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Jurisdiction and Procedure

Class Actions

Antitrust Class Certification: Taking A Holistic View

By Gregory Huffman

Federal courts are in the midst of a fundamental reexamination of class certification, probably to a greater extent than at any time in the past. In *Wal-Mart*, the Court can be said to have laid a foundation for the reexamination by reconfirming that

> Commonality requires the plaintiff to demonstrate that the class members ''have suffered the same injury,'' *Falcon*, . . .,[1] at 157. This does not mean merely that they have all suffered a violation of the same provision of law.[2]

The Supreme Court has now opened further the door for reexamination with its decisions in *Comcast*, *Halliburton II* and *Italian Colors*. In *Comcast*,[3] the Court reversed a class certification order because the plaintiffs' statistical model used a ''methodology that identifies damages that are not the result of the wrong'' being asserted by the plaintiffs. In *Halliburton II*[4] the Court reversed a class certification order because ''defendants must be afforded an opportunity before class certification to defeat'' plaintiff's use of the fraud-on-the-market presumption. In *Italian Colors*,[5] the Court ruled ''that a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act'' even ''when the plaintiff's cost of individually arbitrating a federal statutory [antitrust] claim exceeds the potential recovery.'' The confluence of these three recent Supreme Court decisions ruling adversely to class action claims has excited much controversy among practitioners.

[1] *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982)

[2] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, 131 S. Ct. 2541, 2551 (2011).

[3] *Comcast Corp. v. Behrend*, 569 U.S. ___, 133 S. Ct. 1426 (2013).

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Comcast and Reactions

The Supreme Court decision in *Comcast* in March 2013 probably has had the most impact of the three. There the Court reviewed the sufficiency of an expert report which posited damages for a combination of four antitrust class theories, only one of which survived summary judgment. The Court's narrow holding, that ''a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that [remaining] theory,'' was in the

[4] *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. ___, 134 S. Ct. 2398 (2014). *Halliburton I* [*Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. ___, 131 S. Ct. 2179 (2011)] decided that plaintiff need not prove loss causation to invoke the fraud-on-the-market presumption.

[5] *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. ___, 133 S. Ct. 2304 (2013).

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Court's words ''an unremarkable premise.''[6] So was the Court's repetition of the admonition from its prior decisions[7] that ''rigorous analysis'' ''behind the pleadings'' even of merits issues might be required at time of class certification.[8]

What has been more remarkable is the Court's discussion, in coming to its ruling, as to the showing apparently required for the damages class under Rule 23(b)(3).

> The District Court held, and it is uncontested here, that to meet the predominance requirement respondents had to show (1) that the existence of individual injury resulting from the alleged antitrust violation (referred to as ''antitrust impact'') was ''capable of proof at trial through evidence that [was] common to the class rather than individual to its members''; and (2) that the damages resulting from that injury were measurable ''on a classwide basis'' through use of a ''common methodology.'' 264 F.R.D. at 154.[9]

The Court seems to suggest as ''uncontested'' that class certification, at least in that case, depends on both common proof of antitrust impact and a classwide common damages methodology.

Common proof of antitrust impact is not a new development. There is discussion of that requirement in *Wal-Mart* as to the commonality requirement (''Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.' ''[10]), as well as in circuit decisions (''the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.'').[11]

The Court's suggestion of a classwide common damages methodology requirement, however, was a new development, as the dissent pointed out in citing to a ''[l]egion of appellate decisions'' and other authorities to the contrary.[12] The majority had cited to the district court's opinion below on this proposition which in turn cited to another district court decision,[13] which relied on a 1983 Third Circuit decision not involving a class action.[14]

But on this point the *Comcast* majority opinion does not seem a casual comment. The opinion goes out of its way to emphasize the need for a common damages methodology.

> [Defendants' failure to make a *Daubert* objection] does not make it impossible for them to argue that the evidence failed ''to show that the case is susceptible to awarding damages on a classwide basis.''[15]

> And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class. This case thus turns on the straightforward application of class-certification principles; it provides no occasion for the dissent's extended discussion, *post,* at 1437-1441 (GINSBURG and BREYER, JJ., dissenting), of substantive antitrust law.[16]

The majority opinion does say that ''[c]alculations need not be exact''[17] but also says that the damages model must establish that ''damages are susceptible of measurement across the entire class'' and must avoid relying on a factor not the ''same in all counties.''[18]

The dissenting opinion in *Comcast* also raised an additional point—''at the outset, a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings.''[19] The majority opinion did not address that statement.

Courts of appeal have split on the meaning of *Comcast*. Although more circuits generally have taken a limited view of *Comcast* in ruling that class members' damages need not be proven by a classwide formula, the opinions of the appellate courts have been quite varied in addressing whether the *Comcast* majority's statement about common proof of damages should be applied generally. To see how much variation there has been requires a dive into the opinions.

Almost all of the circuit decisions since *Comcast* have taken a narrow view of the holding in *Comcast.*

- First Circuit— *In re Nexium Antitrust Litigation*[20] (alleged delay of introduction of generic medication)
- Second Circuit—*Roach v. T.L. Cannon Corp.*[21] (alleged wage and hour violations)
- Fifth Circuit— *In re Deepwater Horizon*[22] (alleged losses due to a well blow-out)
- Sixth Circuit— *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*[23] (alleged losses due to mold and mildew occurring in washing machines)
- Seventh Circuit— *Butler v. Sears, Roebuck & Co.*[24] (alleged losses due to mold and sudden stoppage occurring in washing machines)

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[6] *Comcast*, 133 S. Ct. at 1433.
[7] *Wal-Mart*, 131 S. Ct. at 2551-52; *General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160-61 (1982).
[8] *Comcast*, 133 S. Ct. at 1432-33.
[9] *Id.* at 1430.
[10] *Wal-Mart,* 131 S. Ct. at 2551 (citing *Falcon*, 457 U.S. at 157).
[11] *E.g., In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (citing *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008) and *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003)).
[12] *Comcast*, 133 S. Ct. at 1436 (citing to decisions from the First, Second, Third, Fifth, Sixth and Seventh Circuits). *See generally* ANTITRUST LAW DEVELOPMENTS (SEVENTH) 856 (''When common proof establishes liability (including fact-of-injury), courts traditionally have shown a greater willingness to certify classes involving individualized proof of the amount of damages'' [citations omitted]).
[13] *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 141 (D.N.J. 2002).
[14] *Danny Kresky Enters. Corp. v. Magid*, 716 F.2d 206, 209-210 (3d Cir. 1983).
[15] *Comcast*, 133 S. Ct. at 1432 n.4.
[16] *Id.* at 1433.
[17] *Id.* at 1433 (citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)).
[18] *Comcast*, 133 S. Ct. at 1433, 1435.
[19] *Id.* at 1437 n.*.
[20] 777 F.3d 9 (1st Cir. 2015).
[21] 778 F.3d 401 (2d Cir. 2015).
[22] 739 F.3d 790 (5th Cir. 2014).
[23] 722 F.3d 838, 860-61 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).
[24] 727 F.3d 796, 801 (7th Cir. 2013).

- Ninth Circuit— *Leyva v. Medline Industries Inc.*[25] (alleged wage and hour violations)
- Tenth Circuit— *In re Urethane Antitrust Litigation*[26] (alleged price fixing).

Those decisions have all viewed the holding as limited to the disaggregation issue and as not including a requirement for common proof of damages. Typical is the Second Circuit's statement in *Roach*.

> *Comcast* held that a model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury; but the Court did not hold that proponents of class certification must rely upon a classwide damages model to demonstrate predominance.[27]

Some of the cases have looked at public policy reasons for taking a narrow view of the holding.

> It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits.[28]

As the Ninth Circuit protested in the *Leyva* case,

> But damages determinations are individual in nearly all wage-and-hour class actions. *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004, 139 Cal.Rptr.3d 315, 273 P.3d 513, 546 (2012) (''In almost every class action, factual determinations of damages to individual class members must be made. Still we know of no case where this has prevented a court from aiding the class to obtain its just restitution. Indeed, to decertify a class on the issue of damages or restitution may well be effectively to sound the death-knell of the class action device.'').[29]

Many of the decisions adopting a narrow view took confidence from the fact that ''[o]ther circuits have also adopted this understanding of *Comcast*.''[30]

A few courts based their narrow interpretation in part on the ability of a court under Rule 23(c)(4) to limit the issues for which certification is granted—the same possibility raised in the *Comcast* dissenting opinion but ignored in the majority opinion.

> [T]he rule of *Comcast* is largely irrelevant ''[w]here determinations on liability and damages have been bifurcated'' in accordance with Rule 23(c)(4) and the district court has ''reserved all issues concerning damages for individual determination.''[31]

One court appeared not to impose on the plaintiffs at the class certification stage an obligation to delineate how injury or damages would be addressed.

> We hold that the district court did not abuse its discretion by certifying the class here and determining that at the certification stage, it had not been shown that future proceedings would not be manageable consistent with defendants' Seventh Amendment and due process rights.[32]

Two decisions referenced that the court could presume that impact or damages resulted from the defendant's conduct.

> The district court did not abuse its discretion in determining that impact involved a common question that would override other individualized issues. Under the prevailing view, price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated.[33]

Two of the decisions noted questions relating to defendants' rights under the Seventh Amendment and due process clause, but neither found those questions to prevent class certification.[34]

And one of those decisions ruled that the defendant had no right to complain about damages-related issues.

> We reject this argument because Dow has no interest in the method of distributing the aggregate damages award among the class members. . . . And Dow cannot complain about the uncertainties inherent in an aggregate damages award because Dow never requested individualized findings on damages.[35]

Two other courts of appeal, however, have taken a position more consistent with the language of the majority opinion. The D.C. Circuit in *In re Rail Freight Fuel Surcharge Antitrust Litigation*,[36] although noting that precise amount of damages need not be shown at time of class certification, relied on the *Comcast* opinion in reversing and remanding a class certification order because the court viewed the plaintiff's damages model as yielding false positives.

> As we see it, [*Comcast v.*] *Behrend* sharpens the defendants' critique of the damages model as prone to false positives. It is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so ''requires inquiry into the merits of the claim.'' 133 S. Ct. at 1433. If the damages model cannot withstand this scrutiny then, that is not just a merits issue. . . . No damages model, no predominance, no class certification.[37]
>
> Meeting the predominance requirement demands more than common evidence the defendants colluded to raise fuel surcharge rates. The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy. . . . Otherwise, individual trials are necessary to establish whether a particular shipper suffered harm from the price-fixing

[25] 716 F.3d 510, 513-14 (9th Cir. 2013).
[26] 768 F.3d 1245, 1257-58 (10th Cir. 2014).
[27] *Roach,* 778 F.3d at 401. *Accord In re Nexium,* 777 F.3d at 23; *In re Deepwater,* 739 F.3d at 815; *In re Whirlpool,* 722 F.3d at 854; *Butler,* 727 F.3d at 799-800; *Leyva,* 716 F.3d at 514; *In re Urethane,* 768 F.3d at 1257-58.
[28] *Butler,* 727 F.3d at 801. *See also In re Nexium,* 777 F.3d at 20.
[29] *Leyva,* 716 F.3d at 513-14 (internal citation and quotation marks omitted in original).
[30] *In re Nexium*, 777 F.3d at 18 and n.15 (citing to decisions of 10, 5, 7 and 9 Circuits). *See also Roach,* 778 F.3d at 401; *In re Deepwater,* 739 F.3d at 815, 817; *In re Whirlpool,* 722 F.3d at 854; *Butler,* 727 F.3d at 802.
[31] *In re Deepwater,* 739 F.3d at 817. *See also In re Whirlpool,* 722 F.3d at 854; *Butler,* 727 F.3d at 800.
[32] *In re Nexium,* 777 F.3d at 14.
[33] *In re Urethane,* 768 F.3d at 1254. *See also In re Nexium,* 777 F.2d at 19.
[34] *In re Nexium,* 777 F.3d at 14; *In re Urethane,* 768 F.3d at 1269
[35] *Id.* at 1269 (citations omitted).
[36] 725 F.3d 244 (D.C. Cir. 2013) (alleged price fixing).
[37] *Id.* at 253.

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> scheme. That is not to say the plaintiffs must be prepared at the certification stage to demonstrate through common evidence the precise amount of damages incurred by each class member. . . . But we do expect the common evidence to show all class members suffered *some* injury.[38]

The Tenth Circuit in *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, [39]envisioned that individualized damages could defeat predominance, but opined that certification might still be proper if damages were bifurcated.

> As the Supreme Court recently emphasized in *Comcast v. Behrend*, the district court has a ''duty to take a close look at whether common questions predominate over individual ones.'' 133 S. Ct. at 1432 (quotation omitted).[40]
>
> Additionally, the district court should consider the extent to which material differences in damages determinations will require individualized inquiries. Although ''individualized monetary claims belong in Rule 23(b)(3),'' *Wal–Mart,* 131 S. Ct. at 2558, predominance may be destroyed if individualized issues will overwhelm those questions common to the class . . . . [41]
>
> That said, there are ways to preserve the class action model in the face of individualized damages. *See, e.g., Comcast,* 133 S. Ct. at 1437 & n.* (Ginsburg, J. and Breyer, J., dissenting) (''A class may be divided into subclasses for adjudication of damages. Fed. R. Civ. Pro[ ]. 23(c)(4)-(5). Or, at the outset, a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings.'').[42]

The district courts have been more evenly-divided about *Comcast*'s impact. Those citing the case in reversing class certification include *In re POM Wonderful LLC Marketing & Sales Practices Litigation*[43] (C.D. Cal. March 25, 2014) (plaintiffs' expert did not tie class-wide damages to a legal theory); *Fort Worth Emps. Retirement Fund v. J.P. Morgan Chase & Co.*[44] (S.D.N.Y. 2014) (plaintiffs failed to meet their burden of showing that damages can be calculated on a class-wide basis); *In re Skelaxin (Metaxalone) Antitrust Litigation*[45] (E.D. Tenn. 2014) (determining members of class may require transaction-by-transaction inquiry); *In re BP p.l.c. Securities Litigation*[46] (S.D. Tex. May 20, 2014) (''damages cannot be deployed without an individualized inquiry into each investor's subjective motivations''); *Royal Mile Co., Inc. v. UPMC*[47] (W.D. Pa. Aug. 21, 2014) (small groups' damages could not be proven on a class wide basis); *In re Optical Disk Drive Antitrust Litigation*[48] (N.D. Cal. 2014) (regression assumes all class members were overcharged); *Werdebaugh v. Blue Diamond Growers*[49] (N.D. Cal. May 23, 2014) (plaintiff's expert failed to analyze separately the effect of brand loyalty and price advertising).

Those district courts taking a narrow view of *Comcast* include *Martins v. 3PD, Inc.*[50] (D. Mass. Mar. 28, 2013) (court ''interpret[s] [*Comcast*] not to foreclose the possibility of class certification where some individual issues of the calculation of damages might remain''); *Harris v. comScore Inc.*[51] (E.D. Ill. 2013) (*Comcast* statement on common damages ''is merely dicta and does not bind this court''); *In re Motor Fuel Temperature Sales Practices Litigation*[52] (D. Kan. 2013) (relies in part on Ginsburg and Breyer dissent from *Comcast*); *In re High-Tech Employee Antitrust Litigation*[53] (N.D. Cal. 2013) (plaintiffs ''need only show that common questions will predominate with respect to their case as a whole''); *In re Cathode Ray Tube (CRT) Antitrust Litigation*[54] (N.D. Cal. Sept. 24, 2013); *Fox v. Riverview Realty Partners*[55] (N.D. Ill. April 22, 2014) (''The lack of a formalized damages calculation methodology does not change . . . that such a methodology is not a prerequisite to a finding of predominance.''); *In re Cox Enters., Inc. Set-Top Cable Television Box Antitrust Litigation*[56] (W.D. Okla. Jan. 9, 2014) (''Put simply, the question is, does Dr. Hastings' damages model redress the harm suffered by class members? . . . The damage model provides a method to redress that harm.'').[57]

Lawyers on both sides of the docket will have ample precedent to draw on.

Outstanding Issues

The widely varying reactions of lower courts to the *Comcast* opinion raise a number of issues for practitioners to confront, in addition to the issue of whether classwide proof of damages will be a prerequisite to certification. Those issues include

- May individualized issues be considered separately under Rule 23(c)(4) without destroying predominance? The minority opinion in *Comcast* treated this option as established black-letter law.[58]
- Will a party's expert need to present opinions at the time of the Rule 23 hearing which satisfy the *Daubert* standards of admissibility? This issue was the one on which the writ of certiorari was granted for review in *Comcast,* but which was left behind when the majority chose to base its decision on the plaintiffs' failure to demonstrate Rule 23 predominance.[59]
- Will a presumption or inference be applied to allow a plaintiff to satisfy its *prima facie* burden for

[38] *Id.* at 252 (citations omitted).
[39] 725 F.3d 1213 (10th Cir. 2013) (alleged underpayment of royalties).
[40] *Id.* at 1219.
[41] *Id.* at 1220 (citations omitted).
[42] *Id.*
[43] No. ML 10-02199 DDP, 2014 WL 1225184, at *5, 2014 BL 83192, at *5-6.
[44] 301 F.R.D. 116, 141.
[45] 299 F.R.D. 555, 560, 574–75.
[46] No. 4:10-md-2185, 2014 WL 2112823, at *11-12, 2014 BL 452159.
[47] No. 10-1609, 2014 WL 4187129, at *25-26, 2014 BL 232931.
[48] 303 F.R.D. 311, 321.
[49] No. 12-CV-02724-LHK, 2014 WL 2191901, 2014 BL 146743.
[50] No. 11-11313-DPW, 2013 WL 1320454, at *7-8 n.3, 2013 BL 83001, at *8 n.3.
[51] 292 F.R.D. 579, 589 n.9.
[52] 292 F.R.D. 652, 674-75.
[53] 985 F. Supp. 2d 1167, 1187.
[54] No. C-07-5944-SC, 2013 WL 5391159, at *2, 6-8, 2013 BL 258100.
[55] No. 12 C 9350, 2014 WL 1613022, at *6, 2014 BL 111651, at *9.
[56] No. 12-ML-2048-C, 2014 WL 104964, at *12, 2014 BL 5426, at *13.
[57] *See* Alex Parkinson, *Comcast Corp v Behrend and Chaos on the Ground,* 81 U. Chi. L. Rev. 1213 (2014) for an extensive review of post-*Comcast* lower court decisions.
[58] *Comcast*, 133 S. Ct. at 1437, n.*.
[59] *Id.* at 1431 n.4.

one or more requisite elements of a cause of action?

Resolution of the Rule 23(c)(4) issue logically is a prerequisite for determining whether predominance must be shown as to all or only some of the issues in a claim. The *Comcast* majority opinion can be read as assuming that predominance must measured across the issues of violation, antitrust impact, and damages (the majority opinion is silent on the issue of affirmative defenses).

The interplay between Rule 23(c)(4) segmentation and predominance suggests a spectrum of possible outcomes. At one extreme would be a rule that predominance would be measured and have to exist as to each of all issues (merits, impact/causation, damages and affirmative defenses) in a claim being considered for certification. At the other extreme would be a rule that predominance as to any one issue in a claim would suffice, with all other issues being resolved individually. Rule 23(b)(3) requires that ''a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'' But the apparent inconsistency between Rule 23(b)(3)'s statement that ''the questions of law or fact common to class members predominate over any questions affecting only individual members'' and Rule 23(c)(4)'s statement that ''When appropriate, an action may be brought or maintained as a class action with respect to particular issues'' leaves open to dispute whether predominance is measured over all or only some of the issues in a claim.

The Supreme Court in majority opinions has made only passing reference to Rule 23(c)(4) [or its predecessor Rule 23(c)(4)(A)][60] and has not ruled on the use of Rule 23(c)(4) to avoid certification problems arising from individualized evidentiary issues.

On the *Daubert* issue, the Third Circuit subsequent to *Comcast* has ruled that a ''plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*.''[61] The circuit court relied on *Comcast*'s reference to ''rigorous scrutiny'' and to two pre-*Comcast* circuit opinions—the Seventh Circuit's decision in *Messner v. Northshore University HealthSystem*[62]and the Eighth Circuit's decision in *In re Zurn Pex Plumbing Products Liability Litigation*.[63]

The circuit court in *In re Nexium* implied that the *Daubert* issue could be deferred—''At the class certification stage, the court must be satisfied that, *prior to judgment*, it will be possible to establish a mechanism for distinguishing the injured from the uninjured class members.''[64]

Two of the subsequent cases have referred to use of a presumption as a way to facilitate class certification. *In re Urethane* applied an ''inference'' to find a classwide basis for showing impact.

> The district court did not abuse its discretion in determining that impact involved a common question that would override other individualized issues. Under the prevailing view, price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated. *E.g.*, *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 151-52 (3d Cir. 2002); *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 409–10 (S.D. Ohio 2007). The inference of classwide impact is especially strong where, as here, there is evidence that the conspiracy artificially inflated the baseline for price negotiations.[65]

The circuit court had referenced the district court's treatment of this issue as a presumption.

> This determination was unaffected by the fact that prices were individually negotiated. The court reasoned that the industry's standardized pricing structure—reflected in product price lists and parallel price-increase announcements—''*presumably* established[d] an artificially inflated baseline'' for negotiations. Consequently, any impact resulting from a price-fixing conspiracy would have permeated all polyurethane transactions, causing market-wide impact despite individualized negotiations.[66]

In re Nexium only hypothesized about the use of a presumption.

> Under these circumstances there appear to be at least two ways that the consumer could establish injury. The first would be to argue for a presumption that consumers would purchase the generic if it were available, i.e., a presumption that economically rational consumers faced with two identical products would purchase the less expensive alternative. This presumption would be similar to the presumption of reliance in securities class actions and would be subject to rebuttal by the defendant. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. ___, 134 S. Ct. 2398, 2408, 2412, 189 L.Ed.2d 339 (2014) (presumption of reliance in *Basic, Inc. v. Levinson*, 485 U.S. 224, 108 S. Ct. 978, 99 L.Ed.2d 194 (1988), applies to class action, but is subject to rebuttal by defendants). We do not decide whether applying such a presumption would be appropriate.[67]

The three issues surfacing in the *Comcast* opinion and subsequent circuit decisions interrelate with one another. The Rule 23(c)(4) issue is critical in determining the breadth of issues over which predominance is measured and whether damages is one of those measured issues. Use of a presumption obviates or lessens the need for a *Daubert*-worthy classwide opinion from the plaintiffs' expert. Rule 23(c)(4) also influences the scope of expert opinions and the need for a presumption.

The Scope of Manageability

The issues also raise an even more fundamental question. Running through the cases is a tendency of the litigants, and the courts, to view the certification question in the context of only the plaintiff's *prima facie* case. *See, e.g., In re Nexium*[68] (''To meet the predominance requirement, the party seeking certification must show that 'the fact of antitrust impact[can[ ] be established through common proof' . . .''); *In re Rail*

[60] *Basic, Inc. v. Levinson*, 485 U.S. 224, 249 n.29 (1988) (citing to the Rule in concluding that ''the District Court retains the authority to amend the certification order as may be appropriate.'').

[61] *In re Blood Reagents Antitrust Litigation*, 783 F.3d 183, 187 (3d Cir. 2015).

[62] 669 F.3d 802, 812 (7th Cir. 2012.

[63] 644 F.3d 604, 614 (8th Cir. 2011).

[64] *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2013) (emphasis added).

[65] *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014) (footnotes omitted).

[66] *Id.* at 1251 (emphasis added; record cite omitted).

[67] *In re Nexium*, 777 F.3d at 20.

[68] *Id.* at 18.

  ATRR ISSN 0003-6021

Freight[69] (''The plaintiffs must also show that they can prove, through common evidence, that all class members were in fact injured . . . .''); *In re Whirlpool*[70] (''The Court [in *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. ___, 133 S. Ct. 1184 (2013)] repeatedly emphasized that the predominance inquiry must focus on common questions that can be proved through evidence common to the class.''); *Roach*[71] (''Predominance is satisfied 'if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof . . . .''). This tendency can be explained by plaintiff's being the movant under Rule 23 for certification of the class.

Rule 23(b)(3) has a number of moving parts which should be considered together. The Rule requires that ''the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.'' The Rule also requires ''that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy'' and that the court consider, *inter alia*, ''(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.'' Limiting the determination of superiority and manageability to the plaintiff's *prima facie* case would be an incomplete assessment of how the case will need to be managed through trial.

Rule 23(c)(1) was revised to remove the reference to certification ''as soon as practicable'' in part to allow the district court time to analyze manageability issues. The Advisory Committee's commentary to the Rule's revision says

> A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a ''trial plan'' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof. *See* Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.[72]

The current edition of the Manual on Complex Litigation similarly explains ''A trial plan addressing each element of the claims can help to identify the nature and extent of the individualized proof needed.''[73]

Some circuit courts have recognized this need for an overall perspective by requiring trial plans. *E.g.*, *Espenscheid v. DirectSat USA, LLC*[74] (7th Cir. 2013) (Posner, J.) (''if class counsel is incapable of proposing a feasible litigation plan though asked to do so, the judge's duty is at an end.''); *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of Am.*[75] (3d Cir. 2006) (trial plan advisable); *Madison v. Chalmette Refining, LLC*[76] (5th Cir. 2011) (class decertified for failure to show how the court would actually conduct the trial); *Zinser v. Accufix Research Inst., Inc.* [77] (9th Cir. 2001) (nationwide class involving multiple states' laws decertified for failure to show realistic trial plan). *See also Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*[78] (10th Cir. 2013) (citing to *Gene & Gene LLC v. BioPay LLC*[79] (5th Cir. 2008) for proposition that ''trial court must look beyond defendant's common course of conduct to consider 'how a trial on the merits would be conducted if a class were certified'.''). *See* 2 NEWBERG ON CLASS ACTIONS § 4:79 (4th ed. 2002) (''The trial plan is therefore a method for addressing the key recurring concerns of manageability—individualization and choice of law complexities.'').

Some courts do not recognize the need for trial plans. *Chamberlain v. Ford Motor Co.*[80] (9th Cir. 2005) (trial plan not required under Rule 23); *Peterson v. Cleveland Inst. of Art*[81] (N.D. Ohio Mar. 31, 2011) (trial plan not required); *Gillespie v. Equifax Info. Servs., LLC*,[82] (N.D. Ill. Oct. 15, 2008) (trial plan not required in Seventh Circuit).

The Supreme Court has recognized that predominance is determined by more than the plaintiff's expert report. In *Comcast* the plaintiffs argued that defendants' failure to object to the plaintiffs' expert's opinion precluded defendants from challenging the certification decision. The Supreme Court disagreed.

> Such a forfeit [of not challenging the plaintiffs' expert under *Daubert*] would make it impossible for petitioners to argue that Dr. McClave's testimony was not ''admissible evidence'' under the Rules; but it does not make it impossible for them to argue that the evidence failed ''to show that the case is susceptible to awarding damages on a class-wide basis.''[83]

The Court went on to criticize the circuit court's refusal to assess whether the admitted expert report was speculative.

> Under that logic, at the class certification stage any method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity.[84]

The Supreme Court there ruled that predominance had not been shown despite the admission of the plaintiff's expert report without objection.

Halliburton II

A similar focus on a defendant's response to the plaintiff's *prima facie* showing is found in the Supreme Court's recent *Halliburton II* decision.[85] In *Halliburton II* the plaintiff relied on the fraud-on-the-market pre-

[69] *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013).

[70] *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 858 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

[71] *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 406 (2d Cir. 2015) (quoting *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 131 (2d Cir. 2010)).

[72] Fed.R.Civ.P. 23 Advisory Committee Note on 2003 Amendments for Subdivision (c), Paragraph (1).

[73] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.142 (2004).

[74] 705 F.3d 770, 776.

[75] 453 F.3d 179, 186.

[76] 637 F.3d 551, 556.

[77] 253 F.3d 1180, 1189.

[78] 725 F.3d 1213, 1220.

[79] 541 F.3d 318, 326–29.

[80] 402 F.3d 952, 961 n.4.

[81] No. 1:08 CV 1217, 2011 WL 1297097, at *10-11, 2011 BL 86602, at *11.

[82] No. 05 C 138, 2008 WL 4614327, at *8, 2011 BL 86602, at *9.

[83] *Comcast*, 133 S. Ct. at 1432 n.4.

[84] *Id.* at 1433.

[85] *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. ___, 134 S. Ct. 2398 (2014).

sumption of reliance by class members, which applies when alleged misrepresentations are publicly known and material, the stock has traded in a ''generally efficient market,'' and the customer trade occurred during the time the misrepresentation was known but not revealed as untrue.[86] The Court upheld the continuing legal viability of the *Basic* presumption, but also a defendant's right to rebut the presumption.

> At the same time, *Basic* emphasized that the presumption of reliance was rebuttable rather than conclusive. Specifically, ''[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance.'' 485 U.S. at 248, 108 S. Ct. 978. So for example, if a defendant could show that the alleged misrepresentation did not, for whatever reason, actually affect the market price, or that a plaintiff would have bought or sold the stock even had he been aware that the stock's price was tainted by fraud, then the presumption of reliance would not apply. *Id.,* at 248–249, 108 S. Ct. 978. In either of those cases, a plaintiff would have to prove that he directly relied on the defendant's misrepresentation in buying or selling the stock.[87]

The plaintiff in *Halliburton II* contended that defendants' evidence could only be used at the time of class certification to challenge the presumption's factual foundation of a generally efficient market in which public information affects the market price of the stock, not the presumed fact of reliance itself. The Court disagreed and held the evidence could be used directly to disprove reliance.

> Defendants—like plaintiffs—may accordingly submit price impact evidence prior to class certification. What defendants may not do, EPJ Fund insists and the Court of Appeals held, is rely on that same evidence prior to class certification for the particular purpose of rebutting the presumption altogether.
>
> . . .
>
> But an indirect proxy should not preclude direct evidence when such evidence is available.[88]

The Court recognized that the defendant's evidence, whether as to the specific alleged misrepresentation's lack of impact on market price or any other aspect of reliance, could threaten predominance, but not if applicable to only a very few class members.

> *Basic* does afford defendants an opportunity to rebut the presumption of reliance with respect to an individual plaintiff by showing that he did not rely on the integrity of the market price in trading stock. While this has the effect of ''leav[ing] individualized questions of reliance in the case,'' *post,* at 2424, there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3). That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate.[89]

The circuit court in *In re Nexium* recognized the implications to the issue of predominance of an individualized evidentiary showing by defendants.

> Under *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), a plaintiff securities class can satisfy the reliance requirement at class certification by invoking a presumption of reliance, rather than proving direct reliance on defendant's misrepresentation for each individual class member. *Halliburton II*, 134 S. Ct. at 2408, 2412. *Basic* permits defendants to rebut this presumption using individualized evidence ''showing that [the class member] did not rely on the integrity of the market price in trading stock.'' Id. at 2412. The *Halliburton II* Court concluded that ''[w]hile [the rebuttal] has the effect of leaving individualized questions of reliance in the case, there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3).'' *Id*. (internal quotation marks omitted). Even if ''the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal . . . individual questions [did not] predominate'' over common questions. Id. Thus, the *Halliburton II* Court contemplated that a class with uninjured members could be certified if the presence of a *de minimis* number of uninjured members did not overwhelm the common issues for the class.[90]

Although the *Halliburton II* court did not cite to Federal Rule of Evidence 301, *Basic* did.[91] Rule 301 provides that ''In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption.''[92] The Supreme Court's recognition of the propriety of considering a defendant's evidence in response to a plaintiff's invocation of a fraud-on-the-market presumption is consistent with the general rule laid out in Rule 301.

Halliburton II spoke to the effect on predominance of a defendant's evidentiary response to a presumption used by plaintiff to show an element of plaintiff's *prima facie* case. Would the introduction of a defendant's evidence for other purposes similarly undercut predominance—for example, if the defendant were introducing individualized evidence to counter a plaintiff's expert's classwide opinion on a merits issue? A court would seem to face the same manageability concern as in *Halliburton II*, to the extent the defendant's individualized evidence extended to a significant number of the class members. In the situation of either a presumption or *prima facie* proof of an element of plaintiff's claim, manageability and predominance would seem a determination to make based on the whole of the evidence to come before the court.

Defendants have a right to present individualized proof in response to a plaintiff's evidence. *E.g., Thompson v. City of Chicago*[93] (7th Cir. 2013).

> At the same time, however, the district court abuses its discretion if it so limits the evidence that the litigant is effectively prevented from presenting his or her case. *See Cerabio LLC v. Wright Med. Tech., Inc.*, 410 F.3d 981, 994 (7th Cir. 2005); *Sec'y of Labor v. Desisto*, 929 F.2d 789, 796 (1St Cir. 1991) (''[W]e hold that the witness limitation constituted an abuse of discretion in that it prevented both parties from presenting sufficient evidence on which to base a reliable judgment.'').

[86] *Id.* at 2413 (citing *Basic, Inc. v. Levinson*, 485 U.S. 224, 248 n.27 (1988)).
[87] *Halliburton II,* 134 S. Ct. at 2408.
[88] *Id.* at 2416. The Court did not allow materiality to be contested at class certification because materiality was by definition an objective classwide factor. *Id.* at 2416 (citing *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 568 U.S. ___, 133 S. Ct. 1184, 1195-96 (2013)).
[89] *Halliburton II,* 134 S. Ct. at 2412.
[90] *In re Nexium,* 777 F.3d at 16.
[91] *Basic,* 485 U.S. at 245.
[92] Fed. R. Evid. 301.
[93] 722 F.3d 963, 971.

  ATRR ISSN 0003-6021

The Supreme Court upheld this right recently as to affirmative defenses in *Wal-Mart*,[94] ruling that Wal-Mart ''will have the right to raise any individual affirmative defenses it may have, and to 'demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.' ''[95]

This right has a Constitutional dimension, per the Supreme Court—''Due process requires that there be an opportunity to present every available defense'',[96] and per Justice Breyer when on the court of appeals—''The Constitution does not require every procedural protection that might help; it simply requires that a private person have a basically fair opportunity to convince the decision maker, by presenting proofs and arguments and evidence and replies to the arguments of others.''[97]

The First Circuit recently addressed the Constitutional issue in *In re Nexium*.

> The court may proceed with certification so long as this mechanism will be ''administratively feasible,'' *see Carrera* [*v. Bayer Corp.*], 727 F.3d [300] at 307 [(3d Cir. 2013)], and protective of defendants' Seventh Amendment and due process rights, *see* American Law Institute, Principles of the Law: Aggregate Litigation, § § 2.02(a)(3), 2.07(d) cut. j (2009) (indicating that the court should exercise discretion to authorize aggregate treatment only if it would ''not compromise the fairness of procedures for resolving any remaining issues presented by such claims'' and that ''due process in aggregation . . . extend[s] to persons opposing the aggregate group litigating related claims on an aggregate basis'').[98]

To the extent the defendant's individualized evidence makes certification problematic, the possibility of using Rule 23(c)(4) to certify only particular issues comes more into play. If the issues on which a defendant would be introducing individualized evidence (*e.g.*, merits issues, damages or affirmative defenses) are excluded as classwide issues under Rule 23(c)(4), that would seem, on the surface, to lessen a court's manageability concerns.

Yet were the same jury to determine both the classwide and individual issues, a Rule 23(c)(4) ruling would not seem to reduce the burden on the fact-finder unless the fact-finder found for the defendant at the first trial. With a single jury hearing all the issues, classwide and individual, a Rule 23(c)(4) determination and bifurcation would merely space out the jury's work, with the attendant greater risk of a mistrial due to loss of jurors over the extended time frame.

Another possibility might be where the defendant, after an adverse ruling on the merits, is determined to have no longer a justiciable interest in the determination of individual class members' damages. *See In re Urethane*[99] (the defendant ''has no interest in the method of distributing the aggregate damages award among the class members.''). The court in *In re Urethane* relied on two circuit opinions, *Allapattah Services Inc. v. Exxon Corp.*[100] and *Six Mexican Workers v. Arizona Citrus Growers*,[101] both of which were narrow holdings. *Allapattah* ruled that the defendant Exxon retained the right to contest allocation of damages in that case because damages were individualized. *Six Mexican Workers* involved statutory damages under a labor statute which were not individualized. *Allapattah* noted the Supreme Court's decision in *Boeing Co. v. Van Gemert*[102] where the Court held that the defendant, despite having lost ''any present interest in the fund'' by failing to appeal, nonetheless still had an interest in the possible return of the unclaimed portion of the common fund. *Allapattah* concluded that ''Exxon has certain defenses to each dealer's claim . . . . We therefore conclude that Exxon still has a present interest in the claims process, and due process required that it be allowed to participate in that process.''[103]

The *In re Urethane* decision involved antitrust damage claims which the defendant was arguing were individual in nature. How the *In re Urethane* decision meshes with either of the precedents it cited is unclear.

Courts which segregate individualized issues under Rule 23(c)(4) for non-class treatment often consider the option of bifurcating the issues for consideration by successive juries under Rule 42(b). In that way, the complexity and length of the proceeding may be able to be cut up into more manageable pieces.

Seventh Amendment

If a federal court bifurcates a case for separate juries, the Seventh Amendment must be considered. The Seventh Amendment governs the allocation of issues between juries in federal court. *See* Federal R. Civ. P. 42(b) (''When ordering a separate trial, the court must preserve any federal right to a jury trial.''). The Seventh Amendment provision that ''no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law,'' although originally intended to prevent a jury's verdict from improper interference by an appellate court,[104] has been held by several courts of appeal to apply to bifurcation of class-action issues. All three circuit courts refused to allow a second jury to be used to reexamine an issue in a prior jury's verdict. *Matter of Rhone-Poulenc Rorer, Inc.*[105] (7th Cir. 1995) (''The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have judicable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact.''); *Castano v. American Tobacco Co.*[106] (5th Cir. 1996); *Blyden v. Mancusi*[107] (2d Cir. 1999). *But see Valentino v. Carter-Wallace, Inc.*[108] (9th Cir. 1996) (''This constitutional concern of the *Rhone-Poulenc* court may not be fully in line with the law of this circuit . . . .'').

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[94] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, 131 S. Ct. 2541, 2561 (2011).

[95] *Id.* (quoting *Teamsters v. United States*, 431 U.S. 324, 362 (1977)).

[96] *Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

[97] *Newman v. Burgin*, 930 F.2d 955, 961 (1st Cir. 1991) (Breyer, J.).

[98] *In re Nexium*, 777 F.3d. at 19-20.

[99] 768 F.3d at 1269.

[100] 333 F.3d 1248 (11th Cir. 2003).

[101] 904 F.2d 1301 (9th Cir. 1990) .

[102] 444 U.S. 472, 481-82 (1980).

[103] *Allapattah*, 333 F.3d at 1259.

[104] Stanton D. Kraus, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. Rich. L. Rev. 407, 411-12 (May 1999).

[105] 51 F.3d 1293, 1303.

[106] 84 F.3d 734, 751 (citing *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978)).

[107] 186 F.3d 252. *Accord Johnson v. Nextel Commn's Inc.*, 780 F.3d 128, 150 n.27 (2d Cir. 2015) (citing *Rhone-Poulenc* with approval).

[108] 97 F.3d 1227, 1232.

The Seventh, Fifth, and Second circuits relied on the Supreme Court's decision in *Gasoline Products* that a jury on remand after an appeal should not be limited to retrying one issue unless ''the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.''[109] The courts in *Rhone-Poulenc*, *Castano*, and *Blyden* extrapolated that the *Gasoline Products* rule should also be applied to prevent under the Seventh Amendment the bifurcation of issues between successive juries in the initial trial of a class action.

Rhone-Poulenc[110] disallowed the splitting of the issue of negligence from the issues of comparative negligence and proximate cause. *Castano*[111] disallowed the splitting of the issue of defendants' conduct from the issue of comparative negligence, both under Seventh Amendment and as demonstrating lack of superiority under Rule 23. *Blyden*[112] disallowed the use of a successive jury to consider damages for Section 1983 reprisals not specifically identified in an earlier jury verdict.

Although none of the three circuit decisions involved antitrust claims, there is authority where an antitrust claim was being remanded under the *Gasoline Products* rule after appeal. In *Hasbrouck v. Texaco, Inc.* [113] (9th Cir. 1981), the court of appeals required that both the issues of Robinson-Patman liability and damages be tried again on remand after reversing a damages award.

> The appellants would have us affirm the jury's finding of liability and remand on the measure of damages issue alone. We do not feel, however, that the determination of liability is fairly separable from the calculation of damages in a private antitrust action such as this one. *See Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978) (noting the overlap between proof of injury for liability purposes and for damage calculation purposes under Clayton section 4). Accordingly, we remand for a new trial on both the issues of liability and amount of damages.[114]

In *Castano*, the court of appeals noted that the Seventh Amendment issue also surfaces in the determination of superiority under Rule 23(b). ''Another factor weighing heavily in favor of individual trials is the risk that in order to make this class action manageable, the court will be forced to bifurcate issues in violation of the Seventh Amendment.''[115] The *Castano* court went on to conclude that the overlapping of issues was such that ''the second jury would be impermissibly reconsidering the findings of a first jury. The risk of such reevaluation is so great that class treatment can hardly be said to be superior to individual adjudication.''[116]

Because the Supreme Court has not addressed the Seventh Amendment issue in the bifurcation context, there are many unresolved issues about the Amendment's application in a Rule 23(c)(4) situation. For example, the Fifth and Second Circuits have stated

> The existence of common factual *issues* is to be distinguished from the existence of overlapping *evidence*. For purposes of the Seventh Amendment, the question is whether factual issues overlap, thus requiring one trier-of-fact to decide a disputed issue that must be decided by a subsequent jury, not whether the two fact-finders will merely have to consider similar evidence in deciding distinct issues.''[117]

If and how that rule would be applied in specific circumstances is unclear. Would a court find the issues of fact of damage and amount of damages to overlap one another so as to require determination by a single jury, as did the Ninth Circuit in *Hasbrouck* and in a way similar to the overlap between negligence and contributory negligence found by the Fifth and Seventh Circuits?[118]

Two of the circuit decisions after *Comcast* have mentioned Seventh Amendment issues, albeit in different contexts. *In re Urethane* recognized but found no Seventh Amendment problem due to lack of standing and waiver at trial.

> According to Dow, the Seventh Amendment problem arises not from the use of Dr. McClave's model to distribute damages, but from the application of a pro rata reduction to reflect the jury's award of a lesser amount. The court's across-the-board reduction is problematic, Dow says, because the reason for the jury's reduction is unknown. Dow argues that: (1) the reduction was based on a finding that certain class members suffered no injury, and (2) as a result, Dow was unable to have a jury determine which class members had suffered less damage than Dr. McClave had figured. Appellant's Opening Br. At 65.
>
> We reject this argument because Dow has no interest in the method of distributing the aggregate damages award among the class members.[119] . . . And Dow cannot complain about the uncertainties inherent in an aggregate damages award because Dow never requested individualized findings on damages.[120]

In re Nexium recognized the Seventh Amendment in passing—''The court may proceed with certification so long as this mechanism will be 'administratively feasible,' . . . and protective of defendants' Seventh Amendment and due process rights.''[121] The circuit court predicted the district court on remand could avoid the problem.

> Thus, we have confidence that a mechanism would exist for establishing injury at the liability stage of this case, compliant with the requirements of the Seventh Amendment and due process. *See Madison v. Chalmette Refining, LLC*, 637 F.3d 551, 556 (5th Cir. 2011) (approving, in the context of class certification, consideration of possible ''case management tools, including narrowing the claims and potential plaintiffs through summary judgment [or] facilitating the disposition of the remaining plaintiffs' claims through issuance of a Lone Pine order [requiring affidavits from plaintiffs]'').
>
> Defendants have merely speculated that a mechanism for exclusion cannot be developed later. This is not enough to

[109] *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931).
[110] 51 F.3d at 1303.
[111] 84 F.3d at 751.
[112] 186 F.3d at 269.
[113] 663 F.2d 930.
[114] *Id.* at 934.
[115] *Castano*, 84 F.3d at 750.
[116] *Id.* at 751.
[117] *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 423 n. 21 (5th Cir. 1998); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 170, n.14 (2d Cir. 2001) (quoting *Allison*). *See also In re Paoli Railroad Yard PCB Litig.*, 113 F.3d 444, 453 n.5 (3d Cir. 1997) (dictum).
[118] *Hasbrouck*, 663 F.2d at 934; *Castano*, 84 F.3d at 751; *Rhone-Poulenc*, 51 F.3d at 1303.
[119] *See infra* at 4 for a discussion of this portion of the *In re Urethane* opinion.
[120] *In re Urethane*, 768 F.3d 1245, 1269.
[121] *In re Nexium*, 777 F.3d at 19-20.

  ATRR ISSN 0003-6021

> overcome plaintiffs' case for having met the requirements of Rule 23.[122]
>
> Nor do we see a basis for concluding the number of uninjured class members here is so large as to violate defendants' 7th Amendment or due process rights, in light of the fact that uninjured members can be excluded and the district court expressly ''preserve[d] the Defendants' rights to challenge individual damage claims at trial.''[123]

The circuit court in *In re Nexium* did not address the question of issue overlap which had been the focus of *Castano* and *Rhone-Poulenc*. Instead the court found that the number of claimants with individual issues would be able to be narrowed for manageability purposes—''it does not follow that the existence of a de minimis number of uninjured class members bars certification if those members can be weeded out at a later stage.''[124]

The approach taken in *In re Nexium* of viewing manageability as a function of the number of claimants presenting individualized issues echoes the statement in the *Halliburton II* majority opinion.

> *Basic* does afford defendants an opportunity to rebut the presumption of reliance with respect to an individual plaintiff by showing that he did not rely on the integrity of the market price in trading stock. While this has the effect of ''leav[ing] individualized questions of reliance in the case,'' post, at 12, there is no reason to think that these questions will overwhelm common ones and render class certification inappropriate under Rule 23(b)(3). That the defendant might attempt to pick off the occasional class member here or there through individualized rebuttal does not cause individual questions to predominate.[125]

The implication of both *Halliburton II* and *In re Nexium* is that the burden in addressing the defense's individualized evidence could be unmanageable if there were more than a few claimants presenting such individual issues.

Careful consideration of the Seventh Amendment would seem necessary in any situation in which a court uses different juries to adjudicate the merits, damages, and affirmative defense issues required to come to a final judgment against a defendant.

A Structural Determination of Manageability

There will be a tendency for defendants to assert individualized issues and evidence, just as there will be a tendency for plaintiffs to emphasize classwide issues and evidence. One approach a court might undertake to evaluate those contentions is a structural analysis. Were the dealings between the defendants and claimants structured on a common or individualized basis, did those dealings impact claimants in common or individualized ways, did the individual circumstances of the claimants affect whether and how much they were damaged, etc.? Although a plaintiff might contend that the outcomes in individually-structured situations were the same, the defendant may be able to point to nonactionable factors bearing on those outcomes which would require individualized determinations by the finder of fact.

A structural approach has already been used in securities and other types of cases. For example, the Third Circuit has held in securities cases that ''it has become well-settled that, as a general rule, an action based substantially on oral rather than written communications is inappropriate for treatment as a class action'' where the communications were ''not standard or scripted but were oral and varied.''[126] Similarly, the Second Circuit held ''The common scheme presented here does not demonstrate that the individual misrepresentations made were uniform; therefore, standing alone, the scheme does not provide a sufficient basis to justify class certification.''[127]

In the antitrust area, the cases have not been consistent as to the use of a structural analysis in determining class certification. *Compare Piggly Wiggly Clarksville v. Interstate Brands Corp.* [128] (5th Cir. 2004) (upholding denial of class certification where transactions were individually negotiated) *with In re Urethane*[129] (''Under the prevailing view, price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated.'').

Italian Colors

Overarching the question of how defense evidence is weighed in determining manageability is the issue of how much weight should manageability problems be given in the certification decision. Rule 23(b)(3) includes as a criterion for certification whether a class action would be superior to individual actions as a fair and efficient method of adjudication. Many courts which approve certification give significant weight to whether the class members would be able to pursue their claims due to the disproportionate relationship between the litigation cost of individual suits and the individual recoverable damages. *See, e.g., In re Nexium*[130] (''The plaintiff class members in this case appear to be the very group that Rule 23(b)(3) was intended to protect. As we discuss later in this opinion, the actual overcharge to each class member was generally a small amount per prescription and too small to warrant individual litigation.''). Some might argue that if there is a choice between managing an unwieldy class action or effectively leaving claimants with no viable judicial remedy, the former option is preferable.

The Supreme Court's decision in the *Italian Colors* case[131] suggests that affording individuals a viable judicial remedy should not be given undue weight. There the Court considered ''whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.'' The Court ruled that class action waivers in arbitration agreements should be given effect, even when doing so likely left the claimant without an affordable avenue for recovery. The Court allowed the waiver because the antitrust laws did not guarantee an affordable class remedy, as well as because there was no judge-made ''effective vindication'' exception to the Federal Arbitration Act for antitrust claims.

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[122] *Id.* at 21.
[123] *Id.* at 31.
[124] *Id.* at 24-25 n.20.
[125] *Halliburton II,* 573 U.S. __, 134 S. Ct. 2398, 2412 (2014).
[126] *Johnston v. HBO Film Mgt., Inc.*, 265 F.3d 178, 190-91 (3d Cir. 2001).
[127] *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1255-56 (2d Cir. 2002).
[128] 100 Fed. Appx. 296.
[129] 768 F.3d at 1254.
[130] 777 F.3d at 15.
[131] *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. ___, 133 S. Ct. 2304 (2013).

> The Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was ''designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'' *Califano v. Yamasaki*, 442 U.S. 682, 700-701, 99 S. Ct. 2545, 61 L.Ed.2d 176 (1979). The parties here agreed to arbitrate pursuant to that ''usual rule,'' and it would be remarkable for a court to erase that expectation.
>
> Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights. To begin with, it is likely that such an entitlement, invalidating private arbitration agreements denying class adjudication, would be an ''abridg[ment]'' or''modif[ication]'' of a ''substantive right'' forbidden to the Rules, see 28 U.S.C. § 2072(b). But there is no evidence of such an entitlement in any event. The Rule imposes stringent requirements for certification that in practice exclude most claims. And we have specifically rejected the assertion that one of those requirements (the classnotice requirement) must be dispensed with because the ''prohibitively high cost'' of compliance would ''frustrate [plaintiff's] attempt to vindicate the policies underlying the antitrust'' laws. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 166–168, 175–176, 94 S. Ct. 2140, 40 L.Ed.2d 732 (1974).[132]

The *Italian Colors* decision echoes the earlier *Wal-Mart v. Dukes* decision where the Court ruled

> Because the Rules Enabling Act forbids interpreting Rule 23 to ''abridge, enlarge or modify any substantive right,'' 28 U.S.C. § 2072(b); *see Ortiz*, 527 U.S. at 845, 119 S. Ct. 2295, a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims.[133]

The Court's reliance on the Rules Enabling Act (28 U.S.C. § 2072(b)—''Such rules shall not abridge, enlarge or modify any substantive right.'')—suggests a broad basis for the Court's decision which would extend to rights beyond the Federal Arbitration Act. A Constitutional right such as under the Seventh Amendment or due process clause would seem clearly protected by the Rules Enabling Act; a right created under a rule of procedure, such as manageability in Rule 23(b)(3), might not. The interpretation of the various elements of Rule 23, however, would seem *in pari materia* with each other.

Conclusion

A holistic approach of looking at both the plaintiff's and defendant's realistically-expected evidentiary showings would seem essential to predicting how a class action would be tried. That approach to determining class certification will raise troubling issues not now being explicitly addressed in some opinions and could be a matter of concern for those who believe that the availability of the class action procedure should be protected.

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[132] *Id.* at 2309-10.

[133] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, 131 S. Ct. 2541, 2561 (2011).

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