Human Erasers

How Plaintiffs' Class Counsel Try to Make Differences Vanish

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The vast majority of class-action lawsuits are won or lost in the class certification stage. Defeating class certification most often dissuades a plaintiff from pursing litigation any further, while a court's decision to grant class certification can often push the parties toward settlement.

One of the biggest obstacles to class certification is the Rule 23(b)(3) requirement that common questions of fact predominate over individualized issues of class members. "At its essence, predominance is concerned with whether the putative named plaintiffs can, through their individualized cases, offer proof on a class-wide basis." *Hyderi v. Washington Mutual Bank*, 235 F.R.D. 390, 398 (N.D. Ill. 2006) (citing *Hewitt v. Joyce Beverages of Wisc., Inc.*, 721 F.2d 625, 628–629 (7th Cir. 1983)). Similarly, in a case seeking injunctive relief under Rule 23(b)(2), the plaintiffs are required to demonstrate that the proposed class is "cohesive." *See In re Compensation of Managerial, Profel and Technical Employees Antitrust Litig.*, No. 02-CV-2924, 2006 WL 38937, at *6 (D. N.J. Jan. 5, 2006). A class is not cohesive or manageable, and should not be certified, if significant individual issues exist. *See id.*

Whether a defendant can successfully defeat class certification often turns on the number of individual issues that are revealed through class certification discovery and highlighted in the defendant's opposition brief. Indeed, the core defense theme in many cases focuses on the fact that the "class" is really a group of distinct individuals, particularly when it comes to issues of causation, reliance, individual defenses such as comparative fault and limitations, and damages. To try to preempt such arguments, plaintiffs have developed various tactics intended to make these individual issues "disappear." These include using 1) statistics to argue that the individual class members are the same; 2) fluid recovery for distribution of damages;

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3) fraud-on-the-market theories; and 4) administrative processes to determine individual injures and damages. When examined closely, however, these tactics can be exposed as violative of Due Process, contrary to the Rules Enabling Act, and failing to cure the individual issues that often lead to the defeat of class certification.

This article analyzes the tactics plaintiffs have developed to try to make individual class members' differences disappear and what defendants can do to counter such methods. It starts with a discussion of a recent noteworthy case in which plaintiffs attempted (unsuccessfully) to employ many of the aforementioned tactics. It then turns to a more detailed analysis of other caselaw examples.

The use of statistics and its related benefits in terms of getting a class certified has spilled over into other practice areas.

A Recent Case Illustration

A case recently decided by the Second Circuit Court of Appeals highlights several of the techniques plaintiffs attempt to implement in order to "erase" the individual issues from their case and, they hope, get their proposed class certified. The case, *McLaughlin, et al. v. American Tobacco Co.* (referred to below as *Schwab, et al. v. Philip Morris USA, et al.*), was brought on behalf of smokers of light cigarettes. Plaintiffs sought recovery under the federal civil RICO provisions, alleging $800 billion in economic damages from their purchase of light cigarettes ("Lights"). *See* 522 F.3d 215, 221 (2d Cir. 2008).

On appeal from the district court's certification of the class, the Second Circuit ruled that certification was improper because plaintiffs failed to meet their burden of demonstrating that common questions predominated as to the RICO requirements of reliance, loss (or proximate) causation, and injury, and plaintiffs' proposed method for calculating and distributing damages violated the Enabling Act and the Due Process clause. *Id.* The court rejected plaintiffs' attempt to use a fraud-on-the-market theory with respect to reliance, finding that the theory was inapplicable to nonefficient markets such as the market for consumer goods. *Id.* at 224. Reliance could not be presumed because class members could have chosen to smoke Lights "for any number of reasons" and was "too individualized to admit of common proof." *Id.* at 225. The court also noted that the statistics offered by plaintiffs' expert, which allegedly showed that 90.1 percent of those who smoked Lights chose to do so because of Lights' alleged health benefits, suffered from methodological flaws and only "reinforce[d] the difficulty of coming up with" classwide proof of reliance. *Id.* at 225 n.6. For many of these same reasons, the court determined that plaintiffs likewise could not demonstrate loss causation "by way of generalized proof." *Id.* at 226.

In order to demonstrate classwide injury-in-fact, plaintiffs asserted two theories, including a "loss of value" theory. *Id.* at 227. Under that theory, plaintiffs argued that injury was measurable by looking at the difference between the price plaintiffs paid for Lights as represented by defendants and the price they would have paid had they known that Lights were not healthier than full-flavored cigarettes. *Id.* at 228. The court declined to consider the theory because it is designed to award damages based on expectancy, and RICO limits compensation to actual injury to business or property. *Id.* at 228–29. Even if such damages could be awarded, there was no reasonable means for calculating them. Plaintiffs' expert's survey-based conclusions, which purported to calculate the same, were determined to be pure speculation. *Id.*

The court finally held that plaintiffs' proposed method for the calculation and distribution of overall monetary damages was violative of the Second Circuit's previous preclusion of fluid recovery. Plaintiffs suggested that the court could estimate "the gross damages to the class as a whole" and only subsequently allow "for the processing of individual claims." *Id.* at 231. Such a scheme would result in a damages figure unrelated, and presumably substantially greater, than the actual economic harm suffered. *Id.* This type of fluid recovery concept offends the Rules Enabling Act, which prohibits the use of "federal rules of procedure, such as Rule 23, to 'abridge, enlarge or modify any substantive right.'" *Id.* (quoting 28 U.S.C. §2072(b)). Additionally, the court determined, "[w]hen fluid recovery is used to permit the mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation." *Id.* at 232.

Further Analysis of Most Commonly Used "Eraser" Tactics and Methods to Combat Them

Use of Statistics

Plaintiffs have historically used statistics in employment cases to prove a prima facie case of discrimination. This also allows plaintiffs to argue that the question of discrimination is common to the class and does not preclude class certification. 7 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions*, §24:23 (4th ed. 2008). For example, in *Dukes v. Wal-Mart*, the Ninth Circuit affirmed the class certification of over one million women employed by Wal-Mart who alleged sexual discrimination. 509 F.3d 1168, 1174 (9th Cir. 2007). The court held that the predominance requirement may be established in employment discrimination cases by raising the inference of class-wide discrimination through the use of statistical analysis. *Id.* at 1181–1182. A vigorous dissent noted that what the majority called "historic" was "a euphemism for 'unprecedented.' In the law, the absence of precedent is not a recommendation." *Id.* at 1200. It recognized that "[c]lass actions need special justification because they are an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Id.* at 1199 (internal citations omitted).

Lately, the use of statistics and its related benefits in terms of getting a class certified has spilled over into other practice areas. For example, in *In re Neurontin Mktg. & Sales Practices Litig.*, a nationwide class of consumers and insurance companies sought to be reimbursed for the amounts they spent on Neurontin prescriptions. 244 F.R.D. 89 (D. Mass. 2007). The suit alleged that deceptive marketing practices

led doctors to prescribe Neurontin to treat conditions for which it was ineffective. *Id.* Plaintiffs abandoned traditional proof of causation, because, of course, this would only highlight the numerous individual issues that a fraud case raises. Their expert instead proposed an "econometric analysis" to estimate the number of prescriptions doctors gave because of allegedly improper marketing. *Id.* at 109–10. The court recognized that there was no way to identify injured class members, and that to establish causation and injury the plaintiffs would need to conduct inquiries into the prescribing decisions of each class member's physician. *Id.* at 113–14. However, the court also opined that if defendants had used a national marketing scheme to promote fraud, they should not get off scot-free. *Id.* at 114. It accordingly would consider statistical proof to demonstrate that most purchasers in that period were injured, but determined that the record did not contain such a proffer, and denied the motion for class certification without prejudice. *Id.*

Defendants can oppose the attempted use of statistics in support of class certification on various fronts. Defendants should challenge the science behind the plaintiffs' statistics and insist on a *Daubert* analysis. Failing to scrutinize an expert's methodology amounts to a "delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *Wes v. Prudential Sec.*, 282 F.3d 935, 938 (7th Cir. 2002). As a general matter, there will be numerous fundamental flaws in aggregation theories, such as failing to take into account individuals who will not be able to prove liability or withstand affirmative defenses, as well as a lack of scientific basis for averaging subjective items or individual conduct such as knowledge, expectations, reliance, or decision-making.

It is important to stress that statistics cannot be used to relieve plaintiffs from their burden of proving the elements of their individual claims or to preclude defendants from asserting individual affirmative defenses. Class actions are strictly a procedural device and should not be used to alter the substantive rights or obligations of the parties. *Oritz v. Fireboard* 527 U.S. 815, 845 (1999). Rule 23 "does not alter the required elements which must be found to impose liability and fix damages." *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 312 (5th Cir. 1998). The use of statistics can also run afoul of the Seventh Amendment right to trial by jury and due process rights. The "applicability of the Seventh Amendment is not altered simply because the case is Rule 23(b)(3) class action." *Cimino*, 151 F.3d at 312 (asbestos manufacturer had a right to a jury determination of distinct and separable issues of actual damages suffered by each extrapolation plaintiff).

Requests for Fluid Recovery

Plaintiffs may also argue, in attempting to get a class certified, that they are entitled to a fluid recovery. The term fluid recovery has been used to refer to a variety of circumstances and procedures allowing for indirect recovery or distribution of damages. 3 Alba Conte and Herbert B. Newberg, *Newberg on Class Actions* §10:17 (4th ed. 2008). In the context of the predominance requirement of Rule 23(b)(3), "fluid recovery has been used to refer to the entire procedure of class-wide calculation of damages and distribution of the aggregate amount or any unclaimed balance thereof to injured class members or to others under cy pres notions or other doctrines." *Id.* at n.7. *Cy pres* is the principle that if the funds in a charitable trust can no longer be devoted to the purpose for which the trust was created, they may be diverted to a related purpose. *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

The Sixth Circuit recently attempted to clarify the confusion of the term by drawing a distinction between fluid recovery and aggregate damages. *In re Scrap Metal Antitrust Litig.*, 2008 WL 2050820, at *12 (6th Cir. 2008). The court stated that fluid recovery refers solely to the distribution of unclaimed or unclaimable damages, whereas aggregate damages refer to the class-wide determination of damages. *Id.* In reality, however, federal courts have largely failed to draw such a clear distinction, and fluid recovery has been used to refer to both procedures.

Utilizing a broad definition of the term, many circuits have prohibited or strongly restricted the use of fluid recovery as a method of avoiding the individual proof of damage and concomitant manageability problems present in most purported class action cases. There are several arguments available to defendants in this regard. As a threshold matter, fluid recovery may not be applied where a practical system for identification of class members is not available. *In re Neurontin Mkt. and Sales Practices Litig.*, 244 F.R.D. at 112–14.

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Defendants should further object to the use of fluid recovery on the grounds that it violates due process rights. The Second Circuit's opinion in *Eisen v. Carlisle & Jacquelin* is often cited to support this view. 479 F.2d 1005 (2d Cir. 1973), *judgment vacated on other grounds*, 417 U.S. 156 (1974). The court therein implied that fluid recovery results in astronomical classwide damage awards not based on actual injury, which provide a windfall to plaintiffs and constitute a violation of due process. *Id.* at 1018. As a result, the court held "the 'fluid recovery' concept and practice to be illegal, inadmissible as a solution to the manageability problems of class actions and wholly improper." *Id.* This view was also adopted by the Fourth Circuit in *Windham v. American Brands, Inc.*, where the court refused to apply fluid recovery to an antitrust class action in order to "fix" manageability issues with regard to proving individual damages. 565 F.2d 59, 72 (4th Cir. 1977).

Some courts have rejected due process challenges to fluid recovery. In *In re Antibiotic Antitrust Actions*, defendants argued that the proposed class-wide damages model violated their due process rights because it significantly impaired their right to defend properly against individual claims. 333 F. Supp. 278, 288 (S.D.N.Y. 1971). First the court acknowledged the potential problem, but side-stepped the issue by determining that the trial process itself, not the fluid recovery system, was the cause of such concern. *Id.* Later, the court noted that the defendant's argument failed because the very point of fluid recovery was to alleviate the need for individual damages claims. *Id.* One scholar argues that such a system does not violate due process because any error in distribution occurs with respect to individual plaintiffs, not the overall damages award, which is likely to be accurate because overcompensation of some plaintiffs is balanced by undercompensation of others. Leah Bressack, *Small Claim Mass Fraud Actions: A Proposal for Aggregate Litigation Under Rico*, 61 VAND. L. REV. 579, 610–11 (2008) (citing *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 288–89 (S.D.N.Y. 1971). From the defendant's perspective, Bressack argues, only the accuracy of the total award is relevant, and there is no indication that aggregate damages are any less accurate than individual damage determinations, which are equally susceptible to precision problems. *Id.*

Defendants should also argue that fluid recovery violates the Rules Enabling Act because it substantively alters the law by lowering the plaintiff's required burden of proof. *See In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974) ("[A]llowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes. Such enlargement or modification of substantive statutory rights by procedural devices is clearly prohibited by the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure.").

Defendants should make the additional argument that fluid recovery cannot be used to circumvent the requirement of proving individual injury. *See, e.g., In re Phenylpropanolamine (PPA) Products Liab. Litig.*, 214 F.R.D. 614, 620 (W.D. Wash. 2003) (proposal of fluid recovery as solution to manageability problems with determining individual injury rejected). The Ninth Circuit has likewise cautioned, in an antitrust class action against real estate brokers for price fixing, that systems of generalized proof of damages cannot circumvent the requirement of proving individual damages. *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 236 n.8 (9th Cir. 1974) ("[G]eneralized proof of damages ... does not eliminate the ultimate need for individual proof of damages by each member of the class."). Fluid recovery is also not appropriate when damages, while small, are not difficult to assign or distribute. *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 345 (7th Cir. 1997).

However, some courts have permitted aggregate, class-wide determinations of damages when a system for distribution of individual damages exists. *See In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 525–26 (S.D.N.Y. 2006) (in antitrust class action, aggregate determination of damages acceptable when defendant could distribute damages through the use of detailed computer records); *see also Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 454–55 (3d Cir. 1977) ("When an antitrust violation impacts upon a class of persons who do have standing, there is no reason in doctrine why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual."). And while fluid recovery may not be used to side-step the requirement of proving individual damages, it is important to note that individual issues of damages alone may not defeat an otherwise sufficient showing of common question predominance under Rule 23. *See In re Scrap Metal Antitrust Litig.*, 2008 WL 2050820, at *13 (6th Cir. 2008).

Fraud-on-the-Market

Plaintiffs have also attempted to utilize the fraud-on-the-market theory to demonstrate the lack of individual issues in their purported class action. "The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business." *Basic, Inc. v. Levinson*, 485 U.S. 224, 241 (1988). In a securities fraud claim, the fraud-on-the-market theory relieves the plaintiff from having to prove the element of individualized reliance and instead creates a rebuttable presumption of reliance. *See In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 7 (1st Cir. 2005). Creative

plaintiffs attempt to employ "fraud-on-the-market" type theories outside of the securities context.

One of the defendant's best tools to combat a fraud on the market theory is that, outside the securities context, most courts have found this theory inapplicable. This is true even where plaintiff attempts to employ the same concepts found in the theory while avoiding calling it by name. In *Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co.*, for instance, a nationwide class action of insurance companies (third-party payors) argued that the defendant engaged in deceptive marketing of Vioxx, and that the proposed class was the target of the campaign and received the same information. *See* 929 A.2d 1076, 1087 (N.J. 2007). Plaintiff did not suggest that proposed class members reacted in a uniform or similar manner, however, and the court found that each made "individualized decisions" about Vioxx. *Id.* Plaintiff argued that ascertainable loss could be proven by reliance on expert analysis alone, which the defendant contended was nothing more than a fraud-on-the-market theory. *Id.* at 1085. The court agreed and rejected the use of "a single expert to create a common question of fact or law that would bear on the predominance analysis." *Id.* at 1089.

Similar attempts have been made by plaintiffs in cases involving fraud and other state law claims, RICO and antitrust claims, but they have been largely unsuccessful.

Common Law Fraud and State Law Claims

Where plaintiffs assert fraud on the market in a common law fraud action, defendants should point out that the majority of courts have held that the theory cannot be used to avoid individual proof of reliance. *See, e.g., Gartin v. S & M NuTec LLC*, 245 F.R.D. 429, 438 (C.D. Cal. 2007) ("'[T]o permit common law claims based on the fraud-on-the-market doctrine would open the door to class action lawsuits based on exceedingly speculative claims.'"(quoting *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1108, (1993)); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1363 (11th Cir. 2002), *abrogated on other grounds*; *Bridge v. Phoenix Bond & Indem. Co.*, ___ U.S. ___, 2008 WL 2329761 (June 9, 2008) ("The securities market presents a wholly different context than a consumer fraud case, and neither this circuit nor the Supreme Court has extended a presumption of reliance outside the context of securities cases.").

In fraud actions, a court cannot presume that a causal connection exists. For example, the Fourth Circuit rejected the extension of a fraud-on-the-market type presumption of reliance to a class action against a collapsed health plan's claims administrator and individual and corporate insurance agents who marketed and sold the plan. *See Gunnells v. Healthplan Serv., Inc.*, 348 F.3d 417 (4th Cir. 2003). In contrast to securities fraud, the alleged fraud and misrepresentations at issue did not involve such a close causal connection between available information and the market, which the court noted is required to presume reliance. *Id.* at 435.

The Ninth Circuit, by contrast, accepted a class-wide presumption of reliance in a fraud claim against a trust company where it was alleged that the company communicated the same misrepresentation to all class members. *See Jenson v. Fiserv Trust Co.*, 256 Fed. App'x 924, 926, 2007 WL 4163889, 1 (9th Cir. 2007). But the court noted, in accordance with California precedent, that reliance cannot be presumed on a class-wide basis when the same misstatement or omission was not communicated to all class members. *See id.* Relying on similar precedent, a Texas district court found plaintiffs were entitled to a rebuttable presumption of reliance in a state law fraud case involving a failure to disclose. *See In re Great Southern Life Ins. Co. Sales Practices Litig.*, 192 F.R.D. 212, 220 (N.D. Tex. 2000). The court found that the presumption applies to cases involving misrepresentations as well as omissions. *See id.*

Where plaintiffs make fraud-on-the-market theories based on state common law, defendants should counter that such attempts have been largely unsuccessful as well. *See In re Rezulin Prods. Liab. Litig.*, 524 F. Supp. 2d 436, 441 (S.D.N.Y. 2007) ("'[c]ourts repeatedly have refused to apply the fraud-on-the-market theory to state common law cases despite its widespread acceptance in the federal securities fraud context.'"(quoting *Secs. Invest or Prot. Corp. v. BDO Seidman, L.L.P.*, 222 F.3d 63, 73 (2d Cir. 2000)); *see also Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund*, 929 A.2d at 1088; *Heindel v. Pfizer, Inc.*, 381 F. Supp. 2d 364 (D. N.J. 2004). The notion has not been completely rejected, however, as the Second Circuit examined the application of fraud-on-the-market in New York state common law claims and determined that the authorities were split. *See Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 142 n.2 (2d Cir. 2001).

Defendants should make the additional argument that fluid recovery cannot be used to circumvent the requirement of proving individual injury.

RICO Claims

As with fraud claims, defendants should argue that the majority of courts have rejected fraud-on-the-market theories in RICO suits. For example, the Eighth Circuit, in *Appletree Square I v. W.R. Grace & Co.*, denied the application of fraud-on-the-market to a RICO claim involving misrepresentations in relation to the purchase of a building, stating that the real estate market is not an efficient market. 29 F.3d 1283, 1286–1287 (8th Cir. 1994). Similarly, the Fifth Circuit rejected the application of fraud-on-the-market to RICO claims, noting that no efficient market existed in a RICO claim alleging fraud in the marketing of plumbing systems. *See Summit Props. v. Hoechst Celanese Corp.*, 214 F.3d 556, 561 (5th Cir. 2000).

While the Ninth Circuit rejected the use of a presumption of reliance in a RICO class action involving alleged misstatements about video poker machines, it explicitly failed to address whether a fraud-on-the-market type presumption is ever applicable to RICO claims. *See Poulos v. Caesars World, Inc.*, 379 F.3d 654, 666 (9th Cir. 2004). Instead, the court drew a distinction between cases involving primarily misrepresentations and securities cases invoking a presumption of reliance, which involve omissions (failures to disclose).

Id. at 666–667. It should also be noted that the application of fraud-on-the-market to presume reliance in RICO claims based on mail fraud may now be moot in light of the recent Supreme Court decision in *Bridge v. Phoenix Bond & Indem. Co.*, ___ U.S. ___, 2008 WL 2329761, at *12 (June 9, 2008) (plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations).

If no practical administrative model exists for distribution of the damages, individual issues will predominate and the class should not be certified.

Antitrust Cases

Plaintiffs have also employed an approach similar to that of fraud-on-the-market in antitrust class actions in order to "prove" predominance of common issues with respect to damages. In *Winoff Indus. v. Stone Container Corp. (In re Linerboard Antitrust Litig.)*, the Third Circuit affirmed the lower court's application of the "Bogosian short-cut," where individual damages are presumed if a national conspiracy to increase prices is proven and there is evidence that the wholesale market value on the whole increased. 305 F.3d 145, 151 (3d Cir. 2002).

Administrative Processes

Plaintiffs often suggest administrative processes for determining individual injuries and damages in an attempt to eliminate the presence of individual issues. While trying to get a class certified, plaintiffs have suggested that an administrative officer determine (most commonly) the amount of individual damages to give to each class member *after* a jury determines the total amount of damages to be awarded. Plaintiffs have also suggested that an administrative officer can determine individual exposure to asbestos and individual purchase of a defective product after the jury determines general liability. Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 712 (2006).

Plaintiffs often cite to Federal Rule of Civil Procedure 23(c)(4), which allows for certification of certain issues, to support the use of administrative processes. *See id.* at 709. The advisory committee notes on the 1966 Amendment of Rule 23(c)(4) state that the Rule "contemplates possible class adjudication of liability issues with 'the members of the class... thereafter... required to come in individually and prove the amounts of their respective claims.'" *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 428 (4th Cir. S.C. 2003) (quoting FED. R. CIV. P. 23(c)(4), advisory committee note to 1966 Amendments).

But the fact that Rule 23(c)(4) may permit issue certification in certain, limited circumstances does not end the inquiry, defendants should argue. *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1302–03 (7th Cir. 1995) (rejecting district court's plan to "divide the trial of issues that he has certified for class-action treatment from the other issues involved in the thousands of actual and potential claims of the representatives and members of the class" and holding that the same violated the Seventh Amendment); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) (the proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3), and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial).

Indeed, "[a]pproval of administrative determination of damages may depend on how susceptible to classwide proof or formulaic determination the damages will be," in that segmentation may raise Seventh Amendment problems regarding the right to a jury trial. Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. at 716. And even if damages are easily provable on a classwide basis, if no practical administrative model exists for distribution of the damages, individual issues will predominate and the class should not be certified. *In re Fresh Del Monte Pineapples Antitrust Litig.*, 2008 LEXIS 18388, at *34 (S.D.N.Y. Feb. 20, 2008); *City of Philadelphia v. American Oil Co.*, 53 F.R.D. 45, 72 (D. N.J. 1971) ("It is readily apparent that no matter how easy it is to establish damages on a class level, if it is extremely difficult or almost impossible to distribute these sums to their rightful recipients, the class is unmanageable.").

These types of problems are not limited to administrative determination of damages, moreover. The employment of any administrative process, which is often quite complicated in and of itself, can make the class less, rather than more, manageable. In *Sanneman v. Chrysler Corp.*, for example, the court refused to certify a class action seeking redress from defective paint jobs on cars, where an administrative process was proposed to determine individual injury and causation and would likely last for "untold years." 191 F.R.D. 441, 449 (E.D. Pa. 2000).

Conclusion

While plaintiffs may attempt to employ a multitude of tactics to diminish individual issues and garner class certification, defendants have many methods at their disposal to dispel these attempts. Key arguments include:

- Rule 23 is only a procedural device. As such, plaintiffs are still required to prove the elements of their claims and cannot fall back on an expert's statistics or fraud-on-the-market theories to meet their prima facie requirements.
- The use of statistics, fluid recovery, and other plaintiffs' tools have the potential to violate the defendants' rights under the Seventh Amendment, the Rules Enabling Act, and the Due Process clause.
- The science and methodology used by plaintiffs' experts are often susceptible to attack and mounting such an effort is pivotal to the defense.
- The employment of complicated processes for the distribution of damages is a sign that individual issues predominate and that a class should not be certified. FD