

OVERLOOKED TOOL: PROMISSORY FRAUD IN THE CLASS ACTION CONTEXT

KAREN SANDRIK*

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I. INTRODUCTION

Ten years ago the United States Supreme Court in *Amchem Products, Inc. v. Windsor*¹ ended the trend of mass tort case certification by sending a clear message to district courts and, consequently, plaintiff class counsel.² Declining to approve a global settlement for hundreds of thousands, if not millions, of present and future plaintiffs claiming asbestos-related injuries, the Court decertified the class, emphasizing the lack of commonality and predominance of common issues. The Court stated: “Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes,

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1. 521 U.S. 591 (1997).

2. Howard Roin & Christopher Monsour, *Economic Torts: A View from Experience*, 48 ARIZ. L. REV. 973, 974 (2006).

while others suffer from lung cancer, disabling asbestosis, or from mesothelioma”³ With the clear admonition that district courts must revisit the Court’s earlier statement that class certification should only be granted “after a rigorous analysis” of the explicit requirements of Rule 23 of the Federal Rules of Civil Procedure,⁴ class counsel were forced to search for new avenues of liability and, thus, relief for injured plaintiffs. In these past ten years, counsel have uncovered two such avenues: state courts and economic torts.

Although class counsel have succeeded in these two new paths regarding claims of mass tort,⁵ there is still one claim that they continually lose, and that is fraud.⁶ The objective of this Comment is to reveal a tool that class counsel are currently overlooking—the economic tort of promissory fraud. This objective rests on the commonly accepted notion that claims of fraud are not appropriate for class actions. The crux of this general presumption is that common law fraud requires the element of reliance, which most often calls for an individualized determination by the courts to find whether such reliance did exist and also whether it was reasonable or justifiable. This individualized determination of reliance leads to further complications regarding the final element of common law fraud: resulting damages. If the degree of reliance varies from plaintiff to plaintiff, then presumably so too will the amount of damages. In short, while it is normal to have some differences in a class action between members, a certain level of commonality must exist; and when courts are forced to conduct individualized determinations of reliance and damages for each class member, they simply find that a class action is inefficient and unmanageable, thereby making the action not fit for class certification.

As class counsel have discovered in the mass tort arena since *Amchem*, economic torts serve the important function of diverting the attention from individual issues, such as reliance and injuries that occurred after the defendant’s conduct, to the overarching tortious act

3. *Amchem*, 521 U.S. at 624 (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626 (3d Cir. 1996)).

4. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

5. See, e.g., Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 386 (1998) (“It is no secret that class actions—formerly the province of federal diversity jurisdiction—are being brought increasingly in the state courts.”); Georgene M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction; Supplemental Jurisdiction; Diversity Jurisdiction; Removal; Preemption; Venue; Transfer of Venue; Personal Jurisdiction; Abstention and The All Writs Act*, in ALI-ABA COURSE OF STUDY, THE ART AND SCIENCE OF SERVING AS A SPECIAL MASTER IN FEDERAL AND STATE COURTS 717, 862 (2006), WL SM051 ALI-ABA 717, 862 (stating that “in the wake of *Amchem*” there is a “movement of many mass tort class actions to state court”); see generally Paul D. Rheingold, *Prospects for Managing Mass Tort Litigation in the State Courts*, 31 SETON HALL L. REV. 910 (2001).

6. See *infra* Part II.

of the defendant that occurred prior to the plaintiff's injury and, thus, damages. This is the first part of the two-part approach, which I call the economic tort strategy, that plaintiff class counsel are currently using with great success in class actions involving economic torts.⁷ The second part of this economic tort strategy offers a manageable solution to the problem of determining damages for thousands, if not hundreds of thousands, of absent class members.

A specific economic tort that is undertheorized, but widely utilized in individual litigation, is promissory fraud. Very simplified, promissory fraud occurs where one party enters a contract, that is, makes a promise, with no intention to perform or act upon that promise.⁸ This economic tort has been overlooked by the class-action-plaintiffs bar, and yet wrongly so, because the reliance element of fraud is implicit in entering a contract.⁹ This Comment examines the theory of implicit reliance in promissory fraud and argues that, if used in conjunction with the economic tort strategy, it will enable courts to forego individualized determinations of reliance and damages. Therefore, promissory fraud may serve as an important tool for class counsel to use to avoid the general bar to fraud claims in class actions.

Part II will introduce class actions and outline the explicit requirements a plaintiff class will need to meet for certification, as well as the dual requirements of a Rule 23(b)(3) class action. The first three sections of Part II may be skipped for those who are familiar with Rule 23 of the Federal Rules of Civil Procedure. The final section of Part II will analyze class actions that involve a claim for common law fraud and show why there is such a strong presumption against class certification in such cases. Part II will then conclude by discussing the narrow exception some jurisdictions have carved in this general presumption.

Part III will focus on economic tort law, its recent developments, and its particular relevance to complex litigation. As recently stated, “[i]f money talks, readers might well expect to find a wealth of discussion about the economic torts”;¹⁰ and yet, surprisingly, there is scant academic discourse on economic torts.¹¹ Accordingly, Part III

7. See *infra* Part III.

8. See, e.g., *Green Tree Acceptance, Inc. v. Doan*, 529 So. 2d 201, 206 (Ala. 1988); *infra* Part IV. This definition will be discussed in much more detail and specificity in Part IV.

9. See IAN AYRES & GREGORY KLASS, *INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT* 5-6 (2005). There has been just one reported class action case that I have found alleging promissory fraud in its various causes of actions. See *Crouch v. Bridge Terminal Transp., Inc.*, No. M2001-00789-COA-R3-CV, 2002 WL 772998 (Tenn. Ct. App. Apr. 30, 2002). For reasons discussed in Part IV, this claim failed.

10. Ellen M. Bublick, Symposium Introduction, *Economic Torts: Gains in Understanding Losses*, 48 ARIZ. L. REV. 693, 693 (2006).

11. As just stated, there is not a plethora of discourse on economic torts, especially outside of the recent Dan B. Dobbs Conference on Economic Tort Law. See *id.*

will highlight commentators' recent thoughts on economic torts and how they are being utilized, including the two-part economic tort strategy. Part III will end by showing how this strategy works in class action cases with economic torts other than promissory fraud.

Next, Part IV will specifically discuss the economic tort of promissory fraud. Much like other economic torts, promissory fraud is well established yet has spurred very little discussion. In the past several years, Professor Ayres and Professor Klass have turned their eyes to this doctrine and have since added to this sparse discourse. Their largest and most notable work is their book, *Insincere Promises*,¹² in which they present many great ideas on how to improve what they feel is a muddled and often misused economic tort. That being said, Part IV focuses on case law and argues that class counsel have a tool available to them that does not require any fixing or tweaking in order to be effective.

Finally, Part V will bring together class actions and the doctrine of promissory fraud. Arguing that plaintiff class counsel are currently overlooking an opportunity to seek relief centered around a contract in tort,¹³ Part V will reevaluate the case law utilized in previous sections and contend that these unsuccessful cases should have included a claim for promissory fraud. To help illustrate this argument, I will discuss the basic underpinnings of consumer class actions resting on the "fraud in the market" theory and show how its notion of indirect reliance is similar to the implicit reliance found in promissory fraud.

Part V also stresses the importance that courts require scienter to be shown, as is so in fraud in the market cases, for a successful promissory fraud case. It is not enough that a defendant made a promissory misrepresentation; it must be that she knowingly or recklessly made this promissory misrepresentation with no intention of performing.

Promissory fraud has the potential to serve as an effective tool in the class action arena for plaintiffs' counsel to use to circumvent the typical bar to certification when fraud is involved. Yet counsel for the plaintiff and defendant, as well as the court, must continue to employ the "tripartite system of safeguards"¹⁴ to ensure that the class action

12. AYRES & KLASS, *supra* note 9; *see also* Ian Ayres & Gregory Klass, *New Rules for Promissory Fraud*, 48 ARIZ. L. REV. 957 (2006); Ian Ayres & Gregory Klass, *Promissory Fraud Without Breach*, 2004 WIS. L. REV. 507 [hereinafter Ayres & Klass, *Promissory Fraud Without Breach*].

13. Interesting, yet not in the scope of this discussion, is that the contract may not even need to be breached or be enforceable in order for a promissory fraud claim to be successful. *See generally* Ayres & Klass, *Promissory Fraud Without Breach*, *supra* note 12.

14. Debra Lyn Bassett, *When Reform is Not Enough: Assuring More Than Merely "Adequate" Representation in Class Actions*, 38 GA. L. REV. 927, 949 (2004) (noting three overlapping levels of protection: class counsel, the class representative, and the court).

device is used properly: for individuals to seek redress for the wrongs inflicted upon them, to hold defendants accountable for their actions and further incentivize them to continue to seek out ways to keep practices safe and legal, and to find the most efficient and fair way to settle controversies.

II. CLASS ACTIONS

Since the adoption of Rule 23 of the Federal Rules of Civil Procedure in 1966,¹⁵ multiparty litigation, and most notably, class action, has grown in popularity and now may be considered a dominant force in civil litigation.¹⁶ Yet class actions evoke mixed emotions¹⁷ and in the past five years have been the recipient of harsh criticism.¹⁸ So the question arises: why should we be looking for ways to further develop the use of economic torts in class actions in the hope of avoiding the problems of individualization found in cases such as *Amchem*? I address this question and more in the following section.

A. History of Class Actions

Surprising to many is that class actions have played a role in American jurisprudence since as early as 1842.¹⁹ This first federal

15. FED. R. CIV. P. 23. This rule is largely a restatement of former Equity Rule 38. See FED. R. CIV. P. 23(a) advisory committee's note.

16. See S. REP. NO. 109-14 (2005), as reprinted in 2005 U.S.C.C.A.N. 3; Steven Greenhouse, *Court Approves Class-Action Suit Against Wal-Mart*, N.Y. TIMES, Feb. 7, 2007, at C2; *Banks to Settle an Enron Suit*, N.Y. TIMES, Dec. 28, 2006, at C2; Press Release, Cornerstone Research, Securities Class Action Settlements Skyrocket in 2006 Finds Cornerstone Research (March 21, 2007), available at http://securities.stanford.edu/settlements/REVIEW_1995-2006/Settlements_Through_12_2006_PR.pdf; see generally Class Action Litigation Information Home Page, <http://www.classactionlitigation.com/> (last visited Nov. 1, 2007).

17. See, e.g., Richard A. Epstein, *Class Actions: The Need for a Hard Second Look*, CIV. JUST. REP., March 2002, available at http://www.manhattan-institute.org/pdf/cjr_04.pdf. Compare Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157 (2004), and Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003), with Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: *Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000), and Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681 (2005).

18. See, e.g., Leslie A. Brueckner & Arthur H. Bryant, *Securing Access to Justice: Fighting Class Action Abuse* (2002), http://www.tlpj.org/publications/CAAPP_article.pdf; Wayne T. Brough, *There's Nothing Classy About Lawsuit Abuse* (April 23, 2002), http://www.freedomworks.org/informed/issues_template.php?issue_id=950; Press Release, Rep. Bob Goodlatte, House Judiciary Committee Holds Hearing on Goodlatte Legislation to Curb Class Action Abuse and Return Fairness to the System (Feb. 6, 2002), <http://www.house.gov/goodlatte/CAhearing.htm>; Lawrence H. Mirel, *Illinois Supreme Court Rejects Class Action Abuse*, WASH. LEGAL FOUND., Aug. 26, 2005, available at <http://www.wlf.org/upload/082605LOLMirel.pdf>.

19. See Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 1051 (2005).

class action rule, Equity Rule 48, did not focus on the commonality of claims;²⁰ instead, it focused on the number of class members and the impracticability of joinder.²¹ Roughly sixty years later, the Supreme Court approved recommendations from the Rules Committee suggesting that Equity Rule 48 be renumbered as Rule 38 and that an explicit requirement of commonality of facts and legal issues be included.²² Rule 38 was the class action rule until Rule 23 was adopted in 1966.²³ The new rule set forth more complex requirements and specific types of actions that will be discussed below.

Despite this long history of class actions in America and the inclusion of more requirements over the years, many feel that recently the class action device has been abused.²⁴ As Professor Epstein explained, this recent “omnipresence” is due to the versatility of the class action.²⁵ This omnipresence will undoubtedly only be furthered with the rising complexity of litigation, and concomitantly, the rising costs of litigating and the decline of the individual’s desire to finance those costs.²⁶ Despite this overwhelming presence and heavy criticism of class actions, there are still many compelling justifications for their existence and continued development. Important to this Comment is one of the fundamental reasons why we have class actions. As the Supreme Court stated:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the

20. Equity Rule 48 stated:

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

Debra Lyn Bassett, *Constructing Class Action Reality*, 2006 BYU L. REV. 1415, 1433 n.69 (quoting FED. R. EQ. 48 (1842) (repealed 1912)).

21. See FED. R. CIV. P. 23(a)(1). However, “the Supreme Court in 1853 read a commonality requirement into the rule.” Erbsen, *supra* note 19, at 1051 (citing *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302 (1853)).

22. *Id.* at 1051. “Rule 38 stated that: ‘When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.’” *Id.* at 1051 n.102.

23. *Id.* at 1051; FED. R. CIV. P. 23.

24. See *supra* notes 17-18.

25. See Epstein, *supra* note 17, at 1.

26. *Id.*

relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.²⁷

Of course, with the empowerment of the individual comes the social benefit of forcing the wrongdoer to take responsibility for her actions, thus creating deterrence of future wrongdoing. Yet the versatility of the class action device has been checked by the Supreme Court's demand that the lower courts certify class actions only "after a rigorous analysis" of the explicit requirements of Rule 23.²⁸

B. Rule 23(a)—Prerequisites

Rule 23(a) of the Federal Rules of Civil Procedure contains four explicit requirements, each of which must be satisfied prior to class certification: numerosity, commonality, typicality, and adequacy.²⁹ Discussed in virtually every class action suit that is brought in which certification is sought,³⁰ these explicit requirements are also often referred to as "prerequisites."³¹

1. Numerosity

Rule 23(a)(1) reflects the original class action rule, Equity Rule 48, and requires that the number of plaintiffs represented in the class action are so *numerous* that joining all of their claims under a mass joinder would be impracticable.³² This requirement goes to the very idea of a class action and the generalized notion that because so many people were injured by another's conduct, it would be more efficient if a class were compiled and one or two individuals represented all of the members in one trial. And while there is no magic number, for "[c]ourts have certified classes with as few as thirteen

27. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (internal quotation marks omitted) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

28. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

29. Rule 23(a), "Prerequisites to a Class Action," states that a class action may only be brought when "(1) the class is so *numerous* that joinder of all members is impracticable, (2) there are questions of law or fact *common* to the class, (3) the claims or defenses of the representative parties are *typical* of the claims or defenses of the class, and (4) the representative parties will fairly and *adequately* protect the interests of the class." FED. R. CIV. P. 23(a) (emphasis added).

Courts have also identified three threshold requirements that must be met before the explicit requirement analysis is undergone. These requirements are: "(1) a definable class; (2) the representative's membership in the class; and (3) a claim that is live, that is not moot." ROBERT H. KLONOFF ET AL., *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS* 46 (2d ed. 2006). For this Comment, I will assume that there is a generalized understanding that these implicit requirements are relevant to the class action, as they must be met prior to the explicit requirements; however, I will also assume that they were already met in the following examples and discussion.

30. Interesting, albeit not relevant to this Comment, is that some class actions never seek certification, only a certified settlement.

31. See *supra* note 29.

32. FED. R. CIV. P. 23(a)(1).

members, and have denied certification of classes with over three hundred members,”³³ classes consisting of forty or more persons will generally be found to meet the numerosity requirement.³⁴ This variation in required class member size is due in large part to geographic dispersion of the potential class members.³⁵

Overall, because of the well-developed case law that numerosity is met when there are forty or more class members, the defendant will often concede this requirement assuming the plaintiff class comes forward with at least forty possible class members.³⁶

2. Commonality

Rule 23(a)(2) requires the plaintiff to prove that there are “questions of law or fact common to the class.”³⁷ Courts have generally found this to be an easy requirement to meet and, hence, many treat commonality as a mere formality. For example, in *Marisol A. ex rel. Forbes v. Giuliani*, a class action was brought against New York City, naming the mayor in his individual capacity, alleging that children of New York City’s welfare system had been injured by its “systemic failures” in violation of several constitutional, federal, and statutory laws.³⁸ The Second Circuit held that commonality is met when the “plaintiffs’ grievances share a common question of law or of fact.”³⁹ Thus, the Second Circuit held that just one commonality is needed, despite the plural language in Rule 23(a)(2).⁴⁰

33. *Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Haw. 1995) (citing exemplary authorities); see also *Dale Elecs., Inc. v. R.C.L. Elecs., Inc.*, 53 F.R.D. 531, 534 (D.N.H. 1971) (holding class of thirteen was large enough to meet numerosity requirement).

34. See *Esler v. Northrop Corp.*, 86 F.R.D. 20, 34 (W.D. Mo. 1979).

35. For example, in *Patrykus v. Gomilla* the court held that a class of fifty was sufficient to warrant that joinder was impracticable. 121 F.R.D. 357, 361 (N.D. Ill. 1988). This case involved individuals who were all at a bar in Chicago on the same night and were subjected to unlawful searches, seizures, excessive force, and detentions by the police. *Id.* at 359-60. This was presumably due to the fact that the bar was “primarily frequented by homosexual and bisexual men.” *Id.* at 360. The suit was not brought until three years later, so the plaintiffs argued and ultimately prevailed on the premise that many of the individuals had moved away or had perhaps never lived in Chicago. *Id.* Moreover, the likelihood of fifty people bringing individual suits for their rights being trampled on was highly unlikely; therefore, the court found the plaintiffs sufficiently carried the burden of proof and showed that a class of these particular fifty individuals would be impracticable to bring as a mass joinder. *Id.* at 361.

36. See, e.g., *Ammons v. Am. Family Mut. Ins. Co.*, 897 P.2d 860, 864 (Colo. Ct. App. 1995) (conceding numerosity); *In re Tina T.*, 579 N.E.2d 48, 55 (Ind. 1991) (conceding numerosity); *Exxon Mobil Corp. v. Gill*, No. 13-06-048-CV, 2007 WL 1080655, at *4 (Tex. Ct. App. Apr. 12, 2007) (“Exxon has conceded that the numerosity requirement is satisfied in this case.”).

37. FED. R. CIV. P. 23(a)(2). Thus, the focus is on the proposed class in general.

38. 126 F.3d 372, 375 (2d Cir. 1997).

39. *Id.* at 376 (citing *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 166-67 (2d Cir. 1987) and *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)).

40. This is a general rule that just one common issue is needed. See *id.*

With this definition of just one common question of fact or law, it seems hard to find a situation where this cannot be met. In *Marisol*, the defendants argued that the plaintiff class had no common question of fact or law, complaining that the district court abused its discretion “by aggregating all of the plaintiffs’ claims into one ‘superclaim.’”⁴¹ And even though the Second Circuit noted that each child would present a unique circumstance and that “the claims raised by the plaintiffs stretch[] the notions of commonality,” the court held that the district court did not abuse its discretion in finding commonality.⁴² It affirmed the district court’s finding that a common question of law existed in that each child of the welfare system was being denied services to which he or she was legally entitled.⁴³ The district court also found a common question of fact in the issue of “ ‘whether defendants systematically have failed to provide these legally mandated services.’ ”⁴⁴

Yet several jurisdictions have put more teeth into this prerequisite; one such jurisdiction is the Tenth Circuit. The case of *J.B. ex rel. Hart v. Valdez*⁴⁵ has strikingly similar facts to those in *Marisol*, involving children who were in New Mexico’s welfare system instead of New York’s. The plaintiffs charged New Mexico with failing to provide services and benefits that were guaranteed to them by constitutional, federal, and statutory law,⁴⁶ much like the plaintiffs in *Marisol*. However, instead of finding a common question of law or fact, the Tenth Circuit affirmed the district court’s holding that “ ‘there is no one statutory or constitutional claim common to all,’ ” due to the varying circumstances of the children.⁴⁷

One judge on the panel disagreed with the majority’s decision on this issue⁴⁸ and pointed to the Third Circuit, where the exact opposite conclusion was reached in a very similar case, *Baby Neal ex rel. Kanter v. Casey*.⁴⁹ The Third Circuit held that the commonality requirement is easily met because it requires just one single common issue; therefore, it seems that in *J.B. ex rel. Hart*, and according to this particular judge, the commonality requirement should be met because all the children were in the New Mexico welfare system.⁵⁰

41. *Id.* at 377.

42. *Id.*

43. *Id.*

44. *Id.*

45. 186 F.3d 1280 (10th Cir. 1999).

46. *Id.* at 1283.

47. *Id.* at 1289.

48. *Id.* at 1299.

49. 43 F.3d 48 (3d Cir. 1994).

50. *J.B. ex rel. Hart*, 186 F.3d at 1299 (quoting *Baby Neal*, 43 F.3d at 56). The judge further stated that he found it troubling that the majority rejected, unexplained, the decisions of its sister courts in *Marisol* and *Baby Neal*. *Id.* at 1300.

Overall, the important takeaway here is that although some courts have characterized commonality as a mere formality, or as a “low hurdle,”⁵¹ it actually depends on the court’s definition of “common issue.” With the Supreme Court’s “rigorous analysis” warning to lower courts,⁵² however, this is likely to continue to gain teeth, especially in the fraud context where there is already a general presumption against finding commonality in light of differences in the class that occur when allegations of misrepresentations are involved.⁵³

3. Typicality

Rule 23(a)(3) requires that the representative parties have claims or defenses that are typical of those in the class.⁵⁴ Important to keep in mind here, and as the Tenth Circuit demonstrated in *J.B. ex rel Hart*,⁵⁵ is that every single prerequisite must be established for certification to be granted. Thus, it is clear that the lack of just one prerequisite prevents class certification; that is, in order to even reach the analysis of Rule 23(a)(3), the court must find that it would be impracticable to bring the suit due to the sheer numerosity of the plaintiff class and that there is at least one common issue to the members of the class. Yet often when courts have found commonality exists, typicality will also exist because a similar analysis is used.⁵⁶ As the Supreme Court stated, these two prerequisites “tend[] to merge” together, and both commonality and typicality “serve as guideposts” to ensure that “maintenance of a class action is economical and [that] the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.”⁵⁷

The Tenth Circuit has declared that typicality requires the representatives to show that other absent members of the class “have suffered the same [or similar] grievances of which [the representatives] complain[].”⁵⁸ But, just like with commonality, courts differ as to how

51. See, e.g., *In re Prudential Sec. Litig.*, 163 F.R.D. 200, 206 n.8 (S.D.N.Y. 1995); *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 185 (N.D. Ill. 1992).

52. See *supra* note 28.

53. See, e.g., *Kelley v. Galveston Autoplex*, 196 F.R.D. 471, 475 (S.D. Tex. 2000) (holding that there was no common issue in each sales contract and, therefore, there was no commonality demonstrated); see also *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) (holding no commonality due to variations in the franchise contracts used by plaintiffs).

54. FED. R. CIV. P. 23(a)(3).

55. *J.B. ex rel. Hart*, 186 F.3d at 1290. The court here stopped its analysis of the prerequisites with commonality because it did not matter if typicality or adequacy of representation was found, since the class was already not appropriate for certification. *Id.*

56. See, e.g., *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997).

57. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (internal quotation marks omitted) (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982)).

58. *White v. Gates Rubber Co.*, 53 F.R.D. 412, 415 (D. Colo. 1971).

stringently to examine the issues and whether factual differences destroy typicality. For example, in *Reilly v. Gould, Inc.*, residents in a neighborhood that was contaminated with lead, presumably due to the operation of a nearby battery crushing and lead processing plant, brought a class action against the current owner of the plant.⁵⁹ The plaintiffs split the class into three subclasses according to the specific area lived in and, consequently, to the damage suffered.⁶⁰ The *Reilly* court refused to find typicality because of the “hodge-podge” of claims and injuries.⁶¹ While each class had a named representative, the court seemed to shy away merely because of the amount of individualized issues that would undoubtedly arise.⁶²

Likewise, in *Hazelhurst v. Brita Products Co.*,⁶³ the plaintiff class brought suit against a water purifying company alleging, *inter alia*, fraudulent misrepresentations.⁶⁴ The first class representative claimed that the Brita representative should have told her to change her filter once a month because if she followed the recommended schedule of replacing the filter every two months, she would get black spots in the water.⁶⁵ The second class representative claimed that she had to change her filter more than every other month because the performance of the filter diminished so quickly.⁶⁶ And finally, the third class representative stated that her particular model held less water than other similar models.⁶⁷ While the class representatives showed a common question of fact on the issue of whether Brita had made misrepresentations, they failed to meet the typicality requirement because every misrepresentation was different.⁶⁸ This is a common result in fraud causes where the misrepresentations are orally made to individuals and, therefore, every class member must show he or she relied on a specific false representation.⁶⁹

4. Adequacy of Representation

The last and arguably most important prerequisite is “adequacy of representation,” in Rule 23(a)(4), which requires that “the representative parties will fairly and adequately protect the interests of the

59. 965 F. Supp. 588, 592-93 (M.D. Pa. 1997).

60. *Id.* at 593.

61. *Id.* at 600.

62. The *Marisol* court (children of NYC welfare system case) noted that subclasses would have to be created due to the varying issues and claims, but that these factual differences did not destroy typicality. *Marisol A. ex rel. Forbes v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997).

63. 744 N.Y.S.2d 31 (N.Y. App. Div. 2002).

64. *Id.* at 32.

65. *Id.* at 34.

66. *Id.*

67. *Id.*

68. *Id.* at 33.

69. See *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 549-60 (5th Cir. 2003).

class.”⁷⁰ This prerequisite was specifically included by the drafters of Rule 23 because of the Supreme Court decision in *Hansberry v. Lee*,⁷¹ where “the Court held that class members may avoid the preclusive effect of a class judgment if they can demonstrate a lack of adequate representation in the class proceedings.”⁷² This is especially important because the objective of every defendant in going to court or in settling a class action is finality, or the binding of all potential class members.⁷³

One commentator notes that, in order to ensure this adequate representation for the absent class members, which Due Process requires,⁷⁴ this process “involves a tripartite system of safeguards—three levels of overlapping protection . . . (1) the class representative, (2) class counsel, and (3) court oversight.”⁷⁵ The court will look at such things as whether any conflict of interest exists between class counsel and class members, whether any special relationships exist between class counsel and defense counsel, class counsel’s experience in handling class actions, and class counsel’s overall competence.

Important to note here is that the court may revisit and examine the prerequisites at any stage of the trial, not just at certification.⁷⁶ Furthermore, with adequacy of representation, the court often visits it again during the settlement hearing.⁷⁷

C. Rule 23(b)—Types of Class Actions

Besides having the burden of meeting all four prerequisites, the plaintiff class also has the burden of showing that a class action is maintainable by one of the three types of class actions set forth in Rule 23(b). Due to this Comment’s focus on promissory fraud, the (b)(1) action⁷⁸ and the (b)(2) action⁷⁹ will not be discussed; instead,

70. FED. R. CIV. P. 23(a)(4).

71. 311 U.S. 32 (1940). This infamous case involved the African-American Hansberry family and its fight to live in a white neighborhood in Chicago during the 1930s when segregation was largely enforced in the American South and in Northern metropolitan areas. It was the inspiration of the major motion picture, *A Raisin in the Sun* (Columbia Pictures 1961).

72. Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 289 (2003).

73. *See id.*

74. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

75. Bassett, *supra* note 14, at 949 (footnotes omitted).

76. *See* FED. R. CIV. P. 23(d); *see also* Cabana v. Littler, 612 A.2d 678, 686 (R.I. 1992).

77. As mentioned above, the majority of class action suits do not reach the end of the trial to receive a verdict. They settle. *See* Nagareda, *supra* note 72, at 289.

78. The first and second types of class actions will most likely not be affected by a claim of promissory fraud. The first type of action, (b)(1), has two subdivisions—(b)(1)(A) and (b)(1)(B). Rule (b)(1)(A), focusing on the party opposing the class action (defendant), allows the action to proceed if she will be subject to “inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.” FED. R. CIV. P. 23(b)(1)(A). This kind of

this Comment will focus solely on the third type of class action, (b)(3). Acting as a catchall, (b)(3) actions are the most commonly used; because the plaintiffs in these actions are usually seeking large sums of money, a (b)(3) action is the only one that demands both reasonable notice to potential class members⁸⁰ and an opportunity for class members to “opt out”⁸¹ of the suit.

Specifically, the court must find in a (b)(3) suit that “the questions of law or fact common to the members of the class *predominate* over

action has been limited to plaintiffs seeking injunctive or declaratory relief, although not without some hesitation. *See, e.g., In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987) (reluctantly agreeing that this action is not available to those plaintiffs seeking compensatory damages). One example of where a (b)(1)(A) is appropriate is in environmental cases where if a class was not certified, property owners, residents, and lessees could all seek judicial intervention with courts granting conflicting orders. In that scenario, the defendant would have to pick and choose which orders to obey and which to simply disregard and face the threat of contempt. *See, e.g., Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 67-68 (S.D. Ohio 1991) (ordering (b)(1)(A) certification due to possible varying adjudications if residents within six mile radius of radioactive materials brought individual suits). A (b)(1)(A) is also the type of class action used in medical monitoring cases. *See, e.g., In re Teletronics Pacing Sys., Inc.*, 172 F.R.D. 271, 284-85 (S.D. Ohio 1997) (ordering certification of (b)(1)(A) class action due to medical monitoring class consisting of plaintiffs who had the “J” lead inserted as a pacemaker.)

The second subdivision, (b)(1)(B), focuses on the plaintiffs and is commonly referred to as the “limited fund” class action. In accordance with its name, this type of action is used when the defendant’s financial assets are limited and there are many plaintiffs who need monetary relief. Instead of letting a handful of plaintiffs empty the defendant’s pockets, this class action sets up a fund where the money can be evenly distributed to the injured class. A typical example is in an action to split up a company’s limited assets in efforts to compensate injured plaintiffs. *See In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328 (N.D. Ill. 2002). While class actions involving claims of fraud will not hit any more large barriers in terms of requirements under (b)(1), each subdivision has its own unique requirements and as stated above, often will not allow compensatory damages to be sought.

79. This second type of class action, (b)(2), similar in available remedies to the (b)(1)(A) action, is used specifically where the primary relief sought is declaratory or injunctive relief. Rule 23(b)(2) states this action may be maintained when “the party opposing the class has acted or refused to act on grounds generally applicable to the class.” FED. R. CIV. P. 23(b)(2). The prototype of this action is a civil rights case; however, another use of the (b)(2) action is to enjoin a particular business from fraudulently concealing that its product does not operate as the business claims it will. *See, e.g., McManus v. Fleetwood Enters., Inc.* 320 F.3d 545, 547 (5th Cir. 2003) (plaintiffs sued seeking (b)(2) action to enjoin defendant from selling any more recreational vehicles until the defendant clearly put customers on notice that supplemental brakes would need to be purchased in order to safely stop the recreational vehicle while towing another vehicle). Especially relevant here is that under a (b)(2) action, common issues do not have to predominate over individualized issues (as is required by the third type of action). *See Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). Thus, it would be okay for the plaintiff class in this type of action to have lots of individualized circumstances and damages, because the remedy is a simple declaratory or injunctive relief.

80. “For any class certified under Rule 23(b)(3), the court *must* direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” FED. R. CIV. P. 23(c)(2)(B) (emphasis added).

81. Included in Rule 23(c)(2)(B) is the requirement that the “opt out” notice state “that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded.” *Id.*

any questions affecting only individual members, and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy.”⁸² This invokes two separate questions and analyses: do the common questions predominate over the individualized issues, and is a class action, particularly under (b)(3), the best form of litigation to settle the matter at hand? To help guide the court in the latter analysis are four nonexhaustive factors: (1) the class members’ interest in individually controlling separate actions; (2) whether any litigation has already been commenced by the class members or against the defendants concerning the controversy at hand; (3) the interest in the particular forum and concentrating all the litigation in that particular forum; and (4) whether the class action would be manageable.⁸³

To begin with, while the first question regarding the predominance analysis sounds similar to the (a)(2) prerequisite of commonality, it is a much more thorough and stringent requirement. The commonality prerequisite requires just one issue of law or fact that is common and addresses the general question of whether Rule 23 is truly applicable to the lawsuit, while “(b)(3) addresses the issue of whether Rule 23 certification will have practical utility in the [class action] suit, considering the facts, substantive law, procedural due process, and fundamental fairness.”⁸⁴ Yet because there is no set definition of “predominance” and the Advisory Committee Notes fail to give any meaningful guidance on this issue, courts have developed several theories of what should be weighed in this analysis.

The first, and arguably the most widely used, theory of quantifying predominance is basically a gut-level decision by a trial court.⁸⁵ This decision focuses on the fourth factor, manageability, and asks how the case would actually be litigated. Hence, one court has stated that when the issue of liability can be attributed as a common question to the class, (b)(3) is likely satisfied.⁸⁶ For example, if a conspiracy is found to exist across the board, affecting each class member and fraudulently inducing the members to buy worthless stock, a court could conduct a gut-check and decide that the common question of culpability predominates over the individualized question of how much stock each member purchased.

A second theory is what may be referred to as the “light at the end of the tunnel theory,” where “common issues are predominant only if their resolution would ‘provide a definite signal of the beginning of

82. FED. R. CIV. P. 23(b)(3) (emphasis added).

83. *Id.* at 23(b)(3)(A)-(D).

84. *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 42 (E.D. Va. 1981).

85. *See Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981).

86. *See Brown*, 92 F.R.D. at 44.

the end.’ ”⁸⁷ If one common issue is settled, like whether the defendant was in fact responsible for the chemical spill, then a resolution of the major issue exists and thus predominates over individualized issues.

And finally a third theory is that if the common questions are resolved and, consequently, the resolution of the controversy is materially advanced, then the questions sufficiently predominate over individualized issues.⁸⁸

Due to the various theories, the predominance analysis becomes especially tricky in cases alleging fraud. In *McManus v. Fleetwood Enterprise, Inc.*,⁸⁹ for example, a subclass of plaintiffs consisted of consumers who had purchased a motor home from the defendant.⁹⁰ On the wardrobe door of the motor home was a tag that stated 3,500 pounds could be towed.⁹¹ This weight was labeled as the maximum carrying capacity, but when the McManuses asked the salesperson about it, he assured them that the motor home could safely tow 3,500 pounds.⁹² In that representation, the plaintiff class believed there was an implicit promise that when the R.V. towed 3,500 pounds, it could also safely brake.⁹³ This was not the case; supplemental brakes had to be purchased in order for the motor home to safely brake while towing 3,500 pounds.⁹⁴ The plaintiff class sued on several theories but ultimately lost on both its fraudulent concealment and negligent misrepresentation counts.⁹⁵

The Fifth Circuit held that the lower court abused its discretion in holding that common questions predominated over individualized issues.⁹⁶ This is because every salesperson presumably made a slightly different pitch to customers, and perhaps some of the customers knew that they would need to purchase supplemental brakes if they planned to tow that much weight. Moreover, the class would have to prove that every individual relied on the oral representation in the form of buying the particular model of motor home.⁹⁷ Hence, even if it were found that misrepresentations were made, there would be no light at the end of the tunnel because reliance on those misrepresen-

87. *Mattoon v. City of Pittsfield*, 128 F.R.D. 17, 20 (D. Mass. 1989) (quoting *Mertens v. Abbott Labs.*, 99 F.R.D. 38, 41 (D.N.H. 1983)).

88. See *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986).

89. 320 F.3d 545 (5th Cir. 2003).

90. *Id.* at 546.

91. *Id.*

92. *Id.*

93. *Id.* at 547.

94. *Id.*

95. *Id.* at 549-50.

96. *Id.*

97. *Id.* at 549.

tations would have to be shown in every case. Accordingly, the Fifth Circuit decertified the class.⁹⁸

Similar to the slightly nebulous concept of predominance is the second required analysis of (b)(3)—superiority. In the Advisory Committee’s Note, the four factors of a (b)(3) action are spelled out with a little bit more specificity:

[T]he court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretical rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. . . .

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.⁹⁹

Courts have taken the superiority analysis even further than a simple judiciary notice of the four guiding factors and identified three steps courts should take to ensure a thorough analysis.¹⁰⁰ At a minimum, it has been held that a court should make an informed consideration of alternative methods of adjudication of each issue, a comparison of the fairness to all whose interests may be involved between such alternative methods and a class action, and finally a comparison of the efficiency of adjudication of each method.¹⁰¹

Yet the most commonly addressed and, therefore, the most important guide courts look to is the fourth factor—manageability.¹⁰² As several courts have stated, “[m]anageability is a real issue.”¹⁰³ The court must decide at a fundamental level whether the action is plausible as a class action and whether a class action is the “superior”

98. *Id.* at 554.

99. FED. R. CIV. P. 23(a) advisory committee’s note on subdivision (b)(3) (1966).

100. *See, e.g.*, *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 625-26 (E.D. Pa. 1994) (holding that the superiority finding requires three distinct steps clearly identifying that there was a thorough analysis of other available methods and a comparison of those adjudications and their efficiencies).

101. *Id.* at 625. Other such methods may include the following: individual action, a test case, joinder under Federal Rule 19 (permissive) or 20 (compulsive), liberal intervention per Rule 24, consolidation under Rule 42(a), or multijurisdictional coordination.

102. *See* FED. R. CIV. P. 23(b)(3)(D).

103. *Sonmore v. Checkrite Recovery Servs., Inc.*, 206 F.R.D. 257, 266 (D. Minn. 2001) (quoting *In re Workers’ Comp.*, 130 F.R.D. 99, 110 (D. Minn. 1990)).

method for adjudicating the dispute.¹⁰⁴ And although one court held that “dismissal for management reasons, in view of the public interest involved in class actions, should be the exception rather than the rule,”¹⁰⁵ this is arguably the minority view and will continue to be so in light of *Amchem*.

D. Class Action Suits Claiming Fraud

The following case illustrates how fraud claims often fail at the prerequisite analysis of commonality and typicality. In *Kelley v. Galveston Autoplex*,¹⁰⁶ the plaintiff purchased a used car from the defendant’s lot for a total purchase price of \$15,072.96, which included several ancillary charges.¹⁰⁷ One such charge was a \$1500 “service contract charge” that was to be paid to a third party warranty company.¹⁰⁸ In fact, the plaintiff alleged that the defendant retained, without disclosure, \$555.00 of that service contract charge.¹⁰⁹ The plaintiff brought a (b)(3) class action claiming, *inter alia*, that the defendant made fraudulent representations when selling the car and that this induced the plaintiff to pay the extra charges.¹¹⁰

The court began its analysis with the prerequisites and found that the first one, numerosity, had been met.¹¹¹ The court then moved on to the second explicit requirement, commonality, and held that it was not met because this was not a case involving a “ ‘single type of contract that is virtually, if not completely, identical in each transaction.’ ”¹¹² Thus, although each member would have purchased a car from the defendant and no doubt signed a contract similar to the plaintiff’s, the court employed the “commonality with teeth” analysis and did not feel that there was a single common issue. Although perhaps one might argue that this is being a little too strict, the court did move on to discuss the other elements¹¹³ and held that even if commonality had been found, the plaintiff class would have lost on

104. *Id.*

105. *In re Folding Carton Antitrust Litig.*, 88 F.R.D. 211, 216 (N.D. Ill. 1980) (citation and internal quotation marks omitted).

106. 196 F.R.D. 471 (S.D. Tex. 2000).

107. *Id.* at 472. This price included a finance charge of \$3472.82, a \$1500 service contract charge, and a charge of \$556.53 for credit life, accident, and health insurance. *Id.*

108. *Id.*

109. *Id.* at 473. The plaintiff also alleged that the defendant kept \$49.04 of the credit life insurance premium and \$145.75 of the health insurance premium. *Id.*

110. *Id.*

111. *Id.* at 474. The plaintiff proposed that the class would have at least 2000 members, and the defendant decided not to contest this; in effect, the defendant conceded this first explicit requirement, which is a frequent practice. *Id.*

112. *Id.* at 475.

113. The court did not need to discuss the remaining prerequisites, let alone the requirements of a (b)(3) action as it did, because just one missing prerequisite is fatal to the plaintiff’s claim.

the typicality prerequisite as well as the predominance and superiority requirements of (b)(3).¹¹⁴

A similar result for class actions involving fraud claims is illustrated in *Gunnells v. Healthplan Services, Inc.*¹¹⁵ The class in this case consisted of purchasers and beneficiaries of a failed health and dental insurance plan.¹¹⁶ This plan was marketed and sold to 1400 employees and their families as an ERISA health plan, yet it failed to comply with the ERISA standards.¹¹⁷ Moreover, the company failed to keep up with the claims and got severely backlogged, ultimately to the point of having to fold the plan with millions of dollars in unpaid medical bills.¹¹⁸ Regarding the claims of fraud and negligent misrepresentation, the Fourth Circuit found that the district court had abused its discretion in certifying the class because common issues did not predominate.¹¹⁹ The court, which ultimately decertified the class on these two claims, reasoned that there would need to be “considerable individual inquiry” due to the element of reliance in both claims.¹²⁰

In contrast to the two cases above, the court in *Arenson v. Whitehall Convalescent and Nursing Home, Inc.*¹²¹ certified a class of nursing home residents on a theory of common law fraud.¹²² The plaintiff class alleged that the nursing home represented the cost of pharmaceuticals to residents in two documents that they signed upon entering the home; however, the nursing home subsequently inflated this cost in invoices sent to the residents, keeping the difference for its own profits.¹²³ The court first noted that “[a] common nucleus of operative fact is typically found where the defendants have engaged in standardized conduct toward [all] members of the proposed class.”¹²⁴ In accordance with this general rule, the court found both commonality and typicality were achieved because all of the residents signed the same contract and had been subjected to the inflated pricing scheme.¹²⁵

114. *Kelley*, 196 F.R.D. at 476-77.

115. 348 F.3d 417 (4th Cir. 2003).

116. *Id.* at 422.

117. *Id.* ERISA stands for Employee Retirement Income Security Act and requires participants to comply with certain standards and regulations. *See infra* note 312.

118. *Id.*

119. *Id.* at 434.

120. *Id.*

121. 164 F.R.D. 659 (N.D. Ill. 1996).

122. *Id.* at 667.

123. *Id.* at 661-62. Notice that these representations are similar to those made to Plaintiff Kelley in *Kelley v. Galvenston Autoplex*. *See supra* text accompanying notes 106-14.

124. *Arenson*, 164 F.R.D. at 664. This is the key difference between the outcome here and that of *Kelley*.

125. *Id.*

The court then proceeded to the two-fold analysis of a (b)(3) action. The defendant raised four issues that would seem to point to many individualized calculations; however, the court found each to be without merit.¹²⁶ In the end, the court held that while there were several questions of law and fact that may be individualized in nature, such as reliance and damages, with these particular facts the common issues predominated.¹²⁷

As the nursing home case above illustrates, it is possible to have a class action certified under (b)(3) alleging common law fraud; however, the case must really contain the perfect facts. The class has to meet the numerosity requirement, yet also be small enough (as in the nursing home case) to still be manageable in light of necessary individual determinations of reliance and damages. Hence, very few common law fraud claims will be found suitable for class action status.

III. ECONOMIC TORTS

As explained in Part II, a plaintiff class must have a certain level of commonality between the legal and factual issues. This is a high standard for claims sounding in fraud based on the general belief that there will be too many required individualized determinations of specific misrepresentations and reliance; however, what if the focus was shifted from each class member's personal interactions with the defendant to the overarching tortious conduct that affected every class member? This is what the utilization of economic torts may do for the plaintiff class: reframe the issue to the initial injury as opposed to the results of that harm.

Economic torts are "tort claims that do not allege physical contact with the victim or his property or harm to such nonfinancial, or at least noncommercial, goods [such] as business reputation and personal privacy."¹²⁸ While several commentators have recently voiced

126. The defendant raised the following four points: (1) oral representations may have been made; (2) the version of the key documents varied year to year; (3) each plaintiff would have to show individual reliance on the misrepresentations; and (4) each plaintiff would have different damages. *Id.* The court found each reason for lack of predominance unpersuasive: (1) no proof of oral representations had been shown except for the one made to the named plaintiff; (2) the key language in the documents did not vary year to year; (3) while individual reliance would have to be shown for the common law fraud claim, this did not in itself bar the (b)(3) action; and (4) it is not necessary to only have common issues of fact or law, and thus acceptable to have individualized damages. *Id.* at 665-66.

127. *Id.* at 665-67.

128. Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735, 735 (2006). Noteworthy here is that economic torts, at least the many varieties of fraud, are not barred by the economic loss rule. A current debate concerning the viability of damages in economic torts, specifically with fraud claims, lies in the economic loss rule. "Economic loss" is when an individual suffers loss that is solely "pecuniary or commercial loss that does not arise from actionable physical, emotional or reputa-

that economic tort cases play just a minor role in civil litigation,¹²⁹ others have offered a contrasting view.¹³⁰ This contrasting view is that in class actions plaintiffs almost always include at least one

tional injury to persons or physical injury to property.” Dan B. Dobbs, *An Introduction to Non-Statutory Economic Loss Claims*, 48 ARIZ. L. REV. 713, 713 (2006); see also R. Joseph Barton, *Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims*, 41 WM. & MARY L. REV. 1789, 1793 (1999) (defining economic loss “as losses other than those resulting from an injury to the plaintiff’s person or other property”). While economic loss that is inflicted negligently and results in some injury other than mere financial loss may be recoverable, stand-alone economic loss is typically not recoverable. Dobbs, *supra*, at 713; see also *Garweth Corp. v. Boston Edison Co.*, 613 N.E.2d 92, 94 (Mass. 1993) (“The traditional economic loss rule provides that, when a defendant interferes with a contract or economic opportunity due to negligence and causes no harm to either the person or property of the plaintiff, the plaintiff may not recover for purely economic losses.”); Barton, *supra*, at 1795-96 (stating the economic loss rule “requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise”). Thus, the debate revolves around whether fraud involves more than mere stand-alone economic loss.

Judicially created to serve as a dividing line between contract law and tort law, the key to the economic loss doctrine rests on discovering what source the duty is derived from. See *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1262 (Colo. 2000). Thus, “[a] breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract” and a “[a] breach of a duty arising independently of any contract duties between the parties” may be redressed under tort law. *Id.* Confusion occurs in the fact that economic torts were designed to give plaintiffs a specific cause of action for damages that are purely economic. Hence, it seems counterintuitive that the economic loss rule should bar recovery for specifically created causes of action for economic losses. This confusion is alleviated by focusing on the alleged violation and its source of duty. *Id.* at 1263. For example, breach of fiduciary duty concerns an independent duty (a fiduciary duty) when a particular relationship exists between a company director and shareholders. See, e.g., *S. Kane & Son Profit & Sharing Trust v. Marine Midland Bank*, No. CIV.A. 95-7058, 1996 WL 325894 (E.D. Pa. June 12, 1996) (holding fiduciary duty creates independent duty); *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138, 1141-42 (Colo. 1984) (stating that the relationship between insurer and insured is quasi-fiduciary, therefore creating an independent duty). Overall, the takeaway here is that if there is an independent duty that is outside of a contractual duty, then the economic loss rule does not serve to bar the plaintiff’s economic tort claim.

Moreover, many scholars “argue strongly against (and no one argues for) an economic loss rule so broad that it precludes actions for scienter fraud.” Bublick, *supra* note 10, at 700; see also Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 846 (2006) (“[W]arranties are not sufficient to redress fraud, let alone deter it.”); Steven C. Tourek et al., *Bucking the “Trend”: The Uniform Commercial Code, the Economic Loss Doctrine, and Common Law Causes of Action for Fraud and Misrepresentation*, 84 IOWA L. REV. 875, 891 (1999) (expressing that neither the economic loss doctrine nor the U.C.C. in any way affect common law fraud and misrepresentations). Two specific reasons why scholars argue against the economic loss rule barring common law fraud actions, outside of the independent duty already accepted by many courts, are that 1) contract damages are inadequate for fraud actions and taking tort remedies away would leave consumers to remedies in warranty and 2) fraud is an intentional tort and thus is arguably outside the economic loss rule. Braucher, *supra*, at 836.

129. However, not only does the empirical data show that economic torts are being used more frequently, see Bublick, *supra* note 10, at 707-08, but the *Restatement (Third) of Economic Torts* is currently being revised and readied for publication. See RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS (Council Draft No. 1, 2006).

130. Roin & Monsour, *supra* note 2, at 973.

economic tort,¹³¹ such as breach of fiduciary duty, bad faith, unjust enrichment, tortious interference with contractual expectancies and interests, or fraud in its many varieties.

A. *Class Actions Involving Economic Torts*

But how do economic torts function specifically in class actions? As briefly stated above, economic tort law functions in the class action context by “allow[ing] prospective class plaintiffs to focus on the defendant’s conduct rather than the plaintiffs’ harms.”¹³² Furthermore, because this focus is shifted to the defendant, economic torts may provide the courts with creative opportunities to remedy the plaintiff classes’ harm without delving into individualized damage calculations.¹³³ In a recent scholarly article, two practitioners explained a common two-part approach—for convenience I call it the economic tort strategy—that class action plaintiffs’ attorneys take when preceding with an economic tort claim.¹³⁴ First, the attorney will seek to “characterize the ‘misconduct’ and ‘injury’ as occurring *before* individual events have differentiated members of the plaintiff class from one another.”¹³⁵ Second, the attorney will seek to avoid any calculation of individualized damages by employing “expert economic testimony to quantify and assign a dollar value” to the harms and any variation in those harms.¹³⁶

As the two practitioners point out in their article, a relatively recent class action tobacco case, *Price v. Philip Morris, Inc.*,¹³⁷ is a great example of this strategy in practice. At that point in the tobacco litigation, many courts had held that class action tobacco suits were inappropriate due to the highly individualized claims and issues.¹³⁸ Because of these consistent results, plaintiff class counsel began to look to economic torts. In *Price*, the claim was that using the term “light”

131. *Id.*

132. *Id.* at 975.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. 848 N.E.2d 1 (Ill. 2005).

138. The highly individualized issues stem from the common questions of what brand did the smoker use, was this the same brand the entire class used, did the plaintiff switch brands, what health problems does the plaintiff class have, can these health problems be specifically attributed to smoking, etc. Thus, courts sent a clear message that these kinds of claims were not going to be granted certification. *See, e.g.*, *Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998) (denying certification for Pennsylvania smokers); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (decertifying nationwide class consisting of nicotine-dependent persons); *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379 (D. Kan. 1998) (denying certification for Kansas smokers); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo. 1997) (denying certification for Missouri smokers); *Reed v. Philip Morris Inc.*, No. 96-5070, 1997 WL 538921 (D.C. Super. Ct. Aug. 18, 1997) (denying certification for D.C. resident smokers).

for a particular kind of cigarettes was consumer fraud, an economic tort, because it induced the plaintiffs to believe that this particular cigarette was healthier than the normal cigarettes. As the *Price* court found, it was actually not true at all that light cigarettes were healthier and, in fact, in some ways the light cigarettes were worse health-wise for the plaintiffs.¹³⁹

Thus invoking the two-part economic strategy, class counsel focused on the defendant's misrepresentations of advertising "light cigarettes" as more healthy, which was the initial harm, and then presented expert testimony that demonstrated the entire class was "tricked and confused"¹⁴⁰ by the "light" representation.¹⁴¹ This claim prevailed at the lower level, but the ten billion dollar judgment against Philip Morris was overturned by the Supreme Court of Illinois.¹⁴² Interestingly, and on rather "idiosyncratic grounds," the judgment was overturned because of "[a] provision of the Illinois Consumer Fraud Act [which] precludes liability for actions authorized by federal law, and the Court held that FTC regulations authorized the use of 'light' on the cigarette label."¹⁴³ Although the outcome of this case was changed, it nevertheless demonstrates the potential of economic torts in class actions to divert attention away from individualized issues and to the underlying harm.

Another example of the two-part strategy is illustrated in *Thompson v. Community Insurance Co.*¹⁴⁴ This class action centered on Anthem, an insurance company, and its announcement made to approximately 20,000 senior citizens that it was discontinuing its Anthem Senior Advantage Plan (ASA Plan) in twenty-two Ohio counties, six of which had no other option other than general Medicare.¹⁴⁵ After the class action suit was filed and other loud criticism was voiced, Anthem decided to continue the ASA Plan in the six counties (and also three other counties), albeit with reduced benefits and a higher premium.¹⁴⁶ One of the class representatives, Mr. Thompson, was now paying the higher premium for fewer benefits, and the other class representative, Mr. Criner, was forced to rely on Medicare after the plan was discontinued due to preexisting conditions.¹⁴⁷ Pleading nine counts of action, the plaintiffs used three economic torts—breach of fiduciary duty, bad faith, and fraud—seeking to certify the following class: "all persons . . . who were enrolled in the Anthem

139. *Price*, 848 N.E.2d at 20.

140. Roin & Monsour, *supra* note 2, at 977.

141. *Price*, 848 N.E.2d at 29-31.

142. *Id.* at 50.

143. Roin & Monsour, *supra* note 2, at 977.

144. 213 F.R.D. 284 (S.D. Ohio 2002).

145. *Id.* at 289.

146. *Id.*

147. *Id.*

Senior Advantage program . . . who were informed . . . by Anthem that Anthem intended to withdraw coverage under this program . . . and who have not subsequently enrolled in an alternative HMO Medicare Plan offered by a private insurance company other than Anthem.”¹⁴⁸ The plaintiffs also proposed two subclasses¹⁴⁹ to minimize the individualized differences within the class due to location differences and the nine counties who still had the ASA Plan.

Starting its analysis with the four prerequisites,¹⁵⁰ the court found in regard to 23(a)(2), commonality, that a common question of fact to all members was “the interpretation of the ASA Plan.”¹⁵¹ Moreover, the court noted that the claims of breach of fiduciary duty and bad faith did not require a showing of reliance, which generally signals individualized issues.¹⁵² The court then moved on to typicality and noted that the concept of this requirement is: “‘as goes the claim of the named plaintiff, so go the claims of the class.’”¹⁵³ Because the focus of typicality is on the class representation, the court started its analysis with Mr. Thompson.¹⁵⁴ It found that Anthem informed Mr. Thompson that it was planning to discontinue the ASA Plan coverage in his area; that Anthem subsequently reinstated the ASA Plan; and, finally, that Mr. Thompson did not get coverage outside of Anthem.¹⁵⁵ For those reasons, Mr. Thompson sufficiently demonstrated that he was a member of the first subclass and had similar defenses and claims.¹⁵⁶ Noting, however, that although his coverage, benefits, and premium were likely different than those of many other class members, those matters affected his damages and not his general injuries.¹⁵⁷ Proceeding to Mr. Criner, the court found that he was typical of the second subclass in that he was forced to obtain general Medicare and that he did not purchase an alternative private HMO Medi-

148. *Id.* at 290.

149. Noteworthy here is that each subclass is required to meet the prerequisites for a class action by itself. FED. R. CIV. P. 23(e)(4) (stating that “a class may be divided into subclasses and each subclass treated as a class”); *see also* *Betts v. Reliable Collection Agency, Ltd.*, 659 F.2d 1000, 1005 (9th Cir. 1981) (ruling that “each subclass must independently meet the requirements of Rule 23 for the maintenance of a class action”); *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1129 n.38 (7th Cir. 1979) (ruling the same).

150. I will not discuss numerosity and adequate representation, as they are not particularly relevant to this discussion. However, they were found to be satisfied. *Thompson*, 213 F.R.D. at 291-92, 294-95.

151. *Id.* at 292.

152. *Id.*

153. *Id.* at 293 (quoting *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

care Plan.¹⁵⁸ Therefore, the plaintiff class cleared its first hurdle—the prerequisites.

Next, the court analyzed predominance and superiority because the class sought a (b)(3) certification.¹⁵⁹ Regarding predominance, the court agreed with the defendant that it would be difficult to litigate the damages as a class action, but it disagreed with the defendant that this in itself barred the action from going forward and noted that a court is always free to bifurcate a trial.¹⁶⁰ Thus, the court focused on the defendant's single act in cancelling the ASA Plan and disregarded, at least momentarily,¹⁶¹ the individualized issues of damages. Failing to explicitly address the superiority requirement, the court went ahead and certified the class on the economic tort claims of breach of fiduciary duty and bad faith.¹⁶² It did not certify the class for the claim of fraud due to the lack of reliance.¹⁶³

The plaintiff class counsel in *Thompson* exemplified how the two-part approach is successful. For the count of breach of fiduciary duty, class counsel first characterized the injury as occurring immediately when the contract was broken; that is, when the ASA Plan was cancelled.¹⁶⁴ This focused the court's attention on the overarching tortious conduct of the defendant rather than on what happened afterwards—individualization. The court also inferred that plaintiff class counsel sought to avoid the damages issue and, instead, focused solely on getting the class certified for liability reasons.¹⁶⁵ This was presumably done because counsel knew that the court would likely rule the class unmanageable if it would be required to assess every senior citizen's damages.

Finally, this two-part economic strategy can also be used in insurance cases.¹⁶⁶ The typical fact pattern is as follows: a plaintiff has an accident, this accident is within the ambit of some insurance policy she carries, and so the plaintiff files a claim; however, the bills are

158. *Id.* at 293-94.

159. *Id.* at 295.

160. *Id.* (“Varying damage levels rarely prohibit a class action if the class members’ claims possess factual and legal commonality.” (quoting *Eddleman v. Jefferson County, Ky.*, No. 95-5394, 1996 WL 495013 (6th Cir. Aug. 29, 1996))). Also, the court stated that it is free to certify the class action on liability but not on damages. *Id.*

161. The court may revisit the sufficiency of the prerequisites at any time during the litigation. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

162. *Thompson*, 213 F.R.D. at 295-96.

163. *Id.* at 296 n.8.

164. *Id.* at 301. The court found that there was a genuine issue of fact as to Mr. Criner (representing the second subclass) as to whether Anthem was allowed, via the terms of the contract, to cancel the ASA Plan. However, the court dismissed the breach of fiduciary duty count as to Mr. Thompson because Anthem was allowed, by Ohio state law, to change the terms (cost and benefits) of the ASA Plan.

165. *Id.* at 295.

166. The following illustration is similar to the one discussed in *Roin & Monsour*, *supra* note 2, at 978-80.

never fully reimbursed or the claim is denied several times before the plaintiff finally gives up. The plaintiff, perhaps after talking to others, suspects that it is actually the insurer's plan to reduce lots of claims or deny every claim that comes through the claims process the first time in order to save money. Thus, she has a possible action in breach of contract (for the insurer did not pay out like the contract said would happen if injury occurred) and bad faith denial of an insurance claim.¹⁶⁷ But if one attempts to transfer these incidents into one action, there are potentially lots of individualized issues. What kind of accident was it? What type of injuries occurred? Who is at fault for the accident and resulting injuries?

Another possibility is that if the aggrieved plaintiffs convert their breach of contract and bad faith denial of an insurance claim into an economic tort, then they would have a better chance of succeeding on a theory of class action. "In essence, the plaintiffs' theory converts a claim for breach of an insurance contract into an economic tort akin to a securities fraud claim."¹⁶⁸ It is here that I seek to bring the economic tort discourse one step further in the class action context. My argument is that the plaintiff class in the above example is overlooking an economic tort—promissory fraud.

IV. PROMISSORY FRAUD

In the early English case *Edgington v. Fitzmaurice*,¹⁶⁹ Lord Bowen formally established a cognizable action for fraud based on a promissory misrepresentation. The case involved two directors of a company that promised an investor that money paid for debentures would be used to purchase new equipment and expand the current facilities,¹⁷⁰ however, the directors never intended to use the money for this stated purpose. Instead, they planned to use it to pay off other debts.¹⁷¹ Recognizing the directors never had an intention to perform their promised future actions, the court found that the company fraudulently misrepresented its intent and was thus liable to the investor.¹⁷² The oft-quoted rule Lord Bowen articulated is as follows:

[T]he state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it

167. See, e.g., *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973); *Crisci v. Sec. Ins. Co.*, 426 P.2d 173 (Cal. 1967); *Marshalls of MA, Inc. v. Minsal*, 932 So. 2d 444 (Fla. 3d DCA 2006); *Thomas v. Grange Mut. Cas. Co.*, Nos. 2005-CA-002352-MR, 2005-CA-002378-MR, 2006 WL 3457841 (Ky. Ct. App., Dec. 1, 2006); *Hartford Underwriters Ins. Co. v. Williams*, 936 So. 2d 888 (Miss. 2006); *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997).

168. *Roin & Monsour*, *supra* note 2, at 979.

169. (1885) 29 Ch.D. 459.

170. *Id.* at 460.

171. *Id.* at 461.

172. *Id.* at 483-85.

is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.¹⁷³

While Lord Bowen is certainly given the most credit for recognizing the common law fraud action for promissory misrepresentation,¹⁷⁴ American courts were already fashioning their own causes of action and relief for cases with facts similar to those in *Edgington*.

For example, in *Hammond v. Pennock*¹⁷⁵ the plaintiff sought to rescind a contract that provided for an exchange of properties on grounds that the contract was obtained by fraud. The court found that the plaintiff had signed a contract that provided for him to deed his land to the defendant in exchange for the defendant's land in Michigan.¹⁷⁶ The contract also provided that the plaintiff would pay off the defendant's mortgage on the land in Michigan.¹⁷⁷ To induce the plaintiff to enter the contract, the defendant made several representations: the defendant alleged that a large river ran across the land, that there were at least 3,000,000 feet of pine on the land, which was at least 320 acres, and that the taxes had been paid.¹⁷⁸ For this land the plaintiff gave the defendant his personal property, which was valued around \$10,000, as well as made payments to the defendant in the amount of \$1900 to pay off the mortgage on this Michigan piece of land.¹⁷⁹ Unfortunately, the plaintiff later discovered that at the time of the contract, the defendant owned no such land in Michigan.¹⁸⁰ Subsequent to the signing of the contract, however, the defendant did purchase land in Michigan with the plaintiff's money and executed a deed conveying the land to the plaintiff.¹⁸¹ This land had no river running through it, had no timber on it, and was in essence valueless.¹⁸² Moreover, the taxes had not been paid.¹⁸³ The court found the evidence clearly showed the defendant had made fraudulent representations and that these were actionable

173. *Id.* at 483. One commentator found that the rule articulated here by Lord Bowen was not the one currently accepted by the English judiciary; rather, "distinguished from the false representation of a fact, the false representation as to a matter of intention, not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud at law, nor does it afford a ground for relief in equity." Michael J. Polelle, *An Illinois Choice: Fossil Law or an Action for Promissory Fraud?*, 32 DEPAUL L. REV. 565, 566 (1983) (quoting WILLIAM WILLIAMSON KERR, A TREATISE ON THE LAW OF FRAUD AND MISTAKE 88 (1872)).

174. See Polelle, *supra* note 173, at 566; AYRES & KLASS, *supra* note 9, at 4.

175. 61 N.Y. 145 (N.Y. 1874).

176. *Id.* at 146-47.

177. *Id.* at 147.

178. *Id.* at 146.

179. *Id.* at 146-47.

180. *Id.* at 147.

181. *Id.*

182. *Id.*

183. *Id.*

by the plaintiff.¹⁸⁴ For a remedy, the court rescinded the contract, had the defendant return the plaintiff's land that had not already been sold, and ordered further compensatory damages be paid to the plaintiff.¹⁸⁵

The *Edgington* and *Hammond* cases are near perfect examples of the tortious act of promissory fraud. As illustrated, this doctrine centers on promissory misrepresentations, or "insincere promises."¹⁸⁶ In both cases the defendant made a promise that he never intended to keep: in *Edgington* the promise was to use the money to expand the facilities and buy new equipment, and in *Hammond* the promise was that the land as described existed and was indeed his to sell. Perhaps the clearest example is in *Hammond* because one does not need to be able to delve deeply into a rigorous analysis of the defendant's state of mind, since his intentions are transparent from the simple fact that he could not perform his promise.¹⁸⁷ This is paramount, as an intent to deceive is a required element of promissory fraud, and here it is met because the defendant *knew* this impossibility and nevertheless purported to sell land that he did not own and that did not exist.

Despite this early case showing a court enforcing a "legal effect of a promise made without any intention of performing it," considerable controversy over whether to grant a remedy for this type of fraud continued to exist until roughly the 1930s.¹⁸⁸ In this decade, several authorities were written¹⁸⁹ illustrating that American common law had embraced Lord Bowen's stated principle that a person's state of mind and the misrepresentation of it is indeed actionable in fraud because it is analogous to the misrepresentation of "physical facts of the external world."¹⁹⁰

One treatise writer explained that "[m]any courts . . . have held that a statement of a present intention to perform an act, made as an inducement for a contract, is a statement of a fact, and that if there was no such intention at the time the statement was made, there

184. *Id.* at 148.

185. *Id.*

186. See AYRES & KLASS, *supra* note 9, at 4.

187. Another such example where the promissory fraud is easy to see is in *The Producers* (Universal Pictures 2005). I borrow this example from Ayres and Klass, *supra* note 9, at 3-4. The plot centers around Max Bialystock, who purposefully sells over 1000 percent of the interest to investors in what he plans to be a complete flop of a musical, *Springtime for Hitler*. Bialystock clearly deceived his investors, for he could not give each investor a full return on their investments as promised if the play made a profit. One does need to be privy to Bialystock's inner-monologue to see this purposeful intent to deceive his investors and pocket the profit, for he knew his performance of returning the investment would be impossible.

188. Note, *The Legal Effect of Promises Made With Intent Not to Perform*, 38 COLUM. L. REV. 1461, 1461 (1938).

189. See, e.g., *id.*; RESTATEMENT OF CONTRACTS § 473 (1932).

190. Polelle, *supra* note 173, at 567.

was actionable fraud.”¹⁹¹ Another commentator echoed this and wrote that “a misrepresentation of the speaker’s present state of mind . . . is actionable as a misrepresentation of fact.”¹⁹² Finally, *The Restatement of Contracts* stated that an individual who makes a contractual promise with the “undisclosed intention of not performing it”¹⁹³ commits the tortious act of fraud.¹⁹⁴ Early American jurisprudence, however, was also careful to distinguish what was and was not promissory fraud. For example, a mere breach of a contract or lack of adequate performance is much different from an intention to never perform the promised conduct.¹⁹⁵

The most recent edition of *Prosser and Keeton on the Law of Torts* reiterates this caution, stating that a “mere breach of a promise is never enough in itself to establish the fraudulent intent.”¹⁹⁶ Other examples that are not promissory fraud include these: a good faith expectation to be able to perform an action that subsequently becomes impossible to perform for any number of reasons,¹⁹⁷ a prediction of future events which should be regarded as a mere opinion and is therefore not sufficient to justify reliance, and, finally, like a prediction, “puffing” or fabricating that also does not warrant reliance.¹⁹⁸

That said, there are many situations where such fraudulent intent or an insincere promise may be inferred through the surrounding situation, possibly regardless of whether there has been a breach.¹⁹⁹ Several such examples are:

the defendant’s insolvency or other reason to know that he cannot pay, or his repudiation of the promise soon after it is made, with no intervening change in the situation, or his failure even to attempt any performance, or his continued assurances after it is clear that he will not do so.²⁰⁰

Thus, the crux of the doctrine of promissory fraud rests on the well established principle that a promise “carries an implied repre-

191. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS, OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT § 354, at 579 (1932).

192. 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 7.10, at 447 (2d ed. 1986).

193. Note, *supra* note 188, at 1464.

194. RESTATEMENT OF CONTRACTS § 473 (1932).

195. See *generally id.*

196. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 109, at 764 (W. Page Keeton ed., 5th ed. 1984).

197. See, for example, the famous impossibility case where a music hall burned down prior to performance of the contract, thus rendering it impossible to furnish that particular building as promised. *Taylor v. Caldwell*, (1863) 122 Eng. Rep. 309 (K.B.).

198. KEETON ET AL., *supra* note 196, § 109, at 757-64.

199. See Ayres & Klass, *Promissory Fraud Without Breach*, *supra* note 12, at 507.

200. KEETON ET AL., *supra* note 196, § 109 at 765 (citations omitted); see also AYRES & KLASS, *supra* note 9, at 15 (stating that “a short time between promise and breach is . . . suggestive that the promisor never intended to perform” and “[r]epeated assurances of performance are evidence of the same”).

sentation that there is a present intention to carry it out.”²⁰¹ In other words, “a promise necessarily carries with it the implied assertion of an intention to perform.”²⁰² If that intention is not there, the individual has committed a fraudulent act.²⁰³ Accordingly, the promisee is entitled to a recovery in tort, compensatory and punitive damages,²⁰⁴ and may also avoid procedural bars such as the parol evidence rule and the statute of frauds.²⁰⁵ Moreover, the promisor may also be found liable for a criminal charge of false promise, which carries with it the penalty of a possible incarceration term.²⁰⁶

Presently, all fifty states and the District of Columbia at least take judicial notice of, if not “unequivocally recognize[],”²⁰⁷ the action of promissory fraud.²⁰⁸ Of those fifty-one jurisdictions, forty-eight

201. KEETON ET AL., *supra* note 196, § 109, at 763; *see also* AYRES & KLASS, *supra* note 9, at 4 (stating that “the doctrine recognizes that a promisor, by the very act of promising, typically communicates that she intends to perform her promise”); Polelle, *supra* note 173, at 566 (“every statement . . . irreducibly contains the kernel of a factual assertion” and if that “kernel” is not true then it is a factual misrepresentation).

202. RESTATEMENT (SECOND) OF TORTS § 530 cmt. c (1977).

203. *Id.* § 530(1) (stating “[a] representation of the maker’s own intention to do or not to do a particular thing is *fraudulent* if he does not have that intention” (emphasis added)).

204. *See, e.g.*, Vance v. Indian Hammock Hunt & Riding Club, 403 So. 2d 1367 (Fla. 1st DCA 1981); *see also* Kevin E. Davis, *Promissory Fraud: A Cost-Benefit Analysis*, 2004 WIS. L. REV. 535, 535 (citing RESTATEMENT (SECOND) OF TORTS, § 530 (1977) and John A. Seibert, Jr., *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1607 (1986)).

Ayres and Klass identify two important functions besides the legal recourse against a promisor who intentionally makes a promise with no plans to keep it. These two functions are: “to facilitate efficient price and selection decisions and to provide promisees information they need to invest optimally in the transaction.” AYRES & KLASS, *supra* note 9, at 62.

205. *See* KEETON ET AL., *supra* note 196, §109 at 764 (stating that the majority view is to permit the action of promissory fraud because “the policy which invalidates the promise is not directed at cases of dishonesty in making it, and that it may still reasonably be relied on even where it cannot be enforced”); Ian Ayres & Gregory Klass, *Promissory Fraud*, 78 N.Y. ST. B.J. 26, 26 (2006); Susan J. Martin-Davidson, *Yes, Judge Kozinski, There Is a Parol Evidence Rule in California—The Lessons of a Pyrrhic Victory*, 25 SW. U. L. REV. 1, 64 (1995) (stating that “[t]he California Supreme Court overruled a line of cases holding that oral promises within the statute of frauds are inadmissible to prove promissory fraud”); *But see* Bruce v. Cole, 854 So. 2d 47, 58 (Ala. 2003) (holding “an oral promise that is void by operation of the Statute of Frauds will not support an action against the promisor for promissory fraud”).

206. AYRES & KLASS, *supra* note 9, at 4.

207. *Id.* at 6.

208. *See* Saia Food Distribs. & Club, Inc., v. SecurityLink From Ameritech, 902 So. 2d 46 (Ala. 2004); Yoon v. Alaska Real Estate Comm’n, 17 P.3d 779 (Alaska 2001); Anthony v. First Nat’l Bank, 431 S.W.2d 267 (Ariz. 1968); Lazar v. Superior Court, 909 P.2d 981 (Cal. 1996); Stalos v. Booras, 528 P.2d 254 (Colo. Ct. App. 1974); Stephenson v. Capano Dev., Inc. 462 A.2d 1069 (Del. 1983); Howard v. Riggs Nat’l Bank, 432 A.2d 701 (D.C. 1981); Connecticut Gen. Life Ins. Co. v. Jones, 764 So. 2d 677 (Fla. 1st DCA 1981); Kent v. White, 520 S.E.2d 481 (Ga. Ct. App. 1999); Touche Ross Ltd. v. Fillpek, 778 P.2d 721 (Haw. Ct. App. 1989); Sharp v. Idaho Inv. Corp., 504 P.2d 386 (Idaho 1972); Copenhaver v. Lister, 852 N.E.2d 50 (Ind. Ct. App. 2006); Young v. Hecht, 597 P.2d 683 (Kan. App. 1979); Allen v. Lawyers Mut. Ins. Co., No. 2005-CA-002397-MR, 2007 WL 490954 (Ky. App. Feb. 16, 2007); La. Pigment Co., L.P. v. Scott Constr. Co., Inc., 945 So. 2d 980 (La. Ct. App. 3 Cir. 2006); Guinan v. Baker, 2001 WL 1869944 (Me. Super., Dec. 13, 2001); Parker v. Columbia

have remained consistent with the common law principle as stated by Lord Bowen, while two states, Michigan and Illinois, have imposed heightened requirements,²⁰⁹ and a Connecticut court has very recently announced that it “do[es] not recognize promissory fraud.”²¹⁰ Yet while this doctrine of promissory misrepresentation has clearly long been recognized by American jurisprudence, it still remains largely undertheorized²¹¹ and, I argue, underutilized in the class action context.

A. Required Elements

Courts have generally held that the elements of promissory fraud are the same as those required for common law fraud or deceit.²¹²

Bank, 604 A.2d 521 (Md. Ct. Spec. App. 1992); Zhang v. Mass. Inst. of Tech., 708 N.E.2d 128 (Mass. App. Ct. 1999); Halverson Candy & Tobacco Co., Inc. v. Beumatic Wholesale & Vending Supply, No. C1-94-423, 1994 WL 455677 (Minn. App., Aug. 23, 1994); Welsh v. Mounger, 883 So. 2d 46 (Miss. 2004); Bauer v. Adams, 550 S.W.2d 850 (Mo. Ct. App. 1977); Rowland v. Klies, 726 P.2d 310 (Mont. 1986); Abboud v. Michals, 491 N.W.2d 34 (Neb. 1992); Bartsas Realty, Inc. v. Nash, 402 P.2d 650 (Nev. 1965); Munson v. Raudonis, 387 A.2d 1174 (N.H. 1978); Lipsit v. Leonard 315 A.2d 25 (N.J. 1974); Werner v. City of Albuquerque, 229 P.2d 688 (N.M. 1951); Manchester Equip. Co., Inc. v. Panasonic Indus. Co., 529 N.Y.S.2d 532 (N.Y.App. Div. 1988); Ferguson v. Ferguson, 285 S.E.2d 288 (N.C. Ct. App. 1982); Lanz v. Naddy, 82 N.W.2d 809 (N.D. 1957); Galmish v. Cicchini, 734 N.E.2d 782 (Ohio 2000); Citation Co. Realtors, Inc. v. Lyon, 610 P.2d 788 (Okla. 1980); Butte Motor Co. v. Strand, 358 P.2d 279 (Or. 1960); Brentwater Homes, Inc. v. Weibley, 369 A.2d 1172 (Pa. 1977); Robinson v. Standard Stores, Inc., 160 A. 471 (R.I. 1932); Woodward v. Todd, 240 S.E.2d 641 (S.C. 1978); Reitz v. Ampro Royalty Trust, 61 N.W.2d 201 (S.D. 1953); Cravens v. Skinner, 626 S.W.2d 173 (Tex. App. 1981); Berkeley Bank for Coops. v. Meibos, 607 P.2d 798 (Utah 1980); Union Bank v. Jones, 411 A.2d 1338 (Vt. 1980); Lloyd v. Smith, 142 S.E. 363 (Va. 1928); Markov v. ABC Transfer & Storage Co., 457 P.2d 535 (Wash. 1969); State v. Moore, 273 S.E.2d 821 (W. Va. 1980); Beers v. Atlas Assur. Co., 253 N.W. 584 (Wis. 1934); Johnson v. Soulis, 542 P.2d 867 (Wyo. 1975).

209. See Bradley Real Estate Trust v. Dolan Assocs. Ltd., 640 N.E.2d 9, 13 (Ill. App. Ct. 1994) (ruling that promissory fraud is only recognized if the misrepresentation is part of a “scheme to defraud” (quoting Steinberg v. Chicago Med. School, 69 Ill. 2d 320, 334 (1988))); Jim-Bob, Inc. v. Mehling, 443 N.W.2d 451, 459-60 (Mich. Ct. App. 1989) (holding the plaintiff must prove the fraud by “clear, satisfactory and convincing evidence” and that “the evidence of fraudulent intent must relate to conduct by the actor at the time the representations are made or almost immediately thereafter”).

Also interesting to note is that in thirty-four of the above states, there were more promissory fraud claims filed between the years 1992 and 2002 than there were impossibility claims. AYRES & KLASS, *supra* note 9, at 6. Moreover, in ten of those states there were more promissory fraud claims filed than there were both impossibility and mistake claims. *Id.*

210. Ward v. Distinctive Directories, LLC, No. CV044005440, 2006 WL 1391419, at *5 (Conn. Super. Ct., May 5, 2006). This holding is in conflict with earlier cases that explicitly held that an action for fraudulent misrepresentation lies when one makes a promise with no intention of fulfilling it. See, e.g., Smith v. Frank, 332 A.2d 76, 77 (Conn. 1973). Thus, this outlier case is presumably a misstatement by the Ward court.

211. Curtis Bridgeman, *Misrepresented Intent in the Context of Unequal Bargaining Power*, 2006 MICH. ST. L. REV. 993, 996.

212. See, e.g., *In re Tobin*, 258 B.R. 199, 203 (9th Cir. 2001) (noting that promissory fraud is a subspecies of fraud and deceit, with identical elements to common law fraud); see

These elements, although they may differ slightly in wording and numeration, are as follows: a false representation; knowledge of the falsity, otherwise known as scienter; intent to induce reliance; justifiable reliance; and resulting damages.²¹³ Yet due to the nature of the action, there are two more required elements that are generally recognized whether courts explicitly state them or not. One such court that has explicitly stated them is the Alabama Supreme Court. It has routinely stated that in addition to the common law fraud elements, one claiming promissory fraud has the burden of showing the following additional elements: “proof that at the time of the misrepresentation, the defendant had the intention not to perform the act promised, and [] proof that the defendant had an intent to deceive.”²¹⁴

There are two important aspects that distinguish promissory fraud and common law fraud in regard to the elements and proof that is required beyond just the different misrepresentations. The first important difference between promissory fraud and common law fraud is in regard to the element of reliance. In promissory fraud, the reliance is implicit because in order to have an action for promissory fraud there must first be a contract,²¹⁵ which means that the innocent party has relied on the promissory misrepresentation by entering into the contract. As one commentary states, “[a] promise, which carries an implied representation that there is a present intention to carry it out, is recognized everywhere as a proper basis for reliance . . .”²¹⁶ Thus, unless the promise was merely a prediction or “puffing,” reliance will be found. The second aspect that is different from common law fraud is that in promissory fraud the court must make a specific finding of an intent to deceive. While this specific intent element is certainly going to be the most difficult to prove, as it is challenging to clearly know the present state of mind of the promisor when she is making a promise, this intent is often inferred from the surrounding context and subsequent conduct, or lack thereof, of the promisor. I will illustrate how these two specific elements, reliance

also *Agosta v. Astor*, 15 Cal. Rptr. 3d 565, 569 (Cal. Ct. App. 2004) (same); *Sass v. Andrew*, 832 A.2d 247, 261 (Md. Ct. Spec. App. 2003) (same).

213. *Lazar v. Superior Court*, 909 P.2d 981, 984 (Cal. 1996). Another common listing of the elements is as follows: “(1) a false representation or willful omission of a material fact; (2) knowledge of the falsity; (3) an intention to induce reliance; and (4) action taken in reliance on the representation.” *Howard v. Riggs Nat’l Bank*, 432 A.2d 701, 706 (D.C. 1981) (citing *Jacobs v. Dist. Unemployment Comp. Bd.*, 382 A.2d 282, 286 n.4 (D.C. 1978)).

214. *Saia Food Distribs. and Club, Inc. v. SecurityLink From Ameritech, Inc.*, 902 So. 2d 46, 57 (Ala. 2004) (quoting *Waddell & Reed, Inc. v. United Investors Life Ins. Co.*, 875 So. 2d 1143, 1160 (Ala. 2003)); *see also* *Birmingham News Co. v. Horn*, 901 So. 2d 27, 59 (Ala. 2004); *Howard v. Wolff Broadcasting Corp.*, 611 So. 2d 307, 311 (Ala. 1992).

215. *AYRES & KLASS*, *supra* note 9, at 5.

216. *KEETON ET AL.*, *supra* note 196, § 109, at 763 (citation omitted); *see also* *DAN B. DOBBS, THE LAW OF TORTS* 1358 (2000) (“If the misrepresentation is material . . . the plaintiff who acts in accordance with the representation has inferentially or presumptively relied upon it.”).

and intent, are interpreted by courts through using several case examples.

Due to the fact that the act of promising speaks to the promisor's intent, "unless the promisor expressly warns otherwise, courts should assume that a promise says that the promisor does not believe the probability of her performance is so low that it is not in the promisee's interest to rely."²¹⁷ While this notion of implied reliance is clearly cited in both *Prosser and Keeton on the Law of Torts* and Dobbs' *The Law of Torts*,²¹⁸ this is arguably the most important contribution that Ayres and Klass make to the doctrine of promissory fraud. They state that the reliance is in accepting the promise and entering the contract.²¹⁹ An example of this implicit reliance is found in many promissory cases.²²⁰

One such example is in *Thomas v. Henderson*,²²¹ which involved the sale of a Cessna 172E aircraft. Thomas, the plaintiff, first learned about the aircraft from an internet advertisement that stated " 'great plane to train for your IFR ticket.' "²²² He inquired about the aircraft, and Henderson, the owner/seller, informed Thomas that the plane "was in excellent shape, with recent annual and pilot static inspections."²²³ Following this exchange, Thomas arranged for a third party to inspect the aircraft and shortly thereafter entered into an agreement with Henderson to purchase it.²²⁴ In the contract, Henderson made the following representations to Thomas regarding the fitness of the aircraft: "[it] is in airworthy condition as prescribed by FAA standards" and "[it] had all airworthy directives (ADs) completed."²²⁵ Shortly thereafter, Thomas discovered the plane was in less than "excellent shape." In fact, it had several serious mechanical and structure problems that made it "unsafe to fly" and that disqualified it from meeting the FAA standards.²²⁶ Hence, Thomas brought suit.

217. AYRES & KLASS, *supra* note 9, at 12-13.

218. *See supra* note 216 and accompanying text.

219. AYRES & KLASS, *supra* note 9, at 12-13.

220. *See, e.g.*, *Lazar v. Superior Court*, 909 P.2d 981, 983-84 (Cal. 1996) (noting that plaintiff relied on defendant's conduct and representations when he quit his job in New York, commenced work in California, and shortly thereafter moved his family from New York to California); *Godwin Aircraft, Inc. v. Houston*, 851 S.W.2d 816, 821-22 (Tenn. App. 1992) (holding the misrepresentation was relied on by plaintiff when he entered into the transaction).

221. 297 F. Supp. 2d 1311 (S.D. Ala. 2003).

222. *Id.* at 1314.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

In holding that Thomas sufficiently stated a claim for promissory fraud,²²⁷ the court first listed Alabama's required elements for promissory fraud:

“(1) [T]hat the defendant made a false representation of a material fact; (2) that the false representation was relied upon by the plaintiff; (3) that the plaintiff was damaged as a proximate result of the reliance; (4) that the representation was made with a present intent to deceive; and (5) that when the representation was made the defendant intended not to perform in accordance with it.”²²⁸

According to the opinion, Henderson only made objections to the potential finding of the second element, reliance.²²⁹ He argued this point in particular because of the fact that Thomas hired a third party to inspect the aircraft prior to entering an agreement to buy it.²³⁰ Henderson maintained that Thomas did not rely on his specific representations in entering the contract, because of this action of getting an outside opinion.

The court found it was a well-established rule that hiring an independent investigator to check the truth of the representations made by the defendant does not mean that the defendant is free to represent anything he so desires, nor does it lessen the right of the plaintiff “to rely upon [the defendant’s] representations, unless the investigation either discloses the falsity of the representations or discloses facts which would put a prudent person on further inquiry.”²³¹ No evidence of this sort was reported to Thomas by the hired third party; moreover, Thomas alleged that Henderson purposefully covered up and conspired with others to keep him from knowing the truth about the condition of the aircraft.²³² Even further, the court found Thomas specifically alleged that it was Henderson’s representations, presumably supported by the investigation, that he relied on in entering the contract.²³³ As correctly noted by the court, this was his reliance in the case—that he entered the contract and performed his obligations (paid for the aircraft).²³⁴

227. This case revolved around a Rule 12(c) motion and, accordingly, the court was not required to make any specific findings of fact. *See* FED. R. CIV. P. 12(c).

228. *Thomas*, 297 F. Supp. 2d at 1319-20 (quoting *Howard v. Wolff Broadcasting Corp.*, 611 So. 2d 307, 311 (Ala. 1992)). The Alabama court specifically states that these are elements for promissory fraud, as opposed to the typical listing of elements for common law fraud. *Id.*

229. *Id.* at 1317.

230. *Id.*

231. *Id.* 1318-19 (quoting *Apperson v. U.S. Fid. & Guar. Co.*, 318 F.2d 438, 441 (5th Cir. 1963)).

232. *Id.* at 1319.

233. *Id.* at 1318.

234. *Id.*

Another example of this reliance in entering a contract is found in *Tobin v. Sans Souci Limited Partnership*.²³⁵ Here, Tobin was a real estate agent working for his father, Harold Tobin, who owned a real estate development business.²³⁶ For a specific project of three houses, Harold Tobin formed The Cottages III, Inc. (Cottages). He stated that this particular structure was “ ‘to simplify financing . . . [and because] lenders did not want the complications of Harold Tobin’s other projects.’ ”²³⁷ Sans Souci was the financier on this project and just days after it supplied the agreed upon loan of \$90,000, Harold Tobin shut down not only Cottages, but all of his other companies as well.²³⁸ In the end, the court found that the element of reliance was met due to the fact that Sans Souci relied on the representations made by Tobin in agreeing to procure the loan for him.²³⁹ And while the court suspected foul play by the defendant, it did not find promissory fraud because the element of intent to deceive was missing: “the state court made no finding that Tobin personally made any false representation with the intention and purpose of deceiving Sans Souci.”²⁴⁰

Both of these cases, *Thompson* and *Tobin*, illustrate exactly what Ayres and Klass clarified in *Insincere Promises* regarding reliance.²⁴¹ The reliance is implicit in entering the agreement. Thus, in a promissory fraud case, where there must be a contract or agreement, every person who entered into that contract already has reliance proven for them. This notion of implicit reliance is exactly why consumers are currently overlooking an effective tool in class actions. Yet the question regarding what evidence or situation is needed to find the intent that was not found in *Tobin* needs to be addressed.

As mentioned above, there are several situations where the intent to deceive and induce reliance, or the entering of the contract, may be inferred through the surrounding facts of the issue at hand.²⁴² One obvious instance is where the defendant is insolvent or clearly does not have the money to pay for what he is purchasing. Akin to this situation, with just a slight twist, is the case of *Channel Master Corp. v. Aluminium Limited Sales, Inc.*²⁴³ The plaintiff here was a manufacturer and processor of aluminum, requiring a large quantity of

235. 258 B.R. 199 (B.A.P. 9th Cir. 2001).

236. *Id.* at 201.

237. *Id.*

238. *Id.* Tobin said that he did this because “he had run out of capital.” Furthermore, he argued that the deeds of trust were not recorded and even if they were they would not be effectual because the company did not have title to the property. *Id.*

239. *Id.* at 203.

240. *Id.*

241. See *supra* text accompanying note 219.

242. See *supra* text accompanying note 206.

243. 151 N.E.2d 833 (N.Y. 1958).

aluminum ingot to be delivered to the factory every month.²⁴⁴ The defendant was a supplier and arranged a contract with the plaintiff.²⁴⁵ In this contract, the defendant represented that it would sell plaintiff 400,000 pounds of aluminum ingot per month and that it was not only capable of producing such amounts but that it had no other obligations that would reduce this capability.²⁴⁶ As foreshadowed, however, this was not the defendant's present intention when entering into the contract with the plaintiff. The plaintiff alleged, and the court found, sufficient evidence to state a cause of action for promissory fraud: the defendant had already entered into long-term contracts with other manufacturers to the point where it had no available aluminum ingot to sell if all of the other customers kept their binding contracts with the defendant.²⁴⁷

Thus, assuming the plaintiff's facts as alleged were true, as the court assumed here, the defendant clearly made a material misrepresentation. This misrepresentation was the fact that it claimed to have 400,000 pounds of available product to sell to the plaintiff and had no other binding commitments that would reduce such supply. The defendant would certainly know of the falsity of its promise, the second required element, as it had made other contracts and only planned to use this agreement as a backup if additional product became available. Also, for the element of reliance, because it is implicit in a promise that there is an intention to act on it, the plaintiff was induced by the defendant's promise to rely on it and not look to another company to supply its needs. Flowing from this proximate consequence of the misrepresentation are the plaintiff's damages, presumably in the fact that it could not manufacture the aluminum as contracted out to others because it did not have the ingot necessary for production. Finally, because the defendant knew at the time that it not only would not perform, but that it *could* not perform, the fraudulent intent may be inferred.

Overall, this case demonstrates that by looking to the relevant context and facts of the case, an intent to deceive and not perform as promised is inferred when the promise made is knowingly impossible to perform. Just as it is impossible to perform when a company sells more than 1000 percent of the interest in a musical production or a company that has no money but still purchases with the promise that it does, a company that contracts to sell what it knows it does not have fraudulently misrepresents its intent.²⁴⁸

244. *Id.* at 834.

245. *Id.*

246. *Id.*

247. *Id.* at 835.

248. Ayres and Klass also argue that courts must look at the "objective circumstances relevant to the likelihood of . . . performance." AYRES & KLASS, *supra* note 9, at 15. They

A similar case where a fraudulent intent may be inferred is where the defendant makes no attempts at performance and, moreover, continues to make assurances that performance will occur. This is exactly what happened in *Yoon v. Alaska Real Estate Commission*.²⁴⁹ The plaintiff, Moore, wanted to invest money received from the settlement of a personal injury suit into commercial real estate.²⁵⁰ Moore hired a real estate agent, Yoon, in large part because he spoke and also translated English and Korean.²⁵¹ After looking at several properties, Moore decided to make an offer on the Muldoon A. Plaza Mall.²⁵² Because Yoon had previously tried to sell this particular commercial property, he was aware of the leaky roof, which he told Moore about on a walk-through inspection of the mall.²⁵³ Moore had the mall inspected, and it was discovered that the roof was in very poor shape.²⁵⁴ Yoon and Moore submitted an offer stating that the current owner must make some of the necessary repairs on the roof prior to closing.²⁵⁵ Although the repairs were not completed by closing, Moore went ahead and closed on the purchase because Yoon made several promises that he would “‘take care of repairs’ and . . . that ‘he would be responsible’ if any problems arose.”²⁵⁶ Yoon further represented to Moore that he would take care of problems with leaky boilers and water heaters with “‘his own money if necessary.’”²⁵⁷

Shortly after the closing, Moore went to Korea to visit family and left Yoon in charge of the mall via a property management agreement.²⁵⁸ In the fall and early winter, the roof leaked to such an extent that Yoon was forced to hire emergency contractors to remove snow and do other maintenance work.²⁵⁹ According to the agreement,

believe that courts neglect this objective probability, only focusing on intent. *Id.* at 11. An example they give is when a purchaser “overoptimistically” represents her intention to pay for the goods, although she is insolvent and really never could pay for her purchases. *Id.* Ayres and Klass state that some courts have held that because there was no intention to deceive, there was no misrepresentation; however, Ayres and Klass feel this is wrong because there was never a reasonable chance of her performance. *Id.* This is just one specific area of promissory fraud that needs to be reformed.

249. 17 P.3d 779 (Alaska 2001).

250. *Id.* at 780.

251. *Id.* Moore speaks English, but only as a second language, and therefore relied on translators throughout the trial. *Id.*

252. *Id.* at 780-81. When she first looked at the property, Yoon failed to disclose, as required by law, that he was the listing agent for the property. *Id.* at 780.

253. *Id.* at 780-81.

254. *Id.* at 781. The appraisers stated the entire roof needed to be replaced, which would cost \$200,000. If the roof was not completely replaced by the winter, the appraisers stated that the roof, in order to try to prevent leaking, would need to be patched up where bubbles had formed. This would cost roughly \$30,000. *Id.*

255. *Id.*

256. *Id.* at 781.

257. *Id.*

258. *Id.*

259. *Id.* at 782.

Yoon was obligated to contact Moore if extra expenses due to emergencies, but he failed to do so.²⁶⁰ When Moore returned from Korea, Yoon gave her a bill for \$20,000, despite his representations to take care of the roof and other necessary repairs.²⁶¹

The Alaska Supreme Court began its analysis by citing five elements for promissory fraud: “(1) a promise, (2) scienter, or the present intent of not following through on that promise, (3) intention to induce reliance, (4) justifiable reliance, and (5) damages.”²⁶² The court then stated the burden of proof as “substantial evidence that a reasonable mind might accept as adequate to support a finding of each element.”²⁶³ Finding that Yoon promised Moore he would take responsibility for the roofing and other various repair problems, the court moved on to the element of scienter. In Moore’s testimony she stated that when she confronted Yoon regarding the bill, he got angry and stated, “ ‘Did I ever guarantee anything in writing about the property?’ ”²⁶⁴ Yoon then left Moore’s presence.²⁶⁵ The court took this as direct evidence that he never intended to act on his promises and continual assurances to Moore.²⁶⁶ The court also found indirect evidence in the fact that he had previously tried to sell this property and knew of the extensive roof damage.²⁶⁷ Furthermore, the court found scienter in the fact that he knew Moore was relying on him to translate and make accurate representations of what needed to be done in light of the appraiser’s and owner’s own hesitations about the roof.²⁶⁸

In regard to the third and fourth elements, the intent to induce reliance and justifiable reliance, the court found that Yoon made these representations to persuade Moore to trust him as her real estate agent that the roof would get fixed after she closed on the deal.²⁶⁹ By purchasing the mall, Moore showed she did in fact rely on his prom-

260. *Id.*

261. *Id.* After a seven-day administrative hearing with seventeen witnesses and fifty-seven pages of findings of fact, the Alaska Real Estate Commission charged Yoon with promissory fraud and awarded Moore \$10,000. Yoon appealed this finding with a superior court, which affirmed the decision against him; he then appealed to the Supreme Court of Alaska. *Id.*

262. *Id.*

263. *Id.* Although this standard does not seem to give too much direction, the court does suggest that this is lower than preponderance of the evidence and substantial evidence for each element. *Id.*

264. *Id.* at 783.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

issory statements.²⁷⁰ Finally, as the bill of \$20,000 clearly showed, Moore suffered damages as a result of these insincere promises.

Overall, the court found that substantial evidence supported the findings of both the lower court and the Alaska Real Estate Commission that Yoon committed promissory fraud in his dealings with Moore.²⁷¹

V. PROMISSORY FRAUD IN CLASS ACTIONS

As discussed in Part II, there is a strong presumption against the certification of a class action which alleges common law fraud. The underlying explanation is two-fold. First, the element of reliance in fraud requires a court to determine, on an individual basis, whether the plaintiff did, in fact, rely specifically on the defendant's misrepresentations. In the class action context this often creates the appearance that there is no single common issue that unifies the class members and their claims. Moreover, because of the myriad of representations that were made and, therefore, differentiated individualized reliance, the claims of one plaintiff to the next are not the same. Accordingly, the class alleging fraud has a hard time getting past the prerequisites of commonality and typicality. Second, the individualized inquiry of reliance often reveals many disparate questions among the class that the court must answer. It also brings to light the fact that individualized hearings will presumably have to be conducted for each class member's damages. This has a negative effect on Rule 23(b)(2)'s requirement of predominance and superiority. Even if the court does find that common issues predominate, it will still have to find that the class is manageable in light of the individualized reliance and damages. Overall, the crux of the trouble here is the reliance element; courts have been very clear in regard to this issue for years. The Fifth Circuit has been particularly frank: "Claims for money damages in which individual reliance is an element are poor candidates for class treatment" ²⁷² Even further, "a fraud class action cannot be certified when individual reliance will be an issue." ²⁷³

270. *Id.* Further supporting the reliance in this case is that Yoon referred Moore to an appraiser with whom he had worked before and who provided an incomplete report with no questions asked. Yoon also agreed to serve as Moore's property manager if she left town for several months. All of these representations, as noted by the court, were made to induce her to purchase the property and close on it quickly. Yoon made \$66,000 in commission on this sale. *Id.*

271. *Id.*

272. *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 549 (5th Cir. 2003) (quoting *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001)).

273. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996).

Yet, as explained in Part IV, the element of reliance is treated differently in promissory fraud. This is due to the nature of the action in which a contract was made where one party lacks the intention to ever perform her end of the bargain, while the other party unknowingly relies on this insincere promise and promises something back, binding himself with a contract. As stated in Part IV: “A promise, which carries an implied representation that there is a present intention to carry it out, is recognized everywhere as a proper basis for reliance”²⁷⁴

A. *Employing the Tool*

I argue here that class action consumers are currently overlooking this effective tool of promissory fraud. Class counsel can use promissory fraud where applicable, as well as its theory of implicit reliance, to overcome the need for courts to make individualized determinations regarding each class member’s reliance. The court must ensure only that every class member did in fact enter an agreement with the defendant where the promissory misrepresentations were made. Yet, even with this tool, a lingering concern is that there still might be a need to have individual hearings for damages, especially if the terms and conditions in the contract varied from plaintiff to plaintiff.

This is a valid concern, but one which is largely negated with the two-part economic tort strategy currently utilized in class actions involving economic torts. The first part focuses the court’s attention on the overarching tortious conduct of the defendant, the promissory fraud. The defendant made the promissory misrepresentation that she intended to perform her part of the agreement, and at this point, all of the class members have been aggrieved by the same misconduct and thereby suffered the same injury. The second part then deals with the potential concern of damages. Although every member was harmed by the fraudulent representation of intent, the ramifications of that misrepresentation may be felt differently by certain members of the class—that is, they may have suffered differing amounts of damages. The first option for class actions with a large number of plaintiffs is to employ “expert economic testimony to quantify and assign a dollar value” to the members’ harms.²⁷⁵ A second option, especially if the class is extremely large, is to have subclasses that will hold true regarding the damages element. Thus, if the first subclass all signed the same contract and accordingly require “X” damages, the second subclass all signed the same variation of that contract and accordingly suffered “Y” damages. Finally, if the class is smaller, as it was in *Arenson v. Whitehall Convalescent and Nursing*

274. See *supra* note 216 and accompanying text.

275. Roin & Monsour, *supra* note 2, at 975.

Home, Inc.,²⁷⁶ there is the option to bifurcate the trial between liability and damages. The court can treat the liability as a class action to promote efficiency in the court system but break it back down to individual trials for damages.

A similar type of tool that is already being used in class actions is the “fraud on the market theory.” In short:

[t]he fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company’s stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. . . . The causal connection between the defendants’ fraud and the plaintiffs’ purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentations.²⁷⁷

Thus, this theory of indirect reliance rests on the fact that as soon as public statements are made regarding a company, the stock market takes into account the information and reflects it through the prices of the company’s stock.²⁷⁸ The securities buyer relies on this price to be accurate, so if there is a misleading statement, then the buyer has been, in essence, defrauded as if the statement were made directly to the buyer.

In the same way, the promisee relies on the promisor to make accurate representations of her intent. If the present intent to perform the promise in the future is fraudulent, then relying on that promissory representation is similar to a securities buyer relying on the market price of the stock to be accurate. It is assumed that when a promise is made, there is the intent to follow through, just as it is assumed that the price of a stock has only been influenced by accurate information about a company and its business. While there are many differences between the fraud on the market theory and promissory fraud—and I do not argue that they should be treated the same—the fraud on the market theory does instill further confidence that the courts do, in fact, acceptance alternate interpretations of reliance in accordance with the cause of action at issue.

B. Promissory Fraud, Economic Tort Strategy, and Certification

The following two model cases show how promissory fraud will enable a plaintiff class to overcome the typical bars to certification when fraud is involved. The first model is based on *Kelley v. Galves-*

276. See *supra* text accompanying notes 121-27.

277. *Basic, Inc., v. Levinson*, 485 U.S. 224, 241-42 (1988) (internal quotation marks omitted) (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986)).

278. See *id.* at 242.

*ton Autoplex*²⁷⁹ and the second on *Gunnells v. Healthplan Services, Inc.*²⁸⁰ Both of these cases were used in Part II to illustrate how the need for considerable individual inquiry, which is generally required for reliance and damages, is fatal to certification. Using the same facts as the above cases,²⁸¹ these models will show how claims of promissory fraud would have likely changed the certification decision in these cases.

There are two important notes to make here before reaching the models. The first is that courts are generally not permitted to inquire into the merits of the suit before the class is certified.²⁸² As stated by the Supreme Court, “[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.”²⁸³ The second note is that Rule 23 only requires the plaintiff class “to present evidence from which the court can conclude that class-certification requirements are met”;²⁸⁴ this “initial burden is not heavy but requires more than mere conjective [sic] and conclusory allegations.”²⁸⁵

C. Model 1—*Kelley v. Galveston Autoplex*

To review quickly the relevant facts in *Kelley*, the plaintiff (buyer) bought a car from the defendant (dealership) and paid several thousand dollars in various fees, one such fee being \$1500 for a service

279. 196 F.R.D. 471 (S.D. Tex. 2000). Because the claim of promissory fraud was not brought in this case, any facts regarding whether there was a misrepresentation of intent at the time of making promissory statements and signing the contract were not alleged. Thus, I will use the facts of this case but I am not making concrete predictions as to what would have happened had this specific case been brought as a class action sounding in promissory fraud.

280. 348 F.3d 417 (4th Cir. 2003).

281. While I use the facts that were recited above in Part II, there are two reasons that necessary facts are missing from the cases. First, both of these cases failed at the certification hearing and the court is not allowed to decide or even look at the merits of the case until after certification. Thus, the courts in each of these cases took the plaintiffs’ claims to be true and just ruled on whether the allegations could sustain a class action. Second, because promissory fraud was not brought in either of these cases, there are facts vital to promissory fraud claims that are missing. I do not contend that in these cases that these necessary facts existed, such as the present intent to not ever perform in the future. Rather, I contend that, on the face of these allegations, it is conceivable that such insincere promises may have existed.

282. See, e.g., *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir. 1970) (“[I]n a doubtful case . . . any error . . . should be committed in favor of allowing the class action.”); *Olive v. Graceland Sales Corp.*, 293 A.2d 658, 661 (N.J. 1972) (“Ordinarily, the merits of a complaint are not involved in the determination as to whether a class action may be maintained, unless of course the allegations are patently frivolous.”).

283. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (quoting *Miller v. Mackey Int’l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971)).

284. *Cabana v. Littler*, 612 A.2d 678, 686 (R.I. 1992).

285. *Id.*

contract.²⁸⁶ In the buyer's contract, and specifically in the "Itemization of Amount Financed" portion of the contract, the representation was made that the service contract fee was for a third-party warranty company.²⁸⁷ On the second page of the contract, however, in standard boilerplate language, it stated that some of the payments made to third parties may be retained by the dealership or may be given back to the dealership on a basis of commission or other similar reasons.²⁸⁸ Yet the first page of the buyer's contract stated that the dealership would retain a portion of the fees that were marked with an asterisk.²⁸⁹ There was no asterisk anywhere in the buyer's contract, but the dealership retained \$555.00 of the service contract fee (as well as portions of other fees).²⁹⁰ The court failed to find commonality because in some of the contracts there was no disclosure language, while the contracts similar to the buyer's included a disclosure on the second page of the contract but no asterisk.²⁹¹ The court also found that typicality was not met because the named plaintiff's contract was not similar to the absent class members' contracts with the dealership.²⁹² Finally, the court stated that even if the buyer had sufficiently carried the burden of proof in regard to the prerequisites, he would have not been able to sufficiently establish that common questions of law and fact predominated over other questions of an individualized nature.²⁹³

Before a motion for class certification can be made, counsel must file a complaint stating why the claim is being brought and how the class intends to pass muster for the causes of action it pleads. As was demonstrated in *Kelley*, it is not sufficient to simply state that the defendant committed "false representation[s] in connection with a sale of a motor vehicle."²⁹⁴ The following facts should accordingly be woven into the face of the complaint to substantiate the claim of promissory fraud.

The first element requires the plaintiff to show that the defendant made a false or fraudulent representation. Counsel should keep this first one simple and allege that the dealership made false representations that certain items charged were done so in order to pay third parties for services rendered to the dealership and also to the buyer.

The next element requires that the defendant made the promissory representation with the present intent to deceive the plaintiff

286. *Kelley v. Galveston Autoplex*, 196 F.R.D. 471, 472 (S.D. Tex. 2000).

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 472-73.

291. *Id.* at 475.

292. *Id.* at 476.

293. *Id.* at 477.

294. *Id.* at 473.

and to not perform in the future. Regarding this element of intent, the facts here are similar to the seminal case of *Edgington v. Fitzmaurice*.²⁹⁵ In that early English case, the directors of a company told the plaintiff that if he purchased the debentures, the money he spent would be used to upgrade the company's facilities and machines. However, when the directors made that representation, it was not only false, but the directors had the specific and present intent never to honor that promise by instead using the plaintiff's money to pay off other accruing debts.²⁹⁶ Similarly, the car dealership represented to each member of the class that the extra money spent on various fees would be paid to a third party for the services that they were providing to that particular buyer (for example, insurance coverage). However, when the dealership made that promise, it knew that at least a portion of the money would not be given to the third party. Instead, it would be used to increase the dealership's own profits on each individual sale.²⁹⁷

Overall, this is not an easy element to prove and accordingly, it is vital to the class that counsel establishes that the defendant's conduct was not a one-time occurrence—it needs to be shown in the face of the complaint in some form or fashion that this was a promissory misrepresentation that the defendant habitually made.

Another element to prove is reliance. As stated above, counsel must demonstrate that every class member accepted the defendant's insincere promise by entering into the agreement with the defendant—a simple bargained-for exchange. The dealership promised that the extra charges were going to a third party for services that the buyer was benefiting from,²⁹⁸ and the buyer was promising to pay a particular amount to the third party on the premise that the money was going toward such services. Simply put, the buyer relied on the dealership's promissory representation by entering the contract and binding herself to the terms and conditions contained within it. Furthermore, because every putative member has entered a contract with the dealership to purchase a car, there is no need for an individual determination of reliance for each member.

295. (1885) 29 Ch.D. 459.

296. *Id.* at 461.

297. For further proof of this fraudulent intent, the plaintiff class counsel would likely want to conduct an investigation into the two contracts and learn how these fees were specifically charged. Were the fees charged in accordance with a particular set policy or practice? Did the fees change with a particular value of the car being sold or type of financing that was needed? Counsel should seek to answer these questions and more, beginning with a thorough reading of the employee handbook or policy manuals to determine whether employees were taught to answer questions from customers regarding these fees.

298. The benefits that the class representative paid extra for were the service warranty, in case the car needed repair, and also credit life insurance and accident and health insurance. *Kelley*, 196 F.R.D. at 472.

This brings us to the last and final element of promissory fraud: damages. The second part of the economic strategy is needed here by counsel to help avoid this pitfall in common law fraud claims. By using expert testimony to establish both the extent of the damages and to assign a dollar value to any variation in those damages, the plaintiff class can avoid the need for individual inquiry. For example, in *Kelley*, the named class representative was charged thousands of dollars extra in various fees and arguably suffered \$750.00 worth in damages because that was the amount retained by the dealership. However, the court cannot be expected to conduct an individual hearing for all 2000 or more class members, which is exactly why the strategy is to avoid this strenuous inquiry by using an economist to assign a dollar value to the class members' harm.²⁹⁹ Even if the court is not persuaded by the economist, however, many other options for this potential problem exist and should be argued for if the need arises.³⁰⁰ For the following analysis of the four obstacles a plaintiff must get past, I will continue to refer to the case of *Kelley v. Galveston Autoplex*.

1. Rule 23(a)(2)—Commonality

At this point, counsel has sufficiently supported his allegations and is ready to take on the task of arguing that commonality is sufficiently met for a grant of class certification. Employing the two-part economic tort strategy here, class counsel should center all allegations on the dealership's routine practice or policy of charging miscellaneous fees to the customers who bought the used cars during the relevant time period. The purpose here is to emphasize the common issues of fact and law in the class to the court,³⁰¹ especially because there were at least two versions of the contract: one with the disclosure language but no asterisk and one with no disclosure language at all. Although not mentioned in the case specifically, the contracts most likely also differed because the charges from contract to contract presumably varied depending on what services were contracted for by the buyer. These variations will no doubt be highlighted by opposing counsel and if the court loses sight of the overarching conduct of the defendant, as the court did in this case, the differences will be

299. One strategy is for the economist to present the total value of harm caused by the defendant and ask the court to simply award that amount to be placed in a fund where each plaintiff would submit a claim form stating his or her specific damages. This claim would have to be substantiated, of course, by the bill of sale and, in particular, the Itemized List of the charges.

300. Counsel must be creative here.

301. It is important to keep in mind here, and even as the *Kelley* court states, the test for commonality "is not demanding and only requires . . . 'one issue, the resolution of which will affect all or a significant number of the putative class members.'" *Kelley*, 196 F.R.D. at 475 (quoting *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir. 1999)).

overwhelming and thus it may appear that there is not a single common question of law or fact. Yet this cannot be the right result, for what is more individualized than a health insurance contract as seen in *Thompson v. Community Insurance Co.*, or the brand and amount of cigarettes smoked by an individual as in *Price v. Philip Morris*?

The difference here is the focus. Although the claim in *Kelley* was for fraud, the court was drawn into the issues surrounding the contract and showed this by citing a contract case as its authority for finding no single common issue in the fraud case at hand.³⁰² The plaintiff must avoid this pitfall and keep the focal point on the defendant's overarching conduct of promissory fraud, not on the actual contracts. The common issues of fact and law alleged should accordingly reflect this focus so that during this assessment of commonality, the court will see that many commonalities do exist in the class membership.

For example, counsel should continually highlight that there are just two standard form contracts at issue here, both of which contain the promissory representation and which every putative class member signed. This is a common issue of fact that is hard to ignore, especially in light of other economic tort class actions that passed muster at this stage, such as those *Thompson* and *Price*. A simple legal issue is whether all of these members have a right to redress this alleged wrong that they have suffered. If this issue of the dealership's culpability of the promissory representations were resolved, each member would be affected.

2. Rule 23(a)(3)—Typicality

This first step of the economic tort strategy is also important for the typicality analysis because the court must find that the claims of the representative parties are similar to those of the putative class members. Yet, most likely, if the court finds sufficient commonality then it will also find that typicality is met.³⁰³ With the two contracts in *Kelley*, the key to success is to have at least two class representatives: one like the named representative who signed the contract with the disclosures and one buyer who signed the contract with no disclosure language. This is what class counsel did not do in *Kelley*. In fact, the court states that “[o]f the 2,000 potential class members, [the] Plaintiff has only identified one other person whose lack of dis-

302. *Id.* The case cited by the court, *Broussard v. Meineke Disc. Muffler Shops, Inc.*, was a class action for a breach of contract in which each franchise agreement was different from one another. 155 F.3d 331 (4th Cir. 1998). Hence, the court found that commonality was not met given the facts.

303. See *supra* discussion in Part II.B.3 and accompanying notes.

closure stems from an omitted asterisk.”³⁰⁴ I do not know why counsel permitted this to become an issue when it is such a foreseeable one, especially if it really is true that only one other buyer was found with that particular contract. A common-sense argument for the dealership to make, which it did, is that the representative plaintiff, as named, will spend the entire litigation defending issues that do not relate to him because of the difference between the promissory representation made to him but not the other 2000 members. Overall, if counsel had named a representative from the group of individuals that signed the contract with no disclosure language, the court would not be able to find such an easy reason to dismiss the motion for certification.

3. *Rule 23(b)(3)—Predominance and Superiority*

The biggest challenge in the way of any (b)(3) class certification, whether sounding in fraud or not, is showing that the class fits within the specific parameters: the plaintiff must show not only that one common issue exists, but that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.”³⁰⁵ Interestingly, in this case, the dealership did not object to predominance or superiority, “except indirectly by denying that common issues exist[ed].”³⁰⁶ While this would normally be a significant break for the plaintiff, in this case it ended up not being such because the court had already found the plaintiff failed to meet the burden of commonality and typicality. Yet assuming for the moment that with the use of the economic tort strategy the plaintiff in a case such as *Kelley* would have been successful in the prerequisite stage, how would one get past predominance and superiority?

First, class members must demonstrate to the court that their claims are so intertwined that even though differences do exist, these are merely ancillary to the common issues affecting the entire class.

Second, counsel must continually employ the first part of the economic strategy test by emphasizing the defendant’s overarching conduct and maintaining the focus of the suit on the plaintiff’s injuries that all occurred because of this misconduct. Most important at this point in the certification hearing, though, is the plaintiff’s focus on the theory of promissory fraud since the court will question whether there are too many individualized issues due the reliance element.

As discussed above, this particular type of economic tort is the missing tool to plaintiff class counsel’s ability to get a class certified

304. *Kelley*, 196 F.R.D. at 476.

305. FED. R. CIV. P. 23(b)(3).

306. *Kelley*, 196 F.R.D. at 477.

on a theory of fraud. While most courts are quick to dismiss a claim at the predominance inquiry when reliance is involved due to the need for considerable inquiry, this should not be the case here because the only inquiry the court must make is whether there is a valid contract between the dealership and buyer which contains the promissory misrepresentation. Also helpful to the plaintiff's case at this point is the fact that the court is not permitted to look into the merits of the case.³⁰⁷ Hence, the court will only focus on whether the requirements of Rule 23 are met. If there is no need for individual inquiry due to the general rule that in promissory fraud the reliance is contained in the acceptance of the defendant's promissory misrepresentation, then this element is actually common to the class and only further bolsters the plaintiff's case for predominance of common questions of fact and law.

Finally, the last thing that counsel must demonstrate to the court is that a (b)(3) class action is the most efficient and fair way to address the 2000 or more injuries caused by the dealership's promissory misrepresentations. The claims will not be large enough to incentivize individual members to bring their claims, and the class is too large for a mass joinder. This is also clearly a manageable case in that no individual inquiries of reliance will need to be conducted, and the class number is not like that in the *Price* case where hundreds of thousands of claimants' burdens would be on the court. Furthermore, because all of the injuries occurred in one state, there are no choice of law complications.

Although this model is not perfect, it shows that alleging promissory fraud in a class action may be a viable claim, where common law fraud is not without the perfect case.

D. Model 2—*Gunnells v. Healthplan Services, Inc.*

This model is based on the case *Gunnells v. Healthplan Services, Inc.*,³⁰⁸ which, like *Kelley*, is relatively scant on factual details because very little, if any, discovery had been conducted at this point.³⁰⁹ The relevant facts are that the Fidelity Group, Inc. (Fidelity),³¹⁰ at some point in 1995, created the IWG Health and Welfare Fund,

307. However, the plaintiff would want to plead with a little bit of specificity to avoid the perception that it is a frivolous suit. See *Olive v. Graceland Sales Corp.*, 293 A.2d 658, 661 (N.J. 1972) (noting that plaintiffs "reserve[d] the right" to plead with more specificity in order to meet class action requirements after discovery was conducted).

308. 348 F.3d 417 (4th Cir. 2003).

309. Again, this is because the court is not to look to the merits of the case prior to class certification; therefore, discovery is not permitted until after certification.

310. Fidelity Group consisted of the International Workers Guild, Inc. (IWG) and National Association of Business Owners and Professionals (NABOP). *Gunnells*, 348 F.3d at 422.

which sold a health care plan to employees and their families.³¹¹ The plan was marketed as an ERISA healthcare plan yet never complied with the federal standards for ERISA plans.³¹² In April 1995 Fidelity hired a third party administrator, TPCM, to process claims. From the beginning, TPCM was too slow in processing these claims and, thus, claims were backlogged. In May 1997 Fidelity fired TPCM and the claim management process became an in-house operation. The defendants allege that, during this transfer, problems arose with obtaining the data from the third party, which ultimately led to the termination of the plan just months later. At this point, “[a]pproximately 1400 employees and their families [had] contracted for coverage under the Plan[]” and “[a]s many as 2900 claims [had] gone unpaid, amounting to millions of dollars in unpaid medical bills.”³¹³

Also, despite the fact that from August of 1996 until June of 1997 the South Carolina Department of Insurance ordered all marketing to stop, Fidelity continued to sell the plan to employees.³¹⁴ The district court certified the class on its fraud and negligent misrepresentation theories,³¹⁵ however, the Fourth Circuit decertified the class on the ground that the common issues in the case did not predominate the disparate ones.³¹⁶

With these given facts, counsel needs to support the claim of promissory fraud in the initial case in order to avoid the appearance of a frivolous suit. For the first element, counsel should allege the most simple and obvious misrepresentation that occurred—that Fidelity marketed its plan through its agents as an ERISA plan when in fact it was not. The second element requires counsel to show that Fidelity knowingly made this misrepresentation with the intent to deceive and never perform in the future. The two facts that should be emphasized here are that Fidelity never complied with ERISA standards (over a two-year period) and that, moreover, Fidelity was on clear notice of this fact because the state government ordered all marketing to cease. Yet Fidelity defiantly continued to market and sell the plan for over a year until it ultimately folded under the backlog of the claims and millions of unpaid bills. With every marketing

311. *Id.* I infer here that this plan was sold to the employees of Fidelity Group, although the court is not clear on this point.

312. “ERISA requires plans to provide participants with plan information including important information about plan features and funding; [and] provides fiduciary responsibilities for those who manage and control plan assets” U.S. Dep’t of Labor, Health Plans & Benefits: Employee Retirement Income Security Act—ERISA, <http://www.dol.gov/dol/topic/health-plans/erisa.htm> (last visited Nov. 1, 2007).

313. *Gunnells*, 348 F.3d at 422.

314. *Id.*

315. *Id.* at 423.

316. *Id.* at 468.

brochure, letter, email, or call that went out representing that the plan was certified under ERISA, a promissory misrepresentation was made with the intent to induce employees to leave their current insurance provider for this presumably cheaper yet still reliable healthcare plan. For this point in the litigation, these allegations are sufficient; however, later down the road counsel will have to prove with evidence (for example, a policy manual) this intent to misrepresent the plan to potential customers and defraud them.

As for the reliance, every one of the 1400 employees presumably had to sign the insurance contract. In performing this uniform act, every member demonstrated his or her reliance on Fidelity's insincere promise that the plan was financially stable and backed because of the ERISA rules and regulations for all of its benefit plans.

The final element to allege is resulting damages. This is an easy one here because claims have already been submitted showing the class members' damages. There is thus no need for individual determinations of damages for the court to make because an expert can simply quantify the total damages using the claim forms already submitted by the class and, accordingly, show how the damages should be efficiently distributed to the class to promote fairness and efficiency.³¹⁷

For the following four analyses, I will argue that the first two (commonality and typicality) were pled with near perfection by counsel in *Gunnells*; however, this is not the case with predominance and superiority.

1. Rule 23(a)(2)—Commonality

Class counsel emphasized the defendant's overarching misconduct here and accordingly, the Fourth Circuit did not reverse this portion of the district court's finding. Similar to what counsel actually did,³¹⁸ a simple statement should be made describing how the overall promissory misrepresentation was made to every plaintiff in the same

317. One way to distribute these damages would be a tier system, similar to the one plausible in Model 1 (*Kelley*), *supra* Part V.C.

318. Because class counsel were not using promissory fraud, their statement here was slightly different than what I propose should be used for promissory fraud. Nevertheless, the following language is borrowed from the Brief of Appellees to show a real example of how the first part of the economic tort strategy works: "Rule 23(a) is satisfied in this case involving a single insurance plan which was negligently administered by two defendants, sold in a uniform manner using uniform, company-approved marketing materials and methods, and caused all class members the same type of injuries." Brief of Appellees at 18, *Gunnells v. Fid. Group, Inc.*, Nos. 01-2419; 01-2420, 348 F.3d 417 (4th Cir. 2002). The Brief of Appellees then went on to remind the court of its duties, which I also submit here is the best route to take: "Inquiries into the merits of claims are disfavored. The district court properly refrained from making an inquiry into the merits when discovery on the merits has not occurred." *Id.* (citations omitted).

manner with the same materials or method, therefore causing the same type of injuries to all putative class members. Counsel should then list several common questions of fact and law, which is exactly what they did. Counsel stated:

Commonality exists because the identical contract of insurance covers all class members, standardized marketing materials were used to present the Plan to each subclass in materially the same way, and the main measure of damage is unpaid medical bills that have been adjudicated, and premiums paid for worthless coverage. . . . Agents made verbal presentations but all presented the Plan in the same way (as an ERISA plan) as instructed by the marketing materials. NABOP trained the Agents to market the Plan. Each Agent presented the Plan as instructed by NABOP. Each Agent relied on the Plan materials for making their presentations. Each Agent sold their clients the same insurance. The Plan did not provide the coverage sold. Plaintiffs bought the Plan because of the coverage. The coverage was not provided as stated in the policy. No specific oral misrepresentation is important or alleged. Consequently, the classes certified satisfy Rule 23(a)(2).³¹⁹

Overall, the district court held, and the Fourth Circuit did not disagree, that there were five questions of fact and law common to the class: “(1) facts surrounding how TPCM managed its operations; (2) whether it created a backlog of claims; (3) whether it failed to enter claims into its system; (4) whether it breached its contractual duties; and (5) whether TPCM’s alleged negligence proximately caused Plaintiffs’ injuries by contributing to the failure of the Plan.”³²⁰ If promissory fraud had been pled as well, another common issue would be whether Fidelity’s alleged promissory misrepresentations also caused plaintiffs’ injuries by contributing to the failure of the plan.

2. Rule 23(a)(3)—Typicality

Although the opinion does not mention the class representative here like the *Thompson* court did in detail,³²¹ the court must find that this particular individual, or group of individuals, has claims typical to that of the class. Accordingly, counsel must ensure that the class representative was in the defendant’s employ, purchased the insurance plan within the relevant time frame, and has suffered damages in the form of an unpaid claim. If there were different tiers of insurance plans, it would be best to name a plaintiff for each tier in case the court decides subclasses are necessary.³²²

319. *Id.* at 21 (citations omitted).

320. *Id.* at 23.

321. See *Thompson v. Cmty. Ins. Co.*, 213 F.R.D. 284, 293 (S.D. Ohio 2002).

322. Noteworthy, again, is that each subclass must be found to independently meet the prerequisites of Rule 23.

3. *Rule 23(b)(3)—Predominance and Superiority*

While I argued above that counsel set a great example of the economic tort strategy in practice for the commonality assessment, this is not the case for the predominance assessment. Class counsel noted several times that only a few “mini-trials” would be needed for the individuals with very large claims and that accordingly this was manageable.³²³ This concession ended up being a hotly disputed issue, as it in essence opened the door for the defendants to argue validly that there was a great possibility that 1400 such trials would be needed. One of the only reasonable explanations for why class counsel opened this door is that they felt they had a much better case than typical class actions alleging fraud because of the claim forms that were already submitted. Thus, admitting to a few mini-trials was also submitting to the court that not every member will require this trial because of the claim forms.

Yet, even these few individual inquiries by the court could have been avoided with a claim for promissory fraud. While to argue this cause of action the facts must sufficiently support it, arguably, there was a promissory representation in the contract’s statement that the plan was an ERISA plan. This misrepresentation signaled to the employees that the insurance company was indeed a qualified one with the necessary financial backing and standards that are required by the federal government through ERISA.³²⁴ With the use of implicit reliance and the second part of the economic tort strategy, the court should not have to do any mini-trials. If the court reached a resolution of the defendant’s culpability as to promissory fraud, every class member would be affected in a significant way and the “light at the end of the tunnel” would become apparent. Thus, the common issues of facts and questions outweigh the individual differences in the insurance contracts because these differences will only need to be accounted for when the damages received by the defendant are distributed to the injured plaintiff class.

Finally, this (b)(3) action is the most efficient, fair, and manageable way to handle this controversy. Individual litigation would not be fair or efficient because many of the putative members presumably do not have claims that would be worth their time in bringing

323. See Brief of Appellees, *supra* note 318, at 26-27.

324. There is a possible argument that the “fraud on the market theory” should apply here. This theory rests on the generally accepted theory of the semi-strong market, which presumably also would hold true in the insurance context. Thus, there is an interesting argument that this presumption of reliance via the fraud on the market theory should apply in cases such as this one; however, scienter is still a necessary element as it is in promissory fraud. Therefore this theory would not give the plaintiff anything extra in this particular case, but it does add more credence to the implicit reliance notion of promissory fraud.

their own action, and for those that do, the court would be burdened with hundreds of suits against the same defendants for the same misconduct. Moreover, mass joinder is not a possibility because the sheer numbers of the class would be unmanageable in that form of litigation. Overall, the class action is simply the superior way of handling the plaintiffs' claims against the defendant.

VI. CONCLUSION

While the class-action-plaintiffs bar has found two successful avenues since *Amchem* for mass tort litigation—state courts and economic torts—this Comment has argued that the class-action-plaintiffs bar is still overlooking the tool of promissory fraud. This cause of action offers class counsel two significant benefits: the advantages of the economic tort strategy and the implicit reliance from the fact that when one makes a promise, a representation is also made that there is a present intent to perform the obligations of the promise.

As demonstrated in *Price v. Philip Morris* and *Thompson v. Community Insurance Co.*, the first part of the economic tort strategy plays an important role in refocusing the typical attention on the individualization of class members to the overarching harmful misconduct of the defendant. The second part of the strategy relieves the court of the burden to conduct “mini-trials” for individual class members' damages, and instead quantifies and assigns a dollar amount to the class members' harm.

Counsel have never had a viable claim in the class action arena when the defendant committed fraud due to the fact that significant individual determination would have to be made by the court for the element of reliance (and also damages) in common law fraud. Yet with promissory fraud, individuals are justified in relying on promissory representations because it is understood that if a promise is made, there is a concomitant intent to follow through with that promise. Accordingly, where there is a promissory misrepresentation in a contract that an individual has signed, there is reliance. Thus, class counsel can use promissory fraud in the class action context and not invoke the traditional problems of individualized determinations for reliance and damages.