supp.2d 614, 620-22 (E.D. Pa. 2006).

50 PLAL §2.06, comment c.

51 PLAL §2.08, comment j & accompanying reporters' notes (discussing Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998)).

52 Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007); State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422-23 (2003); *Simon II*, 407 F.3d at 139; Engle v. Liggett Group, Inc., 945 So.2d 1246, 1263 (Fla. 2006); Johnson v. Ford Motor Co., 113 P.3d 82, 94-95 (Cal. 2005); *Buynie*, 2007 WL 2275013, at *8-9; Colindres v. QuitFlex Mfg., 235 F.R.D. 347, 378 (S.D. Tex. 2006); O'Neal, v. Wackenhut Servs., Inc., 2006 WL 1469348, at *22 (E.D. Tenn. May 25, 2006).

53 PLAL §2.08, and reporters' notes to comment i.

54 PLAL §2.08, comment k.

55 PLAL §3.03.

56 PLAL §2.09(b).

57 *See In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.-II*, 953 F.2d 162, 166 (4th Cir. 1992) (rejecting such assessments as an abuse of power).

58 PLAL §2.10, comment a.

59 *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763 (7th Cir. 2003).

60 PLAL §2.12, and comment a.

61 PLAL §1.04, reporters' notes to comment b.

62 PLAL §3.02 reporters' notes to comment c.

63 PLAL §3.04.

64 PLAL §3.06 (criticizing Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997)).

65 PLAL §309(c).

66 PLAL §3.10, reporters' notes to comment d (advocating that the "more formalistic" aspects of *Amchem*, 521 U.S. 591, and *Ortiz v. Fibreboard Corp.,* 527 U.S. 815 (1999), be done away with).

67 PLAL §3.10(b).

68 527 U.S. 815 (1999).

69 521 U.S. 591 (1997).

70 In addition, the old rule, supposedly garnered from *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that restricted inquiry into the substantive merits of claims during the class certification phase, is on its last legs. *See* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160-61, (1982) (a court must conduct a "rigorous analysis" during which it "may be necessary for the court to probe behind the pleadings"); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006) (applying *Falcon* specifically to approve extensive merits consideration at certification statge).

71 Pub. L. 109-2, 119 Stat. 4.

72 Southwestern Refining Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000).

73 Smith v. Ill. Cent. R.R. Co., 860 N.E.2d 332, 340 (2006).

74 Avery v. State Farm Mutual Auto. Ins. Co., 835 N.E.2d 801, 820-21 (Ill. 2005).

75 Albert v. Allied Glove Corp., 944 So.2d 1, 4-5 (Miss. 2006); Janssen Pharm. v. Armond, 866 So.2d 1092, 1099 (Miss.2004).

More Searching Fact-Based Scrutiny Reaches Securities And Antitrust Actions

Continued from page 4

Title VII suit alleging employment discrimination. The named plaintiff had sued his employer for discriminatory promotion practices.[21] However, the plaintiff class which the court ultimately certified included not only employees who had been affected by the allegedly discriminatory promotion practices, but also applicants whom the defendant had allegedly refused to hire for discriminatory reasons.[22] After a trial, the district court's class findings were diametrically opposed to its conclusions about the named plaintiff: as to the named plaintiff, the court found discrimination in promotion practices, but not in his hiring, and for the class it found discrimination in hiring practices, but not as to promotions.[23] The Court, examining these results, also noted that "predictably," the plaintiff had tried to prove his claims and the class claims in unrelated ways—for himself he presented proof of intentional discrimination, while, for the class, he limited his presentation to statistical evidence showing disparate impact.[24] Highlighting the issues with the proceeding, the Court stressed that the district court should not simply have accepted the plaintiff's allegations of compliance with Rule 23(a), admonishing that "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."[25] Here, as in *Livesay*, the Court highlighted the need for "rigorous analysis" at the class certification stage.

II. Evidence-Based Analysis of Tort and Product Liability Classes

In addressing class actions involving mass tort and product liability claims, courts have heeded the Supreme Court's admonitions in *Livesay* and *Falcon*, and closely scrutinized plaintiffs' allegations to ensure that they complied with Rule 23's requirements. *Szabo v. Bridgeport Machs., Inc.* is a noteworthy example of the approach taken in this line of cases.[26] There, the Seventh Circuit addressed the certification of a nationwide class of customers that had purchased the defendant company's machine tools.[27] The plaintiff alleged, on behalf of the class, that those tools were defective and that the company had fraudulently marketed them.[28] In analyzing and ultimately certifying the proposed class, the district court cited *Eisen* and refused to look beyond the pleadings to determine whether the claims could be established through common proof.[29] The Seventh Circuit vacated the certification order, holding "[t]he 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."[30] Judge Easterbrook, writing for the court, explained that the district court had misinterpreted *Eisen*, emphasizing that, under *Falcon*, "similarity of claims and situations must be demonstrated rather than assumed."[31] The court noted several factual issues which the district court needed to consider in deciding whether to certify the class. For example, the court questioned whether other tools had the same problems as the model plaintiff purchased, and whether the many sellers of the company's products nationwide had all made the same representations to their customers.[32] The court identified these and other issues as "daunting obstacles" to certification.[33]

Szabo illustrates the high level of scrutiny to which class allegations in mass tort and product liability cases are now routinely subjected.[34] Indeed, in *Castano v. Am. Tobacco Co.*, the Fifth Circuit noted that "historically, certification of mass tort litigation classes has been disfavored," citing a "traditional concern over the rights of defendants."[35] Among the explanations for this tradition, the Fifth Circuit cited the "insurmountable pressure" on defendants to settle even unmeritorious claims, once a class has been certified.[36] Judge Easterbrook in *Szabo* similarly acknowledged that pressure, and also noted the practical finality of the decision to certify a class among the reasons for rigorously applying Rule 23's requirements at the certification stage.[37]

III. Almost Presumptive Certification in Securities and Antitrust Conspiracy Cases

In contrast to class certification decisions in the tort and product liability settings, certification decisions in securities and antitrust class actions have—until very recently—seemed to reflect an *Eisen* hangover. Rather than closely scrutinizing the evidence likely to be adduced at trial, courts in securities and antitrust cases have almost presumed compliance with Rule 23 elements. Even the Supreme Court, in *Amchem Prods., Inc. v. Windsor*, has offered the dictum that "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."[38]

The "fraud on the market" presumption of reliance has been the primary driver behind courts' accommodation of securities fraud classes, as, when properly applied, that presumption relieves plaintiffs of the otherwise

individualized burden of establishing that the defendant's alleged misrepresentations caused them to purchase the defendant's securities.[39] The doctrine provides that, in an efficient market, the alleged misrepresentation is factored into the price of a security, along with all other publicly available information, so that any investor purchasing or selling the stock at its market price is presumed to have relied on the misrepresentation.[40] Of course, if the market for a security is not efficient, there can be no presumption of reliance, and therefore no class action, since "[without] the [fraud-on-the-market] presumption individual questions of reliance would predominate over common questions."[41] But, where the market for a security is efficient, the fraud on the market presumption allows plaintiffs to aggregate claims that would otherwise be ineligible for class treatment. This forgiving point of departure, coupled with the occasional nod to *Eisen*, has traditionally led courts to dispense with a detailed review of whether the material elements of plaintiffs' and putative class members' claims turn on common evidence.

In re One Bancorp Sec. Litig. reflects the traditional analysis.[42] There, the plaintiffs sought certification of a class asserting securities fraud claims, invoking the fraud on the market presumption.[43] The defendants admitted that the presumption could apply, but argued that the plaintiffs needed to show, or at least allege, that the securities at issue were traded in an efficient market.[44] The court spent but one sentence addressing the issue—citing *Eisen*, the court held that the plaintiffs "need not prove the merits of their case at [the class certification] stage of the litigation" and refused to examine the issue any further.[45] The court thus allowed the plaintiffs the benefit of the fraud on the market presumption, without so much as considering whether the plaintiffs could fulfill the prerequisites laid out in *Basic*.[46] To be sure, there have been exceptions to this traditional approach over the years; indeed, shortly after *Basic* was handed down, a district court in *In re MDC Holdings Sec. Litig.* held that a plaintiff must establish market efficiency to benefit from the fraud on the market presumption.[47] However, such rigorous analysis has been the exception rather than the rule, with most decisions citing *Eisen* and side-stepping any searching analysis of the evidence at the class certification stage.[48]

In antitrust cases, the presence of conspiracy allegations has generally been cited as facilitating the aggregation of claims, since the question whether the defendants conspired or not is, definitionally, common to all putative class members.[49] Very little attention has been paid to the separate question—analogous to reliance in securities actions—whether the evidence pertaining to the impact of the conspiracy on putative class members is also common. *In re Linerboard Antitrust Litig.* is characteristic of the typical approach.[50] There, rather than closely examining whether common issues would predominate in the trial of plaintiffs' claims, the court relied primarily upon a presumption that the alleged conspiracy had a class-wide impact.[51] Affirming the district court's certification of a class on that basis, the Third Circuit indicated that the district court had also relied upon expert testimony submitted by plaintiffs.[52] Though that testimony had fallen short of using a specific econometric model to demonstrate the alleged impact, the court found it to be sufficient.[53] Indeed, the district court and the Third Circuit both apparently accepted the experts' contentions without subjecting their methodologies to any scrutiny—for example, as to one expert, the Third Circuit simply concluded: "We deem his conclusion to be significant because it was supported by charts and studies."[54] Though this approach falls short of assuring the "actual, not presumed, conformance with Rule 23" which the Supreme Court pronounced "indispensable," this kind of analysis has proved common in antitrust conspiracy cases.[55]

IV. A New Direction in Recent Securities and Antitrust Decisions

Recent decisions in both securities and antitrust litigation have begun scrutinizing more closely the evidence likely to pertain to class claims at trial. Harmonizing *Eisen* with subsequent Supreme Court decisions, the courts in *In re Initial Public Offering Sec. Litig.*,[56] *Oscar Private Equity Inv. v. Allegiance Telecom, Inc.*,[57] and *Blades v. Monsanto*[58] each engaged in rigorous evidentiary analysis and demonstrated a willingness to examine the merits of plaintiffs' claims to the extent that the merits intersected with Rule 23's requirements. These cases constitute important steps forward in ensuring the required "actual conformance with Rule 23," per the Supreme Court's instructions in *Falcon*, regardless of the subject matter of the putative class claims. And they hold plaintiffs to a substantive evidentiary burden at the class certification stage that should be instructive in class litigation of all kinds.

A. In re Initial Public Offering ("IPO") Sec. Litig.

The *IPO* litigation's most remarkable feature may be its size rather than its holding—the action was actually comprised of 310 *consolidated* class actions, which had themselves been constructed from thousands of class

complaints.[59] These myriad complaints alleged that underwriters, issuers, and their officers had defrauded investors in connection with the IPOs of 310 issuers' securities.[60] One might speculate that it was the enormity of the plaintiff class (and thus the potential damages) that finally led the court to expand to the securities litigation context the rigorous analysis that had typically been reserved for other disciplines.

In fact, the Second Circuit used this securities case to clarify that a more rigorous standard would be required in *all* class actions. At the district court level, Judge Scheindlin had cited *Eisen*'s proscription against conducting a preliminary inquiry into the merits.[61] With that understanding of the Supreme Court precedent, Judge Scheindlin went on to apply *Caridad v. Metro-North Commuter Railroad*,[62] Second Circuit precedent requiring only that plaintiffs make "some showing" to carry their burden at the class certification stage.[63] The Second Circuit reversed, holding that *Caridad*'s lax standard, and Judge Scheindlin's analysis, had been based on a misunderstanding of *Eisen*.[64] The court explained that the "no merits inquiry" language in *Eisen* did not pertain to the analysis of whether Rule 23's requirements had been fulfilled, and that *Caridad* and the lower court had taken the language "out of its context."[65] The Second Circuit explained the standard for class certification arising from its analysis:

With *Eisen* properly understood to preclude consideration of the merits only when a merits issue is unrelated to a Rule 23 requirement, there is no reason to lessen a district court's obligation to make a determination that every Rule 23 requirement is met before certifying a class just because of some or even full overlap of that requirement with a merits issue.[66]

In so holding, the court noted that it was aligning the Second Circuit's standard with, among others, that which was articulated in *Szabo v. Bridgeport Machs., Inc.* (discussed above).[67]

Having jettisoned the trial court's mistaken reading of *Eisen*, the Second Circuit then required the plaintiffs to establish that the securities markets involved were efficient (and thus that they were entitled to the fraud on the market presumption) by a preponderance of the evidence.[68] Gone was the notion that they could prevail just by producing "some evidence" that the presumption's prerequisites could be met.[69] The court's analysis demonstrated that the plaintiffs could not meet their burden.[70] Noting the absence of contemporaneous analyst coverage for IPO shares, the court pointed out that the market for such shares lacked the flow of information characteristic of an efficient market.[71] The court further emphasized that, on the plaintiffs' own allegations, the market in IPO shares was slow to integrate corrective information, and therefore did not behave like an efficient market.[72] Thus, when the court tested whether Rule 23's requirements *had* been met, rather than assessing whether plaintiffs' evidence suggested they *could* be met, the court found that the purported class action was unsustainable.

Beyond ensuring that plaintiffs had to meet the same burden on a motion for class certification regardless of the subject matter of their claims, this case also constituted a convergence of different disciplines' applications of Rule 23 in another respect. Whereas the tort cases described above reflect an interest in protecting defendants from undue settlement pressure, the opposite concern was frequently expressed in securities cases. That is, in securities cases, it was common for courts to be more indulgent of class treatment to ensure that plaintiffs would be able to vindicate their rights in case their allegations proved to be true.[73] The Second Circuit's analysis in *IPO* was not skewed by that goal.

B. Oscar Private Equity Inv. v. Allegiance Telecom, Inc.

Allegiance, like *IPO*, involved the availability of the fraud on the market presumption.[74] There, an investor filed suit after the defendant telecommunications company revealed that it had misstated its line-count information.[75] On the date of that announcement, the company's stock price dropped by 28 percent.[76] However, besides correcting its line count information, the company made other significant announcements on that day; in the same release to the market, the company reported that it had missed analysts' earnings per share targets, that it had experienced greater losses than certain analysts had expected, and that it had a "very thin margin for error" in meeting its revenue covenants for the coming year.[77] Plaintiff, on behalf of the class of investors that was damaged by this stock price drop, claimed that the misstated line-count information constituted securities fraud, and sought to recover damages for the class. As in nearly all securities class actions, plaintiff's ability to bring its claims on a class basis depended upon the availability of the fraud on the market presumption—without it, individual issues of reliance would predominate.

On appeal, the Fifth Circuit held that the district court had abused its discretion in certifying the class, and held plaintiffs to a heightened standard when invoking the fraud on the market presumption. In doing so, the court echoed the concerns courts have expressed in the mass torts context about the "*in terrorem* power of certification"—the court implied that fairness demanded that it rigorously analyze any class,

because certification could have the effect of forcing a settlement even of unmeritorious claims.[78] The court thus applied a standard analogous to that employed by the Second Circuit in *IPO*, and weighed the evidence for and against market efficiency, requiring the plaintiff to prove that the fraud on the market presumption should apply by a preponderance of the evidence.[79] The court further held that in order to receive the benefit of the fraud on the market presumption, the plaintiff had to prove, by a preponderance of the evidence, that the line-count restatement had moved the stock price.[80] In other words, plaintiff would be required to show loss causation at the class certification stage in order to establish the conditions for a fraud on the market.[81]

Discerning the link between loss causation and Rule 23 requires taking a closer look at the fraud on the market presumption which, as *IPO* explained, a securities plaintiff practically requires to obtain class certification. The fraud-on-the–market theory presumes that an efficient market would have incorporated the misrepresentation into the price the plaintiffs paid for the stock.[82] Thus, merely by purchasing shares whose price has been affected by misrepresentations or omissions, a plaintiff can, under the doctrine, establish the element of reliance.[83] The question the Fifth Circuit grappled with was: what if the alleged misrepresentation did not move the stock price? The Fifth Circuit reasoned that without proof that a misrepresentation moved the market in some way, then the stock price can no longer supply the causal link between the misrepresentation and the plaintiff's injury.[84] With this link severed, the fraud on the market theory should no longer be available to the plaintiff, and class litigation should founder on the requirement that reliance be proved the old-fashioned way: individually.[85] Thus, the Fifth Circuit's approach, motivated by due process concerns for both the plaintiff and the defendant, can be presented simply as a logical result of an emphasis on ensuring actual, rather than presumed, compliance with Rule 23.[86]

C. Blades v. Monsanto Co.

Courts have also begun applying analogous rigor in addressing class treatment of antitrust conspiracy claims.[87] *Monsanto*[88] illustrates the new approach.[89] The Eighth Circuit in that case affirmed the district court's refusal to certify a class whose alleged injury could not be established through common proof. There, plaintiff farmers alleged a nation-wide conspiracy among companies selling genetically modified seeds and Monsanto, the company that had developed the genes used in those seeds, to inflate the seeds' prices.[90] To demonstrate the alleged price-fixing had caused class-wide injury—an essential element of plaintiffs' class certification theory—plaintiffs submitted expert testimony.[91] This did not differentiate *Monsanto* from other antitrust cases, as plaintiffs frequently rely upon expert testimony to establish this element.[92] However, the court's analysis of that testimony did set this case apart.

Instead of accepting the expert's testimony at face value, the district court analyzed his claims as well as the assumptions underlying his conclusions.[93] In doing so, the court did not opine as to his credibility or the validity of his conclusions, but limited its inquiry to whether his testimony demonstrated that impact could be shown using class-wide proof.[94] The court found that it did not. Indeed, the court indicated that the expert proffered by plaintiffs had assumed the very conclusion he should have been proving—that the markets and alleged conspiracy operate in a way that would impact the whole class.[95] The facts on the ground, involving varying growing conditions, consumer preferences, and geographic locations resulted in "highly individualized" markets and widely varying prices.[96] The district court responded: "I cannot 'presume' or 'assume'—much less 'conclude'—class-wide impact here."[97] In place of the previous practice of almost presumptive certification, the Eighth Circuit in *Monsanto*, like the Second Circuit in *IPO* and the Fifth Circuit in *Allegiance*, required plaintiffs to convince the court that their purported class claims actually turned on common proof.

Importantly, the district court in *Monsanto* cited *Eisen*, but not for the proposition that it is improper to delve into the merits of the plaintiffs' claims on class certification.[98] Rather, the court relied on *Eisen* to inform *how* it could conduct its merits inquiry. The court began its predominance analysis by citing *Falcon*, and noting that a Rule 23(b)(3) class action necessitated "looking behind the pleadings."[99] It then used *Eisen* to explain that this merits inquiry should only entail determining whether common proof would be required to support plaintiffs' allegations, using particular caution where the dispute approached the heart of the plaintiffs' claim.[100] *Monsanto* thus harmonized *Eisen* with the Supreme Court's subsequent instructions to ensure actual compliance with Rule 23.

V. Toward A Common Fact-Finding Standard Under Rule 23

These recent cases from the securities and antitrust arenas, where courts have traditionally been most indulgent of class treatment, offer important lessons for courts addressing class certification generally, particularly with regard to the nature of the evidentiary burden

plaintiffs should properly bear at the class stage. They suggest that on factual elements necessary to the Rule 23 inquiry, plaintiffs should be required to demonstrate those elements by a preponderance of the evidence, rather than merely providing "some evidence," or showing enough evidence to survive a hypothetical summary judgment motion on the question, as one commentator recently suggested.[101]

Whether under Rule 23(b)(3) or otherwise, the court needs to understand what issues and defenses can be tried with proof common to all, and what issues will fracture into individual proceedings. This essentially is a factual inquiry: is the named plaintiffs' proof of reliance (to take the securities fraud example) the same proof that will be offered by absent class members? Only after making such factual findings concerning which questions do and do not turn on common proof can the court then proceed to the discretionary elements of Rule 23 analysis. Under Rule 23(b)(3), this discretionary element involves ascertaining whether common questions "predominate" over individual ones.[102] Similarly, under 23(b)(2), the court makes a discretionary determination regarding whether the relation of common to individual questions is such that the proposed class is sufficiently cohesive to warrant a joint trial.[103] Thus, in *IPO*, the plaintiffs properly bore the burden of establishing market efficiency, and in *Allegiance*, plaintiffs needed to show loss causation, since the courts of appeals determined that those were critical factual underpinnings to their burden of showing that reliance was subject to common proof in their securities fraud claims. Similarly, the court in *Monsanto* required plaintiffs to show that the "causation of injury" element of their claims would turn on common proof. When plaintiffs could not meet this burden, the court properly held that their action did not warrant class treatment.

Anything short of requiring plaintiffs to establish that allegedly common issues turn on "classwide" proof common to all claimants, *by a preponderance*, is insufficient to protect the parties and the courts from improvident class litigation. If a material issue in the case appears to the court, at the class certification stage, to turn on individual evidence and require claimant-by-claimant factfinding, it is unlikely to mature into a "common" issue before the commencement of trial. Certification on the basis that plaintiff has "some" evidence to suggest that the issue "could" be adjudicated with common evidence therefore commits the parties to wasteful expenditures on notice, and usually to gargantuan discovery, with little if any payoff, since the class should properly require decertification. Or worse: since courts rarely revisit class determinations in practice,[104] application of a lesser evidentiary standard can result in a hopelessly complex class trial that will either disintegrate into individualized proceedings (if due process principles are faithfully applied) or be tried to judgment only through an artificial homogenization of the issues and proof at trial, usually to the detriment of the defendant.

The Federal Reporters are replete with cases that vividly illustrate the problems that arise when a court fails to properly scrutinize the probable trial evidence at the class certification stage. *Broussard v. Meineke* is one such case.[105] There, the Fourth Circuit ultimately decertified a class of franchisees making claims against their franchisor, but not before the parties had spent untold resources on a lengthy trial.[106] The claims included in the initially certified class involved the breach of multiple, materially different contracts, and various alleged misrepresentations which had been made to each franchisee individually.[107] The result was that, at trial, the franchisor was forced to defend against a "fictional composite," and did not have the benefit of deposing or cross-examining the members of the "disparate" group that actually made up the plaintiff class.[108] On appeal, the Fourth Circuit recognized that the lower court had improperly certified a class, and went on to detail a litany of individualized factual issues that the district court failed to consider.[109] Among those issues were: material variations among the class members' contracts, the franchisor's varying representations to each class member, each franchisee's individual reliance on the franchisor's representations, the reasonableness of that reliance, the tolling of the statute of limitations, and the calculation of damages.[110] Indeed, by the time they finished their analysis, the exasperated Fourth Circuit panel wrote: "frankly, in these circumstances, we doubt that any set of claims is common to or typical of this class."[111] Thus, they reversed the lower court's judgment in its entirety, concluding that the district court had failed to observe "the most primary principles of procedure and the most settled precepts of commercial law."[112]

Had the trial court held plaintiffs to a preponderance burden in showing that the material elements of their claims would turn on proof common to all, the train wreck cleaned up by the Fourth Circuit on appeal could have been avoided. *IPO*, *Allegiance*, and *Monsanto* likewise teach that application of a less rigorous standard to the factual elements of a plaintiff's Rule 23 burden poses unnecessary risks to the parties and to the courts. Requiring plaintiffs to meet a preponderance standard, rather than simply showing that common proof might be assembled down the road, is consistent with the rigorous treatment the Supreme Court called for in *Livesay* and

Falcon, and, indeed, by Rule 23 itself, which requires a court to find that class treatment *is* proper, not that it "could be."

** Brian D. Boyle is a Partner in the Washington, D.C. office of O'Melveny & Myers, LLP, and Julia A. Berman is an Associate in the Newport Beach office.*

Endnotes

1 *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

2 Oscar Private Equity Inv. v. Allegiance Telecom, Inc., 487 F.3d 261, 267 (5th Cir. 2007).

3 Newton v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 259 F.3d 154, 164 (3d Cir. 2001).

4 *See* Thomas E. Willging & Shannon R. Wheatman, *An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation*, Federal Judicial Center, at 50 (2005), *available at* http://www.fjc.gov/library/fjc_catalog.nsf/.

5 *See, e.g., In re N. Dist. of Cal., Dalkon Shield, IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982); Barnes v. Am. Tobacco Co., 176 F.R.D. 479 (E.D. Penn. 1997).

6 *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251 (February, 2002) (providing a detailed discussion of the development of the Supreme Court precedent as well as the divergence of securities litigation and mass tort litigation).

7 417 U.S. 156, 177 (1974).

8 437 U.S. 463, 469 (1978).

9 457 U.S. 147 (1982).

10 *See id.* at 161.

11 *See* 417 U.S. at 167-68.

12 *See id.*

13 *Id.* at 168.

14 *See id.*

15 *See id.* at 177.

16 *Id.*

17 *See* 437 U.S. at 469. Ultimately, Fed. R. Civ. P. 23(f) superseded the Court's conclusion that a certification or decertification order was not immediately appealable.

18 437 U.S. at 469 n.12 (quoting 15 Charles Alan Wright, et al., Federal Practice and Procedure § 3911, p. 485 n.485 (1976)).

19 *Id.*

20 457 U.S. at 160.

21 *See id.* at 150.

22 *See i*d. at 152.

23 *See id.*

24 *Id.* at 159.

25 *Id.* at 160.

26 249 F.3d 672 (7th Cir. 2001).

27 *Id.*

28 249 F.3d at 673, 678.

29 *Id.* at 674-675.

30 *Id.* at 675.

31 *Id.* at 677.

32 *See id.*

33 *Id.* at 678.

34 *See also, e.g.,* Zinser v. Accufix Research Inst., Inc. 253 F.3d 1180 (9th Cir. 2001); Haley v. Medtronic, Inc., 169 F.R.D. 643 (C.D. Cal. 1996); *In re GMC Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305 (S.D. Ill. 2007).

35 84 F.3d 734, 746-47 (5th Cir. 1996).

36 *Id.*

37 *See* 249 F.3d at 675-76.

38 521 U.S. 591, 625 (1997).

39 *See* Basic v. Levinson, 485 U.S. 224, 241-247 (1988) (holding that the presumption may be used to fulfill the reliance requirement in actions for securities fraud); *see also, e.g., In re Bearingpoint Inc. Sec. Litig.*, 232 F.R.D 534, 542-43 (E.D. Va. 2006).

40 *See Basic*, 485 U.S. at 243-44.

41 *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24, 43 (2d Cir. 2006).

42 136 F.R.D. 526 (D. Me. 1991).

43 *See id.* at 528, 532.

44 *See id.* at 532.

45 *Id.*

46 *See id.*

47 754 F. Supp. 785 (S.D. Cal. 1990).

48 *See, e.g.,* Garfinkel v. Memory Metals, Inc., 695 F. Supp. 1397 (D. Conn. 1988); Zinberg v. Washington Bancorp, Inc., 138 F.R.D. 397, 404 (D.N.J. 1990); Kinney v. Metro Global Media, Inc., C.A. No. 99-579 ML, 2002 U.S. Dist. LEXIS 18628, at **9-11 (D.R.I. Aug. 22, 2002); *In re Blech Sec. Litig.*, 187 F.R.D. 97, 104 (S.D.N.Y. 1999).

49 *See, e.g.,* Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc., 209 F.R.D. 159, 165-67 (C.D. Cal. 2002).

50 305 F.3d 145 (3d Cir. 2002).

51 *See id.* at 151-52.

52 *See id.* at 153-155.

53 *See id.*

54 *Id.* at 153.

55 *See, e.g.,* Bogosian v. Gulf Oil Corp., 541 F.2d 534 (3d Cir. 1977); *In re Alcoholic Beverages Litig.*, 95 F.R.D. 321 (S.D.N.Y. 1982); *In re Potash Antitrust Litig.*, 159 F.R.D. 682 (D. Minn. 1995).

56 471 F.3d 24 (2d Cir. 2006). O'Melveny & Myers LLP represented Defendant-Appellant Robertson Stephens, Inc. in this matter.

57 487 F.3d 261 (5th Cir. 2007).

58 400 F.3d 562 (8th Cir. 2005).

59 *See* 471 F.3d at 27.

60 *See id.*

61 *See id.* at 29-30.

62 191 F. 3d 283 (2d Cir. 1999).

63 471 F.3d at 29-30.

64 *See id.* at 33, 35.

65 *Id.* at 35.

66 *Id.* at 41.

67 *See* 471 F.3d at 41.

68 Just before the Second Circuit decided *IPO*, a class certification decision in the Southern District of New York similarly required plaintiffs to prove market efficiency by a preponderance of the evidence in order to avail themselves of the fraud on the market presumption. *See* Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 05 Civ. 1898 (SAS), 2006 U.S. Dist. LEXIS 52991, at *44-45 (S.D.N.Y. Aug. 1, 2006). However, the district court in *Bombardier* was still constrained by *Heerwagen v. Clear Channel Commc'ns.*, 435 F.3d 219 (2d Cir. 2006), pre-*IPO* Second Circuit precedent (discussed below at note 87) prohibiting the imposition of a preponderance burden where the element to be established overlapped with the merits. *See id.* Thus, the district court in *Bombardier* premised its holding on the conclusion that the question of whether plaintiffs were entitled to the fraud on the market presumption was not a merits issue. *See id.*

69 *See id.* at 42-45.

70 *Id.*

71 *See id.* at 42-43.

72 *See id.* at 43.

73 For example, this concern is a common justification for courts' certification of classes notwithstanding the intraclass conflicts identified in *In re Seagate II Sec. Litig.*, 843 F. Supp. 1341 (N.D. Cal. 1994). *See, e.g., In re Intelligent Elec., Inc. Sec. Litig.*, No. 92-1905, 1996 U.S. Dist. LEXIS 1713 (E.D. Pa. Feb. 13, 1996); Weikel v. Tower Semiconductor Ltd., 183 F.R.D. 377 (D.N.J. 1998).

74 487 F.3d 261 (5th Cir. 2007).

75 *See id.* at 262-63.

76 *See id.* at 263.

77 *See id.*

78 *Id.* at 267.

79 *Id.* at 267-68.

80 *See id.* at 265.

81 *See id.*

82 *See Basic*, 485 U.S. at 243-44.

83 *See* 487 F.3d at 264.

84 *See id.* at 264-65.

85 *See id.* at 264.

86 *See id.* at 267.

87 Indeed, it was in an antitrust decision that the Second Circuit first hinted at the sea-change coming in *IPO*. *See* Heerwagen v. Clear Channel Commc'ns., 435 F.3d 219 (2d Cir. 2006). While *Heerwagen* held that the court should not weigh evidence on class certification where Rule 23's requirements intersect with the merits of the underlying litigation, the Second Circuit also held that plaintiffs had to establish predominance under Rule 23 by a preponderance of the evidence where the predominance inquiry was independent of the merits. *See id.* at 231-33.

88 400 F.3d 562 (8th Cir. 2005).

89 *See also, e.g.,* Piggly Wiggly Clarksville, Inc. v. Interstate Brands Corp., 03-40973, 2004 U.S. App. LEXIS 11160 (5th Cir. June 7, 2004); Rodney v. Northwest Airlines, Inc., 04-5752, 2005 U.S. App. LEXIS 18242 (6th Cir. Aug. 22, 2005).

90 *See id.* at 565.

91 *See id.* at 569-70.

92 *See, e.g., Linerboard*, 305 F.3d 145 (discussed above).

93 *See* 400 F.3d at 569-70.

94 *See id.*

95 *See id.* at 570.

96 *Id.*

97 *Id.* at 570, 575 (affirming this aspect of the district court's reasoning).

98 *See id.* at 566-67.

99 *Id.* at 566.

100 *See id.* at 567.

101 *See* Alan B. Morrison, *Determining Class Certification: What Should the Courts Have to Decide?*, 8 Class Action Litig. Rep. (BNA) 541 (July 27, 2007).

102 *See, e.g.,* Haywood v. Barnes, 109 F.R.D. 568, 581 (E.D.N.C. 1986).

103 *See, e.g.,* Geraghty v. U.S. Parole Comm'n., 719 F.2d 1199, 1205-06 (3d Cir. 1983).

104 *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1301 (2002).

105 155 F.3d 331 (4th Cir. 1998).

106 *See id.* at 336-37.

107 *See id.* at 340-41.

108 *Id.* at 345.

109 *See id.* at 340-44.

110 *See id.*

111 *Id.* at 343.

112 *Id.* at 352.

The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We publish original scholarship on timely and contentious issues in the legal or public policy world, in an effort to widen understanding of the facts and principles involved and to continue that dialogue. Positions taken on specific issues in publications, however, are those of the author, not reflective of an organization stance. Class Action Watch presents articles on a number of important issues, but these are contributions to larger ongoing conversations. We invite readers to submit opposing perspectives or views to be considered for publication, and to share their general responses, thoughts and criticisms by writing to us at info@fed-soc.org. Additionally, we happily consider letters to the editor.

The Federalist Society
For Law and Public Policy Studies
1015 18th Street, N.W., Suite 425
Washington, DC 20036