CHALLENGING THE ISSUE CLASS ACTION END-RUN

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After over three decades of experience with the modern class action, Federal Rule of Civil Procedure 23 continues to generate controversy, particularly in the context of mass torts.[1] Federal courts initially treated mass tort class actions with hostility,[2] then began to certify such actions more readily, with certifications peaking in the early 1990s.[3] In recent years, however, a series of appellate courts have struck down several far-reaching mass tort class actions,[4] holding that such classes did not satisfy the Rule 23(b)(3) predominance requirement due to the large number of complex

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[1] *See, e.g.*, Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 963 (1998) [hereinafter Cooper, *Future of Class Actions*] (noting the "political" disputes that immediately followed the 1966 amendments to Rule 23, and observing that "the passions kindled by those debates remain, and new mass tort challenges can only augment the intensity of the contending interests"). Outside the contentious arena of mass torts, as Professor Cooper has pointed out, many believe "a substantial portion of all actions filed with class allegations is virtually invisible because the actions are somehow standard or routine." This hypothesis may be translated into the judgment that Rule 23 is working well in most applications." Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 44 (1996) [hereinafter Cooper, *Rule 23 Challenges*]. *See also* Cooper, *Future of Class Actions, supra*, at 963 (reporting the view of many class action attorneys that 30 years of experience "has battered Rule 23 into a workable and above all well-understood tool").

[2] *See, e.g.*, Mertens v. Abbott Labs., 99 F.R.D. 38, 42 (D.N.H. 1983) (describing benefits of certifying class alleging injury from mothers' exposure to DES to be "at best obscure, and the gain difficult to perceive"); Yandle v. PPG Indus., Inc., 65 F.R.D. 566, 569-70 (E.D. Tex. 1974); Charles Allen Wright, *Class Actions*, 47 F.R.D. 169, 179 (1969, 1970) ("There has been no sign to date that class actions are being attempted in mass tort cases.").

[3] This was first true for cases involving mass accidents. *See, e.g.*, Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558 (S.D. Fla. 1973) (cruise ship food poisoning outbreak); Am. Trading & Prod. Corp. v. Fischhbach & Moore, Inc., 47 F.R.D. 155 (N.D. Ill. 1969) (exhibition hall fire). A few courts, however, later extended this line to include cases involving more complex, dispersed mass torts. *See, e.g., In re* Sch. Asbestos Litig., 789 F.2d 996 (3d Cir. 1986); Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir. 1986).

[4] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138 (4th Cir. 2001); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *In re* Am. Med. Sys., 75 F.3d 1069 (6th Cir. 1996); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995).

individual issues raised by class claims.[5] Because mass tort claims so often involve complicated and diverse individual determinations,[6] this latest round of cases seems to suggest that the majority of mass tort class actions are doomed to fail.[7]

An ever-increasing number of courts and commentators, however, have advocated a simple solution to the seemingly insuperable problem of troublesome individual issues: throw those issues out of the class action altogether, leaving class members to pursue all the unruly individual aspects of their claims in separate trials elsewhere.[8] This "issue class action" end-run can be accomplished, according to this theory, under the auspices of Rule 23(c)(4)(A), which authorizes class actions "with respect to particular issues."[9] Until fairly recently, this provision received little attention and even less explanation, perhaps due to its low profile within Rule 23[10] or its somewhat enigmatic language.[11] Some would say (c)(4)(A) deserves its fairly obscure

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[5] *See, e.g.*, *Amchem*, 521 U.S. at 624 ("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."); *In re Am. Med. Sys.*, 75 F.3d at 1085 (striking down class certification in part on predominance grounds: "the economies of scale achieved by class treatment are more than offset by the individualization of numerous issues relevant only to a particular plaintiff").

[6] *See, e.g.*, Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 895 (1995); Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 500 (1998).

[7] *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 372, 374 (2000) (describing recent Supreme Court mass tort class action cases as having "essentially frozen the development of the class action," and warning against "an expansive reading" of those cases that "threatens the viability of the class action across a broad range of litigation contexts"); Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 157 (1998) (noting prevailing view that recent appellate cases have "pronounced the death knell for the mass tort class action"); S. Elizabeth Gibson, *A Response to Professor Resnick: Will This Vehicle Pass Inspection?*, 148 U. PA. L. REV. 2095, 2097-98 (2000) (asserting that while recent Supreme Court cases "may not sound the death knell for mass tort class action settlements, the decisions certainly increase the difficulty of getting either type of class action certified by a district court and ultimately approved on appeal").

[8] *See, e.g.*, Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996); Davis, *supra* note 7, at 230; 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, 281 (criticizing courts for "fail[ing] to grasp" the full meaning of a (c)(4)(A), which resolves common issues and eliminates the need to resolve complicated individual issues, which may be "severed away cleanly and painlessly").

[9] Federal Rule of Civil Procedure 23(c)(4) states, "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues . . . and the provisions of this rule shall then be construed and applied accordingly." FED. R. CIV. P. 23 (c)(4).

[10] *See* Cooper, *Rule 23 Challenges*, *supra* note 1, at 58.

[11] *See infra* notes 56-60 and accompanying text.

status because it is merely a "housekeeping tool," not a mechanism to circumvent other Rule 23 requirements.[12]

But the proponents of an expansive reading of (c)(4)(A) contend that the provision can play a much more powerful and ambitious role, authorizing class treatment of claims that otherwise would be denied Rule 23 certification.[13] One scholar, characterizing (c)(4)(A) as a heroic player on the stage of mass tort litigation, recently argued that issue certification "can fundamentally revamp the nature of class actions."[14] Similarly optimistic about (c)(4)(A)'s future, a prominent class action attorney opined that (c)(4)(A) "seems poised for a renaissance."[15]

So how should we view (c)(4)(A)? As a benign Rule 23 household helper or as an "overlooked and underutilized"[16] source of class action power? The answer may well be crucial to the future of mass tort class actions.[17] If the expansive interpretation proves correct, the vast majority of federal courts have failed to recognize their authority to certify issue class actions.[18] If the narrower view of the rule prevails, however, any attempt to invoke (c)(4)(A) as an end-run around other Rule 23 requirements must be rejected as an abusive exercise of judicial authority—unless and until the Supreme Court and Congress authorize amendments to the current rule.

To best evaluate these polarized interpretations of Rule 23(c)(4)(A), one must return to the beginning and examine Rule 23 itself. As the Supreme Court recently emphasized in two cases rejecting overly "adventurous"[19] applications of Rule 23, "courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce."[20] This Article

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12 *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996).

13 *See, e.g.*, Romberg, *supra* note 8, at 13 (explaining that "cases that do not otherwise meet the predominance and superiority requirements of Rule 23(b)(3) can be certified as issue classes"); Davis, *supra* note 7, at 230 ("The overbroad language of recent decertifications has added to the perception that class actions are wholly inappropriate for mass torts in spite of the availability of the limited issue class.").

14 Romberg, *supra* note 8, at 12, 29.

15 ELIZABETH J. CABRASER, NEW ISSUES AND KEY RULINGS IN THE CERTIFICATION, TRIAL AND SETTLEMENT AND APPEAL OF CLASS ACTIONS 16 (2001). *See also* Romberg, *supra* note 8, at 29 (asserting that "issue certification is merely in a state of hibernation, ready to be revived"). *Cf.* Marcus, *supra* note 6, at 907 ("Perhaps the class action is, after all, a Phoenix rather than a dinosaur.").

16 Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 326 (1983).

17 *See infra* notes 89-93 and accompanying text.

18 *See, e.g.*, Romberg, *supra* note 8, at 13 (noting that "[o]ften, cases that have been rejected as 'global' class actions could profitably have been certified as to common issues").

19 Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999).

20 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997).

contends that neither (c)(4)(A)'s text, its structural placement, nor its rulemaking history provide support for an adventurous interpretation of the provision. This Article concludes that Rule 23(c)(4)(A), in its current form, simply cannot authorize an issue class action end-run around the predominance requirement for class actions that otherwise would fail to satisfy that requirement.

Part I of this Article examines the origins and structure of Rule 23, seeking to understand Rule 23(c)(4)(A) in the context of the entire rule. Despite (c)(4)(A)'s frustratingly ambiguous wording, some insights may be gleaned from the provision itself, its placement relative to other Rule 23 provisions, and its title. Part I argues that (c)(4)(A)'s "plain meaning," based in part on these structural clues, provides little support for an expansive interpretation.

Part II briefly sets forth three models of (c)(4)(A) interpretation, ranging from its most unquestioned application in the classic "bifurcated" class action to its most controversial use in an "expansive issue class action," which invokes (c)(4)(A) as an alternative when certification of a classic bifurcated class action would fail the (b)(3) predominance test.[21] Short of this outer limit stands another type of issue class action that still requires certified common issues to predominate over all the issues in the case, referred to in this Article as the "limited issue class action."[22] The current (c)(4)(A) dispute, therefore, does not merely pit the bifurcated against the "issue" class action, but also demands distinction between types of issue class actions.

Understandably, in light of this confusing state of affairs, courts rarely have offered thoughtful analyses of this provision of the rule. Part III nevertheless reviews the three-and-a-half decades of judicial experience with (c)(4)(A). Unfortunately, even among courts purporting to utilize (c)(4)(A), there exists a dearth of judicial explication as to its role. A close analysis of those cases fails to find much evidence supporting the expansive issue class action. Instead, many of the cases relied upon by proponents of the expansive issue class action approved certification under (c)(4)(A) only after concluding that common issues predominated in accordance with (b)(3). As a result of some of the more broadly worded appellate opinions, however, and the weight of academic support for an expansive partial class action, there exists today a still quiet yet increasingly pronounced split of authority as to the meaning of Rule

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[21] *See infra* notes 65-74 and accompanying text.

[22] *See infra* note 79 and accompanying text.

23(c)(4)(A).[23] Such disuniformity and uncertainty should be cause for concern at the very least and, at worst, might well result in great mischief.

Part IV heeds the caution most clearly communicated in the Supreme Court's recent class action cases, *Amchem Products, Inc. v. Windsor*[24] and *Ortiz v. Fibreboard Corporation*:[25] to better understand the scope and limitations of an ambiguous provision of Rule 23, one should consider the 1966 amendments to Rule 23 and any rulemaking history that helps to reveal the framers' original understanding of the rule.[26] For a provision so hotly contested today, evidence of Rule 23(c)(4)(A)'s intended meaning is remarkably sparse,[27] which itself may be quite telling. This Article analyzes (c)(4)(A)'s largely ignored rulemaking history[28] and argues that it confirms the very limited function its framers intended (c)(4)(A) to serve.[29] Whatever courts or scholars might wish Rule 23(c)(4)(A) could be, or whatever subsequent Advisory Committees proposing to amend Rule 23 might contemplate,[30] this Article argues that the current rule must be our guide. Despite, or perhaps because of, the dearth of evidence regarding the Committee's intentions for (c)(4)(A), its history suggests that its framers would have been dumbfounded at the suggestion that (c)(4)(A) could serve a momentous role in the future of mass tort class actions.

Rule 23(c)(4)(A) may have a useful role to play in resolving complex litigation, and the "issue class action" may be given new life one day. Any such "renaissance" of (c)(4)(A), however, must occur through the deliberative process of amending federal rules rather than by "judicial inventiveness."[31]

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[23] *See, e.g.*, Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 167 n.12 (2d Cir. 2001) (noting the "alternative understanding[s] of the interaction between (b)(3) and (c)(4)" set forth by various circuit and district courts); *see also infra* notes 205-22 and accompanying text.

[24] 521 U.S. at 591.

[25] 527 U.S. 815 (1999).

[26] *See infra* notes 227-49 and accompanying text.

[27] Excerpts from the Rule 23 rulemaking history related to (c)(4)(A) are set forth in the Appendix to this Article.

[28] While the Judicial Conference maintains Civil Rules Advisory Committee rulemaking materials as a matter of public record, there is little evidence to suggest that courts or commentators interpreting (c)(4)(A) have examined these materials or considered their implications with respect to discerning the Advisory Committee's intent. *But see* Hannah Stott-Bumsted, *Severance Packages: Judicial Use of Federal Rule of Civil Procedure 23(c)(4)(A)*, 91 GEO. L.J. 219 (2002).

[29] *See infra* notes 262-81 and accompanying text.

[30] *See infra* notes 290-98 and accompanying text.

[31] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 843-45 (1999); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1119-40 (2002).

Whether the rule ought to be amended to authorize more innovative issue class actions is a question that bears thoughtful evaluation. In addition to considerations of efficiency and fairness, such class actions would raise important Seventh Amendment right to jury issues, and may strike at our fundamental notions of the case or controversy requirement. But this Article does not address those broader policy questions. Rather, it seeks to refocus the debate over issue class actions on the current version of Rule 23(c)(4)(A) and concludes that the rule we are bound to apply today does not fundamentally expand the types of cases that may be certified under Rule 23. Simply put, the rule does not authorize an issue class action end-run around the important procedural safeguard of predominance, which ensures class cohesion and the legitimacy of representational litigation.[32]

I. PLACING RULE 23(C)(4)(A) WITHIN THE CONTEXT OF RULE 23 IN ITS ENTIRETY

The modern American class action rule, Rule 23, was created in 1938 during the adoption of a single set of Federal Rules of Civil Procedure that reflected the merger of common law and equity procedural rules.[33] This original Rule 23, drafted chiefly by Professor James Moore, required a proposed class action to present issues common to the class and interested parties to be "so numerous as to make it impracticable to bring them all before the court."[34] But it otherwise bears little resemblance to the current version of the rule, as it set forth highly abstract and confusing class categories (which came to be referred to as "true," "hybrid," and "spurious"), with differing implications on the binding effect of class judgments.[35]

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[32] *See Amchem*, 521 U.S. at 623.

[33] *See* DEBORAH R. HENSLER, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 11 (2000). The practice of permitting collective action through representational litigation may date back as far as medieval England, when "both formally organized and more loosely associated groups of individuals [brought] complaints about communal harm—merchants manipulating the marketplace, church officials disturbing religious peace, powerful families intimidating juries." *Id.* at 10 (citing STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987)).

[34] FED. R. CIV. P. 23 (1938).

[35] Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 HARV. L. REV. 356, 380-86 (1967). *See also* HENSLER, *supra* note 33, at 11 (noting that Rule 23 categories were intended to delineate the "various features of the litigation that provided a rationale for allowing the parties to proceed jointly, rather than singly. The most important difference among the three types of class actions, however, was whether the outcome would bind 'absent' (i.e. represented) parties . . . .").

In the early 1960s, after several decades of judicial confusion in applying the original Rule 23, the Advisory Committee took on the task of revamping the class action rule. Such action was necessitated, in the view of the Reporter for that Advisory Committee, because the original class action rule had become hopelessly "snarled," amounting to a "breakdown of the systematics of the rule."[36] After several years of deliberation, the Supreme Court and Congress approved the Committee's proposed amendments to Rule 23, which took effect in July of 1966.[37]

The 1966 amendments first clarified the prerequisites for every type of class action, set out in the newly created Federal Rule of Civil Procedure 23(a). These prerequisites may be short-handedly labeled numerosity, typicality, commonality, and adequacy. The numerosity requirement simply states that the class be "so numerous that joinder of all members is impracticable."[38] Commonality may be satisfied if "there are questions of law or fact common to the class."[39] Typicality tests whether "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[40] Finally, Rule 23(a) requires that proposed class actions demonstrate that "the representative parties will fairly and adequately protect the interests of the class."[41] The adequacy, commonality, and typicality tests frequently involve overlapping analyses,[42] with all three prerequisites designed to ensure due

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[36] Kaplan, *supra* note 35, at 385.

[37] Order of February 28, 1966 (with amended rules), 383 U.S. 1031 (1966).

[38] FED. R. CIV. P. 23(a)(1). The exact number that can satisfy this requirement is not clear, but classes have been certified with as few as 30 class members.

[39] *Id.* 23(a)(2). The commonality requirement has not often been closely scrutinized, particularly in classes certified under Rule 23(b)(3), which contains a heightened test of commonality in the predominance requirement.

[40] *Id.* 23(a)(3). Typicality has been said to ascertain whether the class representative's remedial theories of liability are similar to those of the class.

[41] *Id.* 23(a)(4). The Supreme Court recently reaffirmed the importance of this requirement in its recent mass tort class action cases, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

[42] The Court in *Amchem* found that,

> The adequacy-of-representation requirement "tend[s] to merge" with the commonality and typicality criteria of Rule 23(a), which "serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."

521 U.S. at 626 n.20 (quoting Gen. Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982)).

process protections for absent class members[43] whose interests are being adjudicated on a representational basis.[44]

More significantly, the 1966 amendments set forth redesigned categories of class actions in Rule 23(b). Rule 23(b)(1) authorizes a mandatory class action when litigation by individual members of the class risks either (A) inconsistent adjudications that would create "incompatible standards of conduct for the party opposing the class," or (B) individual adjudications that would be practically dispositive of the interests of other members of the class or would "impair or impede their ability to protect their interests."[45] Rule 23(b)(2) permits mandatory class actions for classes seeking injunctive or declaratory relief.[46] Finally, Rule 23(b)(3) creates an opt-out class category permitting damages claims to be brought on a class basis.[47] This last category, the most "adventuresome" new class action,[48] was described in the Advisory Committee's Note as promoting uniformity of decision where "economies of time, effort, and expense" can be achieved "without sacrificing procedural fairness or bringing about other undesirable results."[49] In order to ascertain the propriety of proceeding with a (b)(3) class, the rule requires courts to find both that issues common to the class "predominate" over individual issues and that the class device presents the "superior" method of adjudicating the dispute. These heightened requirements reflect the Advisory Committee's view that "class-action treatment is not as clearly called for as in [(b)(1) or (b)(2)], but it may nevertheless be convenient and desirable" in some cases.[50]

Subdivision (c) of the amended Rule 23 includes a host of class action management provisions, addressing the timing of such a class action order,[51] the need to provide notice to members of a (b)(3) class action and the content of such notice,[52] the binding effect of any judgment that might result from the

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[43] The term "absent class members" refers to all but the named or representative class members.

[44] *Amchem*, 521 U.S. at 621 ("Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives.").

[45] FED. R. CIV. P. 23(b)(1).

[46] *Id.* 23(b)(2).

[47] *Id.* 23(b)(3).

[48] *See* Benjamin Kaplan, *A Prefatory Note*, 10 B.C. IND. & COM. L. REV. 497, 497 (1969).

[49] FED R. CIV. P. 23(b)(3) advisory committee's note.

[50] *Id.*

[51] *Id.* 23(c)(1) (requiring courts "as soon as practicable" to determine whether a class action should be certified, but permitting such orders to be conditional).

[52] *Id.* 23(c)(2) (setting forth notice requirements that must be satisfied for class actions certified under Rule 23(b)(3)). Due to the mandatory character of Rule 23(b)(1) and (b)(2) class actions, class members in those actions were not entitled to notice under (c)(2). This provision is the subject of a proposed amendment

certified class action,[53] and the procedure by which a court may divide a certified class action into subclasses.[54] And, of course, subdivision (c) also contains the provision that is the inscrutable subject of this Article. Rule 23(c)(4) provides: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues . . . and the provisions of this rule shall then be construed and applied accordingly."[55] The provision fails to specify under which circumstances it might be "appropriate" to invoke (c)(4)(A),[56] leaving courts and commentators to continue to debate that very topic thirty-some years after its enactment.

Equally ambiguous is (c)(4)(A)'s central language: What does it mean to bring or maintain a class action "with respect to particular issues?" Again, in light of the growing debates about its meaning among class action litigators and commentators, the term is obviously not self-defining. It clearly envisions that a court may conduct a common class trial of "particular issues," but beyond that its meaning is opaque. One could argue that the words authorizing "an action [to] be brought . . . as a class action with respect to particular issues" are tantamount to an issue class action. In other words, the rule may contemplate the filing of a class action seeking only to resolve common class issues, excluding from that action any remaining issues class members' claims might raise.

Rule 23(c)(4)'s final phrase also appears to create more confusion than elucidation. What is meant by the phrase "and the provisions of this rule shall then be construed and applied accordingly?" This part of the subdivision can

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to Rule 23, however, which would extend (c)(2)'s notice requirement to mandatory class actions, albeit by means merely "calculated to reach a reasonable number of class members." *See* Proposed Amendments to Rule 23(c)(2)(A)(ii) Advisory Committee's note (adopted by the U.S. Judicial Conference Committee on Rules of Practice and Procedure, June 10-11, 2002).

[53] FED. R. CIV. P. 23(c)(3) (providing that whether the class action judgment is favorable to the class or not, it will be binding against all persons included in the class definition, excepting those permitted to opt out of a (b)(3) class action). This provision was expressly added to redress the res judicata uncertainties of the previous Rule 23. *See id.* 23(b)(3) (Adv. Comm. Note) (noting conflicts among courts regarding the binding effect of "spurious" class action judgments on absent class members who fail to "intervene" in the action before the determination of liability to the class).

[54] *Id.* 23(c)(4)(B).

[55] *Id.* 23(c)(4).

[56] *See* 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. 497 (1988) (suggesting that this vague language might be responsible for courts' reluctance to employ (c)(4)(A) partial class actions, as it "discourages all but the most innovative and imaginative judges from utilizing the [(c)(4)(A)] class action device").

be understood more clearly in its application to (c)(4)(B) subclasses.[57] If a class has been properly certified in compliance with subdivision (b), Rule 23(c)(4)(B) permits a court to further divide that class into subclasses, but requires that "each subclass [must be] treated as a class." Once the rule demands that subclasses are treated the same as classes, it seems appropriate that the rule requires each subclass to comply with all the other provisions of the class action rule. Indeed, courts have interpreted the "construe and apply" language for (c)(4)(B) subclasses precisely that way.[58]

As will be addressed more fully in Part III, advocates of a more expansive interpretation of (c)(4)(A) argue that just as (c)(4)(B) subclasses must separately comply with Rule 23(a) and (b) provisions, a court considering certification of an issue class action may "construe and apply" subdivisions (a) and (b) exclusively with respect to the "particular issues" certified, rather than with respect to both the certified common issues and the individual issues that must be adjudicated on a nonclass basis.[59] Because all the "particular issues" will be common to the class, under this theory (c)(4)(A) class actions satisfy the (b)(3) predominance requirement by definition.[60] But given that (b)(3) itself contemplates a class action where some issues must be resolved on an individual basis, this reading of (c)(4)(A) puts into question the meaning of predominance in any (b)(3) class action.

While its terminology may not be particularly illuminating, some conclusions may be drawn from (c)(4)(A)'s position within the structure of Rule 23 as a whole. Its placement in subdivision (c), for example, reflects a

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[57] Indeed, the Advisory Committee of the mid-1990s considered an amendment that would have expressly limited the "construe and apply" directive to subclasses. *See* Cooper, *Rule 23 Challenges, supra* note 1, at 56, 61.

[58] *See, e.g.*, Ret. Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 599 (7th Cir. 1993) ("Subclasses must satisfy the class action requirements before they may be certified [by] Fed. R. Civ. P. 23(c)(4)."); Betts v. Reliable Collection Agency, 659 F.2d 1000, 1005 (9th Cir. 1981) ("[E]ach subclass must independently meet the requirements of Rule 23 for the maintenance of a class action, . . . [and as] a practical matter, the litigation as to each subclass is treated as a separate lawsuit."); Johnson v. Am. Credit Co., 581 F.2d 526, 532 (5th Cir. 1978); Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073, 1077 (10th Cir. 1975).

[59] *See, e.g.*, Slaven v. BP Am., Inc., 190 F.R.D. 649 (C.D. Cal. 2000) (conducting predominance inquiry on an issue by issue basis rather than with respect to class claims as a whole); Castano v. Am. Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996) (same); Romberg, *supra* note 8, at 41 (reasoning by analogy to subclasses that when "issue certification is employed under Rule 23(c)(4)(A), the Rule 23 analysis is applicable to the unit that has actually been certified for collective resolution—i.e., the common issues"); *see also* MANUAL FOR COMPLEX LITIGATION § 30.17 (3d ed. 1995); HERBERT B. NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4.23 (3d ed. 1992).

[60] *See infra* notes 73-74 and accompanying text.

managerial rather than a primary role for (c)(4)(A).[61] While subdivision (b) defines types of "Class Actions Maintainable," the provisions in subdivision (c) reflect the laundry list of steps a court may take after properly certifying a subdivision (b) class action. None of the other subdivision (c) provisions alter the terms under which a (b) class action may be certified, or provide independent authority to certify another type of class action.

Another Rule 23 clue to understanding (c)(4)(A)'s scope may be found in the rather ponderous title to subdivision (c): "Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions."[62] The relevant part of (c)'s title does *not* read "Actions Conducted as Partial Class Actions," which might have suggested that (c)(4)(A) empowers certification of "partial" actions. Instead, the title's wording indicates that the "Action" making up class members' claims, and brought before the certifying court, may be bifurcated under this subdivision and "conducted partially" as a class action, but also (presumably) partially on a nonclass or individual basis. Thus, this choice of words used to describe (c)(4)(A)'s limited power, as well as its location in subdivision (c) rather than (b), suggests that (c)(4)(A) functions as a complement to subdivision (b) class actions rather than as an independent ground for certification of a new class action category (the "partial" class action).

In the end, the proper scope of (c)(4)(A) cannot readily be ascertained by the "plain meaning" of the language employed by its drafters. The above review appears to provide more support for a limited reading of (c)(4)(A) than for an expansive one, but the ambiguity of some of the provision's language bears further scrutiny and analysis. The following Part briefly outlines the various interpretive models courts and commentators have suggested, including the classic "bifurcated" class action model, and the more ambitious "issue" class action models ("limited" and "expansive").

II. MODELS OF RULE 23(C)(4)(A) INTERPRETATION

In a recent article, Professor Jon Romberg offered an analytical framework for Rule 23(c)(4)(A), dividing the cases into two categories, "bifurcated" and

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[61] *Cf.* Cooper, *Rule 23 Challenges*, *supra* note 1, at 58 ("[T]he placement in subdivision (c)(4) of the provision permitting class actions for particular issues has tended to obscure the potential benefit of resolving certain claims and defenses on a class basis while leaving other controversies for resolution in separate actions.").

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

"partial" class actions.[63] As discussed in Part I, the term "partial" class action may be confused with (c)(4)(A)'s authorization of "actions conducted partially as class actions." This Article, therefore, refers instead to "issue" class actions, the other term frequently employed to describe the cases Romberg calls "partial" class actions. These categories, while rarely recognized by courts or commentators,[64] help distinguish the classic model of (c)(4)(A), the "bifurcated" class action, from the modern models of "issue" class actions.

At the very least, as Professor Romberg points out, (c)(4)(A) authorizes bifurcated class actions, which permit severance of common from individual issues for all class members in "multiple stages of the same lawsuit."[65] In other words, (c)(4)(A) in a bifurcated class action serves as the class action equivalent to the bifurcation power authorized by Rule 42(b),[66] severing class issues for separate trial before the court resolves the remaining issues for each class member on an individualized basis.[67] Some early commentary on Rule 23 embraced this limited view of (c)(4)(A), analogizing it to Rule 42(b).[68]

The most obvious example of a bifurcated class action is one certified under Rule 23(b)(3), whose very terms contemplate an action where the class claims involve some matters unique to each class member that must be

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[63] Romberg, *supra* note 8, at 15.

[64] *See, e.g., id.* at 34 (referring to the "relatively unexplored" position of courts and commentators on (c)(4)(A)).

[65] *Id.* at 15.

[66] FED. R. CIV. P. 42(b) (permitting separate trial of any issues "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy").

[67] Courts similarly utilize (c)(4)(A) to permit bifurcation of certain claims for trial on a class basis from other claims not suited to class resolution, or brought by the named plaintiff on an individual basis. *See, e.g.*, Probe v. State Teachers Ret. Sys., 780 F.2d 776, 780 (9th Cir. 1986) (finding that Rule 23(c)(4)(A) "permit[s] actions involving both class and individual claims," and such actions "are not uncommon"); Marshall v. Kirkland, 602 F.2d 1282 (8th Cir. 1979); Cannon v. Cherry Hill Toyota, 184 F.R.D. 540, 544 (D.N.J. 1999) (quoting Stephenson v. Bell Atlantic Corp., 177 F.R.D. 279, 289 n.4 (D.N.J. 1997)) (permitting named plaintiff to assert individual claim "in addition to claims for which she seeks class certification," and emphasizing that "Rule 23(c)(4)(A) permits differential treatment of claims"). Support for this interpretation of (c)(4)(A) as authorizing bifurcation of class claims from individual claims can be found in the 1966 Advisory Committee Notes to Rule 23. The Committee explained that in a limited fund class action, the class action character of the lawsuit that included all class claims against the fund "ordinarily left unaffected the personal claims of nonappearing members against the debtor." FED. R. CIV. P. 23 (Adv. Comm. Note) (comparing subdivision (c)(3) to (c)(4)(A)).

[68] *See, e.g.*, Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1218 n.60 (1966) (noting that the power given to courts under the new (c)(4)(A) provision "is analogous to that conferred by FED. R. CIV. P. 42(b)"); *see also* Marvin Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 47 (1967) ("[E]ffective administration of (b)(3) actions will probably require wide use of the already familiar device of split trials.").

resolved on an individual basis. As one district court explained, on this view (c)(4)(A) reaffirms that Rule 23 "does not require that all liability issues in an action be determinable on a classwide basis before the action may be certified as a class action . . . and the fact that some issues require individual treatment cannot, in itself, foreclose certification."[69] In its classic application, then, (c)(4)(A) authorizes bifurcated class actions and reiterates a court's power (seemingly implicit in (b)(3)) to certify a class action even when some issues cannot be resolved commonly.[70] But this application does not suggest that (c)(4)(A) serves as an "alternative" to a (b)(3) class action or alters the predominance test in any way.

Beyond this seemingly unremarkable use of (c)(4)(A) to effect a bifurcated class action, however, lies its more controversial application in "issue" class actions.[71] Unlike a bifurcated class action where "absent class members who seek damages are obligated to come into court," in an issue class action "the suit ends for absent class members—not only as a class action but as a case at all" after the court resolves the common issues on a class basis.[72] In other words, absent class plaintiffs in issue class actions must file individual lawsuits somewhere else after the class trial to resolve all remaining nonclass issues related to their claims against the defendant.

Close examination of the cases, however, confirms that the division between "bifurcated" and "issue" class actions does not go far enough in delineating among the possible models of (c)(4)(A) interpretation. The dual model framework assumes that if (c)(4)(A) authorizes issue class actions, it necessarily follows that such an action permits an end-run around the predominance requirement of (b)(3). According to this argument, the "issues" certified for class treatment will "automatically" predominate[73] over individual

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[69] McQuilken v. A&R Dev. Corp., 576 F. Supp. 1023, 1028 (E.D. Pa. 1983). *See also In re* Three Mile Island Litig., 87 F.R.D. 433, 442 n.17 (M.D. Pa. 1980) (stating that Rule 23(c)(4)(A) permits class actions "even when some matters will have to be treated on an individual basis," and was intended to realize class action economies "in cases with a mixture of common and uncommon issues that are separable").

[70] As will be discussed in Part III, recognition of (c)(4)(A)'s application to bifurcated class actions should rebut the view of some courts that (c)(4)(A) would be rendered "superfluous" unless it serves to authorize expansive partial class actions. *See, e.g., In re* Tetracycline Cases, 107 F.R.D. 719, 727 (W.D. Mo. 1985).

[71] One early commentator on this "evolutionary" expansion of (c)(4)(A) explained that while the rule originated as a "tool of economy [it] now serves as a means to establish predominance." Susan E. Abitanta, Comment, *Bifurcation of Liability and Damages in Rule 23(b)(3) Class Acions: History, Policy, Problems, and a Solution*, 36 SW. L.J. 743, 752 (1982).

[72] Romberg, *supra* note 8, at 266.

[73] *Id.* at 34 (asserting that for much of (c)(4)(A)'s lifetime, "the dominant (if relatively unexplored) position of courts and commentators was that certifying only the common issues in a case automatically

issues simply because no individual issues exist—those issues will be resolved elsewhere by class members in separate lawsuits after the "issue" class action is completed.[74]

An extraordinarily impressive cadre of academics has voiced support for this view of the (c)(4)(A) "issue" or "partial" class action.[75] The leading Civil Procedure treatise, for example, which in 1987 devoted an encouraging section to Rule 23(c)(4),[76] instructs that when a class action fails the (b)(3) predominance test, a court should still "consider the possibility of determining particular issues on a representative basis as permitted by Rule 23(c)(4)(A)."[77]

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resulted in predominance, or at least resulted in predominance unless the common issues could not feasibly be severed from the individual issues"). *See also* NEWBERG & CONTE, *supra* note 59, § 4.23 (explaining that a (c)(4)(A) partial class action gives courts the power to "automatically satisfy[] the predominance test under Rule 23(b)(3)").

[74] One early advocate of automatic predominance for (c)(4)(A) class actions did not, however, seem to contemplate separate lawsuits outside the class action court. Richard O. Cunningham, Note, *Class Action Treatment of Securities Fraud Suits Under Revised Rule 23*, 36 GEO. WASH. L.J. 1150, 1158 (1968). In this note, the author writes of allowing class members to "come into court" to establish various individual issues, and further speculates that "[c]arried to its logical conclusion, such an interpretation would eliminate the problem of predominance of common questions . . . ." *Id.* But the note does not appear to envision that those individual proofs could be taken to other courts, so that while (c)(4)(A) might provide automatic predominance, it appears this note believes that occurs in a classic bifurcated class action rather than in a partial class action.

[75] *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, *supra* note 59, § 30.17; NEWBERG & CONTE, *supra* note 59, §§ 4.23, 4.25; 7B WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1790 (2d ed. 1987); Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79, 95-96 (1994); Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST L. REV. 979 (2001); Davis, *supra* note 7, at 233; Romberg, *supra* note 8, at 298; Woolley, *supra* note 6, at 500. *Cf.* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1439 (1995) (approvingly noting the series of mass tort cases "certif[ying] a limited class action for purposes of determining liability, but not for purposes of determining causation or damages"); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849, 910 n.30 (1984).

[76] *See* WRIGHT ET AL., *supra* note 75, § 1790 (stating that "(c)(4) is particularly helpful in enabling courts to restructure complex cases to meet the other requirements of maintaining a class action").

[77] *Id.* § 1778. *See also* NEWBERG & CONTE, *supra* note 59, § 4.25 (explaining that "when common questions do not predominate when compared to all the questions that must be adjudicated to dispose of a suit, Rule 23(c)(4) asks whether a suit limited to the unitary adjudication of a particular common issues [sic]" can be certified"); MANUAL FOR COMPLEX LITIGATION, *supra* note 59, § 30.17 (in certifying a class action "of one or more issues relating to liability while certification of other issues affecting liability or damages is denied or deferred, . . . the court should be satisfied that common issues predominate *with respect to the certified issues* . . . .") (emphasis added); WRIGHT ET AL., *supra* note 75, § 1790 (urging any court considering denial of a class action to resist such a "drastic step . . . whenever the court can profitably isolate the class issues under Rule 23(c)(4)(A)"). A senior researcher at the Federal Judicial Center recently emphasized that the *Manual for Complex Litigation* should not be treated as legal authority, pointing to the manual's own cautionary note:

An issue class action, therefore, "'recast[s]' a non-predominating class action into one that may 'predominate' for purposes of Rule 23(b)(3)."[78]

While this issue class action model, which envisions issue class actions as an alternative to non-predominating (b)(3) class actions, enjoys wide support among commentators, it has not been unanimously embraced. Several scholars have declined to adopt this expansive interpretation of (c)(4)(A),[79] and few courts appear to have applied (c)(4)(A) so broadly. Thus, an additional category of issue class actions is needed, one that contemplates an action that resolves only certain issues for the class, but nevertheless requires a finding that the class's claims involve predominantly common issues before doing so. Because this "issue" class action is limited to the resolution of common class issues, it is referred to as the "limited issue class action." The automatic predominance model of issue class actions, because it seeks to expand (c)(4)(A) to its farthest limits, is referred to herein as the "expansive issue class action." However clumsy and cumbersome they may be, these labels serve a useful purpose in distinguishing among the models of (c)(4)(A) interpretation actually utilized by the courts, as the next Part illustrates.

"The manual is offered as an aid to management, not as a treatise on matters of substantive or procedural law . . . ." Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the* Manual for Complex Litigation, 148 U. PA. L. REV. 2225, 2232 (2000).

[78] WRIGHT ET AL., *supra* note 75, § 1778. *See also* Cabraser, *Unfinished Business*, *supra* note 75, at 1024; Davis, *supra* note 7, at 209-10 (criticizing courts' use of an "unnecessarily restrictive" view of (c)(4)(A) requiring predominance of common issues in the entire action); Cunningham, *supra* note 74, at 1158; Rosenberg, *supra* note 75, at 910 n.30 ("The availability of class action efficiencies should not be made to depend on a finding that the common questions in some sense 'predominate' over any individual questions."); Williams, *supra* note 16, at 330 (asserting that partial class actions should be utilized "to adjudicate any significant common issues in mass tort cases"); Abitanta, *supra* note 71, at 762 (arguing that (c)(4)(A) allows courts to "more readily overcome the prerequisites of predominance and manageability"); Bone, *supra* note 75, at 95-96 (arguing that predominance requirement should not "limit certification of issue-specific classes").

[79] *See, e.g.*, Frankel, *supra* note 68, at 43. ("[I]t is assumed that individual questions peculiar to individual class members, but overweighed by common questions, will or may remain after the common questions have been fully determined."); Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1059 (1986) (describing the disadvantages of utilizing partial class actions to resolve mass torts: "First, before a 'limited issue class' can be certified pursuant to subdivision (c)(4)(A), the lawsuit must be certified under a Rule 23(b) category. Thus, the mass-tort litigant cannot utilize Rule 23(c)(4)(A) to maintain a class action in circumstances that would otherwise not support certification of a class."); David L. Shapiro, *Class Actions: The Class As Party and Client*, 73 NOTRE DAME L. REV. 913, 955 (1998) (noting that the predominance requirement "has generally been understood (and I think correctly) to override the possibility of certification of a class on particular issues under Rule 23(c)(4) unless those issues are found to 'predominate' over the individual issues in the case"). *Cf.* Daniel F. Piar, *The Uncertain Future of Title VII Class Actions After the Civil Rights Act of 1991*, 2001 BYU L. REV. 305, 332 (criticizing courts "attempt[ing] to circumvent Rule 23 concerns by applying various schemes of bifurcation or partial certification of Title VII classes").

III. JUDICIAL INTERPRETATION OF RULE 23(C)(4)(A)

The story of federal courts' interpretations of Rule 23(c)(4)(A) can roughly be broken down, as with the history of mass tort class actions, into three eras. In the earliest period, the first decade or so after the adoption of amended Rule 23, courts largely ignored (c)(4)(A) altogether or made mere passing references to it as they bifurcated common from individual issues or certain class claims from others involved in a lawsuit.[80] In the second period, which understandably parallels the heyday of the mass tort class action,[81] courts increasingly turned to (c)(4)(A) to certify complex product liability cases such as asbestos,[82] contraceptives,[83] tobacco,[84] heart valves,[85] prescription drugs,[86] and blood products.[87] Indeed, judicial enthusiasm for mass tort class actions (and, less obviously, (c)(4)(A)) during this era quickly became referred to as the "trend" toward certification of mass tort cases.[88]

In the most recent period, however, a number of appellate courts have struck down certifications of the most expansive (c)(4)(A) issue class actions.[89] In the wake of these rejected applications of (c)(4)(A), courts have begun to focus more clearly on that provision's interplay with other Rule 23 requirements.[90] Some courts have seen (c)(4)(A) as a solution to the dilemma

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[80] *See infra* notes 94-113 and accompanying text (discussing the early interpretation of Rule 23(c)(4)).

[81] *See, e.g.*, Coffee, *supra* note 75, at 1344-45 (describing the "slow and halting" development of the mass tort class action, but noting that "[b]y the end of the 1980s, however, the tide began to turn in favor of class certification"); Davis, *supra* note 7, at 186 (noting that during this period, "class action certification for mass torts ceased to be extraordinary and appeared to become, if not routine, not wholly unusual").

[82] *See* Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 185 (4th Cir. 1993); *In re* Sch. Asbestos Litig., 789 F.2d 996 (3d Cir. 1986).

[83] *In re* A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989).

[84] Castano v. Am. Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996).

[85] *See* Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1228-29 (9th Cir. 1996) (discussing district court's certification order); *see also In re* Cordis Corp. Pacemaker Product Liab. Litig., MDL No. 850 (S.D. Ohio 1992).

[86] *In re* Copley Pharm., Inc., 158 F.R.D. 485, 491 (D. Wyo. 1994).

[87] Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410 (N.D. Ill. 1994), *rev'd on writ of mandamus sub. nom In re* Rhone-Poulenc Rorer, Inc. 51 F.3d 1293 (7th Cir. 1995). *See also* Dante v. Dow Corning Corp., 143 F.R.D. 136 (S.D. Ohio 1992) (breast implants); *In re* Tetracycline Cases, 107 F.R.D. 719 (W.D. Mo. 1985) (antibiotics).

[88] *In re A.H. Robins Co.*, 880 F.2d at 740 ("[T]he 'trend' is once again to give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case 'best serve the ends of justice for the affected parties and . . . promote judicial efficiency.").

[89] *See, e.g.*, Castano, 84 F.3d at 734; *In re* Rhone-Poulenc Rorer, 51 F.3d 1293 (7th Cir. 1995); Davis, *supra* note 7, at 194 (noting that mass tort liability "class action decertifications have come fairly quickly in recent years").

[90] *See, e.g.*, Simon v. Philip Morris, Inc., 200 F.R.D. 21 (E.D.N.Y. 2001).

of complex mass tort cases, taking the position that issue class actions under that provision present an alternative to class actions that appellate courts have found improper on predominance and manageability grounds.[91] Another group of courts, however, has denounced the issue class action "alternative," declining to interpret (c)(4)(A) as authorizing an end-run around (b)(3).[92] This split in authority, still rather quiet against the cacophonous background of the general mass tort debate, suggests that resolution of the proper role of (c)(4)(A) is becoming increasingly important to the future of mass tort class actions.[93]

A. Early Interpretation of Rule 23(c)(4)(A): 1966-1980

In cases citing to (c)(4)(A) during its early years, courts referred to it, if at all,[94] as simply providing authority to effect a bifurcated class action, primarily ordering separate trials of liability and damages.[95] Until the early 1980s, even courts invoking (c)(4)(A) did so with little fanfare or discussion, and then only in class actions involving claims for economic damages,[96] rarely in cases

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[91] *See infra* notes 221-26 and accompanying text.

[92] *See infra* note 220 and accompanying text.

[93] *See* Davis, *supra* note 7, at 233 (arguing that the very integrity of the judicial system could depend on the "use of the mass tort class action in its limited issue format"); Woolley, *supra* note 6, at 501 ("If the parties and the courts are to enjoy the benefits of class aggregation in the mass tort context without sacrificing the right to adjudicate individual issues, the availability of the issue class is essential.").

[94] *See, e.g.*, Windham v. Am. Brands, Inc., 565 F.2d 59 (4th Cir. 1977) (rejecting option of "severing" issues without mention of (c)(4)(A)); Green v. Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968) (explaining without citation to (c)(4)(A) that the "effective administration of 23(b)(3) will often require the use of the 'sensible device' of split trials" (quoting Frankel, *supra* note 68, at 47)); Jenkins v. United Gas Corp., 400 F.2d 28, 35 (5th Cir. 1968) (contending, without citation to (c)(4)(A) that the presence of individual issues does not prevent certification of race discrimination claims under (b)(2): Courts have the duty and power under Rule 23 "to treat common things in common and to distinguish the distinguishable"); Harris v. Jones, 41 F.R.D. 70, 73 (D. Utah 1966) (declining to apply (c)(4)(A) because of practical difficulties); Cunningham, *supra* note 74, at 1158 (asserting that as of 1968, courts had largely ignored (c)(4)(A)); Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 SO. CAL. L. REV. 842, 861-62 (1974) (noting that courts certifying (b)(3) class actions typically reach that decision either "after some general discussion" of predominance or a citation to Rule 23(c)(4)(A): "In the course of interpreting the predominance requirement, the courts have not paid much attention to the method of handling the remaining individual questions.").

[95] *See, e.g.*, *Green*, 406 F.2d at 301; Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 113 (E.D. Va. 1980) (explaining that Rule 23(c)(4)(A) may be employed to "bifurcat[e] the class actions here certified between liability issues and damage issues).

[96] *See, e.g.*, Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686 (9th Cir. 1977) (securities fraud); Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977) (antitrust); *Windham*, 565 F.2d 59 (antitrust); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 566 (2d Cir. 1968), *rev'd on other grounds*, 417 U.S. 156 (1974) (antitrust).

involving mass torts.[97] These cases reflect judicial concern primarily with the question of whether damages could be established on a class basis or, if not, how complex any individualized damages assessments might be.[98] In *Windham v. American Brands, Inc.*, for example, the Fourth Circuit rejected the option of severing liability from damages issues in plaintiffs' proposed antitrust class action because "the issue of violation did not predominate."[99] The Fourth Circuit explained its very narrow view of the propriety of class certification in cases involving individualized damages assessments:

> [W]here the fact of injury and damage breaks down in what may be characterized as "virtually a mechanical task," "capable of mathematical or formula calculation," the existence of individualized claims for damages seems to offer no barrier to class certification on the grounds of manageability. On the other hand, where the issue of damages and impact does not lend itself to such mechanical calculation, but requires "separate 'mini-trial(s),'" of an overwhelming large number of individual claims, courts have found that the "staggering problems of logistics" thus created "make the damage aspect of [the] case predominate," and render the case unmanageable as a class action.[100]

Although proponents of the expansive issue class action have relied on two cases from this early era as support for their interpretation of (c)(4)(A),[101] close examination suggests that such reliance is largely unfounded. In the first of

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[97] Before the early 1980s, no court had approved a mass tort class action involving personal injuries, under (c)(4)(A) or otherwise. *See, e.g., In re* Tetracycline Cases, 107 F.R.D. 719, 723 (W.D. Mo. 1985) (collecting cases through 1985 rejecting mass tort class actions). One rare such example can be found in *Hernandez v. Motor Vessel Skyward*, which certified the issue of negligence under (b)(1)(A) and (c)(4)(A) on behalf of a class of cruise ship passengers. 61 F.R.D. 558 (S.D. Fla. 1973). *See also* Davis, *supra* note 7, at 175 & n.64 (citing rejected mass tort cases demonstrating that "[e]arly attempts to certify class actions in mass tort cases after the 1966 amendments were few and routinely met with defeat").

[98] *See, e.g., Bogosian*, 561 F.2d at 456; *Windham*, 565 F.2d at 66-68 (considering possibility of severing liability and damages, but concluding that damages would involve complicated individual proofs); *Eisen*, 391 F.2d at 566 (explaining that differences among class members regarding "computation of damages" did not preclude certification); Siegel v. Chicken Delight, Inc., 271 F. Supp. 722, 725-26 (N.D. Cal. 1967) (alluding to (c)(4)(A) in certifying class plaintiffs' antitrust claims, emphasizing that differences "with respect to the determination of their damages and the amounts thereof does not render this class action improper"); *see also* Arthur R. Miller, *Problems in Administering Judicial Relief in Class Actions Under Federal Rule 23(b)(3)*, 54 F.R.D. 501, 504-06 (1969) (discussing judicial administration difficulties surrounding assessment of damages in class actions).

[99] 565 F.2d at 67 & n.18 ("Determination of a violation or violations of the Sherman Act establishes nothing automatically as far as the measure of individual damage claims is involved.").

[100] *Id.* at 68 (citations omitted).

[101] *See* NEWBERG & CONTE, *supra* note 59, § 4.24 n.242 (citing *Young* for the proposition that class actions limited to particular issues "will necessarily afford predominance as to those issues").

these cases, *Arthur Young & Co. v. United States District Court*, the Ninth Circuit considered on mandamus a securities fraud class action where the district court proposed to bifurcate common liability issues for class treatment, reserving "certain other issues for individual adjudication."[102] Far from supporting an expansive reading of (c)(4)(A), the court seems to have viewed (c)(4)(A) as simply the class action equivalent of Rule 42(b). The court's sole reference to (c)(4)(A) is a brief citation following its citation to Rule 42(b),[103] stating that (c)(4) provides authority "for class treatment of particular issues if such treatment is otherwise appropriate under Rule 23."[104] At no time does the opinion suggest that the predominance analysis required by (b)(3) is somehow altered by application of (c)(4)(A). To the contrary, the court emphasized that "we take the district court's bifurcation order to mean that he found individual issues to exist in this litigation as reserved, but not on such a large scale as to defeat the conclusion of predominance on common issues as to most of the [class members'] claims."[105] Indeed, the court speculated that the issues reserved for later resolution might well be "amenable to class proof,"[106] or might be tried before a single jury.[107]

In *Bogosian v. Gulf Oil Corp.*, decided the same year as *Young*, the Third Circuit considered the application of (c)(4)(A) to a proposed antitrust class action brought by service station operators against major oil companies.[108] The court rejected several of the lower court's grounds for denying class

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[102] 549 F.2d 686, 692 (9th Cir. 1977). Advocates of an expansive issue class action also cite *Young* for its affirmation of the constitutionality of bifurcating issues in a class action. *See, e.g., In re* Copley Pharm., Inc., 161 F.R.D. 456, 463 (D. Wyo. 1995) (citing *Young* for the proposition that the "weight of the current law demonstrates that the Seventh Amendment is not violated by the separation of common issues of liability for class treatment"). While the Ninth Circuit certainly rejected defendant's argument that the proposed bifurcation in that case violated the Seventh Amendment, the court hardly held that severance of issues in class actions would always pass constitutional muster. Rather, the court considered the proposed bifurcation carefully before concluding that the issues to be tried before a separate jury were not "so 'interwoven' with the class issues" that the right to trial by jury would be violated. *Arthur Young & Co.*, 549 F.2d at 693 (citing *Gasoline Prods. Co. v. Champlin Refining*, 283 U.S. 494 (1931), which explained that the reserved issues "represent separate defenses" to liability, not "part of the plaintiffs' case-in-chief").

[103] *Arthur Young & Co.*, 549 F.2d at 692 (quoting FED. R. CIV. P. 42(b)).

[104] *Id.*

[105] *Id.* at 693 n.10. The court emphasized that only "isolated instances of alleged non-reliance" had been suggested by the defendant, and that defendant failed to show that non-reliance proofs "is of such volume as to be significant to the district court's determination on the Rule 23 issues." *Id.* at 695.

[106] *Id.* at 693 n.10.

[107] *Id.* at 693 n.9 ("Petitioners characterize as 'disingenuous' the suggestion that trial of all issues in these cases will be had before one jury. There is nothing in the district court order that would preclude such a procedure, as a practical matter, and we find nothing inherently wrong with such a procedure.").

[108] 561 F.2d 434 (3d Cir. 1977).

certification, making clear that most of the issues in the antitrust action could be determined on a class basis, possibly including damages. The court expressed its view that a class action would be proper, however, even if damages had to be assessed individually: "it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination *when the common issues which determine liability predominate*."[109]

In the sentence immediately following, the court cites Rule 23(c)(4)(A) as it rather confusingly opines that "[i]f for any reason the district court were to conclude that there would be problems involved in proving damages which would outweigh the advantages of class certification, it should give appropriate consideration to certification of a class limited to the determination of liability."[110] Some have read this passage as authorizing "issue" class actions that effect an end-run around the (b)(3) predominance requirement.[111]

Although *Bogosian*'s language may lend itself to such an interpretation if read in isolation, when viewed in the context of other portions of the opinion (particularly the preceding sentence) the case cannot be seen as interpreting (c)(4)(A) so expansively. The passage citing to (c)(4)(A) should be read only to authorize severance of the *predominating* liability issues in the class phase of the litigation from the individual damages phase if the latter could not be easily calculated.[112] In that event, damages would be assessed in individual adjudications separate from the class action. *Bogosian* can be best analyzed as a twin to *Young*, invoking (c)(4)(A) to function as a bifurcation device, separating the predominately common class issues from possible individual issues that can be handled in later individualized proceedings following resolution of common issues tried on a class basis.[113] These cases fall into the bifurcated class action category: both demanded predominance of common over individual issues, and neither envisioned jettisoning individual issues from the action.

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[109] *Id.* at 456 (emphasis added).

[110] *Id.* (citing FED. R. CIV. P. 23(c)(4)(A)).

[111] *See, e.g.*, Romberg, *supra* note 8, at 291 (arguing that *Bogosian* would permit a partial class action if common issues failed to predominate over individual issues).

[112] Indeed, the Third Circuit recently clarified that this language in *Bogosian* was intended to permit class certification only in the event the case contained predominating common issues. *See* Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 137 (3d Cir. 2000).

[113] *See infra* notes 170-187 and accompanying text.

B. The Modern "Trend" Toward Expansive Use of Rule 23(c)(4)(A): 1980-1995

Courts became significantly more interested in (c)(4)(A) in the 1980s and early 1990s, an era that witnessed the evolution of the "issue" class action.[114] Unfortunately, these innovative courts often failed to describe exactly what such a class action entailed.[115] But however imprecise the jurisprudence might be, courts during this era clearly began to interpret (c)(4)(A) as authorizing an action that only adjudicated common class issues, leaving absent class members to file separate lawsuits elsewhere to pursue all other issues raised by the class claims.[116]

The most confusing aspect of these issue class action decisions involves the precise interplay between (c)(4)(A) and other Rule 23 requirements.[117] Close examination of the cases reveals that most courts certifying such issue class actions during these years continued to require satisfaction of (b)(3) predominance as to the whole case.[118] Because the courts limited the actions to the common issues, excluding absent class members' individual issues, this Article refers to these cases as "limited" issue class actions. At the farthest end of the spectrum lie the decisions interpreting (c)(4)(A) as authorizing an issue

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[114] *See, e.g.*, Abitanta, *supra* note 71, at 750 (arguing that bifurcation under (c)(4)(A) "has taken on a new character. While bifurcation originated as a method of controlling complex litigation already at trial, the separation of issues in a (b)(3) action has evolved into a means of achieving class certification").

[115] Some courts, confusingly, claim to be certifying "issue" or "partial" class actions, when it appears they actually certified a bifurcated class action. *See, e.g.*, Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 111 (E.D. Va. 1980). In *Pruitt*, the court explained that despite its finding that common issues did not predominate in the case as a whole, it would consider plaintiffs' claims pursuant to Rule 23(c)(4). The court proceeded to certify six subclasses that each satisfied "predominance of common questions among their respective members," and then explained that the "presence of individual plaintiffs' damages and the defenses thereto" required the court to "employ the second device under Rule 23(c)(4):" bifurcation of each separate class actions in "partial class action[s]" between liability and damage issues, reserving "the proof and computation of individual plaintiffs' damages, as well as any defenses . . . for a later proceeding." *Id.* at 110-11. If any such "later proceedings" were necessary, the court made clear, they would be done in the "damages phase of the trial, which might be conducted by a special master." *Id.* at 117.

[116] *See, e.g.*, *In re* Tetracycline Cases, 107 F.R.D. 719, 725 (W.D. Mo. 1985). Judge Spencer Williams, whose class certification involving Dalkon Shield was reversed on appeal, explained his vision of (c)(4)(A) issue class actions in an article written after the Ninth Circuit's decertification decision: "One important, but both underutilized and overlooked, aspect of Rule 23's repertoire [(c)(4)(A)] provides the possibility of class adjudication not as an entire case, but limited to one or more issues common to a group of cases." Williams, *supra* note 16, at 326-27.

[117] *See, e.g.*, Nielson, *supra* note 56, at 483 (pointing out that "[e]ven when judges consider Rule 23(c)(4), they may not understand how that rule relates to and is to be construed with the predominance and superiority requirements of Rule 23(b)"); Romberg, *supra* note 8, at 269.

[118] *See infra* notes 121-40 and accompanying text.

class action "alternative" for courts to consider when they find that common issues do not predominate over individual issues in the case as a whole. While a number of courts seem to hold this expansive view of (c)(4)(A)—referred to as the "expansive" issue class action—few have actually certified such a class action,[119] and even fewer certifications have survived appellate review.[120]

1. Appellate Cases

In one of the first attempts at an issue class action, the Ninth Circuit rejected certification of product liability claims brought by a class of California women injured by use of the Dalkon Shield birth control device.[121] Recognizing the existence of certain common issues, the court nevertheless struck down the proposed class action in part because the district court had failed to balance those issues against the "greater number of questions affecting individual class members."[122] This need to assess the predominance of common issues over individual issues existed even though the class was purportedly limited to the issue of liability. As the court pointed out, "Robins' overall liability, under some of the theories, cannot be proved unless each plaintiff also proves that Robins' breach of its duty proximately caused her particular injury."[123]

The Fifth Circuit, in *Jenkins v. Raymark Industries, Inc.*, issued perhaps the most influential appellate decision of this era.[124] The court upheld class

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[119] *See infra* notes 141-56 and accompanying text.

[120] *See, e.g.*, Castano v. Am. Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996); Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410 (N.D. Ill. 1994), *rev'd on writ of mandamus sub. nom In re* Rhone-Poulenc Rorer, Inc. 51 F.3d 1293 (7th Cir. 1995).

[121] *In re* N. Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847 (9th Cir. 1982).

[122] *Id.* at 856.

[123] In its superiority evaluation, the court acknowledged that litigation costs would be "greatly reduced" if portions of liability could be litigated on a class basis, and it cited Rule 23(c)(4)(A) as providing the authority to sever certain issues for class trial. *Id.* But it did not hold that (c)(4)(A) altered the predominance or superiority inquiry, pointing out instead that "[t]he few issues that might be tried on a class basis in this case, *balanced against issues that must be tried individually*, indicate that the time saved by a class action may be relatively insignificant." *Id.* (emphasis added).

[124] 782 F.2d 468 (5th Cir. 1986). *See* Davis, *supra* note 7, at 209 (lauding the trial court judges in *Jenkins* and *Agent Orange*, without whose "courag[eous]" and "legendary" contributions, "there would be no appellate opinions to explore the mass tort class action"). The Second Circuit's decision in *In re Agent Orange Product Liability Litigation*, 818 F.2d 145 (2d Cir. 1987), also may be viewed as providing significant early support for the "issue" class action because it referred to the "centrality of the military contractor defense" in justifying its approval of the district court's class certification order. *Id.* at 166. That decision, however, never cited (c)(4)(A) and emphasized the rare nature of its finding of predominance in the face of complex individual issues: "Were this an action by civilians based on exposure to dioxin in the course of civilian affairs, we believe certification of a class would have been error." *Id.* Moreover, the district court's order clearly found

certification on the "overarching" issue of the asbestos defendants' state of the art defenses against plaintiffs' product liability claims, as well as other questions including product defect and gross negligence.[125] Indeed, the court cites (c)(4)(A) as allowing "certification as to only certain issues, where appropriate."[126] But the court still required common issues raised by the class claims as a whole to predominate over individual issues, approving the district court's experienced conclusion that the state of the art issue alone would consume "a major part of the time required for [class members'] trials."[127]

Jenkins may fairly be read as loosening the predominance criteria that had previously stymied some mass tort class actions,[128] defining that term to require only that common issues "constitute a significant part of the individual cases."[129] Sister circuits quickly picked up on this articulation of predominance to permit broader application of class actions to mass tort cases.[130] Moreover, the decision may provide a building block of sorts in the case for expansive issue class actions, following along the lines of the Fifth Circuit's reasoning that "necessity moves us to change and invent."[131]

But the case cannot be read as actually authorizing such an expansive interpretation of (c)(4)(A).[132] There is simply no evidence the Fifth Circuit believed that its predominance analysis could be conducted only as to the certified common issues, rather than as compared to the individual issues

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predominance of that central issue over all others in the case *as a whole*, and its class action notice makes clear that the court intended to adjudicate the claims of absent class members "for all purposes," by which it meant assessments of liability, compensatory and punitive damages. *In re* Agent Orange Prod. Liab. Litig., 100 F.R.D. 718, 724, 732 (E.D.N.Y. 1983).

125 782 F.2d at 470-71.

126 *Id.* at 472 n.4.

127 *Id.* at 471-73. *See also* Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 279 (E.D. Tex. 1985) (finding predominance where "state of the art is the most significant contested issue in each case").

128 *See, e.g.*, Yandle v. PPG Indus., Inc., 65 F.R.D. 566 (E.D. Tex. 1974).

129 *Id.* at 472. In *Jenkins* itself, the court concluded that reasoning that "[i]t is difficult to imagine that class jury findings on the class questions will not significantly advance the resolution of the underlying hundreds of cases." *Id.* at 472-73.

130 *See, e.g., In re* A.H. Robins Co., 880 F.2d 709 (4th Cir. 1989); *In re* Sch. Asbestos Litig., 789 F.2d 996, 1010 (3d Cir. 1986).

131 *Jenkins*, 782 F.2d at 473. *Cf.* Castano v. Am. Tobacco Co., 160 F.R.D. 544, 559 (E.D. La. 1995) ("Necessity in the form of the present class action moves this Court to certify the liability issues and punitive damages on a classwide basis in order to promote judicial economy and efficiency.").

132 *But see* MANUAL FOR COMPLEX LITIGATION, *supra* note 59, § 30.17 n.702 (citing *Jenkins* in section regarding issue class actions, which the manual describes as appropriately certified even when case as a whole would not satisfy predominance); Nielson, *supra* note 56, at 463 (approvingly citing to *Jenkins* as an example of a court that has "hurdled the predominance and superiority barriers by certifying partial classes"); Romberg, *supra* note 8, at 22-23.

remaining for later proceedings.[133] And the class in *Jenkins* was limited to those who had already filed individual lawsuits in the Eastern District of Texas.[134] So although the court approved a plan where "individual issues of unnamed members would be resolved later in 'mini-trials' of seven to ten plaintiffs," those trials were not expected to take place in courts outside the district, much less the state.[135] In this respect, *Jenkins* resembles more closely the classic bifurcated class action rather than the limited issue class action.

The Third Circuit's opinion in *In re School Asbestos Litigation*[136] similarly has been cited as supporting the view that (c)(4)(A) fundamentally alters the (b)(3) predominance analysis.[137] It is true that the decision includes encouraging passages, such as the one noting that "[r]esolution of common issues need not guarantee a conclusive finding on liability, nor is it a disqualification that damages must be assessed on an individual basis."[138] Citing (c)(4)(A), the court also writes favorably of the "trend" in favor of mass tort class actions: "Reassessment of the utility of the class action in the mass tort area has come about, no doubt, because courts have realized that such an action need not resolve all issues in the litigation."[139]

But like *Jenkins*, although this case contains some broad language, the court's Rule 23 analysis in fact does not evade or circumvent the obligation to ensure predominance. Rather, the court employs a predominance analysis that balances the common issues in the school district claims for asbestos property

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133 Indeed, the district court's opinion repeatedly asserted that common issues predominated over the individual issues of all class plaintiffs, and emphasized the potentially dispositive state of the art issues as "the most significant contested issue in each case" compared to the individual issues relating to exposure and injury. Jenkins v. Raymark Indus., Inc., 109 F.R.D. 269, 278-80 (E.D. Tex. 1985). The district court quoted Wright's treatise for the proposition that "when one or more of the central issues in the action are common to the class *and can be said to predominate*, the action will be considered proper . . . even though other important matters will have to be tried separately." WRIGHT ET AL., *supra* note 75, § 1778.

134 *Jenkins*, 782 F.2d at 470.

135 *Id.* at 471. *See also* Castano v. Am. Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) (attempting to cabin expansive applications of its decision in *Jenkins* along these lines).

136 789 F.2d 996 (3d Cir. 1986).

137 *See, e.g.*, *In re* Copley Pharm., Inc., 160 F.R.D. 456, 463 (D. Wyo. 1995) (relying on case in certification of expansive issue class action); Nielson, *supra* note 56, at 465 (describing court's decision in *School Asbestos* as having "approved certification of partial classes to ensure predominance of common issues"); Romberg, *supra* note 8, at 23.

138 *In re Sch. Asbestos Litig.*, 789 F.2d at 1010 (citation omitted).

139 *Id.* at 1008. *See also In re* Tetracycline Cases, 107 F.R.D. 719, 735 (W.D. Mo. 1985) (citing cases and commentary "champion[ing] the use of Rule 23(c)(4)(A) as a means of handling mass products liability claims").

damages against the individual issues in the case *as a whole*.[140] Therefore, far from supporting an expansive view of (c)(4)(A), this case simply underscores its proper role: to permit class actions in which some predominating common issues are certified for trial on a class basis but which contemplate the existence of individual issues that must be adjudicated separately for each plaintiff or perhaps group of plaintiffs.

The Fourth Circuit, in *In re A.H. Robins Co.*, picked up on this "trend" toward certification of mass tort class actions, citing recent judicial recognition of (c)(4)(A) as partly explaining that trend:

> [I]n order to promote the use of the class device and to reduce the range of disputed issues, courts should take full advantage of the provision in subsection (c)(4) permitting class treatment of separate issues in the case and, if such separate issues predominate sufficiently (i.e., is the central issue), to certify the entire controversy as in *Agent Orange* . . . [and] that the mass tort action for damages may in a proper case be appropriate for class action, either partially [or] in whole.[141]

This language certainly sounds as if the Fourth Circuit might be suggesting (c)(4)(A) ought to be used to certify issues for class treatment even if such issues do not predominate over the individual issues in the whole case.[142] In light of the fact that *A.H. Robins* involved a class certification under (b)(1) and not (b)(3), however, this language is at best dicta for such a reading of (c)(4)(A)'s proper interaction with (b)(3)'s requirements. It even may be plausible to interpret the court as saying something much less dramatic. The court might be saying that (c)(4)(A) should be utilized more aggressively in limited issue class actions where some issues must be tried separately, and if a common issue represents a predominating, overarching central issue in the case (like the state of the art defense in *Jenkins* or the military contractor defense in *Agent Orange*),[143] the court should consider a bifurcated class action, managing

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[140] *In re Sch. Asbestos Litig.*, 789 F.2d at 1010 (upholding lower court's finding of predominance). *See also id.* at 1011 (noting that despite finding of predominance, presence of individualized defenses in case "clearly poses significant case management concerns").

[141] 880 F.2d 709, 740 (4th Cir. 1989).

[142] *See* NEWBERG & CONTE, *supra* note 59, § 4.25 (citing *Robins* in section explaining that the issue class action should be considered as an alternative when the case as a whole does not satisfy predominance); Romberg, *supra* note 8, at 23-24.

[143] *In re A.H. Robins Co.*, 880 F.2d at 741 (comparing the joint tortfeasor issue to both the state-of-the-art defense in *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986), and the military contractor defense in *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987)).

individual class members' follow-up adjudications as well as the common issue trial.[144]

The outer limits of the Fourth Circuit's potentially expansive (c)(4)(A) reasoning also did not need to be examined in detail because the court believed it had just such an appropriately overarching and predominant issue: whether, under a single substantive law standard, the defendant could be held liable as a joint tortfeasor to the thousands of Dalkon Shield claimants.[145] Moreover, the court emphasized the "uniqueness" of this case, including the fact that the defendant had stipulated to resolution of all individual issues through a claims facility if it were found liable.[146] In other words, even if the court needed to conduct a predominance analysis, not only would there be an overarching central common issue, but no individual issues would even exist in the case because the defendant had already agreed not to contest them.

The Fourth Circuit returned to its analysis of (c)(4)(A) in *Central Wesleyan College v. W.R. Grace & Co.*, a nationwide asbestos property damages case brought by institutions of higher education.[147] Unlike *A.H. Robins*, this case did involve a (b)(3) class action, so it provided the Fourth Circuit with a better opportunity to clarify its interpretation of the proper interplay between (c)(4)(A) and (b)(3). After reiterating its language from *A.H. Robins*, the court approved certification of "certain claims for class treatment."[148] Like *Jenkins* and *School Asbestos*, the *Central Wesleyan* court embraced a broad vision of predominance in concluding that "[f]indings in a common issues trial on even a few of the eight identified [common] questions may eventually save considerable time and judicial resources."[149] Yet in light of the frustrating manageability problems still consuming the *School Asbestos* litigation, the Fourth Circuit sounded a more wary note when it observed that "the verdict is still out on the utility of mass asbestos litigation procedures, particularly in the property damage context."[150] Indeed, its concluding sentiments on the manageability of this class action do not sound terribly optimistic: "Even

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144 Such a reading may be unduly strained, but when one considers that the Fourth Circuit was not even dealing with a (b)(3) case, this passage's meaning is particularly abstract.

145 *In re A.H. Robins Co.*, 880 F.2d at 741 (comparing the joint tortfeasor issue to both the state-of-the-art defense in *Jenkins*, 782 F.2d at 468 and the military contractor defense in *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d at 145).

146 *Id.* at 742.

147 6 F.3d 177 (4th Cir. 1993).

148 *Id.* at 185.

149 *Id.*

150 *Id.* at 182.

assuming that resolution of the eight conditionally certified issues advances the litigation, a daunting number of individual issues still loom beyond the Phase One proceedings."[151]

As for the function of (c)(4)(A), the court sends somewhat mixed messages. It seems almost to conflate the subclass provision in (c)(4)(B) with (c)(4)(A) as it states that while

> Rule 23(c)(4)(A) make[s] plain that district courts may separate and certify certain issues for class treatment, the "subclass" on each issue still "must" independently meet all the requirements of [subsection 23(a)] and at least one of the categories specified in [subsection 23(b)]. Thus, a limited class pursuing the eight issues still must possess both (a)(3) typicality and demonstrate (b)(3)(D) manageability.[152]

The confusion stems from its reference to a "subclass" on each issue and also a "limited class pursuing the eight issues." Is a (c)(4)(A) certification a "subclass" as contemplated by (c)(4)(B), or is a "limited issue" class something different? While the first sentence suggests that (c)(4) class certifications must still comply with 23(a) and 23(b), the last suggests that only manageability (i.e. superiority) need be considered, not predominance.

This picture becomes less cloudy, however, when the rest of that paragraph and following paragraph are considered. After worrying about manageability, the Fourth Circuit comments that "[s]imilar concerns over *a few common issues not predominating over individual questions* in asbestos cases previously prompted the Panel on Multidistrict Litigation not to consolidate property damage actions."[153] In the following paragraph, the Fourth Circuit contrasts this class action with the one approved in *A.H. Robins*, emphasizing that this class action "involves dozens of defendants, hundreds of asbestos products sold over decades, and a wealth of individual issues *making it less easy to conclude that one issue or even eight, predominate*."[154] Nevertheless, as in *School Asbestos*, the court decided that the "district court deserves the chance to succeed in resolving issues of unquestioned importance in this litigation."[155] These final acknowledgements by the Fourth Circuit of the need

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151 *Id.* at 188.

152 *Id.* at 189 (citing *In re* A.H. Robins, 880 F.2d 709, 728 (4th Cir. 1989)).

153 *Id.* (citing *In re* Asbestos Sch. Prod. Liab. Litig., 606 F. Supp. 713, 714 (J.P.M.L. 1985)) (emphasis added).

154 *Id.* (emphasis added).

155 *Id.* at 190.

to find predominance of the issues certified for class treatment over the "wealth of individual issues" in the case, in addition to its admittedly confusing admonition that (c)(4) certification must still comply with (b)(3)'s requirements, suggest that the case should not be viewed as supporting a bolder view of (c)(4)(A).[156]

2. *District Court Cases*

In the midst of these often imprecise appellate opinions alluding to (but not specifically explaining) the proper interaction between (c)(4)(A) and (b)(3), a few district courts explicitly interpreted issue class actions pursuant to (c)(4)(A) as altering the (b)(3) predominance requirement. The district court's decision in *In re Tetracycline Cases* represents the earliest[157] and one of the most influential of these cases.[158] In *Tetracycline*, which involved a class whose mothers' ingestion of defendant's product allegedly caused tooth discoloration, the court asserted that all previous decisions denying class certification in mass tort cases were "inapposite" because "none of those cases cited dealt with requests for partial class treatment under Rule 23(c)(4)(A)."[159] In such a case, the court explained, the plaintiff class proposes a class action that will only certify common issues of law and fact, with the understanding that if the class prevailed, "the class members would then proceed to trial separately, in this or other courts, upon the remaining 'individualized' liability and compensatory damages issues."[160]

This case reflects the apparent sea change in plaintiffs' attorneys' approach to mass tort cases, not as readily discernable in the appellate cases:[161] assert the (c)(4)(A) issue class action as an "alternative" to certification of the whole case, and argue that this alternative authorizes an end-run around (b)(3)'s

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156 *But see In re* Copley Pharm., Inc., 161 F.R.D. 456, 464 (D. Wyo. 1995); WRIGHT ET AL., *supra* note 75, § 1790 (citing case favorably in support of "partial" issue class actions); Romberg, *supra* note 8, at 24 & n.108.

157 107 F.R.D. 719 (W.D. Mo. 1985). *See also* Payton v. Abbott Labs, 100 F.R.D. 336, 339 (D. Mass. 1983) (decertifying DES class action certified under (c)(4)(A) after court determined that common issues no longer predominated because state rejected common liability theories).

158 *See* WRIGHT ET AL., *supra* note 75, § 1790 n.12 (citing favorably court's decision in *In re Tetracycline*).

159 *In re Tetracycline*, 107 F.R.D. at 725.

160 *Id.*

161 The best reflection of this litigation strategy in the appellate court decisions of the time can be found in *In re A.H. Robins, Co.*, 880 F.2d 709, 740 (4th Cir. 1989) (discussing apparent class certification choice between entire controversy and only limited issues under (c)(4)(A)).

predominance requirement.[162] The *Tetracycline* court analyzed the parties' conflicting views of (c)(4)(A), evaluating many of the arguments the courts remain split on today concerning the proper interplay between (c)(4)(A) and (b)(3):

> Plaintiffs acknowledge the paucity of case authority on this issue, but reason that since they are seeking only partial certification, it would be illogical to require that all the issues present in the case be taken into account in an evaluation of the Rule 23 requirements. To require a full-blown analysis of all issues, they argue, would have the effect of rendering Rule 23(c)(4)(A) superfluous.
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> Predictably enough, defendants disagree with this view of the effect of a limited class certification request on the Rule 23 prerequisites, and characterize plaintiffs' analysis as nothing more than circular reasoning. The interpretation of Rule 23(c)(4)(A) proffered by plaintiffs, they insist, would render the predominance requirement of Rule 23(b) a nullity.[163]

The court, after acknowledging the "absence of judicial commentary" on the subject, sided with the plaintiffs: "What defendants decry as a dilution of the predominance requirement, however, appears to the court to be precisely what Rule 23(c)(4)(A) allows in the interests of flexibility and economies of adjudication."[164]

If issue class actions under (c)(4)(A) required predominance "in the usual Rule 23 sense, when compared to all the issues in the case," the court reasoned:

> [T]here would obviously be no need or place for Rule 23(c)(4)(A). Reference to the general rules of construction suggests that any interpretation which makes a federal rule superfluous is to be avoided. I believe, accordingly, that the appropriate meaning of Rule 23(b)(3)'s predominance requirement, as applied in the context of a partial class certification request under Rule 23(c)(4)(A), is simply that the issues covered by the request be such that their resolution (as a class matter) will materially advance a disposition of the litigation as a whole. In applying this test the court must obviously consider

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[162] *See Tetracycline*, 107 F.R.D. at 726; *see also* Harding v. Tambrands, Inc., 165 F.R.D. 623, 632 (D. Kan. 1996) (noting that after finding that the case as a whole failed the predominance test, the court must consider plaintiffs' request for certification of certain issues under (c)(4)(A)).

[163] *In re Tetracycline*, 107 F.R.D. at 726-27. *See also* Nielson, *supra* note 56, at 483 n.133 (praising *Tetracycline* for being "one of the few" courts to "address[] the interplay of the prerequisites of Rule 23(b) and Rule 23(c)(4)(A)").

[164] *In re Tetracycline*, 107 F.R.D. at 727.

> the nature of the other potential issues in the litigation; but, to me at least, the ultimate analytical process followed in that regard is quite different than in the usual application of Rule 23(b).[165]

The *Tetracycline* court's thoughtful exposition of the appropriate role of a (c)(4)(A) certification concluded with its assertion that while the effect of (c)(4)(A) "is to lessen . . . the importance of the predominance requirement," such an alteration "may be viewed as offset by a corresponding increase in the importance accorded Rule 23(b)'s requirement of superiority, a requirement which is unaffected by Rule 23(c)(4)(A)." Indeed, in its superiority analysis of the issue class action proposed, the court concluded that "the existence of a large number of individual issues which would remain for resolution . . . in later, individual trials significantly detracts from the usefulness of a common issues trial."[166] Resolution of the common issues must, according to *Tetracycline*, "at least provide a definite signal of the beginning of the end."[167]

So, while individual issues need not be considered in a predominance analysis, according to *Tetracycline*, their presence in the case as a whole still can prevent certification of the proposed issue class action. The court's purported test for superiority, that the common issues "advance this litigation sufficiently to outweigh the manageability problems of any common issues trial,"[168] sounds a lot like predominance in the guise of superiority. Indeed, the

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[165] *Id.* Unlike *Tetracycline*, the district court in *Caruso v. Celsius Insulation Resources, Inc.*, 101 F.R.D. 530, 538 (M.D. Pa. 1984), rejected a request for a "reevaluation" of plaintiffs' formaldehyde exposure claims under (c)(4)(A) "should we decline to certify the entire matter." The *Caruso* court emphasized that "any 'common issue class' certified under Rule 23(c)(4)(A) must still comply with the other applicable subdivisions of Rule 23. *Id.* (citing WRIGHT ET AL., *supra* note 75, § 1790).

[166] *In re Tetracycline*, 107 F.R.D. at 735. The court found that:

> Although this court is in substantial agreement with some of the general views expressed by . . . those commentators who have championed the use of Rule 23(c)(4)(A) as a means of handling mass product liability claims, that sympathy of opinion does not override the concerns expressed in this opinion as to the superiority and manageability problems which exist in the present cases.

Id. (citations omitted).

[167] *Id.* at 733 (quoting Mertens v. Abbott Labs., Inc., 99 F.R.D. 38, 41 (D.N.H. 1979)). Several district courts in the years following *Tetracycline* and *Caruso* recognized the tension between those courts' conflicting views of (c)(4)(A) interpretation. *See, e.g.*, Harding v. Tambrands, Inc., 165 F.R.D. 623, 632 (D. Kan. 1996) (citing, in a confusing way, *Tetracycline*'s language regarding common issues "materially advanc[ing] the litigation as a whole," in the same paragraph in which it cites *Caruso* regarding the need to deny certification under (c)(4)(A) when "the noncommon issues are too predominant to handle on a class basis"); *see also* Brown v. S.E. Pa. Rans. Auth., 1987 WL 9273, at *11 (E.D. Pa. 1987) (citing *Tetracycline* and *Caruso* as reflecting conflict among courts regarding the applicability of (c)(4)(A) in mass tort context).

[168] *In re Tetracycline*, 107 F.R.D. at 736.

Fifth Circuit's opinion in *Jenkins* used similar language in its predominance analysis.[169]

A number of district court opinions in the decade or so following *Tetracylcine* adopted its approach to (c)(4)(A) and yet rejected the proposed issue class action, finding that it did not "materially advance" or reflect the "beginning of the end" of the litigation as a whole.[170] In the mid-1990s, however, a number of other district courts, emboldened by the appellate opinions described above, actually began to certify "expansive" issue class actions. These class action decisions included explicit plans to exclude any adjudication of absent class members' individual issues from the action, and also expressly certified (c)(4)(A) issue class actions that would otherwise fail the (b)(3) predominance requirement on the case as a whole.

The first of these cases, *Wadleigh v. Rhone-Poulenc Rorer, Inc.*, involved a nationwide class of hemophiliacs who contracted the HIV virus through contaminated blood products.[171] After concluding that the "requirements of Rule 23(b)(3) are not satisfied by the case as a whole," the court then considered an alternative certification under (c)(4)(A).[172] The court proceeded to conduct a predominance inquiry for each of the issues raised by class members' claims. While the court found proximate cause, injury, and damages to "involve a predominance of individual questions," for example, it determined that "the common negligence and breach of fiduciary duty issues can appropriately be certified."[173]

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[169] Jenkins, v. Raymark Indus., 782 F.2d 461, 472-73 (5th Cir. 1986) ("It is difficult to imagine that class jury findings on the class questions will not significantly advance the resolution of the underlying hundreds of cases.").

[170] *See, e.g.*, Davenport v. Gerber Prods. Co., 125 F.R.D. 116, 120 (E.D. Pa. 1989) (rejecting issue class action in case involving nursing bottle syndrome because "certification on the narrow legal issue presented by plaintiffs does not advance this litigation in light of the fact that virtually all of the issues related to liability would remain unresolved on an individual basis"); *Brown*, 1987 WL 9273, at *11 (noting that "[e]ven if I utilize the class mechanism to adjudicate the issues of abnormally dangerous activity, negligence, strict liability, and nuisance" under (c)(4)(A), "the entire proceeding would ultimately disintegrate into time-consuming, individual damage and causation trials"). *Cf.* Doe v. Guardian Life Ins. Co., 145 F.R.D. 466, 478 (N.D. Ill. 1992) (denying (c)(4)(A) certification of (b)(1) and (b)(2) limited issue class action to resolve question of whether bipolar disorder qualifies as covered illness under relevant insurance policies because "even if the court could resolve the proposed issue, its resolution would not significantly advance the litigation in this case").

[171] 157 F.R.D. 410 (N.D. Ill. 1994), *rev'd on writ of mandamus sub. nom In re* Rhone-Poulenc Rorer, Inc. 51 F.3d 1293 (7th Cir. 1995).

[172] *Id.* at 422.

[173] *Id.* at 423.

District courts in *In re Copley Pharmaceutical, Inc.*,[174] *Castano v. American Tobacco Company*,[175] and *In re Telectronics Pacing Systems, Inc.*,[176] quickly followed *Wadleigh's* lead in certifying nationwide issue class actions. In *Copley*, which involved a nationwide class claiming injury from a contaminated batch of bronchodilator prescription drugs, the court conducted a similar issue-by-issue predominance evaluation, rather than balancing the common and the individual issues in the case as a whole.[177] This evaluation resulted in the conclusion that "common issues predominate the Plaintiffs' claims for strict liability, negligence, negligence per se, breach of warranties, and the request for declaratory relief," but that "individual issues predominate as to the issues of causation and injury."[178] Those latter individual issues, the court noted, were particularly individualized here because "most of the Plaintiffs who claim physical injury had significant health problems that necessitated their use of [the drug] in the first place."[179]

In *Castano*, the district court also certified a nationwide product liability issue class action under (c)(4)(A) and (b)(3), this one seeking damages for addiction to nicotine in cigarettes.[180] The court explained that its "determination that only some of the issues raised by plaintiffs but not others are properly certifiable under Rule 23(b)(3) does not end the inquiry" because "core liability issues" could properly be certified under Rule 23(c)(4)(A).[181] After conducting an issue-by-issue predominance examination, the court concluded that while class certification "should be granted insofar as the core liability issues alleged by plaintiffs are concerned," the issues of injury, proximate cause, reliance, compensatory damages, medical monitoring, and affirmative defenses, however, "are so overwhelmingly replete with individual circumstances that they quickly outweigh predominance and superiority."[182]

Finally, in *In re Telectronics*, the court certified under (c)(4)(A) and (b)(3) a nationwide "issue" class action involving injuries from allegedly defective

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174 158 F.R.D. 485, 491 (D. Wyo. 1994) (noting that "[t]his Court is also impressed with the well-reasoned decision of Judge Grady in *Wadleigh*").

175 160 F.R.D. 544 (E.D. La. 1995).

176 164 F.R.D. 222, 230 (S.D. Ohio 1995).

177 *Copley*, 158 F.R.D. at 491-92 (denying defendants' motion to decertify proposed issue class action); *see also* WRIGHT ET AL., *supra* note 75, § 1790 (favorably citing *Copley* as an example of a (c)(4)(A) "partial class action").

178 *Copley*, 158 F.R.D. at 491.

179 *Id.*

180 *Castano*, 160 F.R.D. at 560.

181 *Id.* at 559.

182 *Id.* at 556.

pacemaker wires.[183] The district court in this case is not entirely clear on whether common issues of fact and law predominate over individual issues in the litigation as a whole, but it explains that its decision to certify only certain liability issues "has prevented" any concerns about the prospect of time-consuming individual adjudication of issues such as damages and causation.[184] While this may sound like issue-by-issue predominance, the court also held on reconsideration that "common issues do predominate in this case,"[185] reasoning that the case resembled *Copley* more than *In re American Medical Systems*,[186] where the Sixth Circuit decertified a product liability class action due to "predominant individual issues."[187]

By the mid-1990s, then, the growing "trend" appeared to be in favor of issue class actions, if not the more expansive model then at least the limited model. While commentators largely applauded this trend,[188] appellate courts reversed the expansive issue class certifications in *Wadleigh* and *Castano*, and a wave of other appellate court cases struck down other ambitious mass tort class actions in terms that called into question the class action's utility in resolving any complex case. This "backlash" and the district courts' attempts to address the impact of these recent appellate reversals are considered in the following section.

C. The Post-Modern Era of Issue Class Actions: 1995 to the Present

The Seventh Circuit's decision in *In re Rhone-Poulenc Rorer, Inc.*,[189] reversing the district court's class certification in *Wadleigh*, represents the first,

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183 *In re* Telectronics Pacing Sys., 164 F.R.D. 222, 230 (S.D. Ohio 1995).

184 *Id.*

185 *In re* Telectronics Pacing Sys., 168 F.R.D. 203, 221 (S.D. Ohio 1996) (decertifying class on reconsideration, finding that while predominance had been satisfied, plaintiffs had not sufficiently demonstrated that the proposed issue class action would be superior or that the named plaintiffs satisfied either typicality or adequacy requirements).

186 75 F.3d 1069, 1085 (6th Cir. 1996).

187 *In re Telectronics*, 168 F.R.D. at 220. *See also* WRIGHT ET AL., *supra* note 75, § 1790 (noting that *Telectronics* court "recogniz[ed] that the common issues predominated").

188 *See supra* note 75 and accompanying text.

189 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995). Indeed, a number of critics have deplored both Judge Posner's decision and the "pall" it cast over other courts considering issue class actions. *See, e.g.*, Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1232 (9th Cir. 1996); Davis, *supra* note 7, at 195 (referring to *Rhone-Poulenc* as "one of the most important of the class action decertifications because of the sweeping language used to decertify an otherwise arguably fit class," and a "powerful tool in the arsenal of the class action opponent"); Laurie C. Uustal, *In the Matter of Rhone-Poulenc Rorer: Shielding Defendants Under Rule 23*, 51 U. MIAMI L. REV. 1247, 1273 (1997) (accusing Judge Posner's analysis of "eviscerat[ing] subsection (c)(4)(A) and unnecessarily eliminat[ing] a highly effective instrument for managing mass torts").

and arguably the most powerful, blow in the knock-out round of appellate decisions that struck down mass tort class actions during the late 1990s. Writing for the majority, Judge Posner found the expansive issue class action improper in part because the proposed separation of negligence from both proximate cause and contributory negligence would violate the Seventh Amendment's prohibition against a reexamination of juriable issues.[190] Judge Posner also faulted the district court for its apparent willingness to ignore important differences among state substantive laws in violation of *Erie v. Tompkins*.[191] While *Rhone-Poulenc* never expressly considered the interplay between (c)(4)(A) and (b)(3), its warnings regarding the need to examine the common issues closely to ensure both that they are constitutionally distinct from the individual issues to be tried elsewhere and that they are truly capable of common adjudication for the class have been cited by courts declining to utilize (c)(4)(A) as a class action alternative.[192]

Following on the heels of *Rhone-Poulenc*, the Fifth Circuit similarly struck down the expansive issue class action certified by the district court in *Castano v. American Tobacco Company*.[193] Citing many of the same concerns regarding differing state laws to be applied in the "common" issue trial and the potential Seventh Amendment concerns in a case presenting more complex issues of comparative fault,[194] the court devoted greater attention than *Rhone-Poulenc* to Rule 23's requirements. The Fifth Circuit found that the lower court had inadequately considered the (b)(3) predominance requirement

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[190] *Rhone-Poulenc*, 51 F.3d at 1303. Judge Posner explained that the second jury's task of allocating fault between the plaintiff and the defendant would inevitably require a replay of evidence that would impermissibly allow for a reexamination of defendant's negligence contrary to the common issue jury's findings. *See also* Harding v. Tambrands, Inc., 165 F.R.D. 623, 632 (D. Kan. 1996) (denying (c)(4)(A) certification in part because individual issues were inextricably entangled with common issues); Caruso v. Celsius Insulation Res., Inc., 101 F.R.D. 530 (M.D. Pa. 1984) (declining to sever common issues for partial certification under (c)(4)(A) because the noncommon issues are inextricably entangled with the common issues) (citing WRIGHT ET AL., *supra* note 75, § 1790).

[191] *Rhone-Poulenc*, 51 F.3d at 1301-02.

[192] *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 748-51 (5th Cir. 1996) (finding "Chief Judge Posner's analysis of superiority to be persuasive," and adopting Posner's views on the impact of varying state laws and the constitutional concerns raised by a bifurcation of negligence and comparative negligence); Haley v. Medtronics, Inc., 169 F.R.D. 643, 653 (C.D. Cal. 1996) (relying on analysis set forth in *Rhone-Poulenc* rather than following Ninth Circuit precedent more favorably inclined toward issue class actions). *But see* Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1232 (1996) (rejecting defendant's "invitation in this case to adopt the principles of *Rhone-Poulenc* as the law of this circuit"); *In re* Copley Pharm., Inc., 161 F.R.D. 456, 457-70 (D. Wyo. 1995) (rejecting defendant's argument that *Rhone-Poulenc* warranted reconsideration of the issue class action certified, declaring that "Judge Posner's analysis effectively eviscerates Rule 23(c)(4)(A)").

[193] *Castano*, 84 F.3d at 734.

[194] *See supra* notes 190-91.

because it failed to make sufficient findings regarding the nature of the common issues.[195] These errors were compounded by the immaturity of the novel addiction-as-injury claim, which prevented the lower court from fully understanding how such a claim would be tried and which issues would prove the most significant for predominance purposes.[196]

In a footnote refuting the district court's flawed issue-by-issue predominance analysis, the Fifth Circuit asserted that severing common from individual issues through (c)(4)(A) "does not save the class action."[197] The court explained its understanding of the appropriate relationship between (c)(4)(A) and (b)(3):

> 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.[198]

In the wake of *Rhone-Poulenc* and *Castano*, a number of other appellate courts also reversed mass tort class action certifications,[199] and the Supreme Court stepped into the fray as well to decertify two far-reaching asbestos

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[195] *Castano*, 84 F.3d at 744-46 (criticizing the district court for postponing consideration of certain common issues because the court viewed itself as prohibited from looking "past the pleadings" to consider how the issues would be tried).

[196] *Id.* at 749 ("Determining whether the common issues are a 'significant' part of each individual case has an abstract quality to it when no court in this country has ever tried an injury-as-addiction claim.").

[197] *Id.* at 745 n.21.

[198] *Id.* (citation omitted). The Fifth Circuit more recently reiterated this reading of (c)(4)(A) in an employment discrimination case, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998). In that case, the court again rejected any interpretation of (c)(4)(A) to achieve "piecemeal certification of a class action, which . . . distorts the certification process and ultimately results in unfairness to all because of the increased uncertainties in what is at stake in the litigation and in whether the litigation will ever resolve any significant part of the dispute." *Id.* at 422 n.17. *See also* Burrell v. Crown Central Petroleum, Inc., 197 F.R.D. 284, 292 n.5 (E.D. Tex. 2000) (citing *Castano's* analysis of (c)(4) and expressing concern over "what amounts to piecemeal certification of a class action").

[199] *See, e.g.*, Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996); *In re* Am. Med. Sys., 75 F.3d 1069 (6th Cir. 1996); *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995).

settlement class actions.[200] While few of these appellate cases had occasion to address the issue class action "alternative," the Ninth Circuit in *Valentino v. Carter-Wallace, Inc.*, became the first appellate court to unambiguously embrace the expansive interpretation of (c)(4)(A) set forth by the court in *Tetracycline* over a decade earlier.[201] Perhaps partly in response to *Castano*'s reliance on *Dalkon Shield* as supporting the Fifth Circuit's narrow interpretation of (c)(4)(A), the Ninth Circuit made clear that its opinion in *Dalkon Shield* did not "preclude certification of more limited classes."[202] More significantly, the court cited its decision in *Dalkon Shield* as standing for the much broader proposition that "[e]ven if the common issues 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."[203]

This sweeping language regarding the effect of a (c)(4)(A) certification, however, amounts only to dicta. The Ninth Circuit actually reversed the lower court's certification of the class of plaintiffs claiming injury from an allegedly defective prescription drug, and remanded the case back to the district court, which had failed to explain why common issues predominated and how the class trial would be conducted.[204]

The Second Circuit in *Robinson v. Metro-North*, remarked upon this circuit split between *Castano* and *Valentino* on (c)(4)(A)'s appropriate interaction with (b)(3). While the (b)(2) class action under consideration did not require the court to take sides in the debate, the Second Circuit pointed out that the question "would be an issue of first impression in this circuit and [we] caution that an alternative understanding of the interaction of (b)(3) and (c)(4) to that set forth in *Castano* has been advanced elsewhere."[205] Citing *Central Wesleyan*'s positive language on (c)(4)(A), and possibly hinting at the direction it might take in a (b)(3) case, the Second Circuit criticized the district

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200 *See infra* notes 227-49 and accompanying text.

201 *Valentino*, 97 F.3d at 1234.

202 *Id.* at 1231.

203 *Id.* at 1234 (citing *In re* N. Dist. of Cal. Dalkon Shield, 693 F.2d 847, 856 (9th Cir. 1982)). The court also relied upon the more recent version of the treatises, FEDERAL PRACTICE AND PROCEDURE, WRIGHT ET AL., *supra* note 75, § 1790, at 276, and NEWBURG ON CLASS ACTIONS, NEWBERG & CONTE, *supra* note 75, § 4.25 at 4-81.

204 *Valentino*, 97 F.3d at 1234.

205 Robinson v. Metro-North, 267 F.3d 147, 167 n.12 (2d Cir. 2001) (citing *Valentino*, 97 F.3d at 1234 and *In re* Tetracycline Cases, 107 F.R.D. 719 (W.D. Mo. 1985)).

court for failing to appreciate the "potential benefits" of issue certification under (c)(4)(A), of which it urged district courts to "take full advantage."[206]

Robinson's citation to *Central Wesleyan* raises an interesting question about the status of issue class actions among circuits that arguably were most favorably disposed toward them during the heyday period of the 1980s and early 1990s. The Fifth Circuit's attempts to distance itself from the somewhat expansive approach to issue class actions in *Jenkins* have been revealed in *Castano* and other consonant decisions.[207] The Seventh Circuit, never a haven for expansive class action interpretation, recently reiterated its skepticism toward ambitious class actions in *In re Bridgestone/Firestone, Inc. Tires Product Liability Litigation.*[208] Decertifying on interlocutory appeal two nationwide class actions, the Seventh Circuit emphasized the variances among the facts and law applicable to class members' claims that precluded any finding of predominance.[209] The court concluded its opinion with strong words cautioning against the "central planning model" of litigation that does "violence not only to Rule 23 but also to principles of federalism."[210]

As for the Fourth Circuit, its most recent decisions similarly appear to have shied away from the broad language it utilized in *A.H. Robins* and *Central Wesleyan.* In *Lienhart v. Dryvit Systems, Inc.*, [211] for example, the Fourth Circuit decertified a class action asserting product liability claims against the manufacturer of stucco siding products in part due to a lack of predominance. Interestingly, the court in *Lienhart* relied upon neither *Robins* nor *Central Wesleyan*, but its much older case, *Windham v. American Brands*,[212] for the proposition that "the need for individualized proof of damages may defeat predominance where proof of damages is essential to liability."[213] A district court in the Fourth Circuit more explicitly attempted to cabin the reach of *Central Wesleyan*, rejecting the plaintiffs' reliance on that case by explaining: "Rather than reading *Central Wesleyan* as a ringing endorsement of class

206 *Id.* at 167-68 (citing Central Wesleyan, 6 F.3d 177, 185 (4th Cir. 1993)).

207 *See, e.g.*, Allison v. Citgo Petroleum Corp. 151 F.3d 402, 422 (5th Cir. 1998).

208 288 F.3d 1012, 1019 (7th Cir. 2002).

209 *Id.*

210 *Id.* at 1020.

211 255 F.3d 138, 147 (4th Cir. 2001).

212 565 F.2d 59 (4th Cir. 1977). *See also supra* notes 99-100 and accompanying text.

213 *Lienhart*, 255 F.3d at 147 (citing *Windham*, 565 F.2d at 66). *Cf.* Henley v. FMC Corp., 2001 WL 733110, *7 & n.13 (4th Cir. 2001) (questioning whether predominance of common over individual issues still existed once defendant admitted liability for release of allegedly toxic cloud despite certification by district court pursuant to (c)(4)(A), and noting the plan to adjudicate individual issues in the "second phase" of the trial, suggesting court may have seen this as a bifurcated rather than an issue class action).

certification, this court reads the case as a cautious affirmance of the trial court's decision under the abuse of discretion standard."[214]

The Third Circuit, which certified the nationwide asbestos property damages class action in *In re School Asbestos Litigation,* also appears to have stepped back from any expansive inclinations it once might have had in interpreting Rule 23. The court first decertified two nationwide product liability settlement classes.[215] More recently, the Third Circuit reexamined its decision in *Bogosian*, helping to clarify the arguably ambiguous language in that case regarding (c)(4)(A) and predominance.[216] The court explained that plaintiffs' reliance on *Bogosian* was misplaced because that decision held only that the need to determine damages on an individualized basis "should not preclude class determination *when the common issues which determine liability predominate.*"[217] Denial of the proposed class action was proper, the court held, when not just damages but "the issue of liability itself requires an individualized inquiry into the equities of each claim."[218]

Most circuits, of course, have not yet confronted the specifics of the issue class action, much less the proper interplay between (c)(4)(A) and (b)(3). As indicated by the Second Circuit in *Robinson*, however, these questions of first impression may soon be before more circuits. District courts already have struggled to make sense of the split in authority on the viability of an issue class action "alternative."[219] A number of courts have followed the narrow view of (c)(4)(A) asserted in *Castano*, rejecting plaintiff proposals to certify expansive issue class actions without regard to predominance of the whole

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214 *In re* Stucco Litig., 175 F.R.D. 210, 213 (E.D.N.C. 1997). Indeed, this district court cited repeatedly to *Castano* and *Rhone-Poulenc* in its denial of class certification. *See id.* at 216-18.

215 Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), *aff'd sub. nom* Amchem Prods, Inc. v. Windsor, 521 U.S. 591 (1997); *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995), *cert. denied*, 516 U.S. 824 (1995). *See also infra* notes 227-43 and accompanying text (discussing Supreme Court's decision in *Amchem*).

216 *See* Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 137 (3d Cir. 2000).

217 *Id.* The court similarly emphasized that *Bogosian* limited its discussion of (c)(4)(A) to cases where the class action was "*limited to the determination of liability.*" *Id.*

218 *Id.* at 137-38.

219 *See, e.g.*, Rink v. Cheminova, Inc., 203 F.R.D. 648, 670 (M.D. Fla. 2001) (noting that (c)(4)(A) itself is "less than clear," and that "courts are not in agreement on the relationship between these [(b)(3) and (c)(4)(A)] subsections"); *In re* American Honda Motors Co., Inc. Dealer Relations Litig., 979 F. Supp. 365, 367 n.3 (D. Md. 1997) (noting the split in authority between *Castano* and *Valentino*, the court explains: "As I find that the liability issues in the case as a whole predominate over the individual issues as required by Rule 23(b)(3), I need not decide whether the predominance inquiry is altered for a limited issues class under Rule 23(c)(4)(A)").

case.[220] But an equal number of district courts follow the more expansive approach to (c)(4)(A) offered in *Tetracycline* and *Valentino*,[221] even while some have concluded (as did the court in *Tetracycline*), that the proposed class could not be certified even under a less demanding standard.[222]

The innovative district court judge who certified the *Agent Orange* class action, for example, recently embraced the expansive issue class action model in *Simon v. Philip Morris, Inc.*[223] While stopping short of actually certifying the expansive issue class action he proposed,[224] Judge Weinstein's opinion expounded at some length on the benefits to be gained by utilizing bifurcation and issue certification through (c)(4)(A).[225] Judge Weinstein reasoned that the

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[220] *See, e.g.*, Cohn v. Massachusetts Mutual Life Ins. Co., 189 F.R.D. 209, 217-18 (D. Conn. 1999); Peoples v. Wendover Funding, Inc., 179 F.R.D. 492, 501 & n.4 (D. Md. 1998) (adopting *Castano's* view of (c)(4)(A), but certifying Fair Debt Collection Practices Act limited issue class action upon finding that common issues "predominate over the sole significant individualized issue of class members' damages"); *In re* Jackson Nat'l Life Ins. Co., 183 F.R.D. 217, 225 (W.D. Mich.1998) (citing *Castano* as offering "insightful caution" against manufactured predominance); Augustin v. Jablonsky, 2001 WL 770839, at *14 (E.D.N.Y. Mar. 8, 2001) (noting the "considerable doubt" as to the propriety of utilizing (c)(4)(A) to evade the predominance requirement); Arch v. American Tobacco Company, 175 F.R.D. 469, 496 (E.D. Pa. 1997) ("Plaintiffs cannot read the predominance requirement out of (b)(3) by using (c)(4) to sever issues until the common issues predominate over the individual issues."), *aff'd*, 161 F.3d 127 (3d Cir. 1998).

[221] *See, e.g.*, Simon v. Philip Morris, Inc., 200 F.R.D. 21, 28-31 (E.D.N.Y. 2001); Campion v. Credit Bureau Serv., Inc., 206 F.R.D. 663, 676-77 (E.D. Wash. 2001) (adopting *Valentino's* approach to (c)(4)(A) issue certification, and conducting predominance analysis on an issue-by-issue basis rather than on the case as a whole); *see also* Slaven v. BP America, Inc., 190 F.R.D. 649, 657 (C.D. Cal. 2000) (same).

[222] *See, e.g.*, Haley v. Medtronic, Inc., 169 F.R.D. 643, 656 (C.D. Cal. 1996) (denying proposed issue class certification because case would demand "complicated and incredibly inefficient" management techniques like subclassing to try "only certain elements of some causes of action"); *Rink*, 203 F.R.D. at 669-70 & n.20 (leaning toward expansive interpretation offer by *Tetracycline*, but determining that class "cannot meet even the less stringent standard" of common issues materially advancing the litigation); Begley v. Academy Life Ins. Co., 200 F.R.D. 489, 498 (N.D. Ga. 2001) (concluding that while court had power to certify several common issues under (c)(4)(A), those issues "would only be minimally helpful" and did not warrant even issue class certification); Emig v. Am. Tobacco Co., 184 F.R.D. 379, 394 (D. Kan. 1998) (expressly embracing *Valentino*'s approach to (c)(4)(A) as authorizing "certification even if common issues do not predominate," but declining to certify (c)(4)(A) because the common issues would not advance the litigation and are inextricably entangled with the individual issues). *Cf.* Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1332 (E.D.N.Y. 1996) (denying certification of proposed issue class action involving persons injured by handguns, although "certification of a class for a limited purpose may be desirable" in some cases, because the issues here would not advance the interests of economy and efficiency).

[223] 200 F.R.D. 21, 28-31 (E.D.N.Y. 2001).

[224] *Id.* at 51.

[225] *Id.* at 28-31. Judge Weinstein also engaged in a prolonged discussion of the Seventh Amendment's impact on issue class actions, *id.* at 33-51, critiquing *Rhone-Poulenc*'s Seventh Amendment analysis as a "deviat[ion] from the norm," *id.* at 47-49, and concluding that: "Trends in case law, the history of the Federal Rules of Civil Procedure and the United States Constitution, and current scholarship involving mass torts suggest that severing the issue of general compensatory liability from individual compensatory issues [under Rule 23(c)(4)(A)] is appropriate." *Id.* at 51. In this wide-ranging evaluation of the bifurcation envisioned in

framers of (c)(4)(A) intended for that provision to permit certification of common questions "without violating Rule 23(b)(3)'s prerequisite that issues common to the class predominate over those that are individual to class members. Questions of individual proof of reliance or injury and actual compensatory damages that did not meet the predominance requirement would then be resolved for later jury trials."[226]

Judge Weinstein's opinion in *Simon* represents a rare attempt to consider the role that the framers of Rule 23(c)(4)(A) intended for it to play. While courts for over three decades have speculated about the meaning of (c)(4)(A), few have done so with much analysis of the provision, and none has examined its rulemaking history. The following Part will undertake such a review, shedding much-needed light on (c)(4)(A) itself and the interpretive limitations reflected in recent Supreme Court cases that preclude expansive interpretations of Rule 23 that belie its framers' intent.

IV. AN INTENTIONALIST ANALYSIS OF RULE 23(C)(4)(A)

In the final analysis of Rule 23(c)(4)(A)'s meaning, the Supreme Court's recent Rule 23 decisions guide us back to the beginning. Those cases stressed the importance of interpreting federal rules with faithful regard to their text and intended meaning. In the face of an ambiguously worded provision, therefore, one must turn to other sources to illuminate the intentions of the original drafters of Rule 23: the Supreme Court and Congress. While analysis of (c)(4)(A)'s plain meaning seems to reveal a limited role for that provision in the overall context of Rule 23, as demonstrated in Part I, the provision contains sufficiently vague terms that examination of its framers' intentions is necessary. A review of the rulemaking history surrounding (c)(4)(A) confirms that its framers never intended for it to authorize expansive issue class actions and would have been astonished to learn that (c)(4)(A) would be regarded as the last, best hope for mass tort class actions.

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this proposed issue class action, Judge Weinstein cited the Second Circuit's recent opinion clarifying that severance of issues for trial before separate juries can be accomplished "under Rules 42(b) and 23(c)(4)(A) so long as there are proper safeguards." *Id.* at 39 (citing Blyden v. Mancusi, 186 F.3d 252 (2d Cir. 1999)).

[226] *Id.* at 30 (citing FED. R. CIV. P. 23 and its Advisory Committee Note). *See also* Abitanta, *supra* note 71, at 748 (asserting that the drafters of (c)(4)(A) intended to "impose[] a duty upon the courts not to dismiss the class before making every effort to restructure the issues in order to meet certification requirements").

A. Amchem *and* Ortiz*: Interpreting Rule 23*

After years of abstaining from the mass tort class action fray, the Supreme Court recently provided interpretive guidance to lower courts when it struck down two asbestos settlement class actions as unauthorized acts of "judicial inventiveness."[227] The decisions in *Amchem Products, Inc. v. Windsor*[228] and *Ortiz v. Fibreboard Corp.*[229] reflect a Supreme Court insistent on interpreting Rule 23 with careful fidelity to its current text and its framers' intentions, and not as a malleable tool to be "rewritten"[230] in order to achieve social policy.[231] The Court in both cases grounded its originalist or intentionalist[232] approach to Rule 23 analysis on the interpretive limitations imposed by the Rules Enabling Act, which sets forth the process by which federal rules are enacted.[233]

Writing for the majority in *Amchem*, for example, Justice Ginsburg explained that the Enabling Act mandates an "extensive deliberative process involving many reviewers: the Rules Advisory Committee, public commentators, the Judicial Conference, this Court, [and] the Congress."[234] In light of this statutorily required process, Justice Ginsburg reasoned, the Court could not approve the proposed new breed of Rule 23 class action, the

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[227] Amchem Prods. v. Windsor, 521 U.S. 591, 620 (1997). *See also* Ortiz v. Fireboard Corp., 527 U.S. 815, 861-62 (1999).

[228] *Amchem*, 521 U.S. 591 (rejecting certification of global settlement class under Rule 23(b)(3)).

[229] *Ortiz*, 527 U.S. at 815 (rejecting certification of global settlement class under limited fund theory of Rule 23(b)(1)(B)).

[230] *Id.* at 858 (explaining that in this case, as in *Amchem*, "proponents of the settlement are trying to rewrite Rule 23").

[231] *See, e.g.*, *id.* at 864 (rejecting limited fund settlement class action as "improper," and concluding that the "Advisory Committee did not envision mandatory class actions like this one"); *Amchem*, 521 U.S. at 628-29 (describing argument in favor of a nationwide asbestos claims resolution regime as "sensibl[e]," but concluding that Rule 23 "cannot carry the large load . . . the District Court heaped upon it").

[232] *See* Struve, *supra* note 31, at 1152-69 (arguing in favor of an intentionalist analysis of federal rules). *Cf.* Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1724-25 (2000) (describing the *Ortiz* Court as rebuking "rules activism" in favor of an "originalist stance for Rule 23 and class action litigation"). *But see Ortiz*, 527 U.S. at 868 (Breyer, J., dissenting) (disagreeing with the majority's narrow reading of the limited fund class action: "I believe our Court should allow a district court full authority to exercise every bit of discretionary power that the law provides"); *cf.* Coffee, *supra* note 7, at 373 (criticizing the *Ortiz* majority's "cautious, provisional approach" that "rel[ies] more on rule formalism than due process to reach their results").

[233] 28 U.S.C. §§ 2071-2077 (1994) (delegating rulemaking power to the Judicial Branch, setting forth procedural requirements for rulemaking process, and mandating that any such rules "shall not abridge, enlarge or modify any substantive right"). *See also* Struve, *supra* note 31, at 1141 ("Both the structure of the Enabling Act and the actual rulemaking process, then, counsel restraint in the interpretation of the Rules: the Court should not reject authoritative sources of meaning in favor of its own policy conception of a desirable Rule.").

[234] *Amchem*, 521 U.S. at 620. *See also* 28 U.S.C. §§ 2071-74.

"settlement only" class action.[235] After a thoughtful analysis of both the text of Rule 23 and its framers' intentions,[236] Justice Ginsburg rejected the argument that "settlement classes" did not need to satisfy Rule 23(a) or (b)(3) requirements.[237]

Rule 23(e),[238] the provision allegedly authorizing such a bypass,[239] "was designed to function as an *additional requirement, not a superseding direction*, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)."[240] Absent any such superseding authority that would permit this "sprawling" class action, Justice Ginsburg concluded that the district court's class certification could not be upheld, "for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design."[241] Properly understood, Justice Ginsburg emphasized, (b)(3) predominance functions to prohibit cases involving significant disparities among class members in order "to assure the class cohesion that legitimizes representative action in the first place."[242] If Rule 23(e) could be interpreted as authorizing class actions based merely on

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235 *Amchem*, 521 U.S. at 620. *See also id.* (stressing the "overriding importance" of the judicial limits imposed by the Rules Enabling Act, the Court cautioned that "courts must be mindful that the Rule as now composed sets the requirements they are bound to enforce").

236 *See id.* at 613-25.

237 *Id.* at 618-20. Justice Ginsburg cited a number of appellate cases reflecting a circuit split on the extent to which a "settlement only" class alters the requirements of subdivisions (a) and (b). *See id.* at 618. The Third Circuit, for example, in both *Amchem* itself and in an earlier case on the subject, "held that a class cannot be certified for settlement when certification for trial would be unwarranted." Other courts have held that settlement obviates or reduces the need to measure a proposed class against the enumerated Rule 23 requirements. *Id. Compare In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 799-800 (3d Cir. 1995), *cert. denied*, 516 U.S. 824 (1995), *with In re* Asbestos Litig., 90 F.3d 975 (5th Cir. 1996); White v. National Football League, 41 F.3d 402, 408 (8th Cir. 1994), *cert. denied*, 515 U.S. 1137 (1995), *and In re* A.H. Robins Co., 880 F.2d 709, 740 (4th Cir. 1989), *cert. denied sub. nom* Anderson v. Aetna Casualty & Surety Co., 493 U.S. 959 (1989).

238 Federal Rule of Civil Procedure 23(e) provides "A class action shall not be dismissed or compromised without the approval of the court, and notice . . . shall be given to all members of the class in such a manner as the court directs."

239 *Amchem*, 521 U.S. at 619-22. The Court held that the existence of a proposed settlement may affect an evaluation of litigation "manageability" required by Rule 23(b)(3)(D) because the case will never be tried. But the Court emphasized that "other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." *Id.* at 620.

240 *Id.* at 621 (emphasis added).

241 *Id.* at 625. The Court also found that the proposed settlement class action failed the (a)(4) adequacy requirement. *See id.*

242 *Id.* at 623-24. *See also* Coffee, *supra* note 7; Richard Nagareda, *Autonomy, Peace and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 779 (2002); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998).

the commonality of class members' interest in the proposed settlement itself, as those favoring a settlement class alternative contended, the "vital prescription [of predominance] would be stripped of any meaning."[243]

The Court in *Ortiz* similarly rejected a district court's "adventurous" interpretation of subdivisions (b)(1)(B) and (e) that would have permitted a bypass of the crucial safeguarding functions served by subdivisions (a) and (b): "A fairness hearing under subdivision (e) can no more swallow the preceding protective requirements of Rule 23 in a subdivision (b)(1)(B) action than in one under subdivision (b)(3)."[244] The majority opinion, authored by Justice Souter, also viewed the Rules Enabling Act as the analytical starting point: "The nub of our position is that we are bound to follow Rule 23 *as we understood it upon its adoption*, that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act."[245] Justice Souter conceded that Rule 23(b)(1)(B)'s text could be interpreted expansively to apply to the "limited fund" of tort claims for damages at issue, but concluded that the more "prudent course" would be to adhere to a construction of the rule consistent with the "historical limited fund model" contemplated by its framers.[246]

Justice Souter doubted, for example, whether the "Advisory Committee would have intended liberality in allowing such a circumscribed tradition to be transmogrified by operation of Rule 23(b)(1)(B) into a mechanism for resolving the claims of individuals not only against the fund, but also against an individual tortfeasor."[247] Similarly, he argued that the absence of any Advisory Committee debate on the application of (b)(1)(B) to mass tort claims rendered

> simply implausible [the argument] that the Advisory Committee, so concerned about the potential difficulties posed by dealing with mass tort cases under Rule 23(b)(3) . . . would have uncritically assumed

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243 *Amchem*, 521 U.S. at 623.

244 Ortiz v. Fibreboard Corp., 527 U.S. 815, 858-59 (1999). *See also id.* at 862 (while not ruling out a (b)(1)(B) certification of mass tort claims under the present rule, "we are not free to dispense with the safeguards that have protected mandatory class members under that theory traditionally").

245 *Id.* at 861 (emphasis added) (rejecting the approach taken by Justice Breyer, describing it as one that would "sustain the allowances made by the District Court in consideration of the exigencies of this settlement proceeding").

246 *See id.* at 842. *See also* Coffee, *supra* note 7, at 372 (arguing that "the clearest message in *Ortiz* is that any innovation in class action procedures that departs from 'the traditional norm' is hereafter likely to be disfavored").

247 *Ortiz*, 527 U.S. at 844 n.21.

> that mandatory versions of such class actions, lacking such protections, could be certified under Rule 23(b)(1)(B). We do not, it is true, decide the ultimate question whether Rule 23(b)(1)(B) may ever be used to aggregate individual tort claims. But we do recognize that the Committee would have thought such an application surprising, and take this as a good reason to limit any surprise by presuming that the Rule's historical antecedents identify requirements.[248]

Read together, *Ortiz* and *Amchem* caution strongly against expansive interpretations of Rule 23 that "transmogrify" the intended operation of the Rule. Indeed, in the conclusion of her opinion in *Amchem*, Justice Ginsburg warned that "[a]s this case exemplifies, the rulemakers' prescriptions for class actions may be endangered by 'those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the rule] with distaste.'"[249]

B. Applying the Supreme Court's Interpretive Lessons to Rule 23(c)(4)(A): Discerning the 1966 Advisory Committee's Intent

Based on the Court's reading of the limitations imposed against "judicial inventiveness" by the Rules Enabling Act, the starting point of any Rule 23 interpretation must be "the Rule as now composed."[250] The text and structure of Rule 23(c)(4)(A), as examined in Part I, strongly suggest that it no more empowers courts to circumvent subdivision (a) or (b) requirements than the proposed subdivision (e) end-runs resoundingly rejected by the Court in *Ortiz* and *Amchem*.[251] As in *Ortiz*, however, the words of the provision arguably lend themselves to a more expansive interpretation.[252] In such cases of potential textual ambiguity, the Supreme Court instructs us to conduct an intentionalist analysis, interpreting Rule 23 in light of its framers' intentions.[253] As

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248 *Id.* at 844.

249 Amchem Prods. v. Windsor, 521 U.S. 591, 629 (1997) (quoting CHARLES WRIGHT, LAW OF FEDERAL COURTS 508 (5th ed. 1994)). *See also id.* (noting that Rule 23 simply "cannot carry the large load . . . the District Court heaped upon it").

250 *Id.* at 620.

251 *See supra* notes 55-62 and accompanying text.

252 *See supra* notes 229-33 and accompanying text; *see also Ortiz*, 527 U.S. at 842 (explaining that "the text of Rule 23(b)(1)(B) is on its face open to a more lenient limited fund concept, . . . [b]ut the greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse").

253 *See Ortiz*, 527 U.S. at 861 (explaining that the Court is "bound to follow Rule 23 as we understood it upon its adoption," an interpretive process that included a lengthy analysis of the Advisory Committee's intent); *Amchem*, 521 U.S. at 613-25 (interpreting Rule 23 with repeated references to the Advisory Committee's intent); Struve, *supra* note 31, at 1165-66 (arguing in favor of an "intentionalist" approach to

demonstrated by the Court's analyses in *Ortiz* and *Amchem*, Rule 23's intended meaning can best be discerned by examination of its accompanying Advisory Committee Note,[254] authored and approved in connection with the 1966 amendments to Rule 23.[255] Such an analysis may include consideration of the cases and examples cited in the Advisory Committee Note to Rule 23 as illustrative of the Rule's proper application.[256]

The intentionalist approach taken by the Court also urges a review of sources beyond the official Advisory Committee Note that shed additional light on the Committee's (and "presumably the Congress['s]")[257] intentions. Justice Souter in *Ortiz*, for example, considered a host of materials that revealed the Committee's intentions through its "expressions of understanding,"[258] including the published views of Benjamin Kaplan, the 1966 Advisory Committee's Reporter,[259] the minutes and materials associated with

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federal rules). *But see* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1040 (1993) (urging the Supreme Court to take an "activist role in interpreting the Federal Rules by including an analysis of purpose and policy and . . . refrain from excessive reliance on the plain meaning doctrine").

254 *See* Struve, *supra* note 31, at 1156 (asserting that the "most logical evidence of such intent can be found in the Rule's text and Advisory Committee Notes"). While the Supreme Court thus far has declined to hold that Advisory Committee Notes are binding authority, it nevertheless relies on them (as it did in *Ortiz* and *Amchem*) to discern the intended meaning of federal rules. *See* WRIGHT ET AL., *supra* note 75, § 1029 ("Although these Notes are not conclusive, they provide something akin to a 'legislative history' of the rules" that should be "given considerable weight."). One scholar has convincingly argued that Advisory Committee Notes should be interpreted as binding authority; indeed, "seen in the light of their creation—the Notes in some ways resemble text more than legislative history." Struve, *supra* note 31, at 1158. According to this view, when "the text [of a rule] and Note are irreconcilable, the text should trump the Note; but otherwise, the Note should be given binding effect." *Id.* at 1169.

255 While even the earliest federal rules were accompanied by Advisory Committee Notes, a 1988 amendment to the Rules Enabling Act has now made that practice mandatory. *See* 28 U.S.C. § 2073(d) (2000) ("In making a recommendation under this section or under section 2072 or 2075, the body making that recommendation shall provide a proposed rule, an explanatory note on the rule, and a written report explaining the body's action, including any minority or other separate views."); Struve, *supra* note 31, at 1105-09, 1112 (describing history of Advisory Committee Notes).

256 *See Ortiz*, 527 U.S. at 834-38 (discussing "classic" examples of limited fund class actions cited in Advisory Committee Note to (b)(1)(B), including a detailed examination of the limited fund approved in *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir. 1952), *cert. denied*, 344 U.S. 875 (1952)); *id.* at 843 (reasoning that "[n]one of the examples cited in the Advisory Committee Notes or by Professor Kaplan in explaining [the rule] remotely approach" the type of case at issue in *Ortiz*).

257 *See id.* at 841.

258 *See id.* at 842 (asserting that the majority's "limiting construction" of Rule 23(b)(1)(B) "finds support in the Advisory Committee's expressions of understanding," and proceeding to consider various evidence of those "expressions" in addition to the official Advisory Committee Note).

259 *See id.* at 833 (quoting Kaplan, *supra* note 48 *and* Kaplan, *supra* note 35, at 388); *see also id.* at 834, 842-45; Amchem Prods. v. Windsor, 521 U.S. 591, 613-17 (1997). Even the dissenting opinion in *Ortiz*, written by Justice Breyer and joined by Justice Stevens, applauds the majority's reliance on Professor Kaplan's

the Committee's official deliberations regarding Rule 23,[260] and even Committee members' correspondence with each other during the rulemaking process.[261]

Any uncertainties that might have existed after a textual and structural analysis of Rule 23(c)(4)(A), therefore, may be resolved by a close evaluation of its framers' intent. This section begins with the Advisory Committee Note that accompanied the amended Rule 23 in 1966 and then reviews additional rulemaking materials that further confirm the intended meaning of (c)(4)(A) as a complement, not an alternative, to Rule 23(b).

At the outset, one is struck by the minimal attention seemingly paid by the Committee to Rule 23(c)(4)(A). One would expect, if the provision indeed authorized an "alternative" class action that would be otherwise uncertifiable, that its Note at least would hint at such a role. Yet its two sentences contain no such suggestion:

> This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.[262]

This Note does not refer to an "issue" or "partial" class action, but an "action" that may include a "class" phase of adjudication followed by an individual phase where members must "come in" and establish damages. One might argue that the Note's reference to individual class members "coming in" does not prohibit an order under this provision permitting members to "come into" courts other than the court certifying the class action, but that interpretation strains common understanding of that phrase. While it might be

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later-published explanations of the Committee's intentions. *See Ortiz*, 527 U.S. at 882 (Breyer, J., dissenting) (referring to Benjamin Kaplan as someone "upon whom the majority properly relies for explanation," but arguing that Kaplan also wrote that revised Rule 23 "'confirm[ed] the courts' broad powers and invit[ed] judicial initiative'" (quoting Kaplan, *supra* note 48, at 497)).

[260] *See, e.g.*, *Ortiz*, 527 U.S. at 844 & n.20 (citing Committee Meeting excerpts demonstrating that "the Committee's debates are silent" regarding a role for (b)(1)(B) in the resolution of mass torts).

[261] *See id.* at 834 n.14 (referring to a letter written by Benjamin Kaplan to another Committee member in support of the Court's limiting interpretation of a phrase used in Rule 23(b)(1)(B)); *see also* WRIGHT ET AL., *supra* note 75 §1029 (noting the "great prestige" Advisory Committees enjoy, and the "considerable respect" with which "statements on the interpretation of the rules by individual members of the Committee" have been given).

[262] FED. R. CIV. P. 23(c)(4)(A) (Adv. Comm. Note).

difficult to fully discern the Committee's meaning on the basis of so few words, certainly nothing in this Note suggests an express authorization of "issue" class actions where the "action" does not include adjudication of individual class members' damages (or other individual issues).[263]

A useful comparison between this Note and the several paragraphs offered in explanation of subdivision (b)(3) supports an interpretation of (c)(4)(A) as complementary and not supplementary to a (b)(3) class action. In its Note to (b)(3), the Committee illustrates the concept of predominance with the very same fraud example used to illustrate the purpose of (c)(4)(A):

> [A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determinations of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds of degrees of reliance by the persons to whom they were addressed.[264]

This explanation of (b)(3) predominance echoes the illustration used in the Committee's Note to (c)(4)(A), emphasizing that a class action alleging fraud may be certified under (b)(3) to determine liability to the class *even if* damages must be separately determined for each class member. Read side by side, these Notes suggest that (c)(4)(A) functions as a complement to (b)(3), explicitly authorizing a court's power to bifurcate common from individual issues, a procedure implicit in (b)(3) class actions.

The complementary nature of (c)(4)(A) and (b)(3) is further evidenced by a relatively unknown collection of materials that reflect the Committee's inner debates during the rulemaking process that led to the Rule 23 amendments in 1966.[265] During a 1963 Committee meeting, for example, Committee Reporter Benjamin Kaplan called the Committee's attention to a case he believed exemplified the proper application of both (c)(4)(A) and (b)(3).[266]

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263 Indeed, as will be discussed *infra* notes 272-76 and accompanying text, the Note's references to liability and amounts of claims reflects the Committee's view of the provision as primarily to be utilized to bifurcate liability to the class from individual amounts of damages.

264 FED. R. CIV. P. 23(b)(3) (1966 Adv. Comm. Note).

265 *See* Appendix (Excerpts from 1966 Advisory Committee Rulemaking History).

266 *Civil Rules Advisory Committee Meeting*, October 31-November 2, 1963, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, No. C1-7104-53, (Appendix) [hereinafter 1963 Civil Rules Meeting].

That illustrative case, *Union Carbide & Carbon Corp. v. Nisley*, involved antitrust claims brought by a large group of small uranium ore miners.[267] Kaplan explained to the Committee that the

> whole spirit of the opinion is such that it is very plain that a class suit could be conducted there with efficiency and with fairness. This in fact is a growing point in the law. This is the situation that ought to be covered, left to some extent to the discretion of the court.[268]

Kaplan's positive view of *Nisley* apparently carried the day, as the Advisory Committee Note regarding (b)(3) predominance cites it as an example of a case involving predominating common questions.[269]

While the Advisory Committee Note to (c)(4)(A) contains no cases at all, at the 1963 Committee Meeting discussed above, Kaplan also referred to *Nisley* as presenting an illustration of (c)(4)(A)—at the time referred to by the Committee as subdivision (c)(3).[270] Citing *Nisley* in connection with both provisions underscores Kaplan's view that (c)(4)(A) simply clarifies what is already implicit in (b)(3):

> Section (c)(3) . . . says that an action maintained as a class action need not be such as to each and every issue. For example, in the very *Nisley* case, the determination of liability is of course a class determination. When it comes to the proof of claims by individual uranium ore miners, that is of course a series of individual claims•a perfectly obvious point.[271]

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[267] 300 F.2d 561 (10th Cir. 1961). As Justice Ginsburg pointed out, while (b)(3) "does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" Amchem Prods. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Kaplan, *supra* note 48, at 497).

[268] 1963 Civil Rules Meeting, *supra* note 266. *See also Memorandum of Additional Points on Preliminary Draft of Proposed Amendments of March 15, 1963*, submitted to Advisory Committee on Civil Rules by Reporter Benjamin Kaplan and Committee Member Albert M. Sacks, September 12, 1963, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, C1-7001-52 (similarly citing *Nisley* as an appropriately certified class action including predominating common issues) (Appendix) [hereinafter *Kaplan & Sacks Memorandum*].

[269] FED. R. CIV. P. 23(b)(3) (Adv. Comm. Note) (citing Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961)). Kaplan described *Nisley* as a case "referred to over and over again in the Notes." 1963 Civil Rules Meeting, *supra* note 266. *See also Amchem*, 521 U.S. at 625 (noting that predominance is "readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws").

[270] The Committee later added the present (c)(3) to clarify the binding effect of Rule 23 class actions on all class members, with an exception provided for those who opt out of a (b)(3) class action. FED. R. CIV. P. 23(c)(3).

[271] 1963 Civil Rules Meeting, *supra* note 266.

Kaplan's references to *Nisley* as illustrative of both (c)(4)(A) and (b)(3) also undermine any reading of (c)(4)(A) as somehow altering or lessening the predominance requirement. There is no suggestion in this discussion of the two provisions that Kaplan or any other Committee member envisioned (c)(4)(A) as empowering a court to certify a class action that could not meet (b)(3)'s requirements. Rather, Kaplan viewed (c)(4)(A) merely as an "obvious" corollary to the new (b)(3) class action: common issues usefully can be tried on a class basis even if the action includes some issues that might have to be resolved on an individual basis.

In *Nisley*, the court approved a bifurcated class trial of the miners' antitrust claims to be followed by a damages phase conducted by a special master.[272] Those damages were to be calculated by the special master on the basis of a "per-pound formulae provided in the [class] verdict,"[273] and only subject to a final judgment if the unnamed class members are "present"[274] and "able to prove both membership in the class and damages."[275] This illustrative (b)(3) and (c)(4)(A) case, therefore, did not authorize certification of an "issue" class action, which would resolve only class liability, leaving absent miners to file separate lawsuits elsewhere to resolve damage claims. To the contrary, *Nisley* stands for the almost quaint proposition (by today's standards) that Rule 23 authorizes actions that include both class and individual phases.

The Committee apparently viewed the clarification provided by (c)(4)(A) as necessary to confirm the power to bifurcate a class action between common and individual issues, as exercised by courts like *Nisley*. Kaplan, for example, similarly referred to (c)(4)(A) in a post-amendment publication as authority for the proposition that (b)(3) class actions may be certified even if "individual claimants might have to come in and prove damages, for such follow-up proceedings will occur in various (b)(3) actions."[276]

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[272] 300 F.2d at 587.

[273] *Id.* at 587-88. The court emphasized the formulaic nature of the damages assessment, explaining that:

> [a]ll operative facts have been determined in the original action. . . . If, in the process of identifying the members of the class and assessing the amount of their respective damages, unresolved questions of fact are disclosed, it is time enough to submit those questions to a jury, duly empaneled for that purpose.

Id. at 589.

[274] *Id.*

[275] *Id.* at 588.

[276] Kaplan, *supra* note 35, at 393 n.144. Kaplan's reference to individual "follow-up proceedings" for damages assessments squares with the *Nisley* court's vision of a bifurcated class action, and his use of the term

Kaplan's reference to (c)(4)(A) during the 1963 Committee deliberations as making a "perfectly obvious point" also squares with other characterizations by the Committee of the provision as an elucidating class action "detail." Alluding to the complementary role played by (c)(4), indeed by all the provisions in subdivision (c), Kaplan himself later described Rule 23(c) as "round[ing] out" Rule 23 by "listing a number of steps . . . available to the court for the better management of class actions generally."[277]

Advisory Committee member Professor Charles Allen Wright voiced a reluctance to include such a "rounding out" provision in a letter to Kaplan, complaining that then-(c)(3) "seems to me the kind of picky detail which does not require statement in the rule."[278] Expressly responding to Wright's concerns, Kaplan and fellow Committee member Professor Albert M. Sacks explained that the provision, "although making obvious points, is useful for the sake of clarity and completeness."[279] During the Committee's 1963 meeting, again in apparent reference to Wright's views, Kaplan emphasized that then-(c)(3) "is a sort of detail, but perhaps a usable detail."[280] At one point, the Committee Note to Rule 23(c)(4)(A) had to be changed to make the opposite (and equally obvious) point, that the amended Rule 23 would continue to authorize class actions when *all* the issues in the case could be resolved on a class basis.[281]

"come in and prove damages" also confirms that the Committee intended those follow-up proceedings to occur before the court certifying the class action.

277 *Id.* at 393-94.

278 Letter from Charles Allen Wright to Benjamin Kaplan, March 30, 1963, *in* Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, No. C1-7001-41 (Appendix).

279 *Kaplan & Sacks Memorandum*, *supra* note 268. Mollified to some extent, Professor Wright replied to Kaplan and Sacks later in September that "I withdraw my objection to Rule 23(c)(3). When Ben Kaplan and Al Sacks tell me that 'certainly it is the law,' that settles that it is indeed the law, and I rue my own ignorance in having earlier expressed doubt." Comments of Professor Charles Alan Wright Submitted to Advisory Committee Reporter Benjamin Kaplan, September 23, 1963, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, C1-7002-17 (Appendix). Professor Wright remained unenthusiastic, however, about the provision: "Despite what you now say, I remain in dubitante about 23(c)(3), and of course I continue to prefer a very short rule to a very long rule." *Id.*

280 1963 Civil Rules Meeting, *supra* note 266.

281 In an earlier draft of then-(c)(3)(A), the Committee had included language that permitted a class action to be maintained "*only* with respect to particular issues." As Benjamin Kaplan and Committee member Albert Sacks explained in a joint memorandum to the Committee:

> It has been called to our attention, however, that (c)(3)(A) in its present wording is subject to the possible (though plainly erroneous) interpretation that an action may not be maintained as a class

According to these expressions of Committee understanding, (c)(4)(A) functions only to clarify a court's power to bifurcate issues within a class action, resolving confusion among courts at the time regarding the viability of a class action where the action included issues not capable of resolution on a class basis. This review of the Committee's rulemaking history with respect to (c)(4)(A) makes clear that it viewed the provision quite narrowly, as a "usable detail."

In light of the complete absence of evidence that the Committee ever conceived of (c)(4)(A) as anything other than a "usable detail," it would be highly ill-advised to allow that provision to be "transmogrified" into one that authorizes certification of issue class actions as an "alternative" to dismissing (b)(3) class actions for failure to satisfy the predominance test. Indeed, such an expansive interpretation of (c)(4)(A), which its supporters view as the last best hope for certification of mass tort class actions, would certainly have struck the Committee as "surprising." The "implausible" nature of that interpretation is made clear not only by the menial function the Committee envisioned for (c)(4)(A), but also by the nature of its discussions regarding mass tort class actions and the important role served by the predominance requirement.

In its Advisory Committee Note explaining appropriate applications of (b)(3) predominance, for example, the Committee warned that

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.[282]

This Note has become somewhat "infamous,"[283] particularly because courts so quickly seemed to discount it.[284] But in *Amchem*, Justice Ginsburg breathed

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action as to *all* issues, but "only with respect to particular issues." The word "only" should be dropped.

Kaplan & Sacks Memorandum, *supra* note 268.

[282] FED. R. CIV. P. 23(b)(3) (1966 Adv. Comm. Note). The inclusion of this warning against mass tort class actions came after the Committee "elaborately debated the question." *See Memorandum by Reporter Benjamin Kaplan Enclosing Proposed Amendments for May, 1965 Meeting*, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, C1-7005-13 (appendix).

[283] *See In re* Copley Pharm., Inc., 161 F.R.D. 456, 467 (D. Wyo. 1995). The court in *Copley*, citing NEWBERG & CONTE, *supra* note 59, § 17.06, asserted that Professor Charles Alan Wright had "repudiated" this

new life into the Committee's warning. She noted that Rule 23(b)(3) does not "categorically exclude mass tort cases," and the Note only suggests that such cases are "ordinarily not appropriate" for certification, not that they are never appropriate.[285] More powerfully, however, Justice Ginsburg argued that the Committee's warning "continues to call for caution when individual stakes are high and disparities among class members great."[286]

Whatever the continuing vitality of the Note's caution, it certainly reveals the Committee's views on both mass tort class actions and the impropriety of certifying (b)(3) class actions that involve "significant questions" that affect class members "in different ways." *Amchem's* predominance analysis further counsels against a rush to interpret the present Rule 23(c)(4)(A) expansively. As Justice Ginsburg reiterated, the predominance inquiry serves a legitimizing function that prevents representational litigation where class members' claims are more dissimilar than alike. And it is no answer to suggest, as did the court in *Tetracycline*, that to compensate for a lowered predominance requirement (c)(4)(A) issue class actions could be subjected to a higher degree of scrutiny under the (b)(3) superiority inquiry.[287] As the Court made clear in *Amchem*, the

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"infamous" note: "I was an ex-officio member of the Advisory Committee on Civil Rules when Rule 23 was amended, which came out with an Advisory Committee Note saying that mass torts are inappropriate for class certification. I thought then that was true. I am profoundly convinced now that that is untrue." *Id.* (quoting Professor Charles Alan Wright, *In re Sch. Asbestos Litig.*, Master File 830268 (E.D. Pa.) (Class Action Argument, July 30, 1984, Tr. at 106)). *See also In re* A.H. Robins, 880 F.2d 709, 731 (4th Cir. 1989) (same). The Fifth Circuit in *Castano*, however, cast doubt on the force of Professor Wright's "repudiation" in light of later attempts by Wright at clarification:

> I certainly did not intend by that statement to say that a class should be certified in all mass tort cases. I merely wanted to take the sting out of the statement in the Advisory Committee Note, and even that said only that a class action is "ordinarily not appropriate" in mass-tort cases. The class action is a complex device that must be used with discernment. I think for example that Judge Jones in Louisiana would be creating a Frankenstein's monster if he should allow certification of what purports to be a class action on behalf of everyone who has ever been addicted to nicotine.

Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.19 (5th Cir. 1996) (quoting Letter of Dec. 22, 1994, to N. Reid Neureiter, Williams & Connolly, Washington, D.C.).

[284] Courts almost immediately certified class actions involving single event, mass accident cases, but were seemingly reluctant until the late 1970s to consider application of (b)(3) to cases involving dispersed mass torts. *See, e.g.*, Amchem Prods. v. Windsor, 521 U.S. 591, 625 (1997) (referring to the fact that "District Courts, since the late 1970s, have been certifying such cases in increasing number") (citing Judith Resnick, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROB. 5, 17-19 (Summer 1991)). *See also supra* notes 227-43 and accompanying text.

[285] *Amchem*, 521 U.S. at 625.

[286] *Id.* (rejecting the mass tort settlement class action at issue in part on the ground that the lower court did not "follow the counsel of caution").

[287] *In re* Tetracycline Cases, 107 F.R.D. 719 (W.D. Mo. 1985). *See also supra* notes 157-69 and accompanying text.

two (b)(3) provisions serve separate functions, with predominance playing the more vital and protective role against "appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment."[288]

This view of predominance, and its application to mass tort class actions, thus renders utterly implausible any notion that the Committee conceived of (c)(4)(A) as creating an end-run around these difficult problems. In other words, if the Committee believed that complex mass tort claims, rife with predominantly individual issues, could be certified pursuant to (c)(4)(A), one must wonder why its Note on predominance is so discouraging, and why its Note on (c)(4)(A) is so silent about this rule-altering authority. As the Court concluded in *Ortiz*, when the Committee's Rule 23 expressions of understanding and a proposed "adventurous" interpretation of the Rule appear to be irreconcilable, courts should "take this as a good reason to limit any surprise" by construing the disputed provision as its framers intended.[289]

C. *The Implications of Proposed Rule 23 Amendments and Subsequent Advisory Committee Views on Expansive Issue Class Actions*

While the advocates of a more aggressive role for (c)(4)(A) do not address the rulemaking materials discussed above, they do point to a proposal considered by a more recent Advisory Committee that would have encouraged expressly greater utilization of "issue" classes to handle mass tort cases.[290] The proposed amendments would have altered 23(a) to permit class actions under the rule "if, with respect to the claims, defenses, or issues certified for class action treatment [the numerosity, commonality, typicality, adequacy are satisfied] and a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[291] Further, (c)(4)(A) would have been amended to include reference to particular "claims" and "defenses" in addition to "issues," and to move the provision requiring that "the provisions of this rule shall then be construed and applied accordingly" such that it no longer applies to (c)(4)(A) but only to subclasses.[292]

In the proposed Advisory Committee Note explaining these amendments, the Committee observed that

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288 *Amchem*, 521 U.S. at 621.

289 Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999).

290 *See, e.g.*, Davis, *supra* note 7, at 230; Romberg, *supra* note 8 at 25-26.

291 Cooper, *Rule 23 Challenges*, *supra* note 1, at 53 (Appendix A).

292 *Id.* at 56 (Appendix A).

> the placement in subdivision (c)(4) of the provision permitting class actions for particular issues has tended to obscure the potential benefits of resolving certain claims and defenses on a class basis while leaving other controversies for resolution in separate actions. As revised, the rule will afford some greater opportunity for use of class actions in appropriate cases notwithstanding the existence of claims for individual damages and injuries, at least for some issues, if not for the resolution of the individual damage claims themselves . . . . The major impact of this revision will be on cases at the margin: most cases that previously were certified as class actions will be certified under this rule, and most that were not certified will not be certified under the rule.[293]

It certainly appears that the 1995 Advisory Committee viewed "issue" classes favorably, and intended to encourage greater emphasis on their utility.[294] Altering Rule 23(a) to permit at the outset that an issue class action's propriety under (a) and (b) should be evaluated "with respect to the issues certified for class treatment" seems to make clear that (b)(3) predominance, for example, would be determined only on the basis of those issues, as (c)(4)(A)'s most avid fans advocate. It is even true that this Committee seems committed merely to clarifying (c)(4)(A)'s role in Rule 23, which might support an argument that this Committee viewed the rule as it stands today to authorize such (c)(4)(A) "expansive issue class actions."

It need hardly be said, however, that these proposed revisions were never effectuated. Indeed, in 1996 the Judicial Conference published another set of proposed amendments to Rule 23 that did not include these issue class action provisions.[295] So whatever the 1995 Advisory Committee might have hoped for, it did not come to pass. Rejecting a similar argument based on a proposed amendment that would "expressly authorize settlement class certification . . . 'even though the requirements of subdivision (b)(3) might not be met for

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293 *Id.* at 58-59 (proposed Civil Rules Advisory Committee Note to amended Rule 23).

294 *See, e.g.*, Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 615 n.3 (1997) (discussing earlier version of proposed amendments to Rule 23 that similarly "would have placed greater emphasis on the ability of judges to certify so-called 'limited issues' classes").

295 *Proposed Amendments to Rule 23*, 167 F.R.D. 523, 559-66 (1996) (approved by the Committee on Rules of Practice and Procedure of the U.S. Judicial Conference for public comment). The 1996 Advisory Committee Reporter, Professor Edward H. Cooper, later remarked that "[m]any of the comments [on the proposed changes] emphasized the need to 'return to fundamentals,'" and that "class actions cannot accommodate the need" for individualized proofs in mass tort cases: "The alternative of an 'issues' class to resolve such matters as 'general causation' was rejected as undesirable." Cooper, *Future of Class Actions*, *supra* note 1, at 952.

purposes of trial,'" the Court in *Amchem* noted the "voluminous" comments filed in response to this proposal and concluded that "[w]e consider the certification at issue under the Rule as it is currently framed."[296] The Court later reiterated that "[f]ederal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted."[297]

It should be noted that while the forthcoming amendments to Rule 23, effective this December absent congressional action, do not include any changes to Rule 23(a) or to (c)(4)(A), they do include references to class "issues" that may reflect a favorable view of issue class certification. In amended Rule 23(c), for example, the rule now provides that district court class certification orders "must define . . . the class claims, issues, or defenses,"[298] and that class notice must inform class members of "the class claims, issues, or defenses."[299] Similarly, in amended Rule 23(e), the rule now states that a court "must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class."[300] The Advisory Committee Notes, however, fail to offer any explanation of any of these amended Rule 23 references to class "issues." Absent any amendment to Rule 23(c)(4)(A), or to Rules 23(a) or (b), which set forth the prerequisites and types of permissible class actions, these fairly minor alterations to Rules 23(c) and (e) referencing class "issues" can hardly support an expansive interpretation of the current Rule 23(c)(4)(A).

CONCLUSION

This Article concludes that Rule 23(c)(4)(A) in its current form cannot authorize expansive issue class actions. Interpreting the provision to do so would require an untenably strained reading of its text, impermissibly rewriting Rule 23 by judicial fiat. While the proponents of the issue class action seek to expand its scope for the best of reasons—to help vindicate the rights of injured mass tort plaintiffs—federal rules must be interpreted with fidelity to their existing text and intended meaning. When read carefully, and in the context of Rule 23 as a whole, (c)(4)(A) simply cannot carry the weight of the expansive issue class action. Indeed, while a number of courts have invoked (c)(4)(A) in

296 Amchem Prods. v. Windsor, 521 U.S. 591, 619 (1997).
297 *Id.* at 622.
298 FED. R. CIV. P. 23(c)(1)(B) (effective December 1, 2003 pending congressional approval).
299 *Id.* 23(c)(2)(B) (effective December 1, 2003 pending congressional approval).
300 *Id.* 23(e)(1)(A) (effective December 1, 2003 pending congressional approval).

class certification decisions, few have interpreted the provision to permit an end-run around the predominance requirement. Indeed, even among courts that have interpreted (c)(4)(A) so broadly, many have done so in dicta or have been subsequently overruled by appellate courts rejecting such expansive applications of (c)(4)(A).

While supporters of the expansive issue class action bemoan the failure of federal courts to utilize (c)(4)(A)'s untapped powers, a review of the provision's rulemaking history reveals the wisdom of this judicial reluctance. The framers of Rule 23 viewed (c)(4)(A) merely as a useful "detail," and an "obvious" one at that. There is absolutely no evidence in the Committee's official Rule 23 Note, its meetings, memoranda, or correspondence that the Committee ever conceived of (c)(4)(A) as authorizing certification of class actions that could not otherwise be certified under Rule 23. It is particularly implausible that the Committee would have intended (c)(4)(A) to permit an end-run around (b)(3) predominance given the importance the Committee placed on that requirement. Because the present rule cannot be interpreted to authorize expansive issue class actions, any future end-runs around predominance must be accomplished by an amendment to Rule 23, following an "extensive deliberative process" to consider the propriety of such class actions.

APPENDIX

EXCERPTS FROM 1966 ADVISORY COMMITTEE DOCUMENTS[†]

Letter from Charles Allen Wright to Benjamin Kaplan, March 30, 1963, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, No. C1-7001-41:

Page 1

Dear Ben,

I have looked with some care at your materials of March 15th, and also have the benefit of John Frank's letter of March 22nd. Like John, I am happy with the text of most of the rules, but unhappy that it has not been possible to trim the Notes.

Page 3

EE—Class Actions

If we are to have a long, detailed rule—and I have already expressed my preference for a short rule which would leave most questions to the court—this is, on the whole, a very good one. I am glad that the "spurious" class action is now renounced as the spurious invention it was. I admire Rule 23(c)(2), which goes a long way toward settling the binding effect of the judgment without seeming to tamper with res judicata at all. I am less happy about Rule 23(c)(3). Perhaps it is the law—though you give us no cases—but it seems to me the kind of picky detail which does not require statement in the rule.

Page 4

IN GENERAL

I have made no comment on those matters which create no problems for me.

[†] These documents refer to the present Rule 23(c)(4)(A) as (c)(3)(A) because at the time these documents were written the Committee had not yet added the present Rule 23(c)(2) (setting forth (b)(3) class action notice requirements) to subdivision (c).

* * *

> If we do go ahead and publish these proposals for the profession, I hope that in a Preface we will explain why the Committee is working as it is, and why it has produced successive sets of amendments. Judge Maris did this in his article in A.B.A.J. but some have missed the point. Thus so able and informed a person as Professor VanDercreek—a collaborator of Professor's Moore's—says: "Perhaps things are not entirely amiss with class suits." [citation omitted] From the time I joined the Committee, there has been substantial consensus that things are quite amiss with class suits. If as close a student of our work as Professor VanDercreek did not realize that we postponed study of the joinder rules until other matters were taken care of, I doubt if the bar generally has had this realization.
>
> I would be quite reluctant to have these amendments go out without further meeting of the Committee. A good deal can be accomplished by correspondence, but it does not equal the close scrutiny which we make of your proposals in the give and take of a Committee meeting. Some of these matters we have covered pretty thoroughly, but . . . the draft of the class actions rule is, as you recognize, substantially rewritten from anything we have previously had before us.
>
> * * *
>
> Was it over the Temple of Delphi that the words were carved, "speude brawdeos"—or, if my transliteration is undecipherable, "make haste slowly"?
>
> Sincerely,
>
> Charlie [Charles Alan Wright]

Memorandum of Additional Points on Preliminary Draft of Proposed Amendments of March 15, 1963, submitted to Advisory Committee on Civil Rules by Reporter Benjamin Kaplan and Committee Member Professor Albert M. Sacks, September 12, 1963, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, C1-7001-52:

Page 1

In the present memorandum we deal with points raised in the [Committee's] correspondence and certain other points brought to our attention about the draft amendments [dated March 15, 1963 and circulated to the Committee for comments].

We trust it will prove feasible to dispose of this business at the meeting [scheduled for October 31-November 2, 1963] and proceed with a promulgation of the proposed amendments.

2. We do not agree with [the] suggestion that (b)(3) be dropped, and we would regard the omission of (b)(3) as very unfortunate. Proposed (b)(3) allows a class action where there are predominating questions of law or fact common to all members of the class and the court is satisfied that class-action treatment will facilitate fair and efficient adjudication. The law is already headed in this direction, and there is excellent reason for encouraging this growth under proper safeguards. . . . A case like *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961) . . . is a good example of an action which under our proposal could be treated fairly and efficiently as a class action under (b)(3). To eliminate (b)(3) would in our opinion be retrogressive.

3. Proposed (c)(3)(A) notes that an action may be brought or maintained as a class action "only with respect to particular issues such as the issue of liability," and (c)(3)(B) notes that "a class action may be divided into subclasses and each subclass treated as a class," etc. (p. EE-3). Professor Wright wonders whether this is the law and anyway characterizes it as a "picky detail" which does not require statement in the rule. Certainly it is the law: in fund cases, for example, the action is a class action only in part, for after the general determination of liability the claimants must come forward individually and prove their respective claims; and the reality of the class-subclass situation is manifested when courts, speaking of adequacy of representation, observe that besides the interests shared by all members of the class, there are special interests shared only by particular groupings within the class. We think (c)(3), although making obvious points, is useful for the sake of clarity and completeness.

It has been called to our attention, however, that (c)(3)(A) in its present wording is subject to the possible (though plainly erroneous) interpretation that an action may not be maintained as a class action as to all issues, but "only with respect to particular issues." The word "only" should be dropped.

[Change (c)(3)(A) (p. EE-3) to read:]

> (3) When appropriate, (A) an action may be brought or maintained as a class action with respect to particular issues such as the issue of liability, . . . and the provisions of this rule shall then be construed and applied accordingly.

Comments of Professor Charles Alan Wright Submitted to Advisory Committee Reporter Benjamin Kaplan, September 23, 1963, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, C1-7002-17, at 4:

> I withdraw my objection to Rule 23(c)(3). When Ben Kaplan and Al Sacks tell me that "certainly it is the law," that settles that it is indeed the law, and I rue my own ignorance in having earlier expressed doubt. I agree with all except one of your other comments in your September 12 memorandum on this subject, and the changes you are now suggesting in the text are obvious improvements. Despite what you now say, I remain in dubitante about 23(c)(3), and of course I continue to prefer a very short rule to a very long rule.

Transcript of Civil Rules Advisory Committee Meeting, Amendment Proposal EE—Class Actions, October 31-November 2, 1963, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, No. C1-7104-53 (remarks of Reporter Benjamin Kaplan):

> This is the class suit proposal which has been elaborately debated by the Committee and on which we received very clear directions last time. The suggestions by the Committee have been extremely valuable as I have indicated. . . . This is what the rule does in general, if you start at page EE-1 and move down through the subdivisions. The first subdivision sets out the fundamental and sort of unquestioned prerequisites to any class action; then subdivision (b) takes up further requisites and in effect creates three subdivisions or categories of class actions . . . .
>
> Then going on to (b)(3) we have what may be called the "flexible" category. These are cases where the questions of law and facts common to the class predominate over any questions there may be in the case singular to the particular members of the class, and where the court has deliberated on the matter and decided that the class suit can be conducted fairly and efficiently. And we then list some of the factors that the court should consider in this connection.

I can imagine cases like the following: Common fraud cases claimed by beneficiaries of a trust where the trustee has committed a fraud might be appropriate cases for this kind of class suit. Or let us say private antitrust claims arising from corporate dealing. There is a very interesting case of this sort decided in the 10th Circuit called *Nisley* which is referred to over and over again in the Notes. This case is one where a large group of small uranium ore miners were complaining of antitrust violations by a conspiracy of purchasers of uranium ore to depress the prices. The whole spirit of the opinion is such that it is very plain that a class suit could be conducted there with efficiency and with fairness. This in fact is a growing point in the law. This is the situation that ought to be covered, left to some extent to the discretion of the court. As we all know, cases involving large numbers of persons are more and more almost the staple of federal litigation. It is at this point that we make an advance. Now, going on to (c) we have incorporated a suggestion made by the Committee, I think originally by Mr. Morton, that as soon as practicable after the commencement of the suit, the judge is to deliberate on whether this is a class action, whether in the 1st or 2nd or 3rd category, and he is then to make an order to that effect, so that there is no continuing doubt on whether the action is being conducted as a class action or not.

Then we go on to the very important provision in (c)(2) which says that if an action is to be maintained as a class action of any one of the three categories, then the judgment in the action is to extend to the class, whether or not favorable to the class. In other words, we have eliminated from Rule 23 the old style spurious action, where a suit normally called a class suit isn't really that at all. It seems to me that this is a notable advance, particularly when taken in combination with (c)(1), which provides that there shall be a threshold determination of whether the action is a class action or not. Section (c)(3) is a sort of detail, but perhaps a usable detail. The clause says that an action maintained as a class action need not be such as to each and every issue. For example, in the very *Nisley* case, the determination of liability is of course a class determination. When it comes to the proof of claims by individual uranium ore miners, that is of course a series of individual claims—a perfectly obvious point. Then we have a further provision about the division of classes into sub-classes, which looks to the proper conduct of the suit. You may have a group of people who are aligned in interest as to certain matters, but may split up as to others, and in such a case, one can speak properly of classes and sub-classes.

Memorandum by Reporter Benjamin Kaplan Enclosing Proposed Amendments for May, 1965 Meeting, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, C1-7005-13, p. EE-4 & EE-5:

> 3. One correspondent . . . wants us to make sure that actions for damages for bodily injuries are not treated as class actions, while another correspondent . . . sees reason for experimenting with the class action device in large-scale tort cases. Our Committee has already elaborately debated the question. It would be wrong to single out actions by surface characteristics such as "bodily injuries" (why not "property damages" also?). We have set out general criteria and stated [citation omitted]: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice to multiple lawsuits separately tried."

Transcript of Civil Rules Advisory Committee Meeting, Amendment Proposal EE—Class Actions, May 2, 1965, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, No. C1-8003-88, p. 15 (discussing implications of adding the new (c)(3) provision and relocating the present-(c)(4)):

> Mr. Morton: May I ask if you intend to leave the Note with respect to what will be (c)(4) the same as it is now . . . .
>
> Prof. Kaplan: I would leave the Note as it is now.