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

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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

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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'

Fluid Recovery: Manufacturing "Common" Proof?

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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]

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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.