CODIFYING THE ISSUE CLASS ACTION

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INTRODUCTION

In the modern class action landscape shaped by a formalist Supreme Court and an activist Congress, class actions have been shunted from the states to the federal courts,[1] where they often receive a hostile reception.[2] And that grave scenario does not even account for the Court's recent jurisprudence upholding class action waivers in consumer contracts that prevent plaintiffs from pursuing

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[1] Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2012); Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1754 (2008) (concluding that in the wake of CAFA, "federal courts have seen an increase in diversity removals and, especially, original proceedings in the post-CAFA period as a result of the expansion of the federal courts' diversity of citizenship jurisdiction").

[2] *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 746 (2013) (analyzing recent developments in federal courts that heightened various class action standards and have "made class actions more difficult for plaintiffs to bring").

class actions in any venue.[3] But one class action device is thriving, impervious (thus far) to either Congressional or Supreme Court intervention: the Rule 23(c)(4) issue class action.[4]

"Issue class action" is the name for an action that encompasses only component parts of class plaintiffs' claims rather than seeking to adjudicate the entirety of those claims.[5] In an issue class action, certain issues may be litigated on behalf of the class, while the elements that require individualized adjudication are excised from the class action for litigation elsewhere.[6] This severance of individual issues not capable of classwide resolution allows a class action to move forward even when it could not survive examination under the mandate of Rule 23(b)(3)'s predominance test[7]—which requires common issues in the class action as a whole to predominate over all issues that would require individualized adjudication.[8] The predominance criteria of (b)(3) has historically doomed a number of ambitious class actions, as federal appellate courts could not square the concept of predominance in cases involving a multitude of often complex individual elements of plaintiffs' claims.[9]

But this is exactly why the issue class action has proven to be so appealing. According to its proponents, issue class actions automatically satisfy the predominance test of (b)(3), making certification of an issue class action dramati-

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[3] *See generally* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 199 (2015) (opining that "there is every reason to believe that businesses will eventually employ [class] waivers en masse . . . all but entirely insulat[ing] themselves from class action liability"); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility LLC v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012) (lamenting that "[a]ll of the doctrinal developments . . . circumscribing the reach of class actions pale in import" compared to the death blow to consumer class actions delivered in *Concepcion*).

[4] FED. R. CIV. P. 23(c)(4).

[5] *See* Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1874–76 (2015) (articulating a component-based approach to consideration of issues raised by class claims). *See generally* Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709 (2003) [hereinafter *End-Run*]; Laura J. Hines, *The Unruly Class Action*, 82 GEO. WASH. L. REV. 718 (2014) [hereinafter *Unruly Class Action*].

[6] *See, e.g.*, Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1502 (2005); Joseph A. Seiner, *The Issue Class*, 56 B.C. L. REV. 121, 123 (2015).

[7] *See, e.g.*, Seiner, *supra* note 6 ("Even when a class has not been permitted to proceed under Rule 23(b), then, litigants can still certify particular issues common to a class under Rule 23(c)(4).").

[8] FED. R. CIV. P. 23(b)(3).

[9] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624 (1997) ("Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard."); Klonoff, *supra* note 2, at 792 ("[I]n recent years, the courts have made it far more difficult to certify class actions under (b)(3) by summarily finding, after identifying significant individualized issues, that predominance cannot be satisfied.").

cally easier than an ordinary (b)(3) class action.[10] In my view, Rule 23 does not currently provide statutory authorization for this interpretation of Rule 23(c)(4).[11] As I have argued, neither a textualist nor an intentionalist interpretation of (c)(4) allows its application as an end-run around (b)(3)'s predominance requirement.[12] Indeed, it is utterly ahistorical to believe that the framers of Rule 23 had the vaguest notion of a class action that eschewed any obligation to provide a forum in which class members could adjudicate their claims through to final judgment.[13] The framers clearly viewed the class action rule as a joinder device for joining *claims*, not subparts of claims.[14]

Yet support for the issue class action is legion, with treatise authors, academics, and judges alike championing the issue class action.[15] Given this virtually unanimous enthusiasm for the recognition of a Rule 23 issue class action, it came as no surprise that the subcommittee tasked by the Advisory Committee on Civil Rules to consider amendments to Rule 23 quickly identified issue class actions as a top priority.[16] Unfortunately, after months of deliberations, the circulation of various codification proposals, and a host of opportunities for interested stakeholders to weigh in,[17] the subcommittee in late 2015 halted its efforts to proceed with any amendments related to issue class actions.[18]

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[10] *See, e.g.*, Butler v. Sears, Roebuck & Co., 702 F.3d 359, 361 (7th Cir. 2012) ("If there are no common questions or only common questions, the issue of predominance is automatically resolved.").

[11] *See generally End-Run*, *supra* note 5; *Unruly Class Action*, *supra* note 5.

[12] *See Unruly Class Action*, *supra* note 5, at 729–55.

[13] *See id.* at 746–55.

[14] *See, e.g.*, FED. R. CIV. P. 23(a)(3) (requiring putative class representative to establish that his or her *claims* are typical of the *claims* of the class).

[15] *See, e.g.*, MANUAL FOR COMPLEX LITIGATION § 21.24 (4th ed. 2004); 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.86[2] (3rd ed. 2011) (explaining that a "court may certify a class action as to particular issues even if the cause of action as a whole would not meet the predominance requirement"); 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:26 (5th ed. 2012 & Supp. 2015); 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1790 (3d. ed. 2005 & Supp. 2015); Edward F. Sherman, *"Abandoned Claims" in Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 GEO. WASH. L. REV. 483, 497 (2011).

[16] *See, e.g.*, CIVIL RULES ADVISORY COMMITTEE, MINUTES 37 (Apr. 10–11, 2014) (describing preliminary work of the Rule 23 Subcommittee that produced "a list that identifies three topics as potential 'front burner' subjects" including settlement classes, issues classes, and class notice); *see also* CIVIL RULES ADVISORY COMMITTEE, DRAFT MINUTES 35 (Oct. 30, 2014) (describing issue class actions "and the relationship between Rule 23(c)(4) and Rule 23(b)(3)" as one of the Subcommittee's "front-burner issues").

[17] *See* RULE 23 SUBCOMMITTEE ADVISORY COMMITTEE ON CIVIL RULES: MIN-CONFERENCE ON RULE 23 ISSUES 39–44 (Sept. 11, 2015) [hereinafter RULE 23 MIN-CONFERENCE]; ADVISORY COMM. ON CIVIL RULES, REPORT TO THE STANDING COMMITTEE 8 (Jan. 8–9, 2015) (describing status of Rule 23 Subcommittee's continued outreach to "groups for advice that will inform the decision whether to recommend that work begin on possible class action amendments").

[18] ADVISORY COMM. ON CIVIL RULES, RULE 23 SUBCOMMITTEE REPORT (Nov. 5–6, 2015), http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-november-2015 [https://perma.cc/6SAW-SSBK].

Without overly rehashing concerns about the legitimacy of interpreting the current Rule 23 to authorize issue class actions, Part I of this article will nonetheless briefly track the evolution and current state of Rule 23(c)(4). The Rule 23 Subcommittee's decision to abandon work on issue class actions apparently rested on the faulty premise that a uniform understanding of Rule 23(c)(4) presently exists among the circuits, thereby obviating the need for additional rule guidance.[19] This assertion does not bear up under close scrutiny as few circuits have definitively addressed the subject, and conflicting interpretations still abound among those that have weighed in.[20] Wholly apart from the imperative of legitimizing a judicially created class action device, the Advisory Committee's failure to proceed with its consideration of Rule 23(c)(4) leaves lower courts in a continuing state of uncertainty and disuniformity, bereft of much-needed guidance and clarity.

Part II evaluates the varying issue class certification criteria adopted by appellate courts, as well as those tentatively proposed by the Rule 23 Subcommittee. This divergence of existing approaches to issue class certification underscores the need for a rule amendment that clearly and uniformly defines the parameters of this new device. Finally, in Part III, the article identifies several additional Rule 23 subdivisions that may require amendment, or at least thorough consideration, even if the Advisory Committee chooses not to codify the issue class action itself.

I. THE ENIGMA OF RULE 23(C)(4)

Confusion surrounding Rule 23(c)(4) has persisted throughout its fifty-year history, puzzling courts and interested stakeholders alike.[21] The enigmatic wording of Rule 23(c)(4) appears to provide courts with either boundless or obscure authority: "When appropriate, an action may be brought or maintained as a class action with respect to particular issues."[22] Indeed, Rule 23(c)(4)'s textual language has been variously characterized, even by its advocates, as "ambig-

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[19] *See id*. at 90–91 (After "[c]onsiderable discussion," the Subcommittee reached the conclusion that "there is no significant need for such a rule amendment. The various circuits seem to be in accord about the propriety of such [issue class action] treatment '[w]hen appropriate,' as Rule 23(c)(4) now says.").

[20] *See infra* Part I.B; *see also* Jenna G. Farleigh, Note, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1622 (2011) (contending that "the same courts (and even the same judges) reach divergent results on whether or not to allow issue class certification in various situations").

[21] *See, e.g.*, *Unruly Class Action*, *supra* note 5, at 719–23; Bruce H. Nielson, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 HARV. J. LEGIS. 461, 483 (1988) (lack of understanding of (c)(4)'s text "discourages all but the most innovative and imaginative judges").

[22] FED. R. CIV. P. 23(c)(4); *see also* Burch, *supra* note 5, at 1891 (attributing the longstanding divergence of opinion regarding Rule 23(c)(4) to "the scant guidance" offered by its "when appropriate" wording).

uous,"[23] opaque,[24] vague,[25] confus[ing],[26] and "unhelpful."[27] As Rule 23(c)(4)'s decades-long journey from obscurity to renaissance amply demonstrates,[28] this chameleonic provision simply cannot be understood through the plain meaning of its text.[29]

A. The Evolution of the Rule 23(c)(4) Issue Class Action

Rule 23's essential certification criteria date back to the major 1966 amendments that significantly restructured the federal class action rule.[30] In order to achieve judicial approval for representational litigation, Rule 23 mandates that a class proponent satisfy each of the familiar prerequisites set forth in subsection (a)—numerosity, commonality, typicality, and adequacy[31]—and also meet one of the specific class action typology requirements of subsection (b).[32]

Rule 23(b)(1) classes can largely be understood as the class action equivalents of certain necessary party joinder provisions reflected in Rule 19,[33] and Rule 23(b)(2) provides a mechanism for pursuing class-wide injunctive or declaratory relief.[34] Unlike its mandatory class siblings,[35] the (b)(3) class action

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[23] *See* Seiner, *supra* note 6, at 133 (conceding that Rule 23(c)(4) "is ambiguous, and does not explain when an issue class is appropriate").

[24] *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 385 (2005).

[25] *See* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 238–39 (2003) (opining that Rule 23(c)(4) contemplates "some manner of slicing and dicing" within a larger litigation, yet provides no guidance as to "[w]hat slicing and dicing is nonetheless 'appropriate' ").

[26] *See* Klonoff, *supra* note 2, at 764.

[27] *See* Scott Dodson, *Subclassing*, 27 CARDOZO L. REV. 2351, 2372.

[28] *See, e.g.*, Burch, *supra* note 5, at 1857 ("After a rocky debut in the 1990s . . . issue classes are now experiencing a renaissance . . . .").

[29] *See Unruly Class Action*, *supra* note 5, at 730–31. *But see In re* Nassau Cty. Strip Search Cases, 461 F.3d 219, 226 (2d Cir. 2006) (explaining that its interpretation of Rule 23(c)(4) derived from that provision's "plain language").

[30] *See, e.g.*, David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 588 (2013).

[31] FED. R. CIV. P. 23(a). *See generally* WRIGHT ET. AL., *supra* note 15, §§ 1759–1769.

[32] FED. R. CIV. P. 23(b). *See generally* RUBENSTEIN, *supra* note 15, § 4:1.

[33] *See* WRIGHT ET AL., *supra* note 15, § 1772 ("[Rule 23(b)(1)'s] emphasis on the effect individual adjudications may have on parties and absentees is very similar to the standard employed for determining what persons should be joined under Rule 19 to ensure a just adjudication of the dispute.").

[34] FED. R. CIV. P. 23(b)(2). *See generally* RUBENSTEIN, *supra* note 15.

[35] The mandatory nature of Rule 23(b)(1) and (b)(2) class actions results from the inability of class members to exit the class action. *See* WRIGHT ET AL., *supra* note 15, § 1777 (differentiating (b)(1) and (b)(2) class actions from the "special character of Rule 23(b)(3) classes," which include a "notice requirement and the option to exclude oneself from the judgment"). Once a mandatory class action has been certified, no plaintiff included in its definition may choose to proceed on an individual basis. Unwilling plaintiffs may dissent only by challeng-

must include reasonable notice to potential class members offering the right to be excluded from class proceedings (and the binding effect of a class judgment).[36] To proceed under (b)(3), a putative class plaintiff must establish that issues common to class claims "predominate" over individual issues that can be resolved only with regard to the circumstances of each class member.[37] Rule 23(b)(3) also demands that a proposed plaintiff class establish that the class action is "superior" to other adjudicative alternatives.[38]

Living up to its framers' characterization as the most "adventuresome" of the class action vehicles promulgated by the 1966 amendments,[39] Rule (b)(3) has provided decades of controversy regarding its scope and meaning.[40] Because claims for money damages ordinarily must be pursued through the (b)(3) class action,[41] (b)(3)'s domination of the class action landscape was inevitable: it is quite simply where the money is. Rule 23(b)(3)'s superiority and predominance prongs, however, have proven to be potent obstacles to obtaining class status.[42] In particular, the majority of federal courts of appeals and the Supreme Court have hewed in recent years to a quite stringent interpretation of predominance.[43]

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ing the certification of the class itself or filing objections to the terms of any settlement reached on behalf of the class.

[36] FED. R. CIV. P. 23(c)(2)(B). *See* WRIGHT ET AL., *supra* note 15, § 1777.

[37] FED. R. CIV. P. 23(b)(3). *See generally* RUBENSTEIN, *supra* note 15, § 4:47.

[38] *Id*.

[39] *See generally* Benjamin Kaplan, *A Prefatory Note to "The Class Action—A Symposium*," 10 B.C. INDUS. & COM. L. REV. 497 (1969); *see also* Klonoff, *supra* note 2 at 792 ("When (b)(3) was first introduced in 1966, it was considered 'the most complicated and controversial portion' of modern Rule 23.").

[40] *See, e.g.*, Allan Erbsen, *From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions*, 58 VAND. L. REV. 995, 997 (2005); Marcus, *supra* note 30, at 592.

[41] *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558 (2011) ("Given that structure [of Rule 23(b) class types], we think it clear that individualized monetary claims belong in Rule 23(b)(3)."); RUBENSTEIN, *supra* note 15, § 4:47 ("Rule 23(b)(3) class actions are money damages class actions.").

[42] *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 461 (E.D. La. 2006) ("Furthermore, courts have almost invariably found that common questions of fact do not predominate in pharmaceutical drug cases."); Gilles, *supra* note 24, at 388 (describing judicial "refusal to certify [class actions as] driven, in part, by concerns with 'fairness' to the defendants," and invocations of (b)(3) predominance as merely "doctrinal cover"); Klonoff, *supra* note 2, at 792.

[43] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 321 (3d Cir. 2008) (vacating district court's certification of antitrust class on grounds that plaintiff must do more than "demonstrate an 'intention' to try the case in a manner that satisfies the predominance requirement"); *In re* Initial Public Offerings Sec. Litig., 471 F.3d 24, 43 (2d Cir. 2006) (vacating class certification where "individual questions of reliance would predominate over common questions"); Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189 (9th Cir. 2001) (upholding district court conclusion that predominance could not be met where "variances in state laws overwhelm common issues of fact").

It is against this backdrop of judicial resistance to (b)(3) class actions that the issue class action came to be seen as a viable mechanism to avoid the predominance snare altogether.[44] In earlier work, I analyzed Rule 23(c)(4) in depth, including a textualist evaluation of its statutory language and structural placement within Rule 23,[45] and an intentionalist examination of its rulemaking history.[46] That process of statutory interpretation led to the conclusion that the current Rule 23(c)(4) does not authorize a form of class action beyond those set forth in Rule 23(b).[47]

Until the early 1980s, for example, courts rarely had occasion to even invoke Rule 23(c)(4).[48] Faced with the challenge and complexities of increasing numbers of mass tort claims, however, some innovative judges looked to reinvent Rule 23(c)(4) as a workaround to evade the onerous demands of (b)(3) predominance.[49] From its humble origins as a clarification of the implicit bifurcation between common and individual issues in (b)(3) class actions, Rule 23(c)(4) became reimagined as providing positive authority for certification of a so-called "issue class action."[50] Rule 23(c)(4), as thus reconceived, offered courts an alternative means of certification for class actions that could not satisfy Rule 23(b)(3) due to the presence of individual issues raised by class claims that overwhelmed any issues common to the class.[51] These courts therefore interpreted Rule 23(c)(4) to allow issue class actions that simply excised any component of plaintiffs' claims that could not be adjudicated on a class wide basis.[52] Rule 23(c)(4)'s alleged power to isolate issues common to the class

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[44] *See, e.g.*, Jon Romberg, *Half a Loaf is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249 (2002).

[45] *See Unruly Class Action*, *supra* note 5, at 729–44; *see also End-Run*, *supra* note 5.

[46] *See Unruly Class Action*, *supra* note 5, at 744–55; *see also* RULE 23 MIN-CONFERENCE, *supra* note 17, at 40–41 (showing the rulemaking history of Rule 23(c)(4) renders untenable the Rule 23 Subcommittee's recent assertion that "[s]ince its amendment in 1966, Rule 23(c)(4) has recognized" an issue class action that countenances class litigation when (b)(3)'s vital "predominance [mandate] could not be satisfied").

[47] *See Unruly Class Action*, *supra* note 5, at 766.

[48] *See Unruly Class Action*, *supra* note 5, at 725–26.

[49] *See, e.g.*, Gilles, *supra* note 24, at 381–84 (praising the "inventive" judges of the early 1980s for "find[ing] ways to use Rule 23 to address mass torts of the day"); *see also* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 316–18 (2013) (detailing the inhospitable reception given by federal courts to various Rule 23 innovations).

[50] *See, e.g.*, Gilles, *supra* note 24, at 388 ("While the drafters of the modern Rule 23 were justified in doubting that the legal requirements of the rule would be met in the typical mass torts case, given the inevitable individual issues of causation and damages, those concerns went by the wayside with the advent of the issue-specific class action pioneered by Judge Parker and others.").

[51] *See, e.g.*, Romberg, *supra* note 44, at 261–65.

[52] *See, e.g.*, DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 24 (2000); Susan E. Abitanta, *Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems, and a Solution*, 36 SW. L. J. 743, 750 (1982) (discussing the "new character" of (c)(4) that enables the "separation of is-

claims and exile from the action all individualized components led courts to assert that issue class actions automatically satisfied (b)(3)'s predominance requirement.[53]

Appellate courts ultimately rejected the most prominent of the early issue class actions explicitly adopting this interpretation of Rule 23(c)(4).[54] Nonetheless, the issue class action alternative has continued to thrive among lower courts eager to create a "body of federal common law to fill in the gaps."[55] Interest in developing the Rule 23(c)(4) issue class grew particularly after the Supreme Court in *Amchem Products, Inc. v. Windsor*[56] confirmed a rigorously high bar for the satisfaction of predominance.[57] Indeed, the increase in federal court adoptions of the issue class action in the last decade has been driven primarily by the desire to achieve some class efficiencies even in cases where the application of Rule 23(b)(3) predominance would otherwise prove fatal to certification.[58]

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sues in a (b)(3) [class] action" as "a means of achieving class certification"); *Unruly Class Action*, *supra* note 5, at 724–25; Romberg, *supra* note 44, at 261–62.

[53] *See, e.g.*, Butler v. Sears, Roebuck & Co., 702 F.3d 359, 361 (7th Cir. 2012), *vacated by Sears, Roebuck & Co. v. Butler*, 133 S. Ct. 2768 (2013) ("If there are no common questions or only common questions, the issue of predominance is automatically resolved."); JAY TIDMARSH, & ROGER H. TRANGSRUD, MODERN COMPLEX LITIGATION 490 (2d ed. 2010) ("By definition, these common issues would predominate, because only the common issues are litigated on a class-wide basis."); Romberg, *supra* note 44, at 289 ("For many years following the 1966 amendments to Rule 23, the dominant (if relatively unexplored) position of courts and commentators was that certifying only the common issues in a case automatically resulted in predominance, or at least resulted in predominance unless the common issues could not feasibly be severed from the individual issues."); Jeffrey W. Stempel, *Class Actions and Limited Vision: Opportunities for Improvement Through a More Functional Approach to Class Treatment of Disputes*, 83 WASH. U.L. REV. 1127, 1231 (2005) (opining that "the issue class action was not intended to be subject to the predominance requirement imposed upon class certification decisions affecting the entire lawsuit").

[54] *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1296–97 (7th Cir. 1995); *In re* N. Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847, 855–56 (9th Cir. 1982); *see also*, Burch, *supra* note 5, at 1891 (noting that the initial attempts at issue class certification were "haphazard and varied.").

[55] *See, e.g.*, Burch, *supra* note 5, at 1891.

[56] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997) ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."). *See* Cabraser, *supra* note 6; *see also* Sherman *supra* note 15, at 498.

[57] *See, e.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310–11 (3d Cir. 2008); *End Run*, *supra* note 5, at 750–51; Romberg, *supra* note 44, at 295.

[58] *See, e.g.*, Miller, *supra* note 49, at 319 n.125 (predicting more "single-issue class actions under Rule 23(c)(4)" in the wake of the Court's rejection of the Rule 23(b)(2) class action in *Wal-Mart*); Alex Parkinson, Comcast Corp. v. Behrend *and Chaos on the Ground*, 81 U. CHI. L. REV. 1213, 1233 (2014) (liberal use of Rule 23(c)(4) is a means of bypassing *Comcast*); Sherman, *supra* note 15 at 498 ("Issues classes have been particularly attractive to class action attorneys as a way to keep individual questions from predominating, so as to satisfy the 'predominance of common questions' requirement for a Rule 23(b)(3) class action.").

The Supreme Court since *Amchem* has consistently offered a strict and rule-based vision of Rule 23, and has been particularly insistent about the importance of scrutinizing Rule 23(b)(3) class actions to ensure satisfaction of the predominance prong.[59] In its recent decision in *Halliburton Company v. Erica P. John Fund, Inc.*, for example, the Court emphasized both the rigor with which lower courts should approach class certification and the special role of predominance in that analysis. The Court stated,

> our recent decisions governing class action certification under Federal Rule of Civil Procedure 23 . . . have made clear that plaintiffs wishing to proceed through a class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23, including (if applicable) the predominance requirement of Rule 23(b)(3). . . . In securities class action cases, the crucial requirement for class certification will usually be the predominance requirement of Rule 23(b)(3).[60]

In the nearly two decades that have elapsed since the Rule 23(c)(4) circuit first arose,[61] the Court has declined several opportunities to resolve the contested scope and meaning of Rule 23(c)(4).[62] In 2013, in the wake of its decision in *Comcast Corporation v. Behrend*,[63] for example, the Court granted certiorari,

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[59] *See, e.g.*, Seiner, *supra* note 6, at 153 (explaining that while there may be no "complete substitute for the traditional Rule 23(b) class action . . . in assessing the legal landscape post *Wal-Mart*, issue class certification is the best remaining tool available for workers to pursue systemic employment discrimination claims.").

[60] 134 S. Ct. 2398, 2412 (2014); s*ee also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) ("Rule 23(b)(3), as an " 'adventuresome innovation,' " is designed for situations " 'in which "class-action treatment is not as clearly called for," ' " . . . [which] explains Congress's addition of procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (*e.g.*, an opportunity to opt out), and the court's duty to take a " 'close look' " at whether common questions predominate over individual ones.") (citations omitted); Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1199 (2013) (determining if reliance in securities law claim had to be determined on an individual-by-individual basis, "reliance issues would predominate in such a lawsuit. The litigation, therefore, could not be certified under Rule 23(b)(3) as a class action.") (citation omitted); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2558 (2011) (distinguishing Rule 23(b)(2) class actions from those certified pursuant to Rule 23(b)(3), which "allows class certification in a much wider set of circumstances but with greater procedural protections [such as] . . . predominance, superiority, mandatory notice, and the right to opt out").

[61] *Compare* Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."), *with* Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3).").

[62] *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McReynolds, 133 S. Ct. 338 (2012) (denial of certiorari petition challenging issue class action certification); Pella Corp. v. Saltzman, 562 U.S. 1178 (2011) (same);. H&R Block, Inc. v. Carnegie, 543 U.S. 1051 (2005) (same); Grady v. Rhone-Poulenc Rorer, Inc., 516 U.S. 867 (1995) (same).

[63] *See generally* 133 S. Ct. at 1426.

vacated and remanded two class actions certified pursuant to Rule 23(c)(4).[64] But when both issue class actions were subsequently reaffirmed by the lower courts on remand,[65] the Court rejected renewed petitions for certiorari, failing once again to clarify the role of Rule 23(b)(3) predominance and Rule 23(c)(4).[66] Given its historically cautious approach to ambitious interpretations of Rule 23, the Court may be disinclined to endorse an expansive role for Rule 23(c)(4), but explication of any kind from the Court would at least help guide lower courts' understanding of this novel class device.

B. Missed Opportunity for Codification and Rule Guidance

Clarity might have been accomplished through the Rules Enabling Act rulemaking process, as the Civil Rules Advisory Committee directed a special project Rule 23 Subcommittee to consider possible amendments to Rule 23. As the Advisory Committee summarized in its Minutes from April of 2014, the subject of issue class actions qualified as a top priority among such potential Rule 23 amendments because "[d]ifferent circuits treat Rule 23(c)(4) differently. Serious questions arise from integration of Rule 23(c)(4) with the predominance criterion of Rule 23(b)(3)."[67] Again, in December of 2014, the Advisory Committee noted that "[t]he role of 'issues' classes under Rule 23(c)(4) has long seemed uncertain to many observers, including the relation to the 'predominance' requirement in Rule 23(b)(3)."[68] And in April of 2015, the Advisory Committee reiterated concerns about Rule 23(c)(4): "The relationship of Rule 23(c)(4) issues classes to the predominance requirement in Rule 23(b)(3) has been a longstanding source of disagreement."[69]

In November of 2015, however, the Rule 23 Subcommittee ultimately decided to withdraw its efforts to codify the issue class action based on its conclusion that "the various circuits seem to be in accord about the propriety of [issue

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[64] *See* Whirlpool Corp. v. Glazer, 133 S. Ct. 1722 (2013); Sears, Roebuck & Co. v. Butler, 133 S. Ct. 2768 (2013). In her dissenting opinion in *Comcast*, Justice Ginsburg cited Rule 23(c)(4) in a footnote for the proposition that Rule 23(b)(3) class actions often included bifurcation of common liability issues from individualized damages determinations. 133 S. Ct. at 1437 n.* (Ginsburg, J., dissenting).

[65] *See In re* Whirlpool Corp., 722 F.3d 838, 861 (6th Cir. 2013); Butler v. Sears, Roebuck & Co., 727 F.3d 796, 802 (7th Cir. 2013).

[66] *See* Sears, Roebuck & Co. v. Butler, 134 S. Ct. 1277 (2014) (denying petition for *certiorari*); Whirlpool Corp. v. Glazer, 134 S. Ct. 1277 (2014) (same).

[67] *See* CIVIL RULES ADVISORY COMM., MINUTES OF APRIL 2014 MEETING 37 (Apr. 2014), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2014 [https://perma.cc/786Q-GRTX].

[68] *See* CIVIL RULES ADVISORY COMM., REPORT TO COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 10 (Dec. 2014), http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-december-2014 [https://perma.cc/3VNU-MR7E].

[69] CIVIL RULES ADVISORY COMM., MINUTES OF APRIL 2015 MEETING 40 (Apr. 2015), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-april-2015 [https://perma.cc/9Q2M-HEA3].

class certification] '[w]hen appropriate,' as Rule 23(c)(4) now says."[70] The appellate courts, however, have *not* reached consensus regarding the propriety and contours of the issue class action.[71]

The circuit split to which the Advisory Committee referred grew out of the Fifth Circuit's explicit rejection of Rule 23(c)(4) as an end-run around (b)(3)'s predominance in *Castano v. American Tobacco Company*:

> Severing the defendants' conduct from reliance under rule 23(c)(4) does not save the class action. A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial. . . . Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.[72]

Citing *Castano* as binding precedent, the Fifth Circuit reiterated this view of Rule 23(c)(4) in *Allison v. Citgo Petroleum Company*.[73]

In the intervening years since *Castano*, the Second,[74] Third,[75] Sixth,[76] and Seventh[77] Circuits have issued opinions contrary to the Fifth Circuit's interpre-

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[70] *See* CIVIL RULES ADVISORY COMM., RULE 23 SUBCOMMITTEE REPORT 91 (Nov. 5–6, 2015), http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-november-2015 [https://perma.cc/7TKP-RQ79]; *see also* Burch, *supra* note 5, at 1891–93 (describing "emerging consensus" among lower courts surrounding Rule 23(c)(4) issues classes).

[71] *See, e.g.*, Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 200 n.25 (3d Cir. 2009) ("The interaction between the requirements for class certification under Rule 23(a) and (b) and the authorization of issues classes under Rule 23(c)(4) is a difficult matter that has generated divergent interpretations among the courts."); RUBENSTEIN, *supra* note 15, § 4:91 ("[C]ourts and commentators are sharply split on when issue certification is proper under Rule 23(c)(4).").

[72] Castano v. Am. Tobacco Co., 84 F.3d 734, 745–46 n.21 (5th Cir. 1996) (citations omitted).

[73] Allison v. Citgo Petroleum Corp., 151 F.3d 402, 422 (5th Cir. 1998) ("Thus, under the plaintiffs' theory, certification of the first stage of the pattern or practice claim would be appropriate presumably because individual-specific issues would be 'severed'—but only temporarily—under Rule 23(c)(4), making issues common to the class predominant (at least theoretically) for the purposes of meeting the (b)(3) requirements. But such an attempt to 'manufacture predominance through the nimble use of subdivision (c)(4)' is precisely what *Castano* forbade.").

[74] *In re* Nassau Cty. Strip Search Cases, 461 F.3d 219, 227 (2d Cir. 2006).

[75] Gates v. Rohm & Haas Co., 655 F.3d 255, 272–73 (3d Cir. 2011) (adopting expansive view of Rule 23(c)(4) but upholding district court's rejection of issue class certification "[g]iven the inability to separate common issues from issues where individual characteristics may be determinative").

[76] *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838, 860 (6th Cir. 2013).

[77] Butler v. Sears, Roebuck & Co., 702 F.3d 359, 361 (7th Cir. 2012).

tation, finding that Rule 23(c)(4) does provide authority for the certification of an issue class action even when the range of issues necessary to resolve a class claim that would otherwise fail (b)(3)'s predominance criteria. While several sister circuits have asserted generalized support for the concept of an issue class, perhaps resulting in a mistaken impression of consensus, close examination of those cases reveals that none actually approved certification of an issue class action that failed Rule 23(b)(3) predominance as a whole.[78]

The Ninth Circuit's opinion in *Valentino v. Carter-Wallace, Inc.*, for example, created the initial Rule 23(c)(4) circuit split by expressly rejecting the Fifth Circuit's interpretation of Rule 23(c)(4) in *Castano*. The court held that "[e]ven if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."[79] Yet in spite of its embrace of Rule 23(c)(4) to support class certification even without predominating common issues, the Ninth Circuit vacated and remanded the class action on appeal in *Valentino*, finding that the district court had "abused its discretion by not adequately considering the predominance requirement before certifying the class."[80]

The Fourth Circuit offered similarly strong rhetoric about Rule 23(c)(4) in *Gunnells v. Healthplan Services., Inc.*, but utilized Rule 23(c)(4) merely to certify plaintiffs' entire claims against one defendant and declined to certify at all claims against another set of defendants: "All other courts have explicitly or implicitly endorsed an interpretation of (c)(4) that considers whether Rule 23's predominance requirement is met by examining *each cause of action* independently of one another, not the entire lawsuit, as the dissent would."[81] Stressing its view of "the continuing vitality of Rule 23(b)(3)'s predominance requirement," the court explained that it had "scrupulously analyzed whether

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[78] *See, e.g.*, *In re* St. Jude Med., Inc., 522 F.3d 836, 841 (8th Cir. 2008) (citations omitted) ("Even courts that have approved 'issue certification' have declined to certify such classes where the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation. . . . Given the individual issues discussed above, we think this is such a case."); Klay v. Humana, Inc., 382 F.3d 1241 (11th Cir. 2004) (applying Rule 23(c)(4) to certify one class claim in which common issues predominated over individual issues while denying certification of a second class claim that lacked such predominance).

[79] Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996) (*citing In re* N. Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847, 856 (9th Cir. 1982)).

[80] *Id.* ("Here, the certification order merely reiterates Rule 23(b)(3)'s predominance requirement and is otherwise silent as to any reason why common issues predominate over individual issues certified under Rule 23(c)(4)(A). There has been no showing by Plaintiffs of how the class trial could be conducted.").

[81] Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 441 (4th Cir. 2003).

Plaintiffs' claims against [one defendant] . . . taken as a whole, satisfies all of Rule 23's requirements, including predominance."[82]

The Subcommittee seems to have accepted recent suggestions that the Fifth Circuit has altered its express rejection of (c)(4) as procedural tool to avoid (b)(3)'s requirement that common issues predominate over individual issues raised by class claims.[83] Yet the Fifth Circuit has never expressly overruled its Rule 23(c)(4) precedents, and could only do so through an *en banc* proceeding:

> It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court. Indeed, even if a panel's interpretation of the law appears flawed, the rule of orderliness prevents a subsequent panel from declaring it void.[84]

Moreover, none of the Fifth Circuit's more recent citations to Rule 23(c)(4) evidences the alleged retreat from its prior holdings that class claims as a whole must satisfy (b)(3)'s predominance requirement.[85] The court's decision in the BP oil spill litigation, *In re Deepwater Horizon*, for example, has been cited as confirmation that the court has reversed course on its interpretation of Rule 23(c)(4).[86] Yet the court in *Deepwater* simply rejected the specious argument that the Supreme Court's decision in *Comcast* required class plaintiffs to provide a damages model obviating the need for any individualized damages adjudication.

> As we stated in *Bell Atlantic Corp. v. AT&T Corp.*, . . . "[e]ven wide disparity among class members as to the amount of damages," does not preclude class certification . . . . Accordingly, as we recognized in *Steering Committee v. Exxon Mobil Corp*, it is indeed "possible to satisfy the predominance . . . requirements of Rule 23(b)(3) in a mass tort or mass accident class action" despite the particular need in such cases for individualized damages calculations. On this basis, therefore, we have previously affirmed class certification in mass accident cases,

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[82] *Id.* at 443; *see also id.* at n.16 (explaining that "the common issues in the certified cause of action . . . predominate over the individual issues involved *in that cause of action*").

[83] *See, e.g.*, Burch, *supra* note 5, at 1891–92; Patricia Bronte et al., *"Carving at the Joint": The Precise Function of Rule 23(c)(4)*, 62 DEPAUL L. REV. 745, 746–52 (2013) (arguing that any circuit split on the meaning of Rule 23(c)(4) "has all but vanished" because "[r]ecent decisions confirm that the Fifth Circuit is in accord with the consensus view of the other circuits").

[84] Spong v. Fid. Nat'l Prop. & Cas. Ins. Co., 787 F.3d 296, 305 (5th Cir. 2015) (quoting Jacobs v. Nat'l Drug Intelligence Ctr., 548 F.3d 375, 378 (5th Cir. 2008)).

[85] *See, e.g.*, *In re* Deepwater Horizon, 739 F.3d 790, 816 (5th Cir. 2014).

[86] *See, e.g.*, Burch, *supra* note 5, at 1891–92 & n.165 ("For a while the Fifth Circuit consistently adhered to the latter view [of the role of predominance in Rule 23(c)(4) certification], but recently changed course in *In re Deepwater Horizon*."); Seiner, *supra* note 6, at 134 & n.120 (2015) (noting *Deepwater Horizon* as a recent example of the Fifth Circuit's more "relaxed" approach to the authorization of issue class actions in the absence of (b)(3) predominance); PUB. JUSTICE, COMMENTS ON RULE 23 SUBCOMMITTEE RULE SKETCHES 7 (Sep. 8, 2015), www.uscourts.gov/file/18414/download [https://perma.cc/73M7-9X7N] (stating that "it is unclear whether *Castano* is still good law in the Fifth Circuit" after *Deepwater Horizon*).

> as in other cases in which "virtually every issue prior to damages is a common issue."[87]

Indeed, the Fifth Circuit emphasized that "even without a common means of measuring damages, in the district court's view, these *common issues nonetheless predominated over the issues unique to individual claimants*."[88]

The continuing uncertainty and disuniformity among the lower courts regarding the scope of Rule 23(c)(4) issue class actions can perhaps best be demonstrated through examination of the diverse approaches to issue class certification taken by the circuit courts.[89] Part II will address these, as well as consider the three proposals promulgated by the Rule 23 Subcommittee before it halted its issue class action codification project.[90]

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[87] *Deepwater Horizon*, 739 F.3d at 815–16 (citations omitted). Indeed, every circuit thus far has rejected invitations to interpret *Comcast* as requiring plaintiffs to set forth a class damages model to satisfy Rule 23(b)(3) predominance. *See, e.g.*, Roach v. T.L. Cannon Corp., 778 F.3d 401, 407 (2d Cir. 2015) ("*Comcast*, then, did not hold that a class cannot be certified under Rule 23(b)(3) simply because damages cannot be measured on a classwide basis."); *In re* Nexium Antitrust Litig., 777 F.3d 9, 23 (1st Cir. 2015) ("*Comcast* did not require that plaintiffs show that all members of the putative class had suffered injury at the class certification stage—simply that at class certification, the damages calculation must reflect the liability theory."); Leyva v. Medline Indus. Inc., 716 F.3d 510, 514 (9th Cir. 2013) (reading *Comcast* to hold only that class plaintiffs "must be able to show that their damages stemmed from the defendant's actions that created the legal liability").

[88] *Deepwater Horizon*, 739 F.3d at 816 (emphasis added).

[89] *See, e.g.*, Burch, *supra* note 5, at 1892 (listing circuit courts that "have each taken various approaches that facilitate issue classes to different degrees").

[90] Public comments submitted by interested parties to the Subcommittee also reveal the persistence of disagreement regarding the proper interpretation of Rule 23(c)(4). *Compare* PUB. CITIZEN LITIG. GROUP, COMMENT TO THE RULE 23 SUBCOMMITTEE OF THE CIVIL RULES ADVISORY COMMITTEE ON BEHALF OF PUBLIC CITIZEN LITIGATION GROUP 7 (Apr. 9, 2015), www.uscourts.gov/file/17969/download [https://perma.cc/CM89-YLDD] ("[W]e support the proposals of a number of commenters that Rule 23(c)(4) be clarified to provide that an issue class may be certified even where common issues do not predominate for the case as a whole."); *and* PUB. JUSTICE, COMMENTS ON RULE 23 SUBCOMMITTEE RULE SKETCHES 5 (Sept. 8, 2015), www.uscourts.gov/file/18414/download [https://perma.cc/YPG6-Y72Z] ("Although the vast majority of courts to have interpreted Rule 23(c)(4) have done so correctly, there remains some confusion surrounding the Rule, and the topic continues to be litigated vigorously."); *with* DEF. RESEARCH INST., COMMENT TO THE RULE 23 SUBCOMMITTEE, ADVISORY COMMITTEE ON CIVIL RULES 27 (Sept. 10, 2015), www.uscourts.gov/file/18419/download [https://perma.cc/3JPX-VSCG] ("DRI submits that the concept of issue classes should be eliminated from Rule 23 altogether. Alternatively, the rule should be amended to at least make it explicit that all of rule 23(b)'s existing requirements apply with full force to issue classes."); *and* LAWYERS FOR CIVIL JUSTICE, COMMENT TO THE RULE 23 SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON CIVIL RULES, FROM CONCEPTUAL SKETCHES TO A FORMAL PROPOSAL TO AMEND RULE 23: THOUGHTS ON THE SUBCOMMITTEE'S IDEAS FOR REFORM 13 (Oct. 9, 2015), www.uscourts.gov/file/18531/download [https://perma.cc/V2DH-WKFX] ("The role of issue class certification needs to be clarified, not expanded.").

II. PROPOSED CERTIFICATION STANDARDS

Among the appellate courts that have fully adopted the issue class action, three issue class certification standards have emerged. Each court has proposed a somewhat different answer to the question: When is it "appropriate" to certify a Rule 23(c)(4) class action that could not be certified under Rule 23(b)(3)? For the Second Circuit, issue class certification depends upon whether the issue or issues would materially advance the litigation.[91] The Third Circuit also adopted a material advancement standard, but has also established a detailed, multi-factor test for determining material advancement that must be applied by lower courts in the circuit.[92] Finally, the Seventh Circuit has been operating with the loosest approach to issue certification, approving certification if a court identifies common issues that could be usefully tried on a class basis, apparently irrespective of the complexity or quantity of individual issues that remain to be adjudicated.[93]

On the rulemaking front, the Rule 23 Subcommittee tentatively suggested three alternative models of issue class action codification, two of which adopted the material advancement standard.[94] The remaining codification model would simply have eliminated the requirement of (b)(3) predominance for Rule 23(c)(4) issue class actions, perhaps paralleling the Seventh Circuit's less guided approach.[95] Each of these Rule 23(c)(4) standards will be addressed in turn below.

A. Material Advancement Test

In 2006, the Second Circuit became the first appellate court to approve a class action explicitly pursuant to Rule 23(c)(4).[96] Acknowledging the apparent circuit split between the Fifth and Ninth Circuits on recognition of the issue class action, the court in *In re Nassau County Strip Search Cases* held that "a court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement."[97]

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[91] McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 234 (2d Cir. 2008), *abrogated on other grounds by* Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639 (2008).

[92] Gates v. Rohm & Haas Co., 655 F.3d 255, 273 (3d Cir. 2011) ("This non-exclusive list of factors should guide courts as they apply Fed. R. Civ. P. 23(c)(4).").

[93] *See, e.g.*, Butler v. Sears, Roebuck & Co., 702 F.3d 359, 361–63 (7th Cir. 2012).

[94] *See* RULE 23 MIN-CONFERENCE, *supra* note 17, at 39–41.

[95] *Id.* at 40–41 (proposing alternative amendment to Rule 23(b)(3) that would explicitly exempt classes certified pursuant to Rule 23(c)(4) from requirement that common issues predominate over individual issues).

[96] *In re* Nassau Cty. Strip Search Cases, 461 F.3d 219, 226–27 (2d Cir. 2006).

[97] *Id.* The Second Circuit presaged its position on Rule 23(c)(4) five years earlier, in *Robinson v. Metro-North Commuter Railroad Co.*, where it found that the district court had abused its discretion by not utilizing Rule 23(c)(4) to certify certain liability issues in a pattern-or-practice employment discrimination case. 267 F.3d 147, 168–69 (2d Cir. 2001).

Despite its early support for the issue class action, however, the Second Circuit has approved few such class actions. In *McLaughlin v. American Tobacco Company*, for example, the court acknowledged its power under *Nassau County* to utilize Rule 23(c)(4) to certify an issue class action, but declined to do so in the case at hand. The court stated that "given the number of questions that would remain for individual adjudication, issue certification would not 'reduce the range of issues in dispute and promote judicial economy.'"[98] The Second Circuit in *McLaughlin* firmly established material advancement as the proper standard for issue class certification, holding that "the issue of defendants' scheme to defraud, would not materially advance the litigation because it would not dispose of larger issues such as reliance, injury, and damages."[99]

In a later fraud class action, *Dungan v. Academy at Ivy Ridge*, the Second Circuit similarly upheld the denial of a proposed Rule 23(c)(4) issue class action.[100] The Second Circuit found that the district court "accurately identified and applied this Circuit's standard for Rule 23(c)(4) issue certification [in determining] . . . that the significance of individualized issues of reliance, causation, and damages in this case meant that issue certification 'would not meaningfully reduce the range of issues in dispute and promote judicial economy.'"[101]

More recently, the Second Circuit has issued opinions both rejecting and affirming Rule 23(c)(4) issue class actions. In *Johnson v. Nextel Communications, Inc.*, for example, the Second Circuit vacated a district court's determination that the resolution of issues common to the class would materially advance the litigation and thereby warranted Rule 23(c)(4) issue class certification.[102] To the contrary, explained the court, "[b]ecause liability for a significant bloc of the class members and damages for the entire class must be decided on an individual basis, common issues do not predominate over individual ones and a

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[98] 522 F.3d 215, 234 (2d Cir. 2008), *abrogated on other grounds by* Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639 (2008) (quoting *Robinson*, 267 F.3d at 168); *see also In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 352 (S.D.N.Y. 2002) ("[F]inally, plaintiffs do not show that issue certification will materially advance this litigation.").

[99] 522 F.3d at 234. The material advancement standard derives from a Western Missouri case from 1985, *In re Tetracycline Cases*, where the district court judge invoked that concept in determining the proposed class action satisfied the (b)(3) predominance requirement. 107 F.R.D. 719, 727, 732, 735 (W.D. Mo. 1985). The language in *Tetracycline* on material advancement had been cited favorably by the Second Circuit's first opinion addressing Rule 23(c)(4). *Robinson*, 267 F.3d at 167.

[100] 344 F. App'x. 645, 647–48 (2d Cir. 2009).

[101] *Id.* at 648.

[102] 780 F.3d 128, 147–48 (2d Cir. 2015); *see also* Johnson v. Nextel Commc'ns, Inc., 293 F.R.D. 660, 669 (S.D.N.Y. 2013) (quoting Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 589 (S.D.N.Y. 2013)) (certifying issue class action based on finding that "resolution of the particular common issues would materially advance the disposition of the litigation as a whole").

class action is not a superior method of litigating the case."[103] Citing *Nassau County*, however, the Second Circuit in *Jacob v. Duane Reade, Inc.* upheld the district court's determination that "although the individualized nature of the damages inquiry would defeat Rule 23(b)(3) predominance in the case as a whole, Rule 23(b)(3) predominance was satisfied with respect to issue of liability alone. That conclusion was within the district court's discretion."[104]

Material advancement appears to be the leading standard among federal district courts[105] and commentators alike.[106] The American Law Institute (ALI) has also promulgated a "material advancement" standard for issue class actions in its Principles of the Law of Aggregate Litigation.[107] This open-ended approach to issue class certification, however, provides little guidance regarding whether issue certification would "materially advance" the litigation and therefore fall within (c)(4)'s "when appropriate" umbrella.

To some degree, the material advancement test can be understood as a sort of "predominance lite." Courts have found Rule 23(b)(3) predominance to be satisfied whenever "significant" or "substantial" common issues can be resolved on a class-wide basis, despite the presence of issues in the class as a whole that necessitate individual adjudication.[108] The confluence of the predominance test and the issue class action "material advancement" test is highly

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[103] *Johnson*, 780 F.3d at 148.

[104] 602 F. App'x. 3, 7 (2d Cir. 2015) (citation omitted); *see also* Jacob v. Duane Reade, Inc., 293 F.R.D. 578, 593 (S.D.N.Y. 2013) ("In other words, Rule 23(c)(4) certification must 'materially advance a disposition of the litigation as a whole' in order to be warranted."). As a general matter, district courts in the Second Circuit have viewed the issue class action favorably. *See* Charron v. Pinnacle Group N.Y. L.L.C., 269 F.R.D. 221, 242 (S.D.N.Y. 2010) ("Certifying a [l]iability [c]lass of damages-seeking tenants will materially advance this litigation . . . . Issue certification is especially appropriate in a RICO case like this one, where [d]efendants' liability can be determined once, on a class-wide basis, through common evidence."). *But see* Abu Dhabi Commercial Bank v. Morgan Stanley & Co., 269 F.R.D. 252, 266 (S.D.N.Y. 2010). *See generally Jacob*, 293 F.R.D. 578.

[105] *See, e.g.*, *In re* Motor Fuel Temperature Sales Practices Litig., 292 F.R.D. 652, 667 (D. Kan. 2013); *Abu Dhabi Commercial Bank*, 269 F.R.D. at 256, 266.

[106] *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, *supra* note 15 ("Certification of an issues class is appropriate only if it permits fair presentation of the claims and defenses and materially advances the disposition of the litigation as a whole."); Burch, *supra* note 5 at 1893–96; Klonoff, *supra* note 2, at 812 ("The 'materially advance' test urged by some courts and commentators is a sensible one.").

[107] AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 (2010).

[108] *See, e.g.*, Jenkins v. Raymark Indus. Inc., 782 F.2d 468, 472 (5th Cir. 1986) ("In order to 'predominate,' common issues must constitute a significant part of the individual cases."); *In re* Sch. Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986) ("There may be cases in which class resolution of one issue or a small group of them will so advance the litigation that they may fairly be said to predominate."); *In re* Checking Account Overdraft Litig., 307 F.R.D. 630, 645 (S.D. Fla. 2015); Morales v. Greater Omaha Packing Co., 266 F.R.D. 294, 304 (D. Neb. 2010).

revealing.[109] The chief rationale for the development of the issue class action has been that Rule 23(b)(3)'s predominance criteria is simply too difficult for many complex class actions to meet.[110] The reason some courts have endeavored to interpret predominance in the least exacting manner is to achieve the same result—class certification for cases that are not, on their face, obvious candidates for a finding of predominating common issues.[111] The advent of the material advancement standard, indeed, dates to the 1980s, the era in which predominance came to be viewed as too rigorous a test for modern class actions.[112]

Materiality is always a slippery concept, but it implies something objectively important.[113] In the wake of *Wal-Mart Stores, Inc. v. Dukes*, however, one wonders whether the resolution of any issue that satisfies Rule 23(a)(2) commonality would necessarily be deemed to materially advance the underlying litigation.[114] In *Wal-Mart*, the justices intensely debated the role of commonality in class action jurisprudence, and how strictly Rule 23(a)(2) ought to be interpreted.[115] Writing for the majority, Justice Scalia laid out a provocatively stringent set of criteria for finding commonality.[116] He argued that Rule 23(a)(2) commonality required class members to suffer from a common injury,[117] the proposed common issue to be "central" to each class members' claim, and the issue be one that could be decided once (and only once) for all.[118]

This strict interpretation of commonality's demands provoked intense criticism from the dissenters, who pointed out that no previous opinion interpreting Rule 23 had defined commonality so narrowly.[119] The impact, of course, might

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[109] *See, e.g.*, Romberg, *supra* note 44, at 294–95 ("Predominance instead asks whether the class certification, as proposed, would materially advance the fair and efficient resolution of the entire controversy.").

[110] *See supra* note 49 and accompanying text.

[111] *See, e.g.*, *Jenkins*, 782 F.2d at 469.

[112] *See In re* Tetracycline Cases, 107 F.R.D. 719, 735 (W.D. Mo. 1985).

[113] *See, e.g.*, AM. LAW INST., *supra* note 107, § 2.02(a)(1) (defining the material advancement test satisfied only when the issue certified "address[es] the core of the dispute in a manner superior to other realistic procedural alternatives . . . .").

[114] *See generally* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

[115] *Id.* at 2556. ("The dissent misunderstands the nature of [our commonality] analysis. . . . We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there *is* '[e]ven a single [common] question.' And there is not here.").

[116] *Id.* at 2551.

[117] *Id.* ("Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.' ").

[118] *Id.* ("That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."). *But see*, A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 445 (2013) (critiquing Wal-Mart's restrictive and unsupported interpretation of Rule 23(a)(2) commonality).

[119] *See, e.g.*, *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2562 (Ginsburg, J., dissenting in part).

be to deny class action status to a number of cases that would have satisfied a looser standard.[120] Justice Ginsberg's dissenting opinion offered an especially strong critique of the majority's test, arguing that its centrality language, in particular, distorted commonality's purpose.[121] The relative significance of common and individual issues in a proposed class action, she explained, is the exclusive purview of (b)(3) predominance, and to import that higher threshold of super-commonality, would be to heighten improperly the rulemakers' intentions for the role of Rule 23(a)(2) commonality.[122]

Therefore, the evolution of the material advancement standard must be understood in the context of both the ongoing debate about the strictness with which courts should interpret commonality and the pressure on courts to loosen the demands of predominance. Rule 23(c)(4) has emerged as a counterweight to this tension in some respects. If predominance is, as some Rule 23(c)(4) advocates contend, automatically satisfied in an issue class action,[123] then that heavy burden may be lifted.

Yet an issue class action surely cannot be certified whenever a common issue is present, because that could lead to unwieldy and possibly inefficient class action certification.[124] To assuage concerns about over-utilization of the issue class action, courts adopting the "material advancement" test seek to find a middle ground. Not every common issue may be certified, it must "materially advance" the litigation.[125]

In the context of this potential tightening of commonality's definition, it seems inconceivable that any issue certified as "common" pursuant to (a)(2) would not satisfy the notion of a material issue. And if it is a material issue, would it not materially advance the litigation as a whole to dispose of it in one adjudication rather than multiple (possibly thousands) of proceedings? The "advancement" aspect of the test is also poorly defined. Resolution of practically any issue in a complex class action comprised of hundreds or thousands of

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[120] *See, e.g.*, Spencer, *supra* note 118, at 475 ("More important, the common question provision of Rule 23 imposes not one of the requirements that characterize heightened commonality after *Dukes*. In taking this approach, the Court is reviving the nineteenth- and early twentieth-century tradition under the codes of giving strict, narrowing constructions to statutory texts expressly drafted and designed to liberalize joinder[, and] . . . is reflective of a wider move toward restrictiveness in civil procedure.").

[121] *See, e.g.*, *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2561–66 (Ginsburg, J., dissenting in part).

[122] *See id.* at 2565 ("The Court blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer 'easily satisfied.' "); *see also* Spencer, *supra* note 118, at 475.

[123] *See supra* note 53 and accompanying text.

[124] *See, e.g.*, Romberg, *supra* note 44, at 296 (recognizing that issue class certification would be improper if the common issues "were so minor or tangential that even if the class were to succeed as to those issues, it would not advance resolution of the class members' underlying claims").

[125] *See supra* notes 98–101 and accompanying text.

claimants would "advance" the litigation.[126] How "material" must the "advancement" be? Notable? Significant?[127]

The framers of the 1966 amendments to Rule 23 chose "predominance" as one of the two defining criteria for Rule 23(b)(3) class actions, meaning that the common issue or issues must be regarded, in some respect, as greater or more important than the individual issues raised by the class claims.[128] It is not a numbers game—there can certainly be a single complex common issue and multiple individual issues that are nonetheless formulaic or simple to adjudicate.[129] Yet the concept of "greater than" is baked into the predominance test in a way that is important to deciphering how the framers viewed Rule 23(b)(3).[130]

Therefore, it is not surprising that the material advancement test, which emerged when the predominance requirement became frustratingly inconvenient, would be the choice of many courts embracing the issue class action.[131] When courts redefined predominance to simply require material advancement, they were trying to extricate the notion of balancing or comparing common against individual issues in cases where the outcome of that balance would clearly not support a finding of predominance.

So the test, originally developed to lessen the demands of predominance, may prove useful in issue class actions that intentionally eschew any predominance requirement at all. If, however, Justice Scalia's *Wal-Mart* opinion raising the stakes and standards of commonality prevails,[132] perhaps the real issue class action scrutiny will take place in Rule 23(a)(2)'s commonality prerequisite. If a common issue can survive such a high commonality threshold, perhaps additional issue class certification criteria would be redundant.

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[126] *See, e.g.*, Romberg, *supra* note 44, at 296 ("It would be the rare case indeed—one obviously inappropriate for class resolution—in which class-wide resolution of the common issues (rather than repeated resolution in each individual class member's suit) would fail to materially advance the fair and efficient resolution of the underlying controversy . . . .").

[127] *See* AM. LAW INST., *supra* note 107, § 2.02(a)(1) (asserting that the issues certified must "generate significant judicial efficiencies.").

[128] *See, e.g.*, *Predominance*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/Predominance [https://perma.cc/P6NL-EM5W] (defining predominance as "the state of being more powerful or important than other people or things" or "a situation in which there is a greater number or amount of a particular type of person or thing than of other people or things").

[129] *See, e.g.*, WRIGHT ET. AL., *supra* note 15, at § 1778; Burch, *supra* note 5, at 1893 (arguing that "courts should certify issue class actions even if aggregate treatment as to just one issue materially resolves class members' claims").

[130] *See* WRIGHT ET. AL., *supra* note 15, at § 1778 ("Exactly what is meant by 'predominate' is not made clear in the rule, however. Nor have the courts developed any ready quantitative or qualitative test for determining whether the common questions satisfy the rule's test. What is clear, however, is that it is not sufficient that common questions merely exist, as is true for purposes of Rule 23(a)(2), and that the court is under a duty to evaluate the relationship between the common and individual issues in all actions under Rule 23(b)(3).").

[131] *See, e.g.*, *In re* Tetracycline, 107 F.R.D. 719, 727, 735 (W.D. Mo. 1985).

[132] *See supra* notes 113–21 and accompanying text.

B. Multi-Factor Test

In *Gates v. Rohm and Haas Co.*, the Third Circuit offered a multi-factor test for issue class action certification that tracks the ALI's Principles of the Law of Aggregate Litigation even more closely than the Second Circuit's material advancement test.[133] Although the *Gates* court ultimately upheld the district court's denial of the proposed issue class action, it nonetheless promulgated the following "nonexhaustive" list of factors for district courts to consider when certifying issue class actions:

> [1] the type of claim(s) and issue(s) in question;
> [2] the overall complexity of the case;
> [3] the efficiencies to be gained by granting partial certification in light of realistic procedural alternatives;
> [4] the substantive law underlying the claim(s), including any choice-of-law questions it may present and whether the substantive law separates the issue(s) from other issues concerning liability or remedy;
> [5] the impact partial certification will have on the constitutional and statutory rights of both the class members and the defendant(s);
> [6] the potential preclusive effect or lack thereof that resolution of the proposed issue class will have;
> [7] the repercussions certification of an issue(s) class will have on the effectiveness and fairness of resolution of remaining issues;
> [8] the impact individual proceedings may have upon one another, including whether remedies are indivisible such that granting or not granting relief to any claimant as a practical matter determines the claims of others; and
> [9] the kind of evidence presented on the issue(s) certified and potentially presented on the remaining issues, including the risk subsequent triers of fact will need to reexamine evidence and findings from resolution of the common issue(s).[134]

While such a higher level of specificity may serve a beneficial role, the problem with such a long list of factors is that some will point in different directions than others, and the test does not offer guidance on the relative priority of each of these factors. Can an issue class action be certified if one of the factors is satisfied? Two? What if there are four that suggest certification but five that tilt against? How should courts balance these criteria?[135]

On the other hand, the multi-factor test offers much more guidance than the open-ended material advancement test, and also brings several factors into the decision making process that are not directly related to "advancement" of the litigation. The interrelatedness of common and individual issues, for example,

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[133] 655 F.3d 255, 273 (3d Cir. 2011).

[134] *Id.*

[135] *See, e.g.*, Klonoff, *supra* note 2, at 812 (critiquing the multi-factor approach for providing "insufficient guidance, especially given that the myriad factors are not exclusive. The 'material advance' test accomplishes the essence of what the Third Circuit is trying to achieve, but without the complications.").

is a crucial component of issue class action efficiency and fairness.[136] As the Court established in its 1931 opinion in *Gasoline Products Co. v. Champlin Refining Co.*, the Due Process Clause and the Seventh Amendment's right to a civil jury require that separate trials of issues within the same lawsuit must involve "distinct and separa[te]" issues, with each issue capable of being tried fairly without the other.[137] The potential for an unconstitutional overlap between the trials of class and individual issues was most prominently addressed by the Seventh Circuit in *In re Rhone-Poulenc Roher*.[138]

Moreover, the multi-factor test includes other valuable considerations, such as the court's ability to manage multiple state law standards and potentially challenging choice of law questions.[139] These additional and important considerations are not obviously raised by the material advancement standard and few courts interpreting that standard have raised or applied such factors.[140] So, on balance, the more detailed set of guidelines from this multi-factor test may prove helpful to other courts searching for issue class criteria, and may recommend themselves to the Advisory Committee's consideration when it elects to codify issue classes.

C. Seventh Circuit Test

The circuit court most likely to approve issue classes is perhaps the most unexpected of Rule 23(c)(4) allies. In 1995, Judge Richard Posner's scathing critique of the issue class certified in *In re Rhone-Poulenc Rorer, Inc.* struck terror in the hearts of plaintiffs' attorneys and provided powerful ammunition to defendants fending off class certification.[141] *Rhone-Poulenc* cited settlement pressure that results from class certification as a leading reason for finding that the district court abused its discretion:

> And suppose the named plaintiffs . . . win the class portion of this case to the extent of establishing the defendants' liability under either of the two negligence theories. It is true that this would only be prima facie liability, that defendants would have various defenses. But they could not be confident that the defenses would prevail. They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll

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[136] *See, e.g.*, RUBENSTEIN, *supra* note 15, §§ 3:18–27.

[137] 283 U.S. 494, 499–501 (1931).

[138] *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1293, 1297 (7th Cir. 1995).

[139] Gates v. Rohm and Haas Co., 655 F.3d 255, 273 (3d Cir. 2011).

[140] *See* Burch, *supra* note 5, at 1897 (acknowledging that "[w]hen state law governs a defendant's conduct, choice-of-law questions can complicate issue classes," but nonetheless emphasizing that "the need for state law alone should not signal that issue classes are inappropriate.").

[141] *Rhone-Poulenc*, 51 F.2d at 1293; *see also* Gilles, *supra* note 24, at 385–86 (characterizing Judge Posner's decision in *Rhone-Poulenc* as a "watershed" moment that "swiftly became the model for other appellate courts in decertifying mass tort classes").

> these dice. That is putting it mildly. They will be under intense pressure to settle.[142]

In cases where the risk of liability is not so gigantic, however, Judge Posner has opined that he has "trouble seeing the downside of the limited class action treatment."[143] Indeed, the Seventh Circuit has developed a unique approach to issue classes in a series of opinions upholding the certification of issue classes under the aegis of Rule 23(c)(4) despite the lack of any particular plan for resolution of the individualized issues that must be resolved (somehow and somewhere) before a judgment may be entered for individual class members.[144]

Writing for the court in *Butler v. Sears Roebuck and Company*, Judge Posner declared that "predominance is automatically resolved" in a Rule 23(c)(4) class action that contains "only common questions."[145] When the Supreme Court granted certiorari in *Butler*,[146] vacating and remanding the decision in light of *Comcast*,[147] the Seventh Circuit on remand reasserted its position that issue class actions need not comply with ordinary Rule 23(b)(3) restrictions.[148] Writing for the majority in reaffirming the prior decision, Judge Posner concluded that *Comcast*'s holding had no relevance to the issue class certified in *Butler* because the class certified in *Butler* did not include class damages.[149] Invoking Justice Scalia's Rule 23(a)(2) commonality principles from *Wal-Mart*, Judge Posner emphasized that "[t]here is a single, central, common issue of liability: whether the Sears washing machine was defective."[150] The remaining individualized claim components (proximate cause, injury, damages, and af-

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[142] *Rhone-Poulenc*, 51 F.2d at 1298.

[143] McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 492 (7th Cir. 2012); *see also id.* at 491 ("If resisting a class action requires betting one's company on a single jury verdict, a defendant may be forced to settle; and this is an argument against definitively resolving an issue in a single case if enormous consequences ride on that resolution."); Seiner, *supra* note 6, at 149 ("Certifying narrow issues in the case would not threaten the existence of the company or cause it to settle, and would help to streamline future litigation in the individual cases.").

[144] *See McReynolds*, 672 F.3d at 491; Carnegie v. Household Int'l Inc., 376 F.3d 656, 661 (7th Cir. 2004); Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 911 (7th Cir. 2003); Miller, *supra* note 49, at 319 (praising the Seventh Circuit's decision in *McReynolds* for its robust utilization of (c)(4)). *See generally* Butler v. Sears Roebuck & Co., 702 F.3d 359 (7th Cir. 2012); Pella Corp. v. Saltzman, 606 F.3d 391, 394 (7th Cir. 2010).

[145] *See Butler*, 702 F.3d at 361.

[146] Sears Roebuck & Co. v. Butler, 133 S. Ct. 2768 (2013) (granting certiorari petition).

[147] *See generally* 133 S. Ct. 1426 (2013). The Court had denied several previous petitions seeking review of the Seventh Circuit's expansive interpretation of Rule 23(c)(4). *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McReynolds, 133 S. Ct. 338 (2012); Pella Corp. v. Saltzman, 131 S. Ct. 998 (2011).

[148] *See* Butler v. Sears, Roebuck Co., 727 F.3d 796, 801 (7th Cir. 2013).

[149] *See id.* at 800 ("Furthermore and fundamentally, the district court in our case, unlike *Comcast*, neither was asked to decide nor did decide whether to determine damages on a class-wide basis.").

[150] *See id.* at 801.

firmative defenses) apparently could be "readily determined in individual hearings, in settlement negotiations, or by creation of subclasses."[151]

In *Carnegie v. Household International, Inc.*, Judge Posner also expressed little concern about the fate of individual issues excluded from the Rule 23(c)(4) issue class:

> Whether particular members of the class were defrauded and if so what their damages were are another matter, and it may be that if and when the defendants are determined to have violated the law separate proceedings of some character will be required to determine the entitlements of the individual class members to relief.[152]

Although he saw a global settlement as the most likely result of a common issue trial in plaintiffs' favor, Judge Posner also threw out a host of other possible means of resolving the individual issues necessary for entry of a final judgment for any class member:

> Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues. Those solutions include '(1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.'[153]

The Seventh Circuit's approach to issue class certification thus appears to be in conflict with Rule 23(b)(3) jurisprudence requiring plaintiffs to present the court at the certification stage with a manageable plan for trying class claims.[154] Instead, Rule 23(c)(4) frees the court to certify common issues with little regard, and certainly no actual plan for the resolution of individual issues. Given the likelihood of settlement to which Judge Posner referred,[155] this lack of concern for the uncertain mode, means, and venue for adjudicating individual issues may make sense as a pragmatic matter, but finds little support in Rule

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[151] *See id.*

[152] Carnegie v. Household Int'l Inc., 376 F.3d 656, 661 (7th Cir. 2004).

[153] *Id.*

[154] Wachtel v. Guardian Life Ins. Co. of Am., 453 F.3d 179, 186 n.7 (3d Cir. 2006) ("We believe that the pre-certification presentation of the aforementioned trial plans represents an advisable practice within the class action arena, and we note that such instruments could be used by parties and trial courts to facilitate Rule 23(c)(1)(B) compliance regarding the claims, issues, or defenses subject to class treatment."); Klonoff, *supra* note 2, at 799 ("Of course, the burden is on the plaintiff to show, through a precise analysis of the applicable laws and a proposed case management plan, that common issues predominate and that the trial of the case would be manageable.").

[155] FED. R. CIV. P. 23 advisory committee's note to 1998 amendment (justifying Rule 23(f) interlocutory appeal amendment because certification in some cases "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 310 (3d Cir. 2008) ("[T]he potential for unwarranted settlement pressure 'is a factor we weigh in our certification calculus.' ").

23.[156] Rule 23(b)(3), for instance, explicitly identifies the manageability of class claims as an important certification consideration.[157]

As an apparent substitute for the balancing of common and individual issues mandated by (b)(3)'s predominance criterion, the Seventh Circuit instead counsels that if a proposed class action contains

> genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings.[158]

The "kicker," according to Judge Posner, is whether the stakes are so high in the proposed issue class that defendants will be driven to settlement.[159] In that event, denial of class certification would be warranted due to "the danger that resolving an issue common to hundreds of different claimants in a single proceeding may make too much turn on the decision of a single, fallible judge or jury."[160] But so long as the court is not faced with an extortionate, industry-threatening class certification as in *Rhone-Poulenc*, it would seem in the Seventh Circuit that class certification is proper for any common issue " 'the accuracy of the resolution' " of which is " 'unlikely to be enhanced by repeated proceedings.' "[161]

This approach tolerates the risk of an inaccurate resolution of the common issue impacting all claimants and all claims because the alternative is no resolution at all—a classic negative value argument. The problem with this approach, however, is that absent a settlement that certainly cannot be guaranteed, the back end of the issue class action still requires adjudication of those remaining individual issues, leaving class members with an only partially resolved claim that is likely still more costly to litigate than could be recovered in damages. Unless the savings on litigating the common issue represents sufficient gains to class members that the remaining issues are no longer more expensive to litigate than the likely recovery, these negative value claims will remain unrealized. Moreover, determining the cost of individual litigation and its likely re-

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[156] FED. R. CIV. P. 23(c)(1) advisory committee's note to 2013 amendment ("An increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof.") *cf*. RUBENSTEIN, *supra* note 15, § 4:79 ("Whether a party proposing a class action *must* submit a trial plan is therefore a forum-specific question. However, it is fair to generalize that, because a party proposing a class bears the burden of demonstrating that the class action is manageable, a trial plan may be a helpful tool in discharging that burden.").

[157] FED. R. CIV. P. 23(b)(3).

[158] McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491 (citing Mejdrech v. Met-Coil Systems Corp., 319 F.3d 910, 911 (7th Cir. 2003)).

[159] *Id*.

[160] *Id*. ("The alternative is multiple proceedings before different triers of fact, from which a consensus might emerge; a larger sample provides a more robust basis for an inference.").

[161] *Id*.

covery also depends on an understanding of how much of any resulting judgment must be allocated to the class action attorneys, either by express arrangement in the Rule 23(h) attorney fee hearing or by *quantum meruit* principles.[162]

In a more recent case, the Seventh Circuit's analysis more directly refers to consideration of the relative significance of the common issue to the remaining issues in the litigation, in language evocative of the material advancement principle. In *Parko v. Shell Oil Company*, the court observed, "If resolving a common issue will not greatly simplify the litigation to judgment, or settlement of claims of hundred or thousands of claimants, . . . the delay, and the danger that class treatment would expose the defendant or defendants to settlement-forcing risk are not costs worth incurring."[163] In other words, the proposed issue certification may not be warranted for *any* genuinely common issue, as may have been inferred from earlier iterations of the certification standard, but only as to those that would "greatly simplify the litigation to judgment or settlement of claims."[164] Apart from the exclusion of cases involving "enormous" risk of liability generating untenable settlement pressure, it particularly unclear how the Seventh Circuit will apply this criteria to certify a common issue with the goal of "simplify[ing] the litigation" to settlement. Indeed, the settlement of issues rather than claims is largely *terra incognito* in the world of class actions.[165]

The Seventh Circuit's conception of issue class certification criteria may hold sway among other courts, and may represent a pragmatic and socially beneficial approach to cases involving uniform defendant misconduct and multitudes of injured plaintiffs. The judicial invention of such a standard, however, cannot easily be mapped onto Rule 23(c)(4)'s skimpy "when appropriate" language, much less Rule 23(b)(3)'s express predominance and manageability commands. In the absence of Advisory Committee guidance, of course, the Seventh Circuit will forge ahead in its development of the issue class, hopefully confronting many of the as of yet unaddressed aspects of such litigation as fodder for the Advisory Committee's next Rule 23 amendment project.

III. INTEGRATING THE ISSUE CLASS ACTION INTO RULE 23

Wholly apart from articulating a certification standard for the issue class action, other provisions in Rule 23 that were not originally ratified with the issue class action in mind would benefit from Advisory Committee reconsideration. In 2003, the Committee amended Rule 23 in several respects, providing greater detail in some subdivisions, and creating new subdivisions to handle class attorney fees and the selection of a class attorney.[166] In that set of amend-

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[162] *See infra* Part III(D).

[163] Parko v. Shell Oil Co., 739 F.3d 1083, 1085 (7th Cir. 2014).

[164] *Id.*

[165] *See infra* Part III(C).

[166] *See, e.g.*, COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 1 (2002) [hereinafter 2002 ADVISORY COMMITTEE REPORT], http://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-

ments, the Committee also added the word "issues" into some subdivisions where previously the Rule had referred only to "claims."[167] Given the dearth of rulemaking history and the absence of meaningful public comment and vetting, these insertions of the word "issues" into the Rule 23 provision on certification, notice, and settlement cannot be interpreted to actually codify the issue class action.[168] Nonetheless, they provide a starting point for revamping Rule 23 to take the issue class action's unique characteristics into account. Four subdivisions immediately suggest Committee consideration: Rules 23(c)(2), (c)(3), (e) and (h).[169] The following section addresses each in turn.

A. Rule 23(c)(2) Notice

The purpose of the notice commanded by Rule 23(c)(2) is to inform class members of the nature of the claims being litigated representationally on their behalf, where the case is being litigated, their right to exclude themselves from the litigation, the process by which such "opting out" of the class action must be achieved (because the default is inclusion in the class), and the binding effect of any judgment in the absence of their proactive exclusion.[170] The amendments of 2003 did an admirable job of tasking the courts to draft class action notices in a way that is more informative, less "legalese" and confusing, and provide greater transparency for absent class members.[171] But that task, in my view, is made more challenging by the peculiar nature of the issue class action. Absent class members will still have to opt out in order to avoid a binding

rules-civil-procedure-may-2002 [https://perma.cc/TUL3-8QH2] ("Rule 23 subdivision (c) is substantially rewritten, subdivision (e) is completely rewritten, and subdivisions (g) and (h) are new.").

[167] *See, e.g.*, FED. R. CIV. P. 23(e)(1)(A) advisory committee's note to 2003 amendment (explaining that the amendment's adoption of the term "claims, issues, or defenses of a certified class" was intended to "resolve[] the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of 'a class action.' That language could be—and at times was—read to require court approval of settlements with putative class representatives that resolved only individual claims."); *see also* FED. R. CIV. P. 23(c)(1) advisory committee's note to 2003 amendment ("A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof.").

[168] *See* 2002 ADVISORY COMMITTEE REPORT, *supra* note 166, at 2 ("The Rule 23 revisions address the process for managing a class action on the assumption that a class has been certified. They do not address the prerequisites or criteria for certification.").

[169] FED. R. CIV. P. 23(c)(2), (c)(3), (e), (h).

[170] FED. R. CIV. P. 23(c)(1)(B); *see also* RUBENSTEIN, *supra* note 15, § 8:12; WRIGHT, ET AL., *supra* note 15, § 1789 ("[T]he judgment in a class action will include by its terms all the class members, except those in a Rule 23(b)(3) action who request exclusion as permitted under subdivision (c)(2)(B).").

[171] *See, e.g.*, FED. R. CIV. P. 23(c)(1)(B) advisory committee's note to 2003 amendment ("The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members.").

negative judgment,[172] but their incentive to do so may be too obscure to render their failure to act as tantamount to meaningful consent to representational litigation. As confusing as class action notices to recipients in any class action case are,[173] at least a layperson reading the notice understands that her *claim* will be litigated. At the end of that litigation, if she elects to stay in the class, she may receive compensation.[174] That process may require her participation to some degree, of course, but the path from claim to resolution is laid out and, presumably, understood.[175]

In the case of an issue class action, however, class notice requires absent plaintiffs to remain in the class or exercise opt out rights for the resolution of an *issue*, perhaps an element or sub-element of a cause of action, that may still require the filing of individual lawsuits in the event that the class is successful.[176] As the Rule 23 Subcommittee acknowledged, even after a successful litigation of the common issue, a host of issues may remain to be litigated on an individual basis.[177]

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[172] *But see* Pella Corp. v. Saltzman, 606 F.3d 391, 392 (7th Cir. 2010) (certifying six issues pursuant to Rule 23(b)(2) declaratory judgment provision without providing absent class members the opportunity to opt out).

[173] *See* FED. R. CIV. P. 23(c)(1)(B) advisory committee's note to 2003 amendment ("It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high."); Shannon R. Wheatman &Terri R. LeClercq, Majority of Class Action Publication Notices Fail to Satisfy *Rule 23 Requirements*, 30 REV. LITIG. 53, 57 (2010) ("With the passage of the [2003] plain language amendment, the hope was that the world of class action notice would be turned on its head and lawyers would take great strides to ensure that class members could finally understand all of their rights and options.").

[174] *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, *supra* note 15, § 21.311 (providing guidance regarding the content of class notice, including the need to "describe the relief sought").

[175] *But see* Wheatman & Terri R. LeClercq, *supra* note 173, at 57 ("Many [class] notices continue to be written in small, fine print; the notice often features the court's official-looking case caption which does not provide any incentive for actual class members to read it. If readers can get past the design features that deter reading, they will likely be met with large blocks of jargon-filled text that are unintelligible to many laypersons.").

[176] Indeed, if class members remain burdened with litigation on an individual basis, perhaps even the calculus that permitted courts to infer consent in the absence of express exclusion can no longer be presumed. This concern regarding the assumptions we make about class member consent may strain the concept beyond bounds in the context of the issue class action. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997) ("[W]e recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous."); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1561 (2004) ("The data thus suggest that the *Shutts* notion of consent to jurisdiction based on failure to opt out is fictional."); Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 599 (2004).

[177] RULE 23 MIN-CONFERENCE, *supra* note 17, at 42 (recognizing that after "the resolution of the common issues . . . a great deal more may need to be done to accomplish that ultimate resolution"); *id.* at 39 ("[T]o complete adjudication of class members' claims might require considerable additional activity.").

In any event, at the very least the Committee should consider amending Rule 23(c)(2) to instruct courts that notice in issue classes must specify which components of class claims will be litigated representationally in the class action, which components will still require individualized litigation by class members following a successful issue class trial, and a description of the scope and nature of those individual issues excluded from the class action.[178] Moreover, an issue class notice may also need to inform such class members of their obligation, if the class action is successful, to compensate class counsel out of any proceeds they may recover in their individual lawsuits.[179]

B. Rule 23(c)(3) Judgment

As mentioned above, one of the central achievements of the Rule 23 amendments in 1966 was to eradicate the one-way intervention of class members who could receive the benefits of a successful litigation but avoid the burdens of a defendant verdict.[180] The judgment on behalf of the class, win or lose, is binding under Rule 23(c)(3) on any class member within the definition of the class and, with respect to (b)(3) class actions, who did not exercise the right to opt out.[181]

This important provision becomes more complicated in the context of the issue class action, as there will be no "judgment" per se but rather only the resolution of an issue or issues.[182] Whether conceived as the law of the case or issue preclusion, it is not a "judgment" as contemplated in the current Rule 23(c)(3), which imports the meaning of that term from Rule 54(a).[183] Rule 54(a) defines judgment as "an order from which an appeal lies," such as a final decision subject to appeal under 28 U.S.C. § 1291 or an appealable interlocutory order.[184] As explained by a leading civil procedure treatise: "Orders that are not

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[178] *See, e.g.*, *id.* at 40 ("When certifying an issues class, the court should specify the issues on which certification was granted in its order under Rule 23(c)(1)(B) and, for Rule 23(b)(3) classes, include that specification in its notice to the class under Rule 23(c)(2)(B)(iii)."); *cf* Wachtel v. Guardian Life Ins. Co. of Am., 453 F.3d 179, 184 (3d Cir. 2006) (concluding that "Rule 23(c)(1)(B) requires district courts to include in class certification orders a clear and complete summary of those claims, issues, or defenses subject to class treatment").

[179] *See infra* Part III(D).

[180] *See* WRIGHT ET AL., *supra* note 15, § 1789 (explaining that the 1966 Civil Rules Advisory Committee "specifically repudiate[d] the so-called one-way intervention that was permitted in 'spurious' actions prior to the revision").

[181] *See id.*; Eisenberg & Miller, *supra* note 176, at 1535 ("When opt-out rights are conferred, the courts will bind class members to the judgment if they fail to exercise their privilege to exclude themselves from the class.").

[182] *See* RULE 23 MIN-CONFERENCE, *supra* note 17, at 39 ("Particularly if the class is successful on that issue, the resolution of that issue often would not lead to entry of an appealable judgment.").

[183] FED. R. CIV. P. 54(a); *see also* Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737 (1976) (applying Rule 54 jurisprudence on partial summary judgments to class action brought by women challenging employer's pregnancy leave policy).

[184] *See* FED. R. CIV. P. 54(a).

appealable under one of those two categories do not qualify as judgments. Thus, for example, even though denominated a 'judgment,' a nonappealable partial or interlocutory summary judgment under Rule 56 does not qualify as a judgment under Rule 54(a)."[185] Given this longstanding and well understood meaning of the term "judgment" and its consistent use and meaning throughout the Rules of Civil Procedure,[186] amendment to Rule 23(c)(3) would seem an important and necessary reform.

The Rule 23 Subcommittee, recognizing that the resolution of an issue class action would often not result in a final and appealable judgment, floated the idea of amending Rule 23(f) to permit interlocutory appeal of the resolution of a certified issue.[187] Rule 23(f)(2), as it was captioned, would have authorized immediate appellate review at the discretion of the court of appeals.[188] The amendment sought to remedy the potential inefficiencies that could result from an inability to seek appellate approval of the common issue until after the possibly lengthy process of adjudicating the individual issues excised from the issue class: "Before the court and parties expend the time and effort necessary to complete resolution of the class action, it may be prudent for the court of appeals to review the district court's resolution of the common issue."[189] The Subcommittee included its draft Rule 23(f)(2) proposals in its decision not to proceed with any amendments related to issue classes,[190] leaving unresolved not only the appellate review problem but also the Rule 23(c)(3) "judgment" nomenclature.

C. Rule 23(e) Settlement

This subdivision is one of the most important of Rule 23, as the majority of class actions are resolved by settlement rather than litigation.[191] The 2003

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[185] WRIGHT, ET AL., *supra* note 15, § 2651; *Liberty Mut. Ins. Co.*, 424 U.S. at 744 (ruling that partial summary judgments "are by their terms interlocutory, . . . and where assessment of damages or awarding of other relief remains to be resolved have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291").

[186] *See, e.g.*, WRIGHT, ET AL., *supra* note 15, § 2651 ("[T]he purpose of Rule 54(a) is to define the term 'judgment' for purposes of the federal rules. The word is used in several contexts.").

[187] *See* RULE 23 MIN-CONFERENCE, *supra* note 17, at 39 (explaining that "a revision of Rule 23(f) might afford a discretionary opportunity for immediate appellate review of the resolution of that issue.").

[188] *Id.* at 42.

[189] *Id.*

[190] RULE 23 SUBCOMM. REPORT, ADVISORY COMMITTEE ON CIVIL RULES AGENDA MATERIALS 4–5 (2015) (referencing draft Rule 23(f) amendments in its conclusion that "[o]n balance, these issues appear not to warrant amendment of the rules").

[191] *See., e.g.*, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 812 (2010) (observing that "virtually all cases certified as class actions and not dismissed before trial end in settlement"); Thomas Willging & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003–2007*, 80 U. CIN. L. REV. 315, 341–42 (2011).

amendments added the word "issues" to Rule 23(e),[192] but the process for settling an "issue" on behalf of a class is uncharted territory.[193] In other words, may a Rule 23(c)(4) issue class certified only for the litigation of potentially non-predominating common issues nonetheless be settled in a way that encompasses the entirety of class members' claims? This is not a subject that has garnered much interest, nor has it often arisen given the dearth of issue class action certifications thus far.

According to one class action scholar, the standards for certifying a Rule 23(c)(4) issue class cannot be bootstrapped into approval of a settlement class purporting to compromise the entirety of class claims.[194] For one thing, such a settlement class could "raise new intra-class conflicts," as it encompasses previously excluded issues on which class members' interests may diverge.[195] *Amchem* has already addressed the need for settlement classes to comply with Rule 23(b)(3) predominance, and called for "heightened" scrutiny of other Rule 23 criteria.[196] Certainly a settlement class could not so easily evade these safeguards by the mere invocation of Rule 23(c)(4).

D. Rule 23(h) Attorney Fees

Finally, the current Rule 23(h) instructs courts to determine, with hearings if necessary, the proper amount of compensation to be awarded to class counsel in the event of a class judgment or a settlement between the parties.[197] In the event of a litigated issue class action, however, there will not be a money judgment for the class from which to compensate class counsel.[198] The remain-

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[192] *See* FED. R. CIV. P. 23(e)(1)(A) advisory committee's note to 2003 amendment ("Subdivision (e)(1)(A) expressly recognizes the power of the class representative to settle class claims, issues, or defenses."); WRIGHT ET AL., *supra* note 15, § 1753.1.

[193] *See, e.g.*, Seiner, *supra* note 6, at 155 (opining that because "the adverse resolution of a particular issue may still permit the [defendant] to avoid liability and/or substantial damages in the case, . . . [defendants] therefore may not be as eager to settle a case certified under Rule 23(c)(4)").

[194] Burch, *supra* note 5, at 1889 (cautioning that "certifying an issue class should not become a backdoor to plenary certification via a settlement class action. If judges conduct their issue class inquiry as this Article suggests, then certifying a settlement class must entail a separate Rule 23 analysis.").

[195] *Id.*

[196] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) ("[O]ther specifications of [Rule 23]—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold.").

[197] FED. R. CIV. P. 23(h).

[198] *See* Burch, *supra* note 5, at 1908 ("There is, however, little to no precedent for awarding fees once counsel successfully litigates an issue class.").

ing liability and damages issues would require adjudication separately and possibly in other venues.[199]

Issue class counsel compensation is a novel topic for courts, representing yet another issue class procedure for which the current Rule 23 is poorly equipped to address. Professor Elizabeth Burch has recently written a comprehensive treatment of the tension between the need to incentivize attorneys to bring issue class actions and the perils of awarding attorney fees for work that often will not immediately result in compensation for the class.[200] She proposes a number of thoughtful suggestions for providing doctrinal justification for allocating attorney fees, including judgment liens[201] and common benefit principles.[202] Unfortunately, such attorney compensation schemes must rest solely on the uncertain and dissimilar whims of district court judges rather than on a procedure deliberated upon and clearly stated in an amendment to Rule 23(h).

CONCLUSION

The issue class action enjoys such widespread acceptance and appreciation, but it has not undergone the thorough vetting and rulemaking consideration that it deserves. If the Committee supports the adoption of an issue class action, it must first tackle the necessary amendments to incorporate this novel device. The most obvious, of course, is the language codifying the criteria under which an issue class action may be certified. The Committee can be guided by the efforts of several courts of appeals that have already set out to articulate the issue class action standard. The Seventh Circuit's approach, in my view, is not only difficult to codify because of its risk/benefit analysis that may defy elaboration, but also because its applicability only to low value cases renders untenable the notion of subsequent individualized lawsuits to capitalize on the issue class action findings on the common issue or issues.

The material advancement test may be the easiest to articulate, but would seemingly focus exclusively on the significance of the issue certified rather than the complexities of that issue, the conflicts of laws, and other convenience and fairness factors that might render issue certification improper. The multifactor test may best identify those additional sets of important considerations, yet it is too lengthy and unwieldy to incorporate into Rule 23 and it gives little guidance regarding the relative weight of each factor. The material advancement language, due to its familiarity and widest adoption, may be considered with accompanying descriptions of the factors in the *Gates* test and explanations of how those factors ought to be weighed and applied in exemplar cases.

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[199] *See id*. at 1905–06 ("[I]ssue classes are uniquely situated because they do not immediately produce a common fund from which successful class counsel can recover.").

[200] *See id*. at 1916 ("Ensuring mechanisms to award issue-class counsel's fees incentivizes issue classes and evens out the typical resource imbalance between a single plaintiff and a corporate defendant.").

[201] *See id*. at 1908–10.

[202] *See id*. at 1910–13.

The remaining amendments to Rule 23(c)(2) and (3), (e) and (h) may not prove overly complicated, but the matter of the constitutional reach of an issue class action settlement that encompasses aspects of plaintiffs' claims over which the court has not exercised jurisdiction is significantly problematic such that the Committee should give it close consideration and consult constitutional scholars to resolve. If the settlement of an issue class action may not properly include class damages claims under current jurisdiction law, one option may be to send out separate settlement notices that may accomplish the same constructive consent that the Court approved in *Shutts*.

In any event, because issue class actions have flown under the radar for so long, and remained a controversial Rule 23 power, the Advisory Committee would benefit enormously from the contributions of courts that have already attempted to grapple with some of the certification and logistic challenges posed by the issue class action, as well as the contributions of scholars and practitioners.