NOTES

Splitting the Baby: Standardizing Issue Class Certification

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* This Note is dedicated to the late Richard A. Nagareda, a professor deeply devoted to fostering legal scholarship. I sincerely hope that his influence on this Note will be recognizable to those who had the pleasure of knowing him.

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And the king said, Bring me a sword. And they brought a sword before the king. And the king said, Divide the living child in two, and give half to the one [woman], and half to the other.

—The Judgment of Solomon[1]

I. INTRODUCTION

The Bible depicts King Solomon resolving a dispute between two women who claimed to be the mother of the same child.[2] In the pursuit of justice, King Solomon threatened to do the unthinkable—slice the child in two.[3] Although severing children is not a recommended vehicle for justice, severing lawsuits is. In fact, in the class-action context, the "issue class" established by Federal Rule of Civil Procedure 23(c)(4)[4] does just what King Solomon threatened—it

1. 1 *Kings* 3:24–25 (King James).

2. *Id.* at 3:16–28.

3. *Id.* The child's real mother was so horrified at this prospect that she offered to allow the other woman to keep the child, while the lying woman encouraged King Solomon to split the child in two. Knowing that the real mother would never want to harm her child, King Solomon then gave the child to the first woman. *Id.*

4. FED. R. CIV. P. 23(c)(4). The Rule reads that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." *Id.* According to Professor Benjamin Kaplan, the paradigmatic example of the issue class was the *Union Carbide & Carbon Corp. v. Nisley* antitrust case. Transcript of Session on Class Actions (Oct. 31, 1963–Nov. 2, 1964), RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-7104-53 (Cong. Info. Serv.). That case held that absent members of a plaintiff class could use a favorable interlocutory determination of antitrust liability against defendants in later, individual claims for money damages. *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 589 (10th Cir. 1961) ("For one is not precluded from claiming the benefits of a favorable judgment to which he was not a named party, simply because he would not have been bound by an unfavorable judgment rendered against named

severs litigation into pieces, allowing aggregate treatment of only certain issues in a given lawsuit.[5] Residual issues are left to be determined in plaintiff-specific, follow-on suits.[6] Although courts have generally accepted this tool despite normative academic debate over its utility,[7] they have not established the tool's boundaries.[8] Instead, courts haphazardly accept and reject attempts to create issue classes, causing uncertainty about when they should be used.[9] Moving beyond the normative discussion of issue class utility and the textual evolution of Rule 23(c)(4),[10] this Note establishes a framework for determining when issue classes are appropriate. Put another way, this Note moves to the next step of King Solomon's decision: Assuming that it is ever appropriate to split the baby, *when* and *how* should that be done?

To frame the relevant question within the broader landscape of class-action law and to illustrate the practical importance of issue classes, consider the following hypothetical. Imagine a smoker you know. Now, imagine her sucking down ten packs a day, ignorant that cigarettes are addictive and harmful to her health. Tragically, after a year, she develops lung cancer. Believing that the cigarette manufacturer intentionally refrained from warning her about nicotine's addictive properties and engineered the cigarettes' nicotine level to sustain addiction, she hires an attorney to bring a lawsuit for fraud and negligent misrepresentation.[11] Similar smokers join her in the lawsuit, and together they seek class certification for "all nicotine-dependent persons in the United States."[12]

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parties who did not adequately represent his interests.") (citing Hansberry v. Lee, 311 U.S. 32, 43 (1940)).

5. *See* RICHARD A. NAGAREDA, THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 251 (2009).

6. *Id.*

7. *See generally* Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 711 (2003); 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, 252 (2002).

8. *See* Hannah Stott-Bumsted, Note, *Severance Packages: Judicial Use of Federal Rule of Civil Procedure 23(c)(4)(A)*, 91 GEO. L.J. 219, 221 (2002) (indicating that the actual text of Rule 23, particularly what is now FED. R. CIV. P. 23(c)(4), has always received limited attention).

9. *Compare In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298–99 (7th Cir. 1995) (rejecting issue class use), *with* Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 912 (7th Cir. 2003) (allowing issue class use).

10. For a discussion of the issue classes' textual evolution within Rule 23, focusing on the drafters' intent to limit per se proscriptions on class certification, see Stott-Bumsted, *supra* note 8, at 219–25.

11. *See generally* Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (involving a lawsuit against cigarette manufacturers).

12. *Id.* at 737.

The court now faces several dilemmas. How can it sustain an action for a class *as a whole* when individualized concerns, such as proof of addiction, injury-in-fact, proximate cause, reliance, and affirmative defenses, determine the outcome of each plaintiff's case?[13] May the court certify the class only as to the common, core issues of liability, such as duty, fraud, or negligence, while requiring individuals to litigate the remaining issues independently?[14] Even if the court has discretion to certify some issues and not others, should it? How should the court decide?

Given the increasing use of class actions by litigants in recent years,[15] these questions are routine. Yet repetition has not generated clarity. Litigants seeking class certification still muddle through a maze of ambiguity.

Since the birth of Federal Rule of Civil Procedure 23 ("Rule 23"), which governs class actions and establishes prerequisites for class certification,[16] federal courts have diverged on many essential principles regarding when to certify a class.[17] These divisions may jeopardize the efficiency of a federal judiciary already overburdened by class-action litigation.[18]

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13. *See id.* at 738–41.

14. *Id.*

15. The number of class actions filed in 2004 increased by 22% over those filed in 2003. John C. Coffee, Jr. & Daniel Wolf, *Class Certification: Trends and Developments Over the Last Five Years (2004-2009)*, *in* THE 13TH ANNUAL NATIONAL INSTITUTE ON CLASS ACTIONS F-20 (A.B.A. ed., 2009). Additionally, more recent studies have shown no decrease in class actions last year. *See, e.g.*, FULBRIGHT & JAWORSKI L.L.P., LITIGATION TRENDS SURVEY REPORT (2010), *available at* http://www.fulbright.com/litigationtrends. As I will later mention, even after the Supreme Court's 2011 ruling in *AT&T Mobility LLC v. Concepcion*, the class action is still very much alive. *See infra* text accompanying notes 19–24.

16. Hines, *supra* note 7, at 709–10.

17. For example, until recently, the Ninth Circuit diverged from all other circuits on its view of the judicial role at the class certification stage. *See* Richard A. Nagareda, *Common Answers for Class Certification*, 63 VAND. L. REV. EN BANC 149, 150–51 (2010). Contrary to all other circuits, which hold that the judiciary has an obligation to actually assess the common qualities of the proposed class in what is almost a mini-trial, the Ninth Circuit in *Dukes v. Wal-Mart Stores, Inc.* held that "[t]he disagreement [between the parties as to whether common questions exist] *is* the common question" that gives rise to certification and that "deciding which side has been more persuasive is an issue for the next phase of the litigation." 603 F.3d 571, 609 (9th Cir. 2010) (en banc). This Ninth Circuit standard made class certification particularly easy to satisfy, but was recently overruled in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

18. In April 1990, the Federal Courts Study Committee released a report addressing the "workload crisis" in the federal courts, noting that between 1958 and 1988, the caseload of the federal courts tripled. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 30 (5th ed. 2007). Moreover, in December 1995 the Judicial Conference of the United States released a report suggesting that efforts should be made to resist expanding federal jurisdiction. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 8, 21–38 (1995).

This remains true even after the Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*, where the Court ruled that the Federal Arbitration Act preempted broad state laws that made class-action waivers in consumer adhesion contracts unenforceable.[19] This holding encourages companies to include class-action waivers in predispute contracts.[20] But this is not the death of the class action.[21] Even though this holding may diminish products liability and employment-related class actions in the short-term,[22] it will not wipe them out.[23] Additionally, other types of class actions that do not involve predispute contracts, such as securities class actions, will likely remain on the rise.[24]

The Class Action Fairness Act of 2005 and the Supreme Court's controversial decision in *Exxon Mobil Corp. v. Allapattah Services, Inc.*

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19. 131 S. Ct. 1740, 1753 (2011).

20. Gerald L. Maatman, Jr. & David Ross, *AT&T Mobility v. Concepcion—What the Supreme Court's April 27 Ruling Means for Employers*, THE WORKPLACE CLASS ACTION BLOG (Apr. 27, 2011), http://www.workplaceclassaction.com/class-certification/att-mobility-v-concepcion---what-the-supreme-courts-april-27-ruling-means-for-employers/.

21. Many scholars and reporters have even said that this case heralds the "end of class-action litigation." *See, e.g.*, Brian T. Fitzpatrick, *Supreme Court Case Could End Class-action Suits*, SFGATE.COM, Nov. 7, 2010, http://articles.sfgate.com/2010-11-07/opinion/24818566_1_class-action-class-action-suits-federal-arbitration-act.

22. *See Concepcion*, 131 S. Ct. at 1761 (Breyer, J., dissenting) (noting that the court was overly concerned by the burdens of class actions and asking "[w]hat rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?").

23. Lower courts have determined that arbitration agreements are still subject to unconscionability analysis. *See, e.g.*, *Kanbar v. O'Melveny & Myers*, No. C-11-0892 EMC, 2011 WL 2940690, at *6 (N.D. Cal. July 21, 2011) ("In short, arbitration agreements are still subject to unconscionability analysis."); Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Grp., 197 Cal. App. 4th 1146, 1158 n.4 (Ct. App. 2011) ("General state law doctrine pertaining to unconscionability is preserved unless it involves a defense that applies 'only to arbitration or that derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue.' " (citing *Concepcion*, 131 S. Ct. at 1746.)) Additionally, courts have recently held that *Concepcion* does not apply to class actions brought under the Private Attorney General Act of 2004. *Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 500 (Ct. App. 2011) ("AT&T does not provide that a public right, such as that created under the PAGA, can be waived if such a waiver is contrary to state law." (citing Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)). The National Labor Relations Board has also issued complaints against companies that maintain class-action waivers in employment contracts. Maatman & Ross, *supra* note 20. This action is based on the theory that these agreements interfere with employee statutory rights to engage in concerted activity. *Id.* Additionally, the EEOC might step in to promote the use of aggregate litigation against employers who are violating federal law. *Id.*

24. *See* Coffee & Wolf, *supra* note 15, at F-21 to F-22 (noting that that there was a slight increase in securities class actions and a large increase in both ERISA and labor class actions between 2003 and 2004); Paul Karlsgodt, *Concepcion Point/Counterpoint*, CLASSACTIONBLAWG.COM (May 26, 2011), http://classactionblawg.com/tag/class-action-trends/. Mr. Karlsgodt even goes one step further and suggests that, despite *Concepcion*, consumer class actions might even increase. *Id.*

already threaten the federal judiciary's efficiency because they increase federal jurisdiction over class-action lawsuits.[25] More generally, the lack of clarification in certification law also threatens judicial efficiency for a number of reasons. First, class-action plaintiffs fearing removal to federal court may forgo state court and choose to litigate in federal jurisdictions with more generous approaches to certification.[26] Additionally, defendants may remove to get out of state courts that are friendly to certification. These "friendly" jurisdictions, such as the Second and the Ninth Circuits, where over forty percent of class-action lawsuits already take place, could be crushed by the high demand for adjudication.[27] Second, this forum-choice latitude is of great theoretical concern because it results in a practical nullification of more exacting approaches to certification—even when those approaches constitute the rule of law in a majority of jurisdictions.[28] Allowing these "friendly" jurisdictions, which constitute a minority, to effectively set the law for the entire country contravenes principles of federalism and judicial fairness. Finally, abundant divergence in legal treatment results in abundant appeals. This slows the wheels of the judicial process and leaves litigants without remedy for a prolonged period of time.

But fear not:[29] although issue class certification remains unclear, consensus is slowly emerging on many of the broader quandaries. For instance, even prior to the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*,[30] most courts addressed

25. Coffee & Wolf, *supra* note 15, at F-23 to F-24. Under the Class Action Fairness Act, litigants in a diversity-based class action are exempted from fulfilling the complete diversity requirement so long as the aggregate amount in controversy totals to over $5 million. 28 U.S.C. §§ 1332(d), 1435, 1711–15 (2006). Similarly, the decision in *Allapattah Servs.* now makes it necessary for only one plaintiff to meet the $75,000 jurisdictional amount in controversy to obtain federal jurisdiction over a diversity action. *See generally* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546 (2005). At least one study shows a significant increase in removals to federal court following the Class Action Fairness Act. *See* EMERY G. LEE III & THOMAS WILLGING, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT 2 (2008), *available at* www.uscourts.gov/uscourts /rulesandpolicies/rules/CAFA&uscore;report_0906.pdf. Note, however, that some scholars suggest that these class actions might be less likely to get certified due to stricter federal standards. *See, e.g.*, Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1520 (suggesting that it "behooves litigants and courts to develop a more integrated approach to the selection and adjudication of common issues of fact or law that recur in the claims of numerous parties").

26. Coffee & Wolf, *supra* note 15, at F-24.

27. *Id.* at F-20.

28. Nagareda, *supra* note 17, at 156.

29. *See Isaiah* 54:4 (King James).

30. 131 S. Ct. 2541 (2011).

questions pertaining to the merits when ruling on class certification.[31] Other questions—such as when, if ever, it is appropriate to certify claims for monetary relief under Rule 23(b)(2)—have also been clarified by the Supreme Court.[32] In fact, recent Supreme Court decisions, including *Dukes* and *Smith v. Bayer*,[33] signify the Court's newfound willingness to clarify the certification conundrums emerging from the lower courts. While they are at it, the justices should take the opportunity to clarify the proper use of issue class certification, an area relatively unexplored by both courts and academics.[34]

As mentioned above,[35] issue class certification is a litigation tool established by Rule 23(c)(4) that allows for an action to be "brought or maintained as a class action with respect to particular issues."[36] The only additional requirement for certifying an issue class, above and beyond the general requirements of Rule 23(a), which apply to all class actions, and the requirements of Rule 23(b)(3), which apply to all opt-out classes (of which an issue class is one type), is that certification must be "appropriate."[37] Most courts interpret Rule 23(c)(4) to allow certification of single issues, even when they deem it inappropriate to certify the entire constellation of issues in a given litigation.[38]

Although many scholars have explored how courts contemplating partial certification[39] should interpret the general Rule 23(a) certification requirements,[40] few have contemplated what

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31. Nagareda, *supra* note 17, at 150 ("A body of doctrine has emerged from the lower federal courts with the promise of eventually yielding a distinctive law of class certification. Rather than look simply for 'some showing' of compliance with the requirements for class certification in Rule 23 of the Federal Rules of Civil Procedure, the court must affirmatively determine that those requirements are indeed satisfied.").

32. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

33. *Id.*; Smith v. Bayer Corp., 131 S. Ct. 2368, 2382 (2011) (prohibiting the issuance of an injunction under the Anti-Injunction Act's relitigation exception and holding that a federal class action does not bar different plaintiffs in a similar, state-wide class-action lawsuit from seeking certification because different legal standards governed).

34. Most scholarly debate about issue classes centers around the tool's normative value. *See generally* Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 609–10 (2004) [hereinafter Hines, *Dangerous Allure*]; Hines, *supra* note 7, 763–64; Romberg, *supra* note 7, 333–34.

35. *See supra* p. 1586.

36. FED. R. CIV. P. 23(c)(4).

37. *Id.*

38. NAGAREDA, *supra* note 5, at 251.

39. For purposes of this Note the terms partial certification and issue class certification will be used interchangeably.

40. The prerequisite requirements under Rule 23(a) include numerosity, commonality, typicality, and adequacy. FED. R. CIV. P. 23(a). These requirements, as well as the additional

considerations would make partial certification appropriate.[41] Because the language of the Rule gives little guidance on the matter,[42] case law must help determine when it is appropriate to employ Rule 23(c)(4) to certify only some issues for class treatment, rather than all issues implicated in a given litigation.

Drawing on recent cases and academic work, this Note suggests a judicial standard. Part II briefly reviews the current state of the certification inquiry and traces the emergence of the issue class, culminating in the issue class's ultimate acceptance by the majority of courts. Part II also outlines the common barriers that continue to prevent issue class certification in specific contexts. Part III explores recent judicial determinations involving issue classes, organized by type of division, and argues that courts have already begun to create a rubric for determining when issue classes are appropriate. The rubric suggests that the appropriateness of issue class certification should, and does, turn on the degree to which the issues under consideration for class treatment are conceptually separable from the remaining issues. Part IV argues that the draft suggestions proposed by the American Law Institute ("ALI") in 2009 accurately track this preexisting formula, and courts should, in large part, adopt them. Finally, in order to make these ALI proposals more judicially workable, this Note urges the adoption of a multifactor balancing test for issue class appropriateness and a burden-shifting approach to choice-of-law conflicts.

II. BACKGROUND

A. The Nuts and Bolts of Class Certification

Before delving into the realm of issue classes, this Note reviews the basic requirements that a would-be class must satisfy in order to attain judicial permission to litigate in the aggregate. The Federal Rules of Civil Procedure[43] regulate "certification," which is judicial

prerequisite requirements for opt-out classes, which include a predominance of common issues and superiority of the class-action format, are briefly described in Part II.A.

41. *See* Hines, *supra* note 7, at 711 (arguing that allowing issue classes to fulfill the predominance requirement when the issue under consideration does not predominate among the litigation *as a whole*, would be an "end-run" around Rule 23(b)(3)); Romberg, *supra* note 7, at 294–98 (suggesting that it is appropriate to certify issue classes even when the issue under consideration does not "predominate" as among all issues in a given litigation).

42. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §2.02 (Proposed Final Draft 2009).

43. Rule 23 governs class actions while Rule 23.1 governs derivative actions.

permission for aggregate litigation. Specifically, Rules 23(a) and 23(b) govern this practice.[44]

Rule 23(a) establishes four general requirements that all class actions must satisfy.[45] These requirements are: (1) numerosity, which sets a standard of practicality on the minimum number of plaintiffs required to comprise a class;[46] (2) commonality, which requires all members in a class action to share at least a single common question of law or fact;[47] (3) typicality, which requires that "the claims or defenses of the representative parties are typical of claims or defenses of the class";[48] and (4) adequacy of representation, which ensures that

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44. *See* FED. R. CIV. P. 23(a)–(b).

45. FED. R. CIV. P. 23(a).

46. Although commonly known as "numerosity," the specific wording of the rule requires that "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). Some circuits, such as the Second Circuit, have adopted a specific number, over which identifiable, would-be classes presumptively satisfy this requirement. *See* Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d. Cir. 1995) (stating that classes with forty class members or more meet this requirement). Other circuits, however, such as the Tenth Circuit, have declined to adopt a strict numerical test. *See* Trevizo v. Adams, 455 F.3d 1155, 1162 (10th Cir. 2006) ("[T]here is no set formula to determine if the class is so numerous that it should be certified." (citing Rex v. Owens *ex rel.* State of Okla. 585 F.2d 432, 436 (10th Cir. 1978))). Where there is no presumption that the requirement has been satisfied, many jurisdictions utilize a balancing test that considers several factors. *See* Ansari v. N. Y. Univ., 179 F.R.D. 112, 114–15 (S.D.N.Y. 1998) (considering the following factors: "(1) the judicial economy that will arise from avoiding multiple actions; (2) the geographic dispersion of members of the proposed class; (3) the financial resources of those members; (4) the ability of the members to file individual suits; and (5) requests for prospective relief that may have an effect on future class members"); *see also* Jones v. Roy, 202 F.R.D. 658, 665 (M.D. Ala. 2001) (finding that a twenty-one member class did not meet the numerosity requirement because of factors such as geographic diversity, judicial economy, and the ease of identifying class members). Moreover, other factors, such as vagueness of the pleading of failure to specify how class members will be identified may also result in a failure to satisfy numerosity. Coffee & Wolf, *supra* note 15, at F-26.

47. The Rule specifically requires that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2) (2006). This is generally considered to be a fairly easy standard to satisfy. *See* Coffee & Wolf, *supra* note 15, at F-26. However, as with the numerosity requirements, jurisdictions diverge in how they apply the standard. *Compare* Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998) ("All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."), *and* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 599 (9th Cir. 2010) (en banc) ("The commonality test is qualitative rather than quantitative–one significant issue common to the class may be sufficient to warrant certification."), *with In re* Am. Gen. Life Ins. Co. Indus. Life Ins. Litig., No. 3:01-5000-CMC (D.S.C. Mar. 9, 2007) (finding that commonality was not present where the litigation involved several "plan codes" over numerous years and involving numerous states).

48. FED. R. CIV. P. 23(a)(3). As with the commonality requirement, historically, this standard has not been demanding. Coffee & Wolf, *supra* note 15, at F-35. However, there is reason to believe that the more recent tendency is to define typicality in a more rigid manner. *Id.* at F-36. Additionally, in practice, the typicality requirement tends to overlap with the

the class representative in a given action will appropriately and "fairly" represent and "protect" the interests of the entire class.[49]

In addition to fulfilling Rule 23(a)'s general prerequisites, would-be classes must also fit within one of the three defined categories that Rule 23(b) establishes.[50] Fitting within one of these class types often requires fulfilling additional requirements.[51]

The major distinction between the three class types is based on whether class membership is mandatory or whether would-be members have the opportunity to opt out.[52] Subsections 23(b)(1) and 23(b)(2) both authorize mandatory class actions, whereas subsection 23(b)(3) authorizes opt-out class actions.[53]

Subsection 23(b)(2) applies where plaintiffs predominantly seek injunctive relief. Subsection 23(b)(1) allows for certification of a mandatory class where the prosecution of "separate actions by or against individual class members would create a risk of . . . inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class."[54] Although the two subsections are distinct under the Rules, in reality, they have largely merged with each other.[55] While some circuits still occasionally struggle with minor questions about whether plaintiffs satisfied the requirements to establish these types of mandatory classes,[56] more difficulty emerges from the opt-out classes under Rule 23(b)(3).

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commonality requirement. *Id.* One common reason leading would-be classes to fail the typicality requirement exists where injuries are highly individualized. *Id*. at F-41.

49. The adequacy of representation requirement generally encompasses two separate inquiries. Coffee & Wolf, *supra* note 15, at F-43. The first requires an absence of substantial conflicts of interest between the representatives and the class. Busby v. JRHBW Realty, Inc., 513 F.3d 1314, 1323 (11th Cir. 2008). The second requires a determination by the court that the representative will adequately prosecute the class action. *Id.*

50. *See* FED. R. CIV. P. 23(b).

51. *See id.*

52. Coffee & Wolf, *supra* note 15, at F-62. Note that the ability to opt out of class membership is based on constitutional due process rights. *See generally* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

53. FED. R. CIV. P. 23(b).

54. NAGAREDA, *supra* note 5, at 193–94 (citing FED. R. CIV. P. 23(b)(1)(A)).

55. *Id.* at 195.

56. One such question that is treated differently among circuits stems from the advisory committee notes to subsection 23(b)(3), which infers that mandatory classes under this subsection might also encompass some monetary damage claims so long as those claims are nonpredominate. *Id.* at 194. For example, the Fifth, Seventh, Eleventh, and Sixth Circuits generally disallow Rule 23(b)(2) classes from seeking monetary damages. Coffee & Wolf, *supra* note 15, at F-67. However, in *Dukes v. Wal-Mart Stores, Inc.*, the Ninth Circuit held, over a vehement dissent by Judge Kleinfeld, that a Rule 23(b)(2) class could remain certified even

Today, most class actions—usually those involving a high proportion of monetary damages—attempt to qualify for class treatment under Rule 23(b)(3), particularly if they fail certification under 23(b)(2).[57] However, establishing this type of class action requires the would-be class to demonstrate the following, in addition to Rule 23(a)'s general requirements: that common issues of law and fact "predominate" over individual issues[58] and that the would-be class "is superior to other available methods for fairly and efficiently adjudicating the controversy."[59] Additionally, the court must also consider "the likely difficulties in managing the class action."[60] These requirements are known as the "predominance," "superiority," and "manageability" requirements, respectively.[61] Though different federal circuits continue to approach these inquiries differently, Rule 23(b)(3) opt-out classes are most often denied certification on predominance grounds.[62] Variations in state law, as well as the individual nature of both damages and specific claim elements—such as proximate cause in mass tort cases—often thwart a finding of predominance.[63]

Together, the requirements for class certification play an essential role in determining when issue classes are appropriate. As this Note will next demonstrate, modern use of the issue class tool evolved from changes in the federal judiciary's approach to the general certification inquiry. Exploring that history and placing the issue class within its appropriate context facilitates understanding of the instrument's utility and its drawbacks.

B. The Emergence and Development of the Issue Class

1. The *Eisen* Evolution: The New Rigor of Class Certification

Until the late 1980s, courts largely ignored Rule 23(c)(4), choosing instead to make class certification decisions based on the litigation as a whole.[64] In fact, the only courts that employed Rule 23(c)(4) used it as a bifurcation mechanism in order to separate the

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though the monetary damages sought by the plaintiffs could amount to billions of dollars. 603 F.3d 571, 616–19 (9th Cir. 2010) (en banc).

57. *See, e.g.*, *Dukes*, 603 F.3d at 615.

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

59. *Id.*

60. FED. R. CIV. P. 23(b)(3)(D).

61. *See generally* NAGAREDA, *supra* note 5, at ch. 2(C).

62. *See* Coffee & Wolf, *supra* note 15, at F-76.

63. *Id.*

64. Hines, *supra* note 7, at 727–29.

liability and damages portions of cases involving claims for economic relief.[65] Today, courts consider bifurcation, which is governed by Rule 42(a),[66] as distinct from issue class certification. It differs from issue class certification in three primary ways: bifurcation results in only one judgment, it can be used in non-class-action lawsuits, and it may utilize a single jury.[67] In civil trials, bifurcation generally only separates the liability and damages determinations,[68] whereas issue class certification can divide lawsuits in a multitude of ways.[69]

Emergence of issue class certification in its modern form—where certification pertains to only particular issues, requiring litigants to resolve remaining issues in independent trials—derives from a broader doctrinal shift in certification analysis.[70] This shift reflects a departure from early interpretations of a passage from *Eisen v. Carlisle & Jacqueline*, which stated that Rule 23 does not authorize a court to "conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[71]

Early courts interpreted this statement as a prohibition on judicial consideration of the merits of a case at the class-certification stage.[72] Instead, to achieve certification, the courts required only some minimal showing of the elements of Rule 23 prior to certifying a class.[73] But such a rigid prohibition of merit consideration began to lose favor as early as 1982, when the Supreme Court announced its decision in *General Telephone Co. v. Falcon*.[74] There, the Court decertified a plaintiff class in a Title VII action comprising of Mexican-American employees who were either passed up for promotion by the defendant or altogether refused employment.[75] The Court feared that allowing class certification based on the specific discriminatory treatment of one representative plaintiff could lead to "companywide class action[s]" in every Title VII case.[76] Without any reference to *Eisen*, the Court stated:

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65. *Id.* at 728.

66. CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2388 (3d ed. 2011).

67. *Compare id.* § 1790 (3d ed. 2011), *with id.* §§ 2388, 2390.

68. *Id.* § 2390.

69. *See id.* § 1790.

70. *See* Nagareda, *supra* note 17, at 149–50.

71. 417 U.S. 156, 177 (1974).

72. Hines, *supra* note 7, at 725–26.

73. *Id.* at 725–28.

74. *See* NAGAREDA, *supra* note 5, at 274–75.

75. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982).

76. *Id.* at 159.

> We do not, of course, judge the propriety of a class certification by hindsight. The District Court's error in this case, and the error inherent in the across-the-board rule, is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a). As we [previously] noted in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, . . . "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.[77]

Because "probing behind the pleadings" requires courts to delve into the merits of the case during the certification hearing, the Court's ruling was inconsistent with rigid interpretations of *Eisen*. More recent cases, beginning with the Second Circuit's decision in *In re IPO Securities Litigation (Miles v. Merrill Lynch & Co., Inc.)*, have reinterpreted the *Eisen* rule in light of *Falcon* saying, "[a] district court still must give full and independent weight to each Rule 23 requirement, regardless of whether that requirement overlaps with the merits."[78] The Advisory Committee Note to Rule 23(c) seems to support this new interpretation:

> Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis.[79]

Today, most circuits agree that courts must conduct a more rigorous analysis of the Rule 23 requirements than the *Eisen* approach prior to certifying a class.[80] To assist in this inquiry, the Second and Third Circuits demand that plaintiffs prove each certification requirement by a preponderance of the evidence.[81] Such a shift has led one commentator to remark that "[g]one . . . are approaches whereby

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77. *Id.* at 160 (internal citations omitted).

78. 471 F.3d 24, 27 (2d Cir. 2006). The Fifth Circuit also employed the same language in *Oscar Private Equity Invs. v. Allegiance Telecomm., Inc*., 487 F.3d 261, 277 (5th Cir. 2007).

79. FED. R. CIV. P. 23(c), advisory committee's note.

80. *See, e.g.*, Vallario v. Vandehey, 554 F.3d 1259, 1267 (10th Cir. 2009); In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 17 (1st Cir. 2008); *Oscar Private Equity*, 487 F.3d 261 (5th Cir. 2007); Gariety v. Grant Thornton, LLP, 368 F.3d 356, 366 (4th Cir. 2004). The Second and Third Circuits have also adopted a preponderance of the evidence standard for plaintiffs hoping to certify a class. Coffee & Wolf, *supra* note 15, at F-55.

81. *See* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008) ("Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence."); Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 202 (2d Cir. 2008) ("[T]he preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements.").

the court, in ruling on class certification, must avoid any question that overlaps with the parties' dispute on the merits."[82] Though these "enhanced" certification proceedings arguably strengthen certification's ability to generate settlements,[83] they also make it more difficult to achieve class certification.

2. The Normative Issue Class Debate

Rule 23(b)(3) opt-out class actions also pose a particular problem for plaintiffs seeking certification. With the recent shift to a more exacting certification inquiry, courts began more rigorously enforcing the certification requirement that common issues of law and fact "predominate" over individual issues.[84] Enforcement of this provision thwarted class certification where common issues in a given litigation could not overcome the individual issues.[85] Decisions finding an absence of predominance were commonly based on factors such as variations in state law, the difficulty in measuring damages, and the individual nature of various claim elements.[86]

To solve this problem, plaintiffs eager to achieve class certification turned to issue classes as a means of preserving aggregate litigation. They argued that Rule 23(c)(4), which allows specific issues to be certified for adjudication while leaving more individualized issues to be decided in separate trials, narrowed the court's focus only to whether certain issues met the Rule 23(b)(3) requirements.[87] By arguing that plaintiffs needed to satisfy the certification requirements only with respect to a particular issue and not with respect to the entire litigation, class counsel effectively sought to use this provision to carve out the individual issues inappropriate for class treatment. Essentially, these class counselors

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82. *See* Nagareda, *supra* note 17, at 149.

83. *See id.* at 152.

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

85. Despite this being the more common approach to the predominance analysis, some courts—including the Sixth Circuit—still hold that predominance is satisfied if the common question in the lawsuit "is at the heart of the litigation." Powers v. Hamilton Cnty. Pub. Defender Comm'n, 501 F.3d 592, 619 (6th Cir. 2007). Under this analysis, "[t]he mere fact that questions peculiar to each individual member of the class action remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible." *Id.* at 619 (citing Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988)). However, cases involving a single claim or theory of wrongdoing are more likely to satisfy predominance in these jurisdictions. *See id.*

86. Coffee & Wolf, *supra* note 15, at F-76.

87. These prerequisites include the numerosity, commonality, typicality, and adequacy requirements.

hoped that by "splitting the baby" into certifiable and noncertifiable issues, the former might survive. Despite other weaknesses, class counsel viewed partial certification of amenable issues as highly desirable because it allowed them to more efficiently prove liability on certified issues. Additionally, at the very least, it also offered class counsel settlement leverage—leverage some commentators think is undeserved.[88]

Reframing the issue class stirred the proverbial pot, launching academic debate on the tool's proper use.[89] Opponents of this emergent use have argued that it unfairly favors plaintiffs and thwarts the purpose of Rule 23.[90] These academics feel strongly that courts should only certify classes meeting the certification requirements for the litigation as a whole. Professor Laura Hines has stated that the framers of Rule 23 "never intended . . . to authorize expansive issue class actions" in this manner.[91] She finds support for this position by analogy to the Supreme Court's rejection of a settlement-only class[92] in *Amchem Products v. Windsor* based on the fact that the class did not meet the adequacy and predominance requirements of Rule 23.[93] In that case, Justice Ginsburg noted that a settlement-only class "rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the Rule's design" because allowing it would strip the "vital prescription [of predominance] . . . of any meaning."[94] Hines believes that this statement goes beyond settlement-only classes,

88. NAGAREDA, *supra* note 5, at 193. It also allowed class plaintiffs to more efficiently prove liability on certified issues.

89. Hines, *supra* note 7, at 717; Romberg, *supra* note 7, at 255.

90. *See* Coffee & Wolf, *supra* note 15, at F-55; Hines, *supra* note 7, at 709; David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 955 (1998) (arguing that Rule 23(b)(3) overrides issue class certification unless those issue "predominate" over the individual issues in the case).

91. Hines, *supra* note 7, at 748; *see generally* Hines, *Dangerous Allure*, *supra* note 34, at 609–10 (noting that the issue class "presents a tempting solution to the seemingly intractable shortcomings of mass tort class actions" due to the tool's simplicity and ability to allow certification even when class claims fail the predominance or superiority requirements of Rule 23(b)(3)).

92. A settlement-only class is the certification of a class that is only intended to facilitate settlement and does not have judicial approval to proceed to trial as a class action. Hines, *supra* note 7, at 749.

93. *Id.*; *see* Amchem Prods. v. Windsor, 521 U.S. 591, 623–25 (1997).

94. Hines, *supra* note 7, at 749–51 (arguing that issue class certifications are akin to the settlement-only classes rejected in *Amchem* because both should be construed as additional allowances of Rule 23 instead of as a separate means to certification that allows for a bypass of certification requirements) (citing *Amchem*, 521 U.S. at 623–25 (1997)).

interpreting it to mean that certification of singular issues cheats the system and creates an inappropriate class.[95]

On the other hand, proponents of issue class certification argue that the tool yields great benefits for judicial efficiency, while reducing expenses, by trying complex issues only once.[96] These issue class fans think issue classes should receive the same treatment as subclasses.[97] Subclasses are the sister provision of the issue class, governed by Rule 23(c)(5), that allow "a class [to] be divided into subclasses that are each treated as a class."[98] Unlike with issue classes, where singular issues are certified as to *all plaintiffs*, under the subclass rule, the subunits considered for certification are generally groups of plaintiffs that share a common attribute.[99] Different representatives are generally appointed for each subclass.[100] Scott Dodson believes that subclasses should be viewed by courts under a "replacement theory,"[101] which allows subclasses to evade the "certification ringer" and achieve certification even where a court cannot certify a global class.[102] This means that courts view the subclass by "the unit that has actually been certified for collective resolution," not by the litigation as a whole.[103] Issue class proponents have argued that issue

95. *Id.* at 749–52.

96. Coffee & Wolf, *supra* note 15, at F-107; Romberg, *supra* note 7, at 299 (describing issue certification as "a happy medium between individual cases and a global class action" because of its efficiency and fairness); *see* Cabraser, *supra* note 25, at 1520 (suggesting that the use of issue class actions is part of a class action counterreformation that "is a creature of necessity").

97. Romberg, *supra* note 7, at 297. Subclasses are considered the "sister provision" to issue classes. *See* Scott Dodson, *Subclassing*, 27 CARDOZO L. REV. 2351, 2353–54 (2006) (starting the discussion on the utility of subclasses).

98. FED. R. CIV. P. 23(c)(5). Formerly, the issue class certification rule was in FED. R. CIV. P. 23(c)(4)(A) and the subclass rule was in Fed. R. Civ. P. 23(c)(4)(B).

99. *See, e.g.*, *In re* Paxil Litig., 212 F.R.D. 539, 543 (C.D. Cal. 2003) (articulating the difference between issue classes and subclasses). *Compare* FED. R. CIV. P. 23(c)(5), *with* FED. R. CIV. P. 23(c)(4).

100. JUDGE WILLIAM W. SCHWARZER, JUDGE A. WALLACE TASHIMA & JAMES W. WAGSTAFFE, FEDERAL CIVIL PROCEDURE BEFORE TRIAL, 9TH CIRCUIT EDITION § 10:309 (2011).

101. "Replacement theory" is the concept that subclasses can be certified without regard to the certifiability of the class action as a whole. Dodson, *supra* note 97, at 2362. This is often juxtaposed to a competing theory called the "contingency theory," which says that a subclass cannot exist if the entire class cannot be certified as a whole. *Id*.

102. *Id.* at 2354 (arguing that the text of Rule 23(c)(5) supports the "replacement theory"). Dodson also believes that in *Amchem*, the court alluded to the fact that subclasses may have helped the class overcome the denial of certification. *Id.* at 2387.

103. Romberg, *supra* note 7, at 297.

classes deserve consistent treatment,[104] a view that has prevailed in several courts.[105]

3. Acceptance of the Issue Class and Barriers to Partial Certification

Contrary to the wishes of commentators who fully oppose issue class actions, most circuits—namely the First, Second, Third, Fourth, Seventh, and Ninth—issued decisions supporting the more liberal approach to issue class certifications.[106] These circuits generally believe that courts may employ Rule 23(c)(4) "regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement."[107] Despite this trend, one circuit remains staunchly unwilling to view certification requirements, particularly predominance, through an issue-specific aperture. The Fifth Circuit stated that "[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) [of Rule 23] 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."[108]

Although the majority of courts disagree with the Fifth Circuit's approach, scholars John C. Coffee, Jr. and Daniel Wolf suggest that recent case law shows that issue class certifications are falling out of favor with courts.[109] However, recent appellate decisions against issue class certification reflect case-specific concerns rather than opposition to the availability of issue class certification.

In modern jurisprudence, the class action is somewhat distinguishable from the baby before King Solomon. In the Solomon story, the baby survived because it was *not* split. But, in class actions, the lawsuit is doomed to fail if it remains *whole*. The issue class tool splits the baby, reviving a class action from otherwise-certain death by curing a fatal flaw in the certification inquiry. But, as courts are now

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104. *See id.*

105. *See, e.g.*, *In re Paxil Litigation* effectively adopts the replacement theory. 212 F.R.D. at 543; Dodson, *supra* note 97, at 2354 (stating that the interpretation of Rule 23(c)(4)'s text supports the replacement theory of the issue class).

106. Coffee & Wolf, *supra* note 15, at F-108 n.32.

107. *In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 227 (2d Cir. 2006).

108. Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996) (emphasis added).

109. Coffee & Wolf, *supra* note 15, at F-108 to F-109 (suggesting that the Second Circuit's decision in *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), was a significant retreat, and perhaps reversal, from its prior support of issue class certification); Romberg, *supra* note 7, at 279 ("In the mid-1990s, the judicial receptivity to issue classes came to an abrupt halt.").

realizing, the cure is not without risks; in some contexts, the act of splitting the lawsuit to save the class may actually kill the class. For example, using the issue class to split a lawsuit so that only some issues receive class treatment may produce constitutional problems stemming from the Seventh Amendment's Reexamination Clause.[110] The Reexamination Clause may impede issue class certification in cases where the issues under class consideration overlap conceptually with issues to be tried in later proceedings. The fear is that the facts "resolved" in the primary class proceeding would have to be re-explored by different juries, perhaps even in different jurisdictions, during individual proceedings. This would violate the Reexamination Clause's guarantee. Such constitutional problems do not emerge in the bifurcation of individual cases because, in those cases, the same jury serves as the fact finder for each phase of the litigation.[111] These problems are also less likely to emerge in the subclass context, where each subclass receives a single jury for the litigation of all subclass claims. Issue class certification is therefore uniquely plagued by Reexamination Clause concerns.

In other cases, the issue class may not introduce new problems, such as Reexamination Clause issues, but it may instead fail to cure old problems, often based on the predominance or superiority requirements of Rule 23(b)(3). This situation is akin to applying a Band-Aid to a wound that requires stitches. It just isn't enough. This defect occurs most often in diversity actions involving class representatives from multiple states. Here, choice-of-law concerns may impede certification of either the class as a whole or the individual issues, on either commonality or predominance grounds.[112]

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110. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) ("[T]he judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries. . . . The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them . . . . and not reexamined by another finder of fact."). The Reexamination Clause provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. Although this provision only applies to matters where a jury trial is required by the Seventh Amendment, this category includes all "actions for damages to a person or property, for libel and slander, for recovery of land, and for conversion of personal property." Ross v. Bernhard, 396 U.S. 531, 533 (1970). It also includes "actions enforcing statutory rights . . . if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." Curtis v. Loether, 415 U.S. 189, 194 (1974). Therefore, the category of cases to which the Reexamination Clause applies encompasses most class actions, including all mass tort cases.

111. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d at 1303.

112. *See In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1085–86 (6th Cir. 1996) (determining that choice-of-law concerns defeated the plaintiff's ability to show predominance and ultimately decertifying a consumer class of penile implant users); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d

Why is choice of law an impediment here? The Supreme Court's decision in *Erie Railroad Co. v. Tompkins* requires federal courts sitting in diversity to apply the substantive law of the state in which the case would normally be tried, rather than federal common law.[113] This approach often results in situations where multiple state laws would apply to a single class. While no problems emerge where the various state laws are uniform, there are typically some discrepancies between state laws.[114] Courts reason that where several differing state laws are involved in a single class litigation, judges trying the case "would face the impossible task of instructing a jury on the relevant law," making certification inappropriate.[115] State subclasses used in conjunction with the issue class might solve this problem and salvage certification for certain parts of litigation, but subclassing alone will not always be enough, as plaintiffs may have factual differences that additionally require subclass lines to be drawn.

Although issue class opponents suggest that certification is never appropriate where choice-of-law problems are present, this outcome may not always yield the most rational results in terms of judicial efficiency. This problem is pronounced where minor nuances in state law are unlikely to have any bearing on the case's outcome.[116] Given these barriers, the story of the issue class is not unlike the story of King Solomon. In fact, just as the child's true mother in that parable feared,[117] in some cases splitting the baby wouldn't solve the problem *even in theory*. To help make the decision of when to slice versus when to sheathe, this Note turns to established law.

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at 1300. These same choice-of-law concerns contributed to the denial of class certification of litigation as a whole in *In re Dalkon Shield IUD Products Liability Litigation*. 693 F.2d 847, 850, 854 (9th Cir. 1982) (holding that the Rule 23(a)(2) commonality requirement was not satisfied in part because the fifty jurisdictions in which cases arose did not apply the same punitive damages standards).

113. 304 U.S. 64, 78 (1938).

114. *In re Dalkon Shield Litig.*, 693 F.2d at 847 (holding that the commonality requirement was not met where fifty jurisdictions in which cases arose did not apply the same punitive damage standards).

115. *In re* Am. Med. Sys., Inc., 75 F.3d at 1085. Subclasses are an alternative way to cure some of these problems without necessarily running into severe Reexamination Clause problems. However, they are beyond the scope of this Note.

116. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d at 1300 (recognizing that "some level of generality [exists in] the law of negligence . . . not only nationwide but worldwide"). This perhaps demonstrates that nuances in state negligence law may or may not have had much of an actual impact on this case.

117. 1 *Kings* 3:16–28.

III. ANALYSIS OF ISSUE CLASS APPROPRIATENESS: RECENT TRENDS IN CASE LAW

A. To Split or Not to Split: How Issue Class Use Turns on the Issue Being Excised

Recent case law illustrates the good news and the bad news behind issue class certification. The bad news is that many of the same jurisdictions, the same courts, and even the same judges appear inconsistent in their approaches to partial certification. This leaves attorneys unsure of the state of the law and leads to often unjust, inconsistent, and inefficient results. But there is a silver lining: although their insights are buried within the jurisprudence, some courts consider the appropriateness of the issue class during their general certification inquiry, and, from their decisions, this Note pieces together a rubric for determining issue class appropriateness. From these decisions, it is clear that not all issue classes are alike.[118] In fact, as this Note will show, two considerations seem to materially affect issue class appropriateness: (A) what issues are being excised for class treatment and (B) what type of substantive law is involved.

There are many ways to separate the issues arguably suited for class treatment from the remaining issues left for individualized determination.[119] By viewing recent court decisions based on the type of division proposed, this Note identifies the factors affecting the grant or denial of partial certification.[120] The following divisions track those most frequently considered in issue class certification and guide this Note's examination of the case law: (1) elements of liability versus other elements of liability; (2) elements of liability versus affirmative defenses; (3) liability versus remedy; and (4) claims for divisible relief versus claims for indivisible relief.[121]

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118. NAGAREDA, *supra* note 5, at 251–52 (identifying that there are many different ways in which a lawsuit can be divided and noting the four primary "types" of divisions discussed in this Note). This Note, however, goes one step further and organizes case law into these various categories in order to identify why issue-only certification was either granted or denied. *See infra* Part III.A.1–4.

119. NAGAREDA, *supra* note 5, at 251–52.

120. *See id.*

121. *Id.*

1. Elements of Liability vs. Other Elements of Liability[122]

A resolution of liability generally requires plaintiffs to prove multiple elements in a cause of action. For example, in cases involving simple negligence, a plaintiff must prove that the defendant owed the plaintiff a duty of care, the defendant breached that duty of care, the plaintiff suffered an injury, and the defendant's breach was the actual and proximate cause of that injury.[123] Although the elements of a claim differ depending on the cause of action alleged, some aspects of liability are more individualized to particular plaintiffs, whereas others focus exclusively upon the defendant's conduct.[124] Elements specific to a defendant's conduct are most likely to attain class certification because all plaintiffs in a class share them. Despite the commonalities, courts often reject issue class certification in these cases,[125] due to many of the reasons previously discussed.[126] The likelihood of achieving issue class certification on one or several elements in a cause of action may depend on the underlying substantive law claim because some substantive law claims have more easily divisible elements than other substantive law claims.[127] The following sections explore cases involving products liability and general tort claims, consumer fraud claims, environmental tort claims, and constitutional tort claims.

a. Products Liability Cases and General Torts

Products liability and negligence plaintiffs, who often suffer distinct, individualized injuries from use of a common, allegedly defective product or service, usually seek to invoke partial certification on the following elements: duty, breach, negligence, injury, product defect, and causation-in-fact. This is particularly common in drug or

122. Throughout this Section, I will use "elements of liability" and "elements of a cause of action" interchangeably.

123. 86 C.J.S. *Torts* § 2 (2011).

124. NAGAREDA, *supra* note 5, at 251 (identifying that some elements of a cause of action may "focus exclusively upon the defendant's conduct and others of which entail examination of particular plaintiffs' conduct").

125. *See e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 751–52 (5th Cir. 1996) (denying issue class certification); Valentino v. Carter-Wallace, Inc. 97 F.3d 1227, 1234–35 (9th Cir. 1996) (vacating issue class certification and remanding case back to district court); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1308 (7th Cir. 1995) (denying issue class certification).

126. *See* discussion *supra* Parts II.B.1–2.

127. *Compare In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219 (2d Cir. 2006) (upholding issue class certification on broad liability issues), *with In re* Rhone-Poulenc Rorer, Inc., 51 F.3d at 1308 (denying issue class certification on elements of a claim).

medical products liability cases. However, despite repeated opportunities, courts have largely declined to permit issue class certification in this context.[128]

For example, in *In re Rhone-Poulenc Rorer, Inc.*, the Seventh Circuit, in an opinion by Judge Posner, reversed on a writ of mandamus the district court's decision to certify a nationwide class with respect to "whether the defendants [were] negligent under either of [the two] theories [advanced by plaintiffs]."[129] The plaintiffs, a group of HIV-positive hemophiliacs who used the defendants' blood solid products, first alleged that the defendants failed to exercise due care with respect to preventing consumers from contracting Hepatitis B.[130] They argued that, had the defendants fulfilled this duty, the plaintiffs would have been "serendipitously" protected against HIV.[131] Second, the plaintiffs argued that the defendants negligently failed to screen donors and prevent contamination of their product upon learning about HIV in the early 1980s.[132]

The Seventh Circuit based its decision to decertify on the cumulative impact of three primary factors.[133] First, the court considered the risk that the plaintiffs might prevail on their class claim due solely to the human appeal of their case—potentially forcing the defendants into settlements despite a lack of legal liability.[134] Instead of staking everything on a single, negligence-determinative issue class proceeding, the court suggested that the question of the defendants' negligence should instead "emerge from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions."[135]

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128. *See e.g.*, *Castano*, 84 F.3d at 751–52 (denying issue class certification); *Valentino v. Carter-Wallace*, 97 F.3d at 1234; *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d at 1308 (denying issue class certification).

129. 51 F.3d at 1297.

130. *Id.* at 1296.

131. *Id.*

132. *Id.*

133. *Id.* at 1299–1302.

134. *Id.* at 1299 ("The first is a concern with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability, when it is entirely feasible to allow a final, authoritative determination of their liability for the colossal misfortune that has befallen the hemophiliac population to emerge from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions; and when, in addition, the preliminary indications are that the defendants are not liable for the grievous harm that has befallen the member of the class.").

135. *Id.*

Second, the court considered the choice-of-law problem and expressed its discomfort with the fact that the district judge would have to "determine the negligence of the defendants under a legal standard that does not actually exist anywhere in the world."[136] While recognizing that the law of negligence has some level of nationwide uniformity, the court also noted that small nuances in the law are important, particularly where pattern jury instructions on negligence and judicial formulations of "the meaning of negligence and the subordinate concepts" differ and may affect the outcome.[137]

With respect to the plaintiffs' first theory of liability, the court specifically recognized that, in jurisdictions that apply Judge Cardozo's famous *Palsgraf* opinion, the HIV-positive plaintiffs could be barred from recovery because they might be outside of the zone of foreseeable victims.[138] The *Palsgraf* opinion, which involved a man who dropped a package of fireworks on a railroad track, basically held that no liability attached for injuries that fell beyond the realm of possibility[139]—in this case, the lethal spread of HIV, which was at the time relatively unknown. The court, however, noted that jurisdictions that do not use this foreseeability test would not consider this limitation.[140] The court also noted that differing state views on the role of industry practice might materially affect a determination of negligence.[141] Most notably, the standard of care for medical providers differs by state, as some states apply a professional standard while others apply an ordinary-care standard.[142]

Third, the court was concerned that issue class certification of negligence issues would ultimately offend the Seventh Amendment's Reexamination Clause. The court feared that juries in the follow-on, individual cases would have to reexamine the negligence issue—the issue formally resolved by the first jury—in deciding proximate cause.[143] In his opinion, Judge Posner emphasized that a "district judge must carve at the joint . . . [and] must not divide issues between

136. *Id.* at 1300.

137. *Id.*

138. *Id.*

139. *See generally* Palsgraf v. Long Island R.R., 162 N.E. 99, 99–101 (N.Y. 1928) ("[T]here was nothing in the situation to suggest to the most cautious mind that the parcel wrapped in newspaper would spread wreckage through the station.").

140. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d at 1297.

141. *Id.* at 1301.

142. *Id.*

143. *Id.* at 1302–03.

separate trials in such a way that the same issue is reexamined by different juries."[144]

Judge Posner's constitutional concern seems to stem from the fact that negligence and proximate cause are so conceptually intertwined that one cannot be determined independently of the other.[145] Effectively, both negligence and proximate cause require fact finders to consider both the same facts and general causation. In support of this point, he states:

> [The] issue[] overlap[s] [with] the issue of the defendants' negligence. . . . Proximate causation is found by determining whether the harm to the plaintiff followed in some sense naturally, uninterruptedly, and with reasonable probability from the negligent act of the defendant. It overlaps the issue of the defendant's negligence even when the state law does not (as many states do) make the foreseeability of the risk to which the defendant subjected the plaintiff an explicit ingredient of negligence.[146]

Similarly, in *Castano v. American Tobacco Co.*, the Fifth Circuit denied issue class certification on "core liability issues" to a nationwide class of nicotine-dependent smokers.[147] In *Castano*, both Reexamination Clause and choice-of-law concerns defeated issue class certification. First, the court said that the Reexamination Clause allows issues to be bifurcated only when they "are so separable that the second jury will not be called upon to reconsider findings of fact by the first."[148] The court's concern was that if the class was certified as to liability, the second jury responsible for considering comparative negligence and apportioning damages would be tempted to "reevaluate the defendant's fault . . . [thereby] reconsidering the findings of a first jury."[149] Second, even though the case required application of the Fifth Circuit's now-aberrational requirement that the litigation *as a whole* must satisfy the Rule 23(b)(3) predominance requirement prior to issue class certification, choice-of-law concerns independently destroyed predominance and therefore warranted decertification.[150] The court rejected class counsel's arguments that no material differences existed among state warranty laws and suggested that the burden was on class proponents to demonstrate the absence of conflict or the manageability of small legal nuances.[151] Dicta within the

144. *Id.*
145. *Id.* at 1303.
146. *Id.*
147. 84 F.3d 734, 737, 739–40 (5th Cir. 1996).
148. *Id.* at 750.
149. *Id.* at 751.
150. *Id.* at 740–41.
151. *Id.* at 742–44.

opinion also revealed a more generalized concern regarding the lack of superiority of class actions over individualized litigation in this type of action, where individual litigation may be financially worthwhile for each plaintiff.[152] The court suggested that issue class treatment would result in judicial waste instead of judicial economy, because issues "resolved" through the class proceeding would have to be revisited in the follow-on trials.[153]

Although the court based its decision on predominance grounds, the same superiority concern emerged in the Second Circuit's decision in *McLaughlin v. American Tobacco Co.*, which similarly reversed class certification in another tobacco lawsuit.[154] There, although the court recognized that an issue class might be appropriate on the element that defendants had a scheme to defraud, the court reasoned that "larger issues such as reliance, injury and damages" would remain for each individual plaintiff and that certification would therefore not "materially advance the litigation."[155]

Despite these decisions, in *Valentino v. Carter-Wallace, Inc.*, the Ninth Circuit went out of its way to clarify that prior precedent did not create an absolute bar to certification for products liability cases, a rule that might prevent even the application of issue class use in this context.[156] Yet, despite this statement and great efforts to distinguish the case from *In re Northern District Of California, Dalkon Shield IUD Products Liability Litigation*—which had suggested that products liability cases suffer inherent certification problems—the court still found deficiencies and denied certification for a class of plaintiffs who had taken an allegedly defective epilepsy drug.[157] Class counsel failed to establish Rule 23(a)'s typicality and adequacy requirements, was deemed unable to provide adequate notice to potential plaintiffs given the high likelihood that many potential class members had not yet developed injuries, and had not made an adequate showing of either predominance or how a class trial could be conducted.[158]

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152. *Id.* at 748.

153. *Id.* at 749.

154. McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 222, 234 (2d Cir. 2008) (commenting on how class action in this case would not promote judicial economy, but basing the holding on predominance grounds).

155. *Id.* at 234.

156. Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1231 (9th Cir. 1996).

157. *Id.* at 1228–32.

158. *Id.* at 1234–35.

Given these outcomes, the appellate courts suggest that products liability cases resist issue class certification of specific elements of liability, regardless of what those elements might be. The district courts therefore reasonably hesitate to grant issue class certification in products liability cases on *any element of liability*.[159] However, despite the ubiquity of issue class denials in products liability actions, this Note cannot conclude that all claim-element issue classes are inappropriate for certification. Future papers should examine whether specific elements within product- or service-related tort law are more or less amenable to issue class certification.

b. Consumer Fraud

Another area of substantive law, consumer fraud litigation, is conceptually linked to products liability and negligence-based torts. As a result, consumer fraud laws often support alternative causes of action where negligence or defect is alleged.[160] However, claims based on consumer fraud appear more amenable to element-specific class treatment than products liability claims.[161]

In the *per curiam* opinion in *Pella Corp. v. Saltzman*, also before Judge Posner, the Seventh Circuit affirmed the district court's certification order of an issue class to determine liability on six specific elements related to the plaintiffs' consumer fraud claim surrounding a design defect.[162] The court found that the case, which involved

159. For example, in both *Kemp v. Metabolife Int'l, Inc.* and in *Neely v. Ethicon, Inc.*, district courts rejected issue class certification requests in products liability cases dealing with a weight management drug and inadequately sterilized sutures, respectively. Kemp v. Metabolife Int'l, Inc., No. 00-3513, 2004 WL 2095618, at *6 (E.D. La. Sept. 13, 2004); Neely v. Ethicon Inc., No. 1:00-CV-00569, 1:01-CV-37, 1:01-CV-38, 2001 WL 1090204, at *14–15 (E.D. Tex. Aug. 15, 2001).

160. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (alleging fraud and deceit in addition to negligence and other causes of action).

161. *See* Pella Corp. v. Saltzman, 606 F.3d 391, 393–96 (7th Cir. 2010) (affirming the district court's certification of an issue class on liability but not for issues related to causation, damages, and the statute of limitations).

162. *Id.* The elements certified consisted of the following: (1) "that all ProLine windows have a defect which results in premature rotting and this defect requires disclosure"; (2) "that Pella modified its warranty without notice by creating the enhancement program"; (3) "that Pella must notify owners of the defect"; (4) "that the ten-year limitation in the original warranty is removed"; (5) "that Pella will reassess all prior warranty claims related to wood rot"; (6) and "that Pella, upon a class member's request, will pay the cost of inspection to determine whether the wood rot is manifest, with any coverage of disputes adjudicated by a Special Master." *Id.* at 392. Although not relevant to our certification discussion here, the court in fact affirmed the certification of several classes including one nationwide class under Rule 23(b)(2) consisting of all class members who own structures containing Pella aluminum-clad casement windows and whose windows have some wood rot but have not yet been replaced. The other classes, certified

allegations that a manufacturer of defective windows violated state consumer fraud laws by failing to disclose the known defect,[163] was relatively simple in nature and as a result, posed no "risk of error in having complex issues that have enormous consequences decided by one trier of fact rather than letting a consensus emerge from multiple trials."[164] Moreover, because the district court created several well-defined, state-specific classes, there were no concerns about choice of law or that class definitions were overbroad and included too many noninjured plaintiffs.[165] Without the state-specific classes, choice-of-law issues may have been a concern because differences in state law were expected to affect plaintiffs' success on obtaining favorable verdicts on the certified elements.[166] The court also indicated that it was not concerned with Reexamination Clause problems, although it did not clearly explain its rationale.[167] Presumably, the court reasoned that the class issues (i.e., whether a defect existed in the windows when they left the factory, whether the defendant had a duty to disclose the defect, and whether the defendant attempted to modify its warranty) did not overlap conceptually with the individual issues (i.e., causation).[168] The court also lauded the district court for declining to certify a seventh state subclass due to the fact that the consumer protection act of that state would have required a plaintiff-specific, subjective analysis.[169]

c. Environmental Torts

As in consumer fraud litigation, claims brought under environmental tort laws may be more amenable to issue class certification on elements of liability than claims brought under other substantive bodies of law. For example, another 2003 opinion by Judge Posner, the same judge who denied certification in *In re Rhone-Poulenc Rorer, Inc.* but approved it in *Pella*, also approved issue class certification in an environmental tort action.[170] The case, *Mejdrech v. Met-Coil Systems Corp.*, involved 1,000 plaintiffs living within two

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under Rule 23(b)(3) were state-specific, and included plaintiffs who had a manifest defect in their windows and whose windows were already replaced. *Id.* at 392.

163. *Id.* at 392–93.

164. *Id.* at 393–94.

165. *Id.* at 392–94.

166. *See id.* at 393–95.

167. *Id.* at 395.

168. *Id.*

169. *Id.* at 396.

170. Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 912 (7th Cir. 2003).

miles of a factory outside of Chicago. The plaintiffs alleged that a factory storage tank leaked a noxious solvent, which seeped into the groundwater of their homes.[171] The plaintiffs sought both injunctive and monetary relief.[172] Recognizing the highly individualized nature of the injury and damages determinations as inappropriate for class treatment, the district court judge certified the class only as to the existence and geographic scope of the contamination.[173] In reviewing the facts and affirming the certification, Judge Posner indicated that issue class certification was appropriate here both because the certified questions were identical across all of the claimants and because they were relatively simple.[174] Distinguishing this case from *In re Rhone-Poulenc Rorer, Inc.,* Posner said, "When enormous consequences turn on the correct resolution of a complex factual question, the risk of error in having it decided once and for all by one trier of fact rather than letting a consensus emerge from several trials may be undue."[175] He further mentioned the absence of choice-of-law concerns, given that all class members lived in a small geographic area.[176]

d. Constitutional Torts

Although perhaps less amenable to element-specific issue class certification than consumer fraud and environmental tort claims, constitutional torts may also be more amenable to issue class certification than mass torts. In this body of law, courts have approved issue class certification as to some, but not all, elements of liability. For example, in *In re Nassau County Strip Search Cases*, several arrestees brought lawsuits challenging a New York county correctional division's blanket strip search policy for new, misdemeanor detainees.[177] The detainees sought compensatory damages, punitive damages, declaratory relief stating that the policy was unconstitutional, and an injunction barring enforcement of the

171. *Id.* at 911.
172. *Id.*
173. *Id.* at 912.
174. *Id.* at 911–12.
175. *Id.* at 912.
176. *Id.*
177. 461 F.3d 219, 222–23 (2d Cir. 2006).

policy.[178] They also moved to consolidate the actions and proceed as an opt-out class pursuant to Rule 23(b)(3).[179]

The district court granted the consolidation but denied class certification based solely on the lack of common-issue predominance.[180] Although the court considered issue class certification as to several elements of liability—namely, (1) whether defendants maintained a strip search policy, (2) whether that policy was unconstitutional, and (3) whether all defendants may be liable—it declined to grant certification because it perceived "considerable doubt as to the propriety of using Rule 23(c)(4)(A) in this fashion," relying on the rule established in *Castano*.[181] In response to several failed attempts by the plaintiffs to have the court reconsider its class certification decision, the defendants conceded "one common issue" that "might be appropriate for class consideration . . . namely, whether the [correctional department's] strip search policy during the class period was constitutional."[182]

On appeal of the certification denial, the Second Circuit directed the district court to certify the class on the issue of liability.[183] It stated, "contrary to the District Court's reservations, a court may employ Rule 23(c)(4)(A) to certify a class on a particular issue even if the action as a whole does not satisfy Rule 23(b)(3)'s predominance requirement."[184] Additionally, the Second Circuit found that the district court had erred when it eliminated the question conceded by the defendants from the predominance analysis.[185] As its rationale, the court touted many of the advantages of issue class certification:[186]

> Rule 23 seeks greater efficiency via collective adjudication and, relatedly greater uniformity of decision as to similarly situated parties. For these reasons we have written that when plaintiffs are "allegedly aggrieved by a single policy of defendants," such as the blanket policy at issue here, the case presents "precisely the type of situation for which the class action device is suited" since nearly identical litigations can be adjudicated in unison.[187]

In a separate section, the court also rebuked the defendants' argument that the plaintiffs had not satisfied predominance because

178. *Id.* at 222.
179. *Id.*
180. *Id.* at 222–23 (quoting the district court's dissent).
181. *Id.*
182. *Id.* at 224 (quoting the defendant's concession).
183. *Id.* at 230–31.
184. *Id.* at 225.
185. *Id.* at 227–28.
186. *See id.* at 228.
187. *Id.* (internal citations omitted).

resolving class membership required individualized determinations.[188] Instead, the court noted that the class definition was narrowly tailored to exclude individuals searched under probable cause.[189] The fact that the county detention facility possessed records of those prisoners strip-searched under the policy further ameliorated this concern.[190]

The court also rejected arguments that the class-action device was not superior in this case, setting forth four nonexclusive factors to determine superiority in the class context: (1) the interest of the class members in maintaining separate actions; (2) the extent and nature of any litigation already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation in a particular forum; and (4) the difficulties likely to be encountered in the management of a class action.[191] After balancing these factors, the court determined that a class proceeding was superior.[192] This case illustrates that the type of substantive law matters in determining whether or not courts should divide some liability elements from other liability elements when making issue class certification decisions. In fact, the Fourth Circuit recently took a similar approach in *Gunnels v. Healthplan Services Inc.*[193]

Similarly, in *Chiang v. Veneman*, the Third Circuit partially reversed the certification of a class of minority Virgin Islanders trying to obtain rural housing loans.[194] The minority group alleged discrimination in the administration of the loan program.[195] Using the issue class tool, the court upheld class certification on whether a pattern or practice of discrimination existed.[196] But the court rejected the certification of both an injury-related element (eligibility for the loan programs) and the calculation of damages.[197] With regard to the eligibility element, the court believed that individual issues predominated, thereby thwarting class certification.[198] Therefore, separating elements of liability from other elements of liability

188. *Id.* at 230.
189. *Id.*
190. *Id.* at 229–30.
191. *Id.* (citing FED. R. CIV. P. 23(b)(3)).
192. *Id.*
193. Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 439 (4th Cir. 2003).
194. Chiang v. Veneman, 385 F.3d 256, 274 (3d Cir. 2004).
195. *Id.* at 260.
196. *Id.* at 265–66.
197. *Id.* at 267–68, 274.
198. *Id.* at 267–68.

appears to be a multifaceted inquiry that requires the careful consideration of a number of factors. These issues will be revisited in Part IV of the Note.

2. Elements of Liability vs. Affirmative Defenses

Similar to situations where courts single out only certain elements of liability for class treatment, a proposed separation of general liability and affirmative defenses (where only one category receives class treatment) may raise equivalent concerns.[199] Like the element of proximate cause,[200] affirmative defenses—such as comparative negligence, assumption of the risk, and statutory defenses—typically prevent class treatment because they often require individual determinations (e.g., considerations of whether a specific defense protects the defendant from a particular class member's claim).[201] Plaintiffs attempting to certify liability elements in cases where the defendant might claim affirmative defenses tend to fail due to Reexamination Clause concerns resulting from conceptual overlap. For example, as Judge Posner stated in *In re Rhone-Poulenc Rorer, Inc.*, the division between negligence and comparative negligence is problematic because "[c]omparative negligence entails, as the name implies, a comparison of the degree of negligence of plaintiff and defendant."[202] The Fifth Circuit reiterated this same concern in *Castano* when it held that severing a defendant's conduct from comparative negligence risks producing inconsistent judgments.[203] The court went on to say that "[t]here is a risk that in apportioning fault, the second jury could reevaluate the defendant's fault, determine that defendant was not at fault, and apportion 100% of the fault to the plaintiff."[204]

These complications may seem inconsistent with courts' general reluctance to deny class certification *as a whole* based simply

199. In fact, cases where elements of a claim are being singled out for class treatment typically also involve a class-treatment separation between liability and affirmative defenses. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 750 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995).

200. Discussed above in Part IV.A in connection with *In re Rhone-Poulenc Rorer*, *Inc.* and *Castano*.

201. *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d at 1303. Additionally, choice-of-law concerns may exist within affirmative defense law, making class treatment of that part of the lawsuit unacceptable. *Castano*, 84 F.3d at 743 n.15 ("Differences in affirmative defenses also exist. Assumption of risk is a complete defense to a products claim in some [but not all] states.").

202. *Castano*, 84 F.3d at 743 n.15; *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d at 1303.

203. *Castano*, 84 F.3d at 751.

204. *Id.*

on the presence of an affirmative defense directed at an individual class member. However, when certification analysis is broadened to the level of the class as a whole, individualized predominance concerns relating to each component of the litigation carry less weight. This was precisely the case in *Smilow v. Southwestern Bell Mobile Systems, Inc.*, where the First Circuit recognized the utility of partial certification and reversed the decertification of a class of wireless telephone customers alleging breach of contract against a telecommunications provider.[205] Although the First Circuit permitted certification of the entire class, despite the defendant's argument that the waiver defense at issue required individual hearings, it reserved the right to later limit certification to only the common issues. In making this determination, the court reasoned that, despite variances in its applicability to different class members, the waiver defense was common to the class and therefore appropriate for class treatment. As this Section shows, attempts to separate elements of liability from affirmative defenses may depend on the conceptual overlap between the claim and the defense. Once again, substantive law seems to make a material difference in the appropriateness of issue classes within this category. However, despite the *Smilow* ruling, which was based on the concept that affirmative defenses can apply to the class as a whole, after *Wal-Mart Stores, Inc. v. Dukes*, it will perhaps be difficult to justify issue class certification separating liability from affirmative defenses at all. This is because that case iterated that affirmative defenses are very individualized to the plaintiff that they are being asserted against.[206]

3. Liability vs. Remedy

Courts might also choose to divide the issue of liability, or legal responsibility, from the remedy, or the restitution or repayment owed. Treating liability and remedy differently for class certification purposes seems, on the surface, to be markedly less complicated than the previous two divisions discussed—partly because damages, often compensatory, seem to be highly individualized.[207] In fact, this division feels more akin to the bifurcation cases that appeared in the

205. Smilow v. Sw. Bell Mobile, 323 F.3d 32, 38 (1st Cir. 2003).

206. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2560–61 (2011) (holding that the "Trial by Formula" approach of the Ninth Circuit, where the rate of success of a sample set of class members would be applied to the class as whole, was improper because it denied Wal-Mart its right to try affirmative defenses against all *individual* plaintiffs).

207. Chiang v. Veneman, 385 F.3d 256, 272–74 (3d Cir. 2004).

early history of Rule 23(c)(4).[208] But unlike in those cases, where the same juries assessed damages in different phases, different juries would assess the issues of liability and damages in modern issue class cases. Just as with the separation of liability elements from other liability elements or affirmative defenses, this might also raise Reexamination Clause concerns.

Modern courts have not drawn concrete distinctions between liability and remedy for issue class certification. Instead, courts have used the bifurcation tool in these contexts. In fact, the *Smilow* court noted that damages are generally individualized matters, similar to affirmative defenses, even where class treatment is given to the class as a whole. Indeed, the *Smilow* fact pattern—where a mechanical computer model based on records and objective criteria could likely calculate the damage determinations—is likely one of the only situations where damages could be common enough for independent issue certification.

One argument supporting a division along these grounds stems from the fact that Rule 23(b)(2) plaintiffs in pattern-or-practice[209] employment discrimination suits might "prefer to litigate damages claims on their own behalf, and may have a constitutional entitlement to do so."[210] Therefore, it makes sense to use issue class certification for just the liability issue, thereby allowing plaintiffs to opt out of the class damages action. This is effectively the same thing that the Seventh Circuit suggested in *Allen v. International Truck Co.*, which is discussed later in this Note, where the court confined opt-outs to the damages action.[211] Using the *Allen* case as a definitive example, issue class certification separating liability from remedy should almost always be appropriate.

4. Claims for Divisible Relief vs. Claims for Indivisible Relief

Perhaps the division most amenable to issue class treatment is the separation between claims for divisible relief and claims for indivisible relief. Divisible relief, such as monetary relief, is a remedy

208. *Supra* p. 1595–96; *see, e.g.*, Windham v. Am. Brands, Inc., 565 F.2d 59 (4th Cir. 1977); Green v. Wolf Corp., 406 F.2d 291, 301 (2d Cir. 1968). This was discussed in the first sentence of Part II.B.1.

209. Pattern or practice exists where evidence establishes that a defendant has acted in a discriminatory manner as part of their regular behavior instead of just in an isolated incident. *A Pattern or Practice of Discrimination*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/hce/housing_pattern.php (last visited Aug. 11, 2011).

210. Allen v. Int'l Truck & Engine Corp., 358 F.3d 469, 470 (7th Cir. 2004).

211. *Id.*; *see also infra* p. 1618.

that can be provided to one individual without affecting another. Indivisible relief, such as a behavioral injunction, impacts everyone. Effectively, an indivisible remedy for one is a remedy for all. This division most commonly arises in the context of a mandatory class action under Rule 23(b)(2). Although the Supreme Court recently declined to rule whether divisible relief in the form of monetary damages could ever be coupled with indivisible relief and certified under Rule 23(b)(2), it did hold that the rule applies only where a single injunction or declaratory judgment (common forms of indivisible relief) would provide relief to the entire class without the involvement of individualized remedies.[212] In most of these cases, the ability of would-be class members to opt out should not matter, because if some plaintiffs achieve success in stopping the adverse actions of a defendant, either through an injunction or a declaratory judgment, the benefits will accrue to all individuals affected by the defendant's actions, regardless of their status as parties to the lawsuit.

In *Allen v. International Truck Co.*, former employees at a truck and engine plant brought a Title VII action seeking both financial and equitable relief as redress for alleged hostility and harassment based on their race.[213] The Seventh Circuit, in certifying a Rule 23(b)(2) class for equitable matters, rejected the district court's conclusions that the employees' injuries were so dissimilar as to defeat predominance.[214] Moreover, the Seventh Circuit chastised the district court for its belief that the plaintiffs could only be certified under Rule 23(b)(2) for equitable relief, stating that the "financial stakes are too high to be called incidental to equitable relief, and that opt-out rights therefore must be extended."[215] The district court's belief that the plaintiffs could only be certified under Rule 23(b)(2) was the impetus for its ultimate denial of class certification, because the lower court felt that certifying a class for equitable relief collided with the Seventh Amendment's Reexamination Clause. The district court said "[f]actual issues common to damages and equitable claims" would have to be tried by a jury "whose resolution of factual matters" would control.[216] The Seventh Circuit later overturned this holding. In making this decision to reverse, Judge Easterbrook said managing a class action for prospective relief alone would not be any more difficult than

212. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2545 (2011).

213. 358 F.3d at 472.

214. *Id.* at 471.

215. *Id.*

216. *Id.*

managing a class action for plaintiffs seeking both legal and equitable relief.[217] He suggested that, in all cases, regardless of formal class status, the equitable component of damages unavoidably extends to the class as a whole because it is infeasible to draft and enforce an injunction that will bear on some, but not all potential class members.[218] He then discussed the benefits of formal certification and created a class for equitable relief. Thus, this division appears to be the most amenable to issue class certification. However, despite initial appearances that categorical approaches might help solve the issue class appropriateness question, solutions do not come that easily. This Note will next explore perhaps the most complicated case in issue class history.

B. Why'd You Have to Go and Make Things So Complicated?: How Clarity Would Help the Issue Class Certification Problem

As this Note demonstrates, the case law surrounding the issue class is a mess. But the case law also demonstrates that courts are on the path towards rectifying this confusion. Courts are making determinations about issue class appropriateness despite the absence of an articulated standard. They are doing what courts should be doing: using smart rationales to come to smart conclusions. Yet, as demonstrated by a recent case heard by the Eleventh Circuit, simply being smart is not enough. Courts need a uniform approach because without one, issue class case law echoes the lyrics of Canadian pop star Avril Lavigne's song *Complicated*, which asks, "[w]hy'd you have to go and make things so complicated?"[219]

Complicated is exactly the adjective to describe *Brown v. R.J. Reynolds Tobacco Co.*[220] The case involved a certified class of cigarette smokers in Florida who originally sued several defendant tobacco companies in state court in a proceeding known as *Engle v. Liggett Group, Inc.*[221] Here, unlike in the other cases this Note explored, the certification decision was made under Florida state law.[222] However,

217. *Id.* at 472.

218. *Id.*

219. AVRIL LAVIGNE, *Complicated*, *on* LET GO (Arista Records 2002).

220. 611 F.3d 1324, 1326 (11th Cir. 2010).

221. *Id.* at 1326–27.

222. Liggett Grp. Inc. v. Engle (*Engle II*), 853 So. 2d 434, 441 (Fla. Dist. Ct. App. 2003).

because Florida's certification law mirrors Rule 23,[223] the application of the state rule has relevance to the federal rules.

To manage the litigation, the trial court developed a trial plan that had three phases.[224] Phase I addressed only common issues relating to the defendants' conduct and the general health effects of smoking.[225] In that phase, the jury found for the plaintiffs on several factual issues, but the jurors were not asked whether the plaintiff-class had successfully proven any of the alleged claims.[226] In Phase II, the same jury determined that the defendants' conduct legally caused the class representatives' injuries and awarded the class $145 billion in punitive damages.[227] The defendants appealed the case to the Third District Court of Appeals and eventually to the Florida Supreme Court before Phase III was conducted.[228]

The Florida Supreme Court agreed with the appellate court, overturning the award and decertifying the class.[229] The court also affirmed the appellate court's rationale that class-action treatment was inappropriate because "the plaintiffs smokers' claims [we]re uniquely individualized and [could not] satisfy the 'predominance' and 'superiority' requirements imposed by Florida's class-action rules."[230] Although the court denied aggregate treatment of *all* of the bundled issues in the litigation, it nevertheless gave binding, preclusive effect to the following common, factual issues determined by the jury in Phase I: (1) that smoking cigarettes causes specific diseases; (2) that nicotine in cigarettes is addictive; (3) that the defendants placed cigarettes on the market that were defective and unreasonably dangerous; (4) that the defendants concealed or omitted material information not otherwise known or available, knowing that the omission was false or misleading; (5) that all of the defendants agreed

223. Florida Rule of Civil Procedure 1.220 governs class certification in the state of Florida. That rule tracks the four general certification requirements established by Rule 23(a). FLA. R. CIV. P. 1.220(a); *see* FED. R. CIV. P. 23(a). Additionally, the Florida rule includes categorical requirements similar to those in Rule 23(b). FLA. R. CIV. P. 1.220(b); *cf.* FED. R. CIV. P. 23(b). For example, the Florida rule contains an injunctive/declaratory relief category that is nearly identical to Rule 23(b)(2) and an opt-out class category that is strikingly similar to Rule 23(b)(3). *Compare* FLA. R. CIV. P. 1.220(b)(2)–(3), *with* FED. R. CIV. P. 23(b)(2)–(3). *See generally supra* Part II.A.

224. *R.J. Reynolds Tobacco Co.* 611 F.3d at 1326.

225. *Id.* at 1326–27.

226. *Id.* at 1327.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* (citing Liggett Grp. Inc. v. Engle (*Engle II*), 853 So. 2d 434, 444 (Fla. Dist. Ct. App. 2003)).

to misrepresent information relating to the health effects of cigarettes with the intention that smokers and the public would detrimentally rely on this information; (6) that the defendants agreed to conceal or omit information regarding the health effects of cigarettes; (7) that all of the defendants sold or supplied cigarettes that were defective; and (8) that all of the defendants were negligent.[231] Effectively, by giving these issues preclusive effect, the Florida Supreme Court authorized postjudgment certification of an issue class. To fully resolve the remaining issues, the court gave plaintiffs one year to file individual actions, several of which ended up in federal district court.[232]

Faced with the challenge of making the Florida Supreme Court's issue-preclusive judgment operational, the federal district court in *Brown*, one of the post-*Engle* individual actions, had to first resolve a dispute between plaintiffs and defendants as to whether or not the Phase I findings established entire elements of the various causes of action (including, but not limited to, strict liability and breach of warranty).[233] A resolution of this dispute would ultimately determine the scope of the individual, follow-on trials. The court ruled in a pretrial order that lack of clarity as to "what issues were actually decided during the Phase I trial and how to apply them in individual claims" prevented them from having preclusive effect in the subsequent, individual actions.[234] Noting the ambiguity in the special verdict form used in Phase I, the court reasoned that speculating as to what the form meant to the current litigation and then permitting preclusion to the full extent of that interpretation would violate the due process rights of the tobacco companies.[235]

On interlocutory appeal by the plaintiffs, the Eleventh Circuit declined to address the constitutional issue.[236] Instead, the court found that, under Florida preclusion law, which controlled in accord with the Full Faith and Credit Act,[237] the Phase I findings had to be "given effect to the full extent of, but no farther than, what the jury found."[238]

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231. Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1276–77 (Fla. 2006).

232. *See generally supra* note 15, at F-15.

233. Brown v. R.J. Reynolds Tobacco Co., 576 F. Supp. 2d 1328, 1331 (M.D. Fla. 2008).

234. *Id.* (The order stated that "the findings [could] not be given preclusive effect in any proceeding to establish any element of the *Engle* plaintiff's claim").

235. *Id.* at 1345.

236. *Id.* at 1331.

237. Under the Full Faith and Credit Act, 28 U.S.C. § 1738, a federal court must "give preclusive effect to a state court judgment to the same extent as would courts of the state in which the judgment was entered." Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1331 (11th Cir. 2010) (citing Kahn v. Smith Barney Shearson Inc., 115 F.3d 930, 933 (11th Cir. 1997)).

238. *Id.* at 1334.

In practical effect, this was a win for the defendants, because although the decision vacated the district court's order and gave preclusive effect to the Phase I findings as factual issues, the issue preclusion did not extend to claim elements.[239]

The *Brown* case is of practical significance because it illustrates the confusion that results when a court retroactively creates issue classes after initial issues have been determined. It also highlights another reason why clarity is necessary in issue class law: to guide lower courts in accurately defining judgments that will yield meaningful, issue-preclusive effects even in the event of whole-class decertification. Without such guidance, already-conducted jury decisions may become as worthless as they became in *Brown*, resulting in extreme judicial inefficiency.

IV. SOLUTION: WHEN TO SPLIT THE BABY

As illustrated above, the same courts (and even the same judges) reach divergent results on whether or not to allow issue class certification in various situations. However, when categorized by type of division and viewed by category of substantive law, the outcomes of partial certification requests seem more consistent. This suggests that courts are assessing similar factors, namely how the lawsuits are being divided and the substantive characteristics of the claims.[240] However, due to the complexity of the interaction between the type of division and the characteristics of the substantive law, categorical rules for issue class certification are difficult to formulate. In fact, creating per se rules would lead to either underuse or overuse of the issue class. The former would cause judicial inefficiency by requiring independent full-length trials for all individual plaintiffs on common issues, while the latter would cause judicial inefficiency by producing erroneous issue classes that cause disorder when overturned on appeal. Moreover, determining issue class appropriateness based solely on a predetermined judgment of the divisibility of elements in the substantive legal claim would place the proverbial cart before the horse, because plaintiffs, who choose to pursue particular causes of action, would effectively determine the appropriateness of their own

239. *Id.* at 1336.

240. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.03, cmt. a (Proposed Final Draft 2009) ("Once again, the broad-brush distinctions between upstream and downstream matters and between economic-injury claims and personal-injury claims . . . as well as the interplay between the viability of claims on an individual basis and the variation in those claims . . . bear attention.").

issue class. For example, plaintiffs' counsel might elect to pursue or forgo certain claims simply to retain the issue class device.

Yet, leaving the issue class in its current unstructured form is also untenable, as this, too, threatens to create judicial inefficiency due to forum-shopping fears, as well as differences between jurisdictions and unfairness to individual plaintiffs.[241] Instead, courts must strike a consistent balance. This balance must articulate guiding principles for judges while also allowing them discretion to investigate the complex relationships between the type of division proposed and the underlying substantive claim. One answer, advocated by the ALI in *Principles of the Law of Aggregate Litigation*, suggests that issue class appropriateness turns on how cleanly class issues can be separated from other, more individualized matters.

A. Adoption of the ALI Approach

The ALI draft rules suggest that, on common issues of liability, issue class certification is appropriate "when substantive law separates that issue from the choice and distribution of appropriate remedies and from other issues concerning liability."[242] This effectively gives courts the green light to use issue classes where elements of liability are being separated either from other elements of liability or from affirmative defenses.[243] This approach also accepts that issue class treatment should largely remain a matter of judicial discretion.[244] As the comments following the proposed ALI rule suggest, courts should consider the following concerns in making these types of liability divisions: (1) whether there are common issues with similar functional content across all claims to be aggregated; (2)

241. *See supra* Introduction.

242. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.03(a) (Proposed Final Draft 2009). A drafter's comment also notes that "aggregate treatment of a common issue does not materially advance the resolution of multiple claims when the evidence in the aggregate proceeding would need to be substantially reconsidered in subsequent proceedings on other issues." *Id.* § 2.03, cmt. b. Additionally, this comment notes that courts should be constrained in their ability to use issue classes by the "practical need for other fact finders or other courts in proceedings on remaining issues to determine the issue-preclusive effect of the class-action proceeding on liability overall or particular elements thereof." *Id.* For this reason, the ability to identify the specific issues being examined through class treatment, perhaps by using tools like special verdicts and allowing interlocutory appeal, would prevent problems such as those in *Brown v. R.J. Reynolds*. *See id.*

243. *Id.* § 2.03, cmt. b ("Liability issues suitable for class-action treatment under subsection (a) might encompass the entire range of elements necessary to establish the defendant's liability to all claimants or only particular elements of claims.").

244. *Id.* § 2.03, cmt. a.

whether substantive law cleanly separates the common issue from remedial questions and from other issues concerning liability; and (3) whether there are specific, identifiable elements whose aggregate evaluation will materially advance the resolution of the litigation.[245] By using this approach, courts will avoid choice-of-law pitfalls, Reexamination Clause concerns, and complicated problems like those explored in *Brown v. R.J. Reynolds Tobacco Co*.[246] However, as this Note will later discuss, this approach may not be sufficiently clear to promote uniformity in issue class determinations.

On the issue of liability versus remedy, the ALI rules suggest that both common issues of liability and individual issues of remedy might be appropriate for class treatment "when a determination of the liability issues, in practical effect, will determine both the choice of remedy and the method for its distribution on an individual basis."[247] This approach assumes that it is usually appropriate to split litigation between liability and remedy,[248] and this assumption likely derives from the notion that remedies are typically more individualized in nature. However, as the rule recognizes, if this is not the case and remedy is common to the class as a whole, courts should have the power to utilize issue classes for both liability and remedy.[249] As already explored, this approach is consistent with the case law.

Also consistent with this approach to remedy generally, a separate proposed rule addresses the divide between indivisible and divisible remedies.[250] The rule proposes that a court may authorize aggregate treatment on matters related to indivisible remedy without providing the ability for class members to opt out.[251] This principle remains true even where "additional divisible remedies are also available that warrant individual treatment or aggregate but non-mandatory treatment."[252] This approach tracks the outcome in *Allen v.*

245. *Id.* § 2.03, cmt. b.

246. *See Id.*

247. *Id.* § 2.03(b).

248. *See id.*

249. *See e.g.*, Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910 (7th Cir. 2003).

250. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04. In sections (a) and (b), this proposed rule defines divisible remedies as "those that entail the distribution of relief to one or more claimants individually, without determining in practical effect the application or availability of the same remedy to any other claimant" and indivisible remedies as "those such that the distribution of relief to any claimant as a practical matter determines the application or availability of the same remedy to other claimants." *Id.*

251. *Id.* § 2.03(c).

252. *Id.*

International Truck & Engine Corp.[253] and emphasizes "matters of functionality and practical operation rather than inherited categorical labels."[254] The proposed rule effectively orders that, when claimants seek a prohibitory injunction or a declaratory judgment using Rules 23(b)(1) and 23(b)(2) and that relief alters a generally applicable practice propagated by the defendant, those benefits affect all persons subject to the disputed practice regardless of their actual membership in the lawsuit.[255] This same effect occurs where the recovery comes from a limited fund, making class treatment appropriate for the indivisible issues but not for the divisible issues.[256] Because adoption of this rule would bring the law in line with practical realities, this is an appropriate approach that courts should adopt.[257] In fact, because this indivisible versus divisible relief rule is sufficiently clear, the Supreme Court should adopt it as part of Rule 23 pursuant to the Rules Enabling Act.

However, the liability- and remedy-based proposed rules are not sufficiently clear for this treatment, because they rely too heavily on a "you know it when you see it" doctrine that has been rejected in other areas of the law.[258] Although the ALI approach comports with the loose rubric already established by the case law, it is not judicially workable for this reason. However, that does not mean that it lacks value. In fact, because the ALI approach honors the primary factors discussed above—namely, it respects where the litigation is being sliced and requires the split to happen "at the joint,"[259] while also respecting the content of substantive law—it should serve as a

253. *See* 358 F.3d 469, 470 (7th Cir. 2004).

254. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04, cmt. a (Proposed Final Draft 2009).

255. *Id.*

256. *Id.* A limited fund means there is a finite pool of resources from which plaintiffs can recover. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 819 (1999). The comments to the ALI proposed rules state that use of the issue class taken in the context of a limited fund merely "recognizes the preexisting interdependence of [class members' claims] and does not impose an unwanted relationship." PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04, cmt. a (Proposed Final Draft 2009). In fact, such treatment "is likely to be preferable to serial litigation in its capacity to provide for equitable distribution of the limit fund among all claimants." *Id.*

257. *Id.*

258. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (finding in a First Amendment obscenity case that hard-core pornography is not protected and that it is identifiable because "I know it when I see it"). Due in part to the unworkable nature of this doctrine, obscenity jurisprudence remained fragmented until a workable test was articulated in *Miller v. California*. 413 U.S. 15 (1973).

259. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d at 1303.

springboard for the adoption of a more workable approach.[260] In order to implement the ALI proposed rules in a more practical manner, this Note next argues that the Supreme Court should use common law to establish a judicial balancing test based on the ALI proposals for determining issue class appropriateness in liability and remedy contexts. Finally, this Note goes one step further and suggests that, to foster more thoughtful use of the issue class tool, courts should adopt a new approach to choice-of-law problems that continue to thwart findings of commonality and predominance even when viewed through the issue-specific aperture.

B. Additional Clarifying Tools

1. A Judicial Balancing Test

Following the general principles established by the ALI, the Supreme Court should adopt a balancing test to determine whether or not conceptual overlap or difficulty in defining the issue for class treatment should preclude use of partial certification. The primary question should be: Do efficiency interests flowing from class treatment of the issue outweigh potential harms?[261] Although this sounds similar to the superiority inquiry already applied for Rule 23(b)(3) classes, courts would apply this analysis to the *specific issue* under consideration for issue class certification. Additionally, this question would apply not only to issue classes being certified under Rule 23(b)(3), but to all issue classes. In applying this analysis to the proposed issue class, courts should weigh several factors on each side of the equation, and if the factors weigh in favor of issue class use, then a court should employ the tool. If the analysis cuts the other way, then a court should decline to certify an issue class.

On the efficiency side, judges should consider the efficiencies to the judicial system provided by a single adjudication instead of several, as well as the efficiencies to plaintiffs who might pool their resources to attain partial victories on a single issue.[262]

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260. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.03, cmt. b (Proposed Final Draft 2009).

261. This inquiry is very similar to the inquiry used by Judge Posner in *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 912 (7th Cir. 2003). However, in this Note, the question is framed more broadly in order to consider efficiencies beyond mere judicial efficiency and injury to the defendant in the event that the trial court gets it wrong.

262. *See* John C. Coffee, Jr. & Max Heuer, *Class Certification: Trends and Developments Over the Last Five Years (2005-2010)*, *in* THE 14TH ANNUAL NATIONAL INSTITUTE ON CLASS ACTIONS A-117 (A.B.A. ed., 2010).

Consideration of the harms requires a more complicated analysis. The factors that courts should consider on this side include: (1) the relative simplicity of the issue to be resolved in the class proceeding (if it is simple, the court is more likely to get it right on the first attempt, resulting in less prejudice to the defendant); (2) the stakes of a victory or defeat in the issue class proceeding and the ability of such a proceeding to force settlement; (3) the number of overlapping facts relevant to both the class and nonclass issues; (4) the specificity of the proposed class; and (5) the nature of the underlying substantive law. Some, but not all, of these factors appeared in recent opinions by Judge Posner of the Seventh Circuit, serving as relevant guides to making the necessary determinations.[263]

If courts in all jurisdictions looked to these specific factors to help them make determinations—determinations that would consistently mirror the ALI approach—issue-class litigation would serve as an important tool for judicial efficiency. Litigants would know when to pursue issue classes, and courts would fairly and evenly apply the law. Finally, the minority of courts with laws more favorable to issue class certification would no longer swallow the decisions of the majority by serving as issue class mills. To assist in adoption of such a standard, the Supreme Court should codify this approach by granting certiorari to an issue class case and using its opinion to establish this standard.[264] This action would achieve the desired, aforementioned benefits while retaining desired judicial discretion, an aspect inherently built into balancing formulas. As the antithesis of a categorical determination of issue class appropriateness, a balancing test also retains more flexibility.

The advocated approach is designed to be analytically distinct from, and a precursor to, the determination of whether plaintiffs have satisfied the Rule 23(a) and 23(b) requirements. However, the presence or absence of issue class appropriateness might help inform those more complicated inquires. For example, a finding that issue class certification is appropriate would more likely than not lead to a

263. In *Mejdrech*, Judge Posner considered the case's relative simplicity and the stakes. *See, e.g.*, Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 911–12 (7th Cir. 2003). In *Pella*, he considered the simplicity of the case, the lack of overlapping facts, and the specificity of the proposed class. *See, e.g.*, Pella Corp. v. Saltzman, 606 F.3d 391, 393–96 (7th Cir. 2010). And in *In re Rhone-Poulenc Rorer, Inc.*, he considered the stakes, the number of overlapping facts, and the underlying substantive legal issues. *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298–99 (7th Cir. 1995).

264. The U.S. Supreme Court denied certiorari to *R.J. Reynolds Tobacco Co. v. Engle* in October 2007. 552 U.S. 941, 941 (2007). The U.S. Supreme Court also denied a rehearing in November 2007. 522 U.S. 1056, 1056 (2007).

finding that plaintiffs have satisfied the Rule 23(a) prerequisites—particularly given the trend to allow issue-specific satisfaction of prerequisite certification requirements even when the litigation as a whole does not satisfy them.[265] On the other hand, an absence of issue class appropriateness would abruptly end the certification inquiry, allowing courts to avoid the complex investigation into numerosity, commonality, typicality, adequacy, predominance, and superiority. Ending the certification inquiry when issue class certification is inappropriate also promotes judicial efficiency by allowing courts to avoid senseless exploration into the Rule 23 prerequisites while additionally affording judges a healthy measure of discretion.[266]

2. A Burden-Shifting Approach to Cure Choice-of-Law Problems

Although some determination of commonality is inherent in both the ALI approach and in the balancing test suggested above, flaws discovered during the court's inquiry into the satisfaction of the Rule 23 requirements might still bar certification. This is the problem mentioned above, where a Band-Aid cannot close a wound that needs stitches. Issue classes cannot solve choice-of-law problems, which often prevent certification of multistate or nationwide classes during the court's inquiry into commonality and predominance.[267]

In fact, given the utility of issue classes and their ability to promote judicial efficiency, courts in some cases—most notably where the nuances in various state laws are extremely minor—should allow issue class plaintiffs suffering from commonality or predominance flaws, as the result of nuances in the laws of several jurisdictions, to prove that these nuances will not affect the outcome of the case.[268] In order to ensure this burden is not easily met, thereby preserving the sanctity of the predominance standard, courts should require plaintiffs to prove this by clear and convincing evidence, instead of by the more

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265. The primary barrier to certification after this point rests in choice-of-law differences on the specific issue targeted for certification. This was one of the problems discussed in *In re Rhone-Poulenc Rorer, Inc.*, where the negligence law differed between states. Adequacy and numerosity problems might also thwart issue class certification, but as those concerns are more generally applicable to the class as a whole, they are beyond the scope of this Note.

266. *See In re* Nassau County Strip Searches, 461 F.3d 219, 225 (2d Cir. 2006) (noting that appellate courts are generally deferential to class certifications by lower courts).

267. For example, choice-of-law problems were an insurmountable barrier in *In re Rhone-Poulenc Rorer, Inc.*

268. The burden of proof should be heightened in these cases because if certification is granted, the preclusive effects of the judgment will bind all parties, and those parties will never have the chance to find out whether the outcome would actually have been different if they had litigated in an individual proceeding in state court.

typical preponderance of the evidence standard used in civil cases.[269] The clear and convincing standard is already used in civil cases that involve allegations of fraud or quasi-criminal wrongdoing, cases that have a more substantial interest at stake than just money, cases where the defendant runs the risk of suffering a tarnished reputation, cases where a particularly important individual interest is at stake,[270] and cases involving civil commitment of the mentally ill to a treatment facility.[271] Just as in those categories, important interests for the parties and for the state governments whose laws are at issue are involved in overriding choice-of-law nuances through the certification process. For this reason, by analogy, an application of the clear and convincing standard makes sense here.

Once adopted, plaintiffs could satisfy this higher burden by showing that the law is identical in form across relevant jurisdictions, the law is applied consistently in all relevant jurisdictions, or nuances in the law have made no statistically significant difference in the outcome of prior cases. Upon such an illustration, choice-of-law concerns should become irrelevant to the certification decision.

Critics may argue that allowing courts to make such an inquiry goes too far by forcing judges, instead of juries, to determine the effect of legal nuances during the certification phase, prior to juror involvement. But this approach is consistent with current judicial practice now that the *Eisen* rule no longer has effect.[272] In fact, now that courts may examine the merits of a claim in making certification decisions, some class proceedings with merit-based flaws never make it to a jury at all—judges acting as gatekeepers screen them out.

Because judges do make these determinations, giving them the latitude to be more generous with issue class certification—by ensuring that choice-of-law concerns do not unnecessarily thwart certification—would reduce the number of claims disposed of in the procedural phase. This allows more claims to reach a jury, preventing the judge from serving as the final arbiter of the claim. Moreover, this approach does not violate the *Erie* doctrine, which mandates that a federal court sitting in diversity jurisdiction must apply state substantive law.[273] Instead, it forces the federal courts to respect the nuances of state laws by imposing the higher clear and convincing

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269. *Civil Case*, CRIMINAL LAW LAWYER SOURCE, http://www.criminal-law-lawyer-source.com/terms/civil-case.html (last visited July 18, 2011).

269. Addington v. Texas, 441 U.S. 418, 424 (1978) (citations omitted).

271. *Id.* at 433.

272. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 n.6 (2011).

273. *See generally* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

evidence standard and merely giving more flexibility to judges to aggregate plaintiffs where laws are the same in text and in practice. This flexibility makes sense given that many laws—particularly those of geographically proximate states—are modeled after each other. The proposed solution additionally prevents the reexamination of the same factual issues, thereby comporting with Seventh Amendment constitutional guarantees. For these reasons, this approach strikes an appropriate balance among current legal precedent and allows use of issue classes in a way that promotes both efficiency and justice.

V. CONCLUSION

As this Note illustrates, case law and history suggest that issue classes are here to stay. Use of issue classes promotes economy of time and money by allowing courts to lump multiple plaintiffs together into a single class for common issues while reserving individual issues for adjudication in follow-on trials in the event that plaintiffs succeed as a class. However, courts still seem unsure of how to determine when the use of Rule 23(c)(4) is appropriate—a determination required by the text of the rule—resulting in inconsistent certification decisions.

Analogizing to the biblical story where King Solomon threatens to split a living baby in the pursuit of truth and justice, this Note illustrates that the modern litigious climate, where judicial resources are strained, requires the splitting of lawsuits in *some*, but not all, contexts. Unlike Solomon, who likely never intended to complete the dirty deed, judges must understand when to slice and when to sheath. In essence, they must appropriately determine when issue class certification is proper. To do this, judges need direction and guidance.

After reviewing case law and the approach adopted by the ALI, both of which move toward a solution, this Note urges the Supreme Court to do three things. First, the Court should adopt the ALI approach to indivisible versus divisible relief as part of Rule 23, pursuant to its power under the Rules Enabling Act. Second, the Court should adopt a multifactor balancing test to assist lower courts in making decisions on issue class appropriateness when considering the separation of liability elements from either other liability elements or affirmative defenses. Third, and finally, this Note argues that issue classes can better serve their role if courts adopt a more generous approach to choice-of-law problems by allowing class counsel to prove that minor state law variations will have no bearing on the outcome of the case. Courts currently can, and do, split the baby.

However, with a little guidance, courts may also earn the confidence of litigants and academics alike and perform their jobs with few fatalities or complications.

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