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"CARVING AT THE JOINTS": USING ISSUE CLASSES TO REFRAME CONSUMER CLASS ACTIONS

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Abstract: Achieving class certification in consumer litigation is a highly controversial and greatly debated area of civil procedure. Historically, certification under Federal Rule of Civil Procedure 23(b)(3) has been difficult to achieve due to the tension between the presence of individual issues and Rule 23(b)(3)'s predominance, superiority, and management considerations. The future of certification for Rule 23(b)(3) classes was further put in question with the United States Supreme Court's landmark decision in *Wal-Mart v. Dukes* in 2011, which enhanced the level of scrutiny courts apply at the Rule 23(a) level of analysis. The Court's 2013 decisions in *Comcast Corp. v. Behrend* and *Amgen v. Connecticut Retirement Plan and Trust Fund* further highlight the difficulties Rule 23(b)(3) classes face in achieving certification. Despite these developments, there are signs of continued vitality. In 2012, the Seventh Circuit allowed issue class certification in a large employment discrimination class, notwithstanding the presence of individual issues in *McReynolds v. Merrill Lynch*. *McReynolds* placed Rule 23(c)(4) (a historically seldom used subsection of Rule 23) in the spotlight as a means of allowing consumer claims to achieve certification in the post-*Dukes* era. This Comment explores the use of issue class certification under Rule 23(c)(4) and attempts to clarify when issue class certification is appropriate, with a particular focus on consumer class actions. By breaking complex issues into smaller, more manageable pieces, Rule 23(c)(4) allows litigants to frame common issues for class treatment and avoid an unnecessarily rigorous analysis of the merits of a claim at the certification stage.

INTRODUCTION

The efficacy of using class actions to pursue mass consumer claims is the subject of much controversy and great uncertainty.[1] Courts are frequently reluctant to certify mass consumer classes because of the tension between Federal Rule of Civil Procedure 23 and the prevalence of individual issues.[2] The future of mass-consumer class actions was further called into question in the landmark decision, *Wal-Mart Stores, Inc. v. Dukes*,[3] in which the United States Supreme Court set forth a

1. *See, e.g.*, Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection between Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71, 71 (noting that the class action has become the focal point of much political and legal debate); *see also* John 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 (discussing generally the difficulty consumer class actions face at the certification stage).

2. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 594 (1997).

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

more stringent test for satisfying Rule 23(a)'s commonality requirement.[4] As one commentator noted, *Dukes* "raises more questions than it answers."[5]

In light of the heightened standard for achieving certification post-*Dukes*, the use of issue classes under Rule 23(c)(4) is an increasingly attractive option for litigants.[6] Rule 23(c)(4) allows a court to divide litigation into smaller pieces, a process often referred to as bifurcation.[7] Most commonly, courts employ bifurcation first to decide the issue of liability, followed by determinations of individual damages in follow-on proceedings.[8] While bifurcation of a case between liability and damages is the most common use of Rule 23(c)(4) and the focus of most legal scholarship on the issue, "there is no rule that if a trial is bifurcated, it must be bifurcated between liability and damages."[9] Increasingly, the debate among courts has shifted to the use of Rule 23(c)(4) to isolate a threshold issue for class treatment—even if class members' suits might ultimately need to be adjudicated individually—as long as the resolution of the class issue will substantially advance the disposition of the litigation as a whole.[10]

The reinvigoration of Rule 23(c)(4) is in tension not only with traditional perceptions of Rule 23 classes but also with specific provisions of Rule 23(a) and Rule 23(b). This textual tension, combined with the relative paucity of case law interpreting Rule 23(c)(4), has resulted in a three-way circuit split.[11] The majority of circuits, including the Second, Sixth, Seventh, and Ninth, interpret Rule 23(c)(4) expansively, and will certify an issue class even if the claim as a whole

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4. *Id.* at 2551.

5. James Comodeca & Gabrielle Hils, *CAFA*, Wal-Mart v. Dukes, *And Other Key Developments In Class Action Litigation*, ASPATORE, Nov. 2011, at *1, *10, *available at* 2011 WL 5617994.

6. Jennifer Brooks-Crozier, *Put Up Your* Dukes*: The Fight Over Commonality in the Era of* Wal-Mart v. Dukes, 19 TEX. WESLEYAN L. REV. 711, 731 (2013) (discussing the rise of hybrid class actions post-*Dukes*).

7. FED. R. CIV. P. 23(c)(4); Romberg, *supra* note 1, at 262–63.

8. 2 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 8:2 (9th ed. 2012); *see also* RICHARD NAGAREDA, THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 251 (2009); *see also, e.g.*, Hill v. W. Elec. Co., 672 F.2d 381, 387 (4th Cir. 1982) ("[B]ifurcation of Title VII class action proceedings for hearings on liability and damages is now commonplace.").

9. Hydrite Chem. Co. v. Calumet Lubricants Co., 47 F.3d 887, 891 (7th Cir. 1995).

10. 7AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1790, at 588–90 (3d ed. 2005).

11. *See, e.g.*, Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 200 n.25 (3d Cir. 2009) ("The interaction between the requirements for class certification under Rule 23(a) and (b) and the authorization of issue classes under Rule 23(c)(4) is a difficult matter that has generated divergent interpretations among the courts.").

does not satisfy Rule 23.[12] The Fifth Circuit rejects this construction of Rule 23(c)(4) and instead maintains that courts may certify an issue class only if the claim as a whole merits class-wide treatment.[13] The Third Circuit follows a slightly different approach, and applies a multi-factor balancing test to determine whether Rule 23(c)(4) issue classes should be certified.[14]

The Seventh Circuit's decision in *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[15] is perhaps the most high-profile case to endorse a liberal use of Rule 23(c)(4) post-*Dukes*.[16] In *McReynolds*, 700 African-American employees sued Merrill Lynch, alleging that two specific company policies had a disparate impact on racial minorities.[17] While the individual nature of damage determinations would likely have prevented the class from satisfying Rule 23(b)(3)'s predominance requirement, the Seventh Circuit approved the use of Rule 23(c)(4) to certify the class under Rule 23(b)(2) only on the issue of liability.[18] Writing for the court, Judge Posner found that the greatest efficiency and fairness would be achieved by "carving at the joints" of the parties' dispute and resolving the issue of liability on a class-wide basis.[19] While some courts and commentators view *McReynolds* as a direct contradiction of *Dukes*,[20] others view it as a straightforward application

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12. *See In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 227 (2d Cir. 2006) ("courts may use subsection (c)(4) to single out issues for class treatment" even when the cause of action as a whole could not be certified under Rule 23(b)(3)); *see also* Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996) (denying certification of class in Dalkon Shield IUD Products Liability Litigation based on failure to satisfy Rule 23(a)'s typicality and adequacy requirements, but clarifying that there was no absolute bar for issue certification in products liability cases).

13. In the Fifth Circuit, "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3)"; plaintiffs "cannot manufacture predominance through the nimble use of subdivision (c)(4)." Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996).

14. *See* Gates v. Rohm & Haas Co., 655 F.3d 255, 273 (3d Cir. 2011) (adopting the American Law Institute's factors to determine when issue class certification is warranted).

15. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012), *cert. denied*, __U.S.__, 133 S. Ct. 338 (2012).

16. *Id.*

17. *Id.* at 488. Initially, the district court denied certification. *Id.* at 484. However, in light of the groundbreaking nature of *Dukes*, the Seventh Circuit surprisingly allowed interlocutory appeal from the district court's order denying employee's amended motion. *Id.* at 488.

18. *Id.* at 492.

19. *Id.* at 491 (quoting Mejdrech v. Met-Coil Systems Corp., 319 F.3d 910, 911 (7th Cir. 2003)).

20. Petition for a Writ of Certiorari at 14–21, *McReynolds*, 133 S. Ct. 338 (No. 12-113), 2012 WL 3041173, at *14–21; *see also* Bolden v. Walsh Const. Co., 688 F.3d 893, 897–98 (7th Cir. 2012). In *Bolden*, the court held that district court misinterpreted the *McReynolds* court's discussion of *Dukes*:

> Our opinion remarked that the class in *Wal-Mart* would not have been manageable, but we did not suggest that this was the basis of the Court's decision; we just observed that the class certified there had problems in addition to Rule 23(a)(2), and that company-wide suits that do

of Rule 23(c)(4)[21] and a practical model for future consumer class actions to follow.[22] The Supreme Court denied certiorari in *McReynolds*, thereby leaving the boundaries of Rule 23(c)(4) unsettled.[23]

In light of recent Supreme Court jurisprudence, Rule 23(c)(4) is increasingly relevant as a way to avoid a more searching inquiry into the merits of a case at the certification stage.[24] In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*[25] the Court suggested that it would not continue to endorse a more exacting inquiry into the merits of a case beyond what the text of Rule 23 requires.[26] However, just a month later, in *Comcast Corp. v. Behrend*,[27] the Court relied heavily on *Dukes* in determining that plaintiffs must show that damages are capable of measurement on a class-wide basis in order to satisfy Rule 23(b)(3)'s predominance requirement.[28] Consequently, it is unclear whether *Dukes* should be viewed as the high-water mark of hostility toward class certification, or whether the Court will continue to ratchet up class certification requirements.

Despite recent hostility toward certification of large consumer classes, for many types of consumer cases, the class action is the only appropriate mechanism for relief.[29] Especially where consumers have incurred relatively minor harm or damages, filing individual litigation is neither economically feasible nor an efficient use of judicial resources.[30]

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present common issues therefore may be certified (if they are manageable, as *Wal-Mart* would not have been.).

Id.

21. *See, e.g.*, DL v. District of Columbia, 713 F.3d 120, 127 (2013) ("The putative class in *McReynolds* was appropriate post-*Wal-Mart* because the economic harm alleged by each class member was the result of the same corporate-wide policies and if the policies were held unlawful then a question central to the validity of each class member's claim would be resolved in one stroke.").

22. While *McReynolds* involved employment discrimination claims and class certification under Rule 23(b)(2), this Comment argues that this approach is one of the best paths toward certification for consumer litigation, especially in light of the Supreme Court's 2013 class action decisions.

23. *See* McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012), *cert. denied*, __U.S.__, 133 S. Ct. 338 (2012).

24. *See* Comcast Corp. v. Behrend, __U.S__, 133 S. Ct. 1436, 1436–37 (2013) (Ginsburg, J., dissenting) (discussing generally the proposition that Rule 23(c)(4) is increasingly relevant in the wake of heightened certification requirements).

25. __U.S __, 133 S. Ct. 1184 (2013).

26. *Id.* at 1202.

27. *Comcast Corp.*, 133 S. Ct. at 1426.

28. *Id*. at 1433–34.

29. William Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250, 1253 (1996).

30. Romberg, *supra* note 1, at 258.

Additionally, class actions promote several important public policies. By aggregating claims into a single lawsuit, class actions avoid duplicative litigation and prevent inconsistent results—thereby promoting judicial economy and maximizing efficiency.[31] Class actions provide social utility by allowing an aggregation of private individuals to enforce laws, where the cost of litigation and relatively minor amount of recovery might prevent the claims from moving forward on an individual basis.[32] Additionally, if a class action is successful at the certification stage, the threat of bearing the cost of the harm causes many defendants to settle immediately, which can have powerful deterrent effects.[33]

This Comment explores the viability of issue class certification under Rule 23(c)(4) as a means of achieving certification in consumer litigation. Part I of this Comment explains the requirements for achieving certification under Rule 23. Part II highlights the importance of achieving a uniform interpretation of Rule 23(c)(4) in the wake of expanded federal jurisdiction over class actions. Part III discusses how recent Supreme Court decisions will impact the way courts interpret Rule 23. Part IV discusses the viability of issue class certification in the wake of *Dukes*, with a particular focus on the Seventh Circuit's decision in *McReynolds*. Part V argues that other circuits should adopt the expansive interpretation of Rule 23(c)(4) that is in favor in the majority of federal circuits. Part VI discusses the limitations of issue class certification and provides guidance as to when issue class certification might not be appropriate.

I. TO ACHIEVE CERTIFICATION, A PUTATIVE CLASS MUST SATISFY RULE 23(A)'S FOUR PREREQUISITES, AS WELL AS ONE SUBCATEGORY OF RULE 23(B)

The class action mechanism is an important procedural device that allows courts to resolve common claims impacting many individuals in a single action.[34] Rule 23 establishes the requirements for certification of a federal class action.[35] In order to achieve certification, which is required before class-action litigation can commence, a class must first meet the

31. Rachel Tallon Pickens, *Too Many Riches?* Dukes v. Wal-Mart *and the Efficacy of Monolithic Class Actions*, 83 U. DET. MERCY L. REV. 71, 73 (2006).

32. *Id.* at 73–74; *see also* Redish, *supra* note 1, at 87 (noting that "private class actions for money damages can yield significant social benefits").

33. Pickens, *supra* note 31, at 74.

34. GEOFFREY HAZARD, JR. ET AL., PLEADING AND PROCEDURE § 833 (10th ed. 2011).

35. FED. R. CIV. P. 23.

four requirements of Rule 23(a) and must also meet the separate (though overlapping) requirement for any one of Rule 23(b)'s subsections.[36] The four Rule 23(a) prerequisites are numerosity,[37] commonality,[38] typicality,[39] and adequacy of representation.[40] Prior to *Dukes*, most courts interpreted Rule 23(a)'s prerequisites liberally.[41] The rationale behind this approach was that the merits of a potential class are more accurately discerned at the Rule 23(b) level of analysis.[42] As the next section of this Comment will discuss, *Dukes* shifted the heart of class-certification analysis to Rule 23(a), by ratcheting up the commonality requirement to require a more searching analysis of the uniformity of the legal or factual issues of the class.[43]

In addition to meeting the requirements of Rule 23(a), a class must also satisfy the requirements of one of Rule 23(b)'s subsections to

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36. *Id.* 23(a); *Id.* 23(b).

37. To satisfy numerosity, the class must be "so numerous that joinder of all of the members is impracticable." *Id.* 23(a)(1); *accord* Brady v. Thurston Motor Lines, 726 F.2d 136, 145 (4th Cir. 1984). There is no minimum number of class members required, nor is a strict mathematical test required to satisfy numerosity. *Brady*, 726 F.2d at 145. Numerosity depends on the facts and circumstances of each case. Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 448 (N.D. Cal. 1994).

38. Commonality requires "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). Prior to *Dukes*, the commonality requirement had not been applied rigorously, and was "not demanding." *See* Comodeca & Hils, *supra* note 5, at *3 (Prior to *Dukes*, "[m]ost practitioners defending class actions spent little time challenging the 'commonality' requirement under Rule 23(a), instead focusing more on the 'predominance' criteria set out in Rule 23(b)."); Mullen v. Treasure Chest Casino, L.L.C., 186 F.3d 620, 625 (5th Cir. 1999); Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998) (stating that the requirement of commonality is "minimal").

39. Typicality requires that the claims of the named plaintiff be typical of the claims of the class as a whole. FED. R. CIV. P. 23(a)(3). The typicality requirement has historically not been rigorous in application, and the claims of the class representatives need not be identical to the class as a whole, as long as a "class members need to advance legal theories that are similar, if not identical to those advanced by named plaintiffs." Lightbourn v. Cnty. of El Paso, 118 F.3d 421, 426 (5th Cir. 1997); *accord* Paxton v. Union Nat'l Bank, 688 F.2d 552, 561 (8th Cir. 1982) ("The rule does not require that every question of law or fact be common to every member of the class.").

40. Adequacy of representation requires that class representatives "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). In contrast to the more liberal application of the other factors, courts typically apply greater scrutiny as to whether the adequacy of representation requirement is satisfied. *See* Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1186–91 (1982). Any evidence of a conflict of interest or potential conflict of interest among the class representatives and class as a whole will prevent Rule 23(a)(4) from being satisfied. Retired Chi. Police Ass'n v. City of Chi., 7 F.3d 584, 598 (7th Cir. 1993).

41. Black v. Rhone-Poulenc, Inc., 173 F.R.D. 156, 159 (S.D. W. Va. 1996); Kidwell v. Transp. Commc'ns Int'l Union, 946 F.2d 283, 305 (4th Cir. 1991).

42. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997).

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

achieve certification.[44] Rule 23(b) provides four ways to maintain a class action.[45] For the purposes of this Comment, the most important subsections of Rule 23(b) are Rule 23(b)(2) and Rule 23(b)(3), which are the two paths most commonly used in consumer cases.[46] Rule 23(b)(2) allows a court to grant injunctive relief where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate."[47] As Part II of this Comment discusses further, *Dukes* dramatically changed the way Rule 23(b)(2) can be used and limits this category to claims for declarative or injunctive relief.[48]

The last category, Rule 23(b)(3), allows litigants to seek monetary damages where "questions of law or fact common to the class predominate over any questions affecting only individual members," and where a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy."[49] Additionally, the court must also consider "the likely difficulties in managing the class action."[50] Rule 23(b)(3)'s predominance requirement poses particular challenges for large consumer classes seeking certification.[51] Recently, courts have rigorously enforced the requirement that common issues of law and fact "predominate" over individual issues.[52] This has been fatal for certification of many consumer cases, in which courts have held that the

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

45. *Id.* The first category, Rule 23(b)(1)(A), is for situations where separate actions would create a risk of "inconsistent or varying adjudications." *Id.* 23(b)(1)(A). The second category, Rule 23(b)(1)(B), is satisfied where "adjudications with respect to individual class members" would be "dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." *Id.* 23(b)(1)(B).

46. *See* Romberg, *supra* note 1, at 259 n.42.

47. FED. R. CIV. P. 23(b)(2).

48. *Dukes*, 131 S. Ct. at 2545.

49. FED. R. CIV. P. 23(b)(3). To aid in this inquiry, Rule 23(b)(3) provides the following four factors for the court to consider: "(A) the class members' interests in individually controlling the prosecution or defense of the separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Id.*

50. *Id.* 23(b)(3)(D).

51. *See* Romberg, *supra* note 1, at 261 ("Rule 23(b)(3) therefore imposes two specific requirements not applicable to (b)(1) or (b)(2) . . . . It is on the shoals of predominance and superiority that most class actions founder.").

52. Jenna G. Farleigh, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1598 (2011); *see also* Comcast Corp. v. Behrend, __U.S.__, 133 S. Ct. 1426, 1433–34 (2013) (denying certification because plaintiff's economic model failed to show that damages were measurable on a class-wide basis).

individual nature of damages precludes a finding that common issues predominate over individual issues.[53]

Mass tort and consumer class actions present unique challenges for determining whether class certification is appropriate.[54] The Supreme Court has not ruled out the use of class actions in these contexts but acknowledges the difficulty in adopting bright line rules to govern certification analysis.[55] As the Court noted in *Amchem Products, Inc. v. Windsor*,[56] "[i]n the decades since the 1966 revision of Rule 23, class-action practice has become ever more 'adventuresome' as a means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one."[57] In *Amchem*, the Court rejected certification of a settlement-only class, based on the fact that the class did not meet the adequacy and predominance requirements of Rule 23.[58] The Court further noted that while the Advisory Committee for Rule 23 advised that mass accident cases are ordinarily not appropriate for class treatment, "the text of the Rule does not categorically exclude mass tort cases from class certification."[59] The Court concluded that "the Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members are great."[60] *Amchem* continues to be highly influential and has severely limited the availability of Rule 23(b)(3) certification for consumer classes.[61]

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53. *See* Romberg, *supra* note 1, at 261; *see also Comcast Corp.*, 133 S. Ct. at 1433–34.

54. *See* HAZARD ET AL., *supra* note 34, at 837 n.2.

55. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 618–19 (1997).

56. *Id.*

57. *Id.* at 617–18.

58. *Id.* at 624.

59. *Id.* at 625.

60. *Id.*

61. *See, e.g.*, Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 424 (4th Cir. 2003). In *Gunnells*, the court explained:

> However, as the Supreme Court has noted, the predominance and superiority requirements in Rule 23(b)(3) do not foreclose the possibility of mass tort class actions, but merely ensure that class certification in such cases "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."

Id. (quoting *Amchem Prods.*, 521 U.S. at 615).

II. EXPANSION IN FEDERAL JURISDICTION OVER CLASS ACTIONS HIGHLIGHTS THE NEED FOR UNIFORM INTERPRETATION OF RULE 23

The need to achieve uniform interpretation of Rule 23 is further compounded by recent expansion in federal jurisdiction over class actions, as well as an amendment to Rule 23 allowing for immediate appeal of class certification decisions. As will be discussed in greater detail below, the expansion of federal jurisdiction over class actions, easier removal to federal court, and interlocutory review of certification decisions encourage forum shopping and highlight the need to achieve a more uniform interpretation of Rule 23.[62]

The enactment of the Class Action Fairness Act of 2005 (CAFA)[63] significantly changed class-action practice and has further heightened concerns about judicial efficiency surrounding class actions in federal courts.[64] CAFA expanded federal courts' diversity jurisdiction by (1) allowing removal beyond the traditional one-year limit, (2) allowing removal by a defendant who is a citizen of the state where the suit was initiated, (3) allowing a defendant to remove without first obtaining the consent of other co-defendants, and (4) exempting litigants from the complete diversity requirement so long as the aggregate amount in controversy exceeds $5 million.[65] In addition to CAFA, the Supreme Court's decision in *Exxon Mobil Corp. v. Allapattah Services, Inc.*[66] expanded traditional diversity jurisdiction over class actions by requiring only one plaintiff to meet the $75,000 amount in controversy requirement.[67] CAFA's general removal provisions may cause plaintiffs who fear removal to federal court to forego bringing an action in state court, choosing instead to litigate in federal jurisdictions with more generous approaches to certification.[68] CAFA's removal provisions make it easier for litigants to forum shop, thereby exacerbating the circuit split between the Fifth Circuit and "friendlier" circuits, such as the Second, Seventh, and Ninth, and could lead to an inundation of class

62. *See* Farleigh, *supra* note 52, at 1590.

63. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2006)).

64. Farleigh, *supra* note 52, at 1590.

65. *Id.*; 28 U.S.C. § 1453(b).

66. 545 U.S. 546 (2005).

67. *Id.*

68. Farleigh, *supra* note 52, at 1590.

certification requests in those circuits.[69]

Additionally, Rule 23(f) was modified in 1998 to provide for interlocutory review of class-certification decisions.[70] The text of the rule gives courts of appeals great latitude to grant or deny review of certification orders, and courts have developed several different tests to determine when interlocutory review is important.[71] The advisory committee notes cite the various "concerns" associated with class-action jurisprudence as justification for "expansion of present opportunities to appeal."[72] The ability of litigants to seek interlocutory review of class certification decisions and the difficulty courts have encountered in determining when review is appropriate, create further incentives to achieve uniform interpretation of Rule 23 to reduce the burden of certification review in federal courts.[73]

III. RECENT SUPREME COURT JURISPRUDENCE LEAVES THE FUTURE OF CONSUMER CLASS ACTIONS UNSETTLED

As discussed in Part I of this Comment, prior to *Dukes*, courts had largely interpreted Rule 23(a)'s prerequisites liberally and did not apply a more exacting inquiry above and beyond what the text of the rule required.[74] *Dukes* was a landmark departure from this approach and greatly enhanced the level of scrutiny applied at the Rule 23(a) analysis.[75] To many, *Dukes* signaled the death of mass-consumer class actions.[76] However, the Court's 2013 decisions in *Amgen* and *Comcast Corp.* reflect differing approaches to class-certification analysis that

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69. *Id.*

70. Lori Irish Bauman, *Class Certification and Interlocutory Review: Rule 23(f) in the Courts*, 9 J. APP. PRAC. & PROCESS 205, 207 (2007).

71. *Id.* at 208.

72. FED. R. CIV. P. 23(f) advisory committee's note (1998).

73. *Id.* 23(f); Bauman, *supra* note 70, at 208 (discussing how the Advisory Committee "straddled the fence" by recognizing the lack of uniformity and high stakes in class certification decisions while also attempting to protect judicial efficiency by preventing unnecessary appeals).

74. *See* Amgen Inc. v. Conn. Ret. Plans & Trust, __U.S.__, 133 S. Ct. 1184, 1194–95 (2013) (discussing how *Dukes* firmly established that the Rule 23(a) prerequisites would be analyzed "rigorously," but cautioning that rigorous analysis does not authorize "free-ranging merits inquiries at the certification stage").

75. Wal-Mart Stores, Inc. v. Dukes, __U.S.__, 131 S. Ct. 2541, 2551 (2011).

76. Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions:* Dukes v. Wal-Mart *and* AT&T Mobility v. Concepcion, 7 DUKE J. CONST. L. & PUB. POL'Y 73, 77 (2011) (discussing the impact of *Dukes*: "[t]he larger concern is that big companies know that it will be much harder to sue them in class actions, and the unscrupulous ones will more often make the choice to enrich themselves at the expense of consumers and employees").

courts must now reconcile.[77] These decisions, discussed in greater detail below, highlight the uncertainty surrounding certification of mass consumer classes and make a compelling case for the increased use of issue class certification pursuant to Rule 23(c)(4).[78]

A. The Landmark Decision: Wal-Mart v. Dukes *Heightens the Commonality Requirement*

In 2011, the Supreme Court decided *Wal-Mart v. Dukes*.[79] Justice Scalia, writing for the majority, denied class certification for 1.5 million female Wal-Mart employees who alleged gender-based employment discrimination under Title VII.[80] The plaintiffs sought injunctive and declaratory relief, punitive damages, and back pay under Rule 23(b)(2). Although this was an employment discrimination case, the ruling has important and far-reaching consequences for all class actions because the Court's determinations apply to all applications of Rule 23, regardless of the underlying cause of action.[81]

Prior to *Dukes*, most lawyers pursuing or defending class-action claims for damages focused not on contesting Rule 23(a)'s commonality requirement, but instead on whether common issues predominated.[82] *Dukes*, however, focused on commonality, and the Court ultimately determined that the 1.5 million Wal-Mart employees did not satisfy this requirement.[83] The text of Rule 23(a)(2) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . there are questions of law or fact common to the class."[84] The Court interpreted this provision to also require the plaintiff to demonstrate that the class members "have suffered the same injury."[85] The Court noted that class members cannot

77. *See* Glazer v. Whirlpool Corp., No. 10-4188, 2013 WL 3746205, at *25–26 (6th Cir. July 18, 2013) (discussing the impact of *Amgen* and *Comcast Corp.* on Rule 23(b)'s predominance requirement).

78. *See* Linda S. Mullenix, *Class Action Cacophony at the Supreme Court*, 35 NAT'L L. J. 28 (2013) (discussing how the Court's decisions in *Amgen* and *Comcast Corp.* reflect the Court's liberal and conservative divide, but broke no new ground regarding black-letter class certification doctrines).

79. *Dukes*, 131 S. Ct. at 2551.

80. *Id.* at 2541.

81. *See* Comodeca & Hils, *supra* note 5, at *3.

82. *Id.*

83. *Dukes*, 131 S. Ct. at 2551.

84. FED. R. CIV. P. 23(a)(2).

85. *Dukes*, 131 S. Ct. at 2551.

prove the same injury has been suffered by showing "merely that they have all suffered a violation of the same provision of law," which prior to this decision, had been sufficient to satisfy commonality.[86]

The Court held that to satisfy commonality, the claims must depend on a common contention—namely, the assertion of discriminatory bias on the part of the same supervisor—rather than varied examples of potentially discretionary decisions by managers at various levels of hierarchy in the Wal-Mart corporation.[87] The Court articulated a new test for the "commonality" requirement:

> That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.[88]

The Court asserted that the inquiry at the certification stage should focus not on asking common questions, but instead, on the ability of common answers to fairly resolve the litigation for the class as a whole.[89]

The Court further articulated that Rule 23(b)(2) is meant only to address those indivisible harms that apply evenly to all members of the class.[90] Consequently, the Court determined that Rule 23(b)(2) does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.[91] This meant that had the class survived certification, it would only have been entitled to an award of injunctive or declaratory relief under Rule 23(b)(2) and money damages incidental to that injury, such as attorney's fees. To obtain monetary damages, the plaintiffs would have to seek additional certification under Rule 23(b)(3). However, the Court suggested that such an attempt would be fruitless, as the individual nature of the plaintiffs' injuries would surely fail Rule 23(b)(3)'s predominance inquiry.[92]

Immediately following *Dukes*, courts saw a flood of motions for decertification.[93] While it is clear that *Dukes* heightened the

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 2557.

91. *Id.*

92. *Id.* at 2559.

93. *See* Brooks-Crozier, *supra* note 6, at 718 (discussing courts' struggle to make sense of *Dukes*).

commonality requirement,[94] recent certification decisions[95] validate Justice Ginsburg's concern that the new commonality standard "mimics the Rule 23(b)(3) inquiry into whether common questions 'predominate' over individual issues."[96] According to Justice Ginsburg, *Dukes*' impact is problematic for two reasons: first, when courts focus on uncovering dissimilarities among the class at the Rule 23(a)(2) stage, "no mission remains for Rule 23(b)(3)";[97] and second, applying what was effectively the predominance requirement from Rule 23(b)(3) at the 23(a)(2) stage imposes additional requirements on Rule 23(b)(1) and Rule 23(b)(2) classes above and beyond what Rule 23's framers intended.[98] Additionally, *Dukes* pushes any claims for monetary relief into the realm of Rule 23(b)(3).[99] The combined effects of *Dukes* have made it increasingly difficult for consumer class actions to achieve certification under the traditional approach, thereby making the use of bifurcation to achieve certification on certain issues more appealing and necessary than ever before.

B. Amgen: *Retrenching from* Dukes

For class-action plaintiffs, the Court's 2013 decision in *Amgen*[100] was a welcome departure from *Dukes*. Justice Ginsburg wrote for the six justice majority, which also included Chief Justice Roberts, and Justices Breyer, Alito, Sotomayor, and Kagan.[101] *Amgen* involved a claim for securities fraud, with the Court holding that plaintiffs invoking the "fraud-on-the-market" presumption of reliance need not establish the element of materiality to obtain certification in a federal-securities class action.[102] The Court's analysis focused on whether Rule 23(b)(3)'s predominance requirement was satisfied:

> Rule 23(b)(3) requires a showing that *questions* common to the class predominate, not that those questions will be answered, on

94. *See* Amgen Inc. v. Conn. Ret. Plans & Trust, __U.S.__, 133 S. Ct. 1184, 1194 (2013) (discussing how *Dukes* heightened the requirements for certification).

95. *See* Brooks-Crozier, *supra* note 6, at 719 ("Courts' certification decisions since *Dukes* bear out Justice Ginsburg's argument.").

96. *Dukes*, 131 S. Ct. at 2566 (Ginsburg, J., dissenting).

97. *Id.*

98. *Id.* at 2565–66.

99. *Id.* at 2557 (majority opinion) (holding that classes certified under Rule 23(b)(2) may seek only injunctive relief and incidental money damages).

100. Amgen Inc. v. Conn. Ret. Plans & Trust, __U.S.__, 133 S. Ct. 1184, 1195 (2013).

101. *Id.* at 1190.

102. *Id.* at 1195–96.

> the merits, in favor of the class. Because materiality is judged according to an objective standard, the materiality of [the company]'s alleged misrepresentations and omissions is a question common to all members of the class [the retirement plan] would represent. The alleged misrepresentations and omissions, whether material or immaterial, would be so equally for all investors composing the class. As vital, the plaintiff class's inability to prove materiality would not result in individual questions predominating. Instead, a failure of proof on the issue of materiality would end the case, given that materiality is an essential element of the class members' securities-fraud claims. As to materiality, therefore, the class is entirely cohesive: It will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry.[103]

Although *Amgen*'s holding is limited to securities-fraud class actions involving the "fraud-on-the-market" presumption, the Court's reasoning suggests that the Court will not continue to ratchet up certification requirements beyond what the text of Rule 23 requires. *Amgen* can be read to put the brakes on *Dukes*: while *Dukes* held that the plaintiffs must raise issues that are common to the entire class,[104] *Amgen* held that as long as common questions are asked, they need not be answered at the certification stage.[105] The majority articulated that distinction in the following way: "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[106]

The dissent, written by Justice Thomas and joined by Justices Scalia and Kennedy, asserted that the plaintiffs bore the burden of establishing all of the elements of their case at the certification stage, including the element of materiality.

> Without demonstrating materiality at certification, plaintiffs cannot establish *Basic*'s fraud-on-the-market presumption. Without proof of fraud on the market, plaintiffs cannot show that otherwise individualized questions of reliance will predominate, as required by Rule 23(b)(3). And without

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103. *Id.* at 1191.

104. *Dukes*, 131 S. Ct. at 2551.

105. *Amgen*, 133 S. Ct. at 1195.

106. *Id.* at 1194–95.

satisfying Rule 23(b)(3), class certification is improper.[107]

The victory for plaintiffs seeking certification was short-lived because the Supreme Court soon revisited the question of how intensely courts would consider the merits of a case at the certification stage in *Comcast Corp.*[108]

C. Comcast Corp. *Further Unsettles the Future of Mass Consumer Claims*

A few weeks after *Amgen*, the issue of looking beyond the pleadings at the certification stage reappeared in *Comcast Corp.*[109] Justice Scalia wrote for the majority, which included the Chief Justice, and Justices Kennedy, Thomas, and Alito.[110] In *Comcast Corp.*, the Court reversed the Third Circuit's decision to certify a class in an antitrust action where the class failed to show that damages could be calculated on a class-wide basis through a common methodology.[111] Drawing heavily upon *Dukes*, the Court held that the regression model developed by the plaintiffs' expert was not acceptable as proof that damages were susceptible to measurement on a class-wide basis, and emphasized that proving class-wide damages was essential to satisfying the predominance criteria of Rule 23(b)(3).[112] The Court faulted the Third Circuit for refusing to "entertain arguments against respondents' damages model that bore on the propriety of class certification simply because they would also be pertinent to the merits determination" to consider the evidence of how damages would be calculated.[113] The Court reasoned that in some circumstances, "the Court may have to probe behind the pleadings before coming to rest on the certification question."[114]

The dissent, written by Justice Ginsburg and joined by Justices Breyer, Sotomayor, and Kagan, cautioned that *Comcast Corp.* should have been dismissed as improvidently granted.[115] Justice Ginsburg

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107. *Id.* at 1206 (Thomas, J., dissenting).

108. Comcast Corp. v. Behrend, __U.S.__, 133 S. Ct. 1426, 1434 (2013).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1432–33.

114. *Id.* at 1432 (internal quotations omitted).

115. *Id.* at 1436 (Ginsburg, J., dissenting). The Court granted review to address the question of "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." *Id.* at 1431 n.4 (majority opinion). In response, the parties

further argued that the *Comcast Corp.* decision failed to break any new ground in class-action jurisprudence, as it "remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members."[116] Justice Ginsburg explained that Rule 23 does not require "commonality as to all questions," but rather, "when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate."[117] Quoting the Advisory Committee's 1966 Note on Rule 23, Justice Ginsburg explicitly highlighted the continued vitality of issue class certification:

> [A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class.[118]

While the ideological split among the Justices makes it difficult to predict future trends impacting class certification, these recent decisions highlight the importance of carving out common issues for class certification.[119] As both *Comcast Corp.* and *Amgen* illustrate, the Court will not hesitate to transform issues involving the merits of a claim into a Rule 23(b) predominance analysis.[120] Therefore, using Rule 23(c)(4) to carve out issues that more easily satisfy Rule 23's prerequisites enables litigants to avoid a more searching inquiry into the merits of a claim at the certification stage.

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devoted much of their briefing to the issue of whether the standards governing the admissibility of expert testimony set forth by Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), apply in certification proceedings. *See generally* Brief for Petitioner, Comcast Corp. v. Behrend, __U.S.__, 133 S. Ct. 1426 (2013) (No. 11-864), 2012 WL 3613365; Brief for Respondent, Comcast Corp. v. Behrend, __U.S.__, 133 S. Ct. 1426 (2013) (No. 11-864), 2011 WL 9153773. The Court eventually realized, however, that Comcast failed to preserve the issue of admissibility of expert testimony for review. *Comcast Corp.*, 133 S. Ct. at 1436–37.

116. *Comcast Corp.*, 133 S. Ct. at 1437 (quoting 2 W. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:54, at 205 (5th ed. 2012)) ("ordinarily, 'individual damage[s] calculations should not scuttle class certification under Rule 23(b)(3)'" (quoting RUBENSTEIN, *supra*)).

117. *Comcast Corp.*, 133 S. Ct. at 1437.

118. *Id.* (quoting 7AA CHARLES ALLAN ET AL., FEDERAL PRACTICE AND PROCEDURE § 1781, at 235–37 (3d ed. 2005)).

119. *See* Mullenix, *supra* note 78, at 2 ("The *Amgen* and *Comcast Corp.* decisions are nonetheless striking for their similar embrace of fundamental class certification principles, relying on the Supreme Court's decision in *Wal-Mart Stores Inc. v. Dukes* . . . .").

120. *Id.* ("Ironically, in *Amgen* and *Comcast Corp.*, Ginsburg and Scalia performed the same sleight-of-hand trick, transforming the 'merits' problem into a Rule 23(b)(3) analysis.").

IV. THE USE OF RULE 23(C)(4) TO ALLOW CERTIFICATION WITH RESPECT TO DISCRETE ISSUES IS HIGHLY CONTROVERSIAL AND HAS GENERATED A CIRCUIT SPLIT

Bifurcation is a tool that courts may use to break a single lawsuit into separate issues.[121] Rule 42(b) allows district courts broad discretion to bifurcate a single lawsuit into separate trials if bifurcation will promote efficiency, judicial economy, or avoid prejudice.[122] Rule 23(c)(4) specifically allows bifurcation in class actions.[123] The Rule provides that "when appropriate, an action may be brought or maintained as a class action with respect to particular issues."[124] This allows litigants to seek certification with respect to certain issues, while allowing other issues to proceed on an individual basis.[125] The most commonly used type of bifurcation in class action litigation is bifurcation on the issue of a defendant's liability.[126] If liability is established, damages will then be determined in individual proceedings.[127] If the plaintiffs do not prevail on the issue of liability, the litigation ends.[128] In a bifurcated class action, absent class members are typically obligated to "opt in" to resolve all remaining individual issues.[129] Bifurcation, both in the class action context and litigation more generally, has become a relatively common means of managing complex lawsuits.[130] Generally, the term "bifurcation" applies where "common and individual issues for all class

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121. FED. R. CIV. P. 42(b).

122. *Id.*; Farleigh, *supra* note 52, at 1596.

123. *See* Farleigh, *supra* note 52, at 1596. Bifurcation pursuant to Rule 42(a) differs from issue class certification in three primary ways: bifurcation results in only one judgment, it applies in non-class-action lawsuits, and it may utilize a single jury. *Id.* Additionally, bifurcation generally only separates liability and damages determinations, whereas issue certification can divide litigation in a multitude of ways. *Id.*

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

125. *See* McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 483 (7th Cir. 2012), *cert. denied*, __U.S.__, 133 S. Ct. 338 (2012) (allowing certification only on the issue of liability, while leaving the question of certification for a damages class for a later proceeding).

126. Romberg, *supra* note 1, at 266.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 263; *see also* Stephen S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 722 (2000) ("The clear consensus is that bifurcation offers huge potential trial savings in multi-plaintiff, complex litigation because the resolution of a common issue can eliminate the need for hundreds or thousands of separate trials to resolve individual issues.").

members . . . are resolved in multiple stages of the same lawsuit."[131] As one commentator described it, bifurcation allows "the court to cut up a huge meal into bite-sized chunks."[132]

Increasingly, litigants have sought certification of "partial class actions" or "hybrid class actions" in which the court certifies only the common issues in the case for collective resolution.[133] While this often involves certification on the issue of liability, a key distinction is that in a partial class action, after the common issues are resolved, the suit ends for absent class members.[134] Absent class members never directly participate in the class lawsuit itself; rather, after the common issue has been tried, they may file their own individual actions, relying on the preclusive effect of the resolution of the common issue.[135] Another key distinction between a bifurcated class action and a "partial class action" is that bifurcation implies a two-step division of a case between the issue of liability and damages, whereas a partial class action may involve a number of different divisions and need not be limited to the division of liability and damages.[136] This Comment addresses the certification challenges faced by both bifurcated and partial class actions.

Rule 23(c)(4) was adopted along with other major amendments to Rule 23 in 1966. However, until the late 1980s, courts and practitioners largely ignored Rule 23(c)(4), instead choosing to decide certification based on the litigation as a whole.[137] As the requirements for traditional certification have been heightened, litigants are increasingly turning to Rule 23(c)(4) issue class certification.[138] Currently, appellate and district courts are struggling with the boundaries of issue class certification, and there is a three-way circuit split regarding the proper interpretation of Rule 23(c)(4)'s language.[139]

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131. Romberg, *supra* note 1, at 266.

132. *Id.*

133. *Id.* at 266–67.

134. *Id.* at 266.

135. *Id.* at 266–67; *see also* Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 706–09 (2006) (discussing the differences in bifurcated class actions and hybrid class actions in greater depth).

136. *See* Sherman, *supra* note 134, at 706–07.

137. *See* Farleigh, *supra* note 52, at 1595.

138. Brooks-Crozier, *supra* note 6, at 731 (discussing courts' treatment of 23(c)(4) post-*Dukes*); Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567, 582 (2004) (discussing the paucity of decisions involving Rule 23(c)(4) pre-*Dukes*).

139. *See* Farleigh, *supra* note 52, at 1623.

A. The Fifth Circuit Rejects the Use of Rule 23(c)(4) if the Claim as a Whole Does Not Satisfy Rule 23

In the Fifth Circuit, "a cause of action, as a whole, must satisfy the predominance requirement of (b)(3)."[140] *Castano v. American Tobacco Co.*[141] acknowledged that Rule 23(c)(4) can be used in some circumstances to overcome discrete differences among the class or discrete issues that share a more common nucleus of operative fact; however, the court cautioned that:

> Severing the defendants' conduct from reliance under [R]ule 23(c)(4) does not save the class action. A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that . . . (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial.[142]

The court noted that reading Rule 23(c)(4) to allow a court to sever issues until the "remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of [R]ule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended."[143]

Some commentators endorse the Fifth Circuit's view, and describe Rule 23(c)(4) as "merely a 'housekeeping tool,' not a mechanism to circumvent other Rule 23 requirements."[144] In support of this position, scholars cite Rule 23(c)(4)'s placement in subdivision (c) of Rule 23 as reflecting a "managerial rather than a primary role for (c)(4)(A)."[145] Additionally, they note that "[n]one of the other subdivision (c) provisions alter the terms under which a (b) class action may be

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140. Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996) (rejecting certification of a class of millions of persons and their family members who had incurred illness or died from using tobacco products; the widespread variability in the amount of exposure, type of tobacco use, and types and degree of disease were fatal to the plaintiffs' request).

141. *Id.*

142. *Id.*

143. *Id.*

144. Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709, 711 (2003); *see also* Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1059 (1986) (discussing that partial certification for mass tort cases is never appropriate because these cases cannot meet Rule 23(a)'s requirements).

145. Hines, *supra* note 144, at 719 (noting that other provisions in subdivision (c) include notice for (b)(3) class actions, timing of class certification, division of subclasses, and binding nature of class action judgments).

certified, or provide independent authority to certify an alternative type of class action."[146] They argue that if Rule 23(c)(4) was intended to authorize a fourth path for class certification, it would not be contained within subsection (c), but would occupy a more prominent place within Rule 23.[147] Some scholars suggest that recent appellate decisions show that issue class certification is falling out of favor in the courts.[148] Others counter, and this author agrees, that these decisions reflect case-specific concerns such as choice-of-law and Seventh Amendment concerns, rather than a general opposition to the issue class mechanism.[149]

B. Most Circuits Allow Bifurcation Under Rule 23(c)(4) to Certify Issue Classes, Even Where the Claim as a Whole Does Not Satisfy Rule 23

The majority of circuits support a more liberal approach to issue class certification. The First,[150] Second,[151] Fourth,[152] Sixth,[153] Seventh,[154] Ninth,[155] Tenth,[156] and Eleventh[157] Circuits allow the use of Rule

146. *Id.*

147. Hines, *supra* note 137, at 586–87.

148. John C. Coffee, Jr. & Daniel Wolf, *Class Certification: Trends and Developments Over the Last Five Years (2004-2009), in* 13TH ANNUAL NATIONAL INSTITUTE ON CLASS ACTIONS F-20, F-108-F-109, 1 at 104–09, (A.B.A. ed., 2009).

149. *See* Farleigh, *supra* note 52, at 1601.

150. Tardiff v. Knox Cnty., 365 F.3d 1, 7 (1st Cir. 2004) (holding predominance was not defeated merely by the need for individualized damage decisions where there were still disputed common issues as to liability).

151. *In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 226–27 (2d Cir. 2006) (holding that district court exceeded its discretion by failing to certify a class on the issue of liability pursuant to Rules 23(b)(3) and 23(c)(4)(A)).

152. Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 441 (4th Cir. 2003) (affirming conditional certification of some claims and decertifying on other claims where reliance and the need for individual inquiry precluded a finding of predominance).

153. Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988) (affirming certification on issue of liability where cause of groundwater pollution was a single course of conduct that was identical to all plaintiffs, but cautioning that not all claims of property damage or exposure are alike).

154. Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 912 (7th Cir. 2003) (affirming certification of issue class on issue of liability and extent of contamination, but leaving damages to be tried individually).

155. Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues.").

156. Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc., No. 12-3776, 2013 WL 3389469, at *5 (10th Cir. July 9, 2013) (discussing the availability of 23(c)(4) to isolate common issues, but vacating and remanding the certification order because plaintiffs failed to show that

23(c)(4) to single out certain issues for class treatment, even if the cause of action as a whole does not satisfy Rule 23(b)(3).

Judge Richard Posner of the Seventh Circuit is an influential voice on class actions and has emerged as one of the leading proponents of issue class certification.[158] Judge Posner's approach to bifurcation is perhaps best exemplified in *Mejdrech v. Met Coil Systems Corp*:[159]

> [C]lass action treatment is appropriate and is permitted by Rule 23 when the judicial economy from consolidation of separate claims outweighs any concern with possible inaccuracies from their being lumped together in a single proceeding for decision by a single judge or jury. Often, and as it seems to us here, these competing considerations can be reconciled in a "mass tort" case by *carving at the joints* of the parties' dispute. If there are genuinely common issues, issues identical across all the claimants, issues moreover the accuracy of the resolution of which is unlikely to be enhanced by repeated proceedings, then it makes good sense, especially when the class is so large, to resolve those issues in one fell swoop while leaving the remaining, claimant-specific issues to individual follow-on proceedings.[160]

1. McReynolds *Represents the Best Path Forward for Consumer Class Actions*

In 2012, one year after *Dukes*, the Seventh Circuit issued a highly anticipated decision in *McReynolds*.[161] While *Dukes* signaled the Supreme Court's hesitancy to allow clever tactics to avoid compliance with Rule 23, the Seventh Circuit used Rule 23(c)(4) to carve the plaintiffs' disparate impact claims into common issues that were consistent with *Dukes*' heightened commonality requirement.[162]

In *McReynolds*, 700 African-American Merrill Lynch employees

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damages were measurable on a class-wide basis); *see also* Fulghum v. Embarq Corp., No. 07–2602–EFM, 2011 WL 13615, at *2 (D. Kan. Jan. 4, 2011); Law v. Nat'l Collegiate Athletic Ass'n, 167 F.R.D. 178, 184–85 (D. Kan. 1996) (district courts within the Tenth Circuit applying Rule 23(c)(4) where claim as a whole did not satisfy predominance).

157. *See* Williams v. Mohawk Indus. Inc., 568 F.3d 1350, 1359–60 (11th Cir. 2009) (remanding case for determination of whether common issues predominated over individual issues and whether hybrid class for injunctive relief was appropriate).

158. *See* HAZARD ET AL., *supra* note 34, at 839.

159. 319 F.3d 910 (7th Cir. 2003).

160. *Id.* at 911 (emphasis added).

161. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012).

162. *Id.* at 484.

alleged that two Merrill Lynch operating policies had a disparate impact on African-American brokers.[163] Under the company's "teaming policy," brokers in the same office had the option of forming teams for the purpose of sharing clients and gaining access to additional clients.[164] The second policy challenged was the "account distribution" policy, which allowed brokers to compete for the clients of departing brokers.[165] The plaintiffs sought certification for two purposes.[166] They first sought certification for injunctive relief under Rule 23(b)(2), alleging that Merrill Lynch engaged in practices that had a disparate impact on the 700 African-American potential class members.[167] Although the class members intended to seek compensatory and punitive damages under Rule 23(b)(3), they did not seek certification of the Rule 23(b)(3) class at the same time as the Rule 23(b)(2) class.[168] Consequently, the court's ruling focused only on whether the requirements for certification under Rule 23(b)(2) had been met—the putative class did not have to overcome Rule 23(b)(3)'s predominance and superiority hurdles.[169]

The court distinguished the *McReynolds* plaintiffs' claims from those in *Dukes* based on the fact that the *McReynolds* plaintiffs challenged two specific company policies that had an allegedly discriminatory impact.[170] By contrast, in *Dukes*, the plaintiffs did not allege that any top-down corporate policy was responsible for their injuries.[171] As the court articulated:

> But in a disparate impact case the presence or absence of discriminatory intent is irrelevant; and permitting brokers to form their own teams and prescribing criteria for account distributions that favor the already successful—those who may owe their success to having been invited to join a successful or promising team—are practices of Merrill Lynch, rather than practices that local managers can choose or not at their whim. Therefore challenging those practices in a class action is not forbidden by the *Wal-Mart* decision; rather that decision helps (as the district judge sensed) to show on which side of the line

163. *Id.*

164. *Id.* at 488.

165. *Id.* at 488–89.

166. *Id.* at 483.

167. *Id.* at 483, 488.

168. *Id.* at 483.

169. *Id.* at 488.

170. *Id*.

171. Wal-Mart Stores, Inc. v. Dukes, __U.S.__, 131 S. Ct. 2541, 2551 (2011).

> that separates a company-wide practice from an exercise of discretion by local managers this case falls.[172]

The court found that the "incremental causal effect . . . of those company-wide-policies—which is the alleged disparate impact—could be most efficiently determined on a class-wide basis."[173] Thus, the court concluded that granting certification on the issue of injunctive relief under Rule 23(b)(2) was appropriate.[174] Once the issue of liability was decided in the Rule 23(b)(2) class proceeding, the plaintiffs would have to seek certification of a Rule 23(b)(3) damages class, or litigate the issue of damages individually.[175]

The court explained that the propriety of bifurcation under Rule 23(c)(4) depends on the circumstances of each individual case.[176] While the court acknowledged that the issues of compensatory damages and predominance under Rule 23(b)(3) might be difficult to achieve on a class-wide basis, those issues were not before the court, and the relatively high amount of damages sought would justify allowing individual proceedings.[177] Ultimately, the court determined that partial class certification was warranted because liability would "most efficiently be determined on a class-wide basis, rather than in 700 individual lawsuits."[178]

In dicta, the court provided guidance as to when partial certification under Rule 23(c)(4) is appropriate. The court cautioned that consolidating the issue of liability into one class proceeding might not be appropriate "if enormous consequences ride on that resolution."[179] In some cases, there is a more obvious danger "that resolving an issue common to hundreds of different claimants in a single proceeding may make too much turn on the decision of a single, fallible judge or jury."[180] The court warned that the alternative might prove equally dangerous, with the risk that common issues could be decided in hundreds of different proceedings, burdening the judicial system and resulting in very disparate outcomes.[181] Balancing these factors in *McReynolds*, the

172. *McReynolds*, 672 F.3d at 490.

173. *Id.*

174. *Id.*

175. *Id.* at 491.

176. *Id.*

177. *Id.*

178. *Id.* at 483.

179. *Id.* at 491; *see also In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020 (7th Cir. 2002).

180. *McReynolds*, 672 F.3d at 491.

181. *Id.*

court felt that these dangers were best remedied by having separate trials on pecuniary relief, rather than denying certification of all issues.[182]

The court also noted that the amount of damages at issue and the complexity in proving those damages should be considered when evaluating the viability of bifurcation.[183] In *McReynolds*, the damages sustained would be relatively easy to prove and were large enough to justify individual suits.[184] Where no glaring difficulties in conducting individual suits for damages were apparent, the court had "trouble seeing the downside of the limited class action treatment" and reversed the district court's denial of class certification under Rules 23(b)(2) and 23(c)(4).[185] After Merrill Lynch's appeal to the Supreme Court was denied, the parties reached a settlement in August 2013 in which Merrill Lynch agreed to pay $160 million—the largest settlement in U.S. history for a racial discrimination case against an American employer.[186]

The *McReynolds* decision is a high-profile interpretation of the heightened class certification requirements established in *Dukes*, and further exacerbates the conflicting application of Rule 23(c)(4) among circuit courts. Litigants will likely flock to circuits that follow the Seventh Circuit's approach. Rather than read *McReynolds* as a sweeping endorsement of issue class certification, litigants should take note of the practical framing of the issues, particular issues of law involved, and relative simplicity with which individual damages could be calculated as important factors that tipped the scales in favor of allowing issue class certification.

C. The Third Circuit Applies a Balancing Test to Determine when Bifurcation Is Appropriate

After acknowledging the conflict among other circuits, in 2011, the Third Circuit applied the factors set forth in the American Legal Institute's (ALI) Principles of the Law of Aggregate Litigation[187] to determine when certification of an issue class is appropriate.[188] The Third Circuit instructed courts to consider:

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182. *Id.*

183. *Id.*

184. *Id.* at 492.

185. *Id.*

186. Patrick McGeehan, *Merrill Lynch in Big Payout for Bias Case*, N.Y. TIMES, Aug. 27, 2013, http://dealbook.nytimes.com/2013/08/27/merrill-lynch-in-big-payout-for-bias-case/.

187. *See* A.L.I., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 2.02–2.05, 2.07–2.08 (2010).

188. *See* Gates v. Rohm & Haas Co., 655 F.3d 255, 273 (3d Cir. 2011).

> [T]he type of claim(s) and issue(s) in question; the overall complexity of the case; the efficiencies to be gained by granting partial certification in light of realistic procedural alternatives; the substantive law underlying the claim(s), including any choice-of-law questions it may present and whether the substantive law separates the common issue(s) from other issues concerning liability or remedy; the impact partial certification will have on the constitutional and statutory rights of both the class members and the defendant(s); the potential preclusive effect or lack thereof that resolution of the proposed issue class will have; the repercussions certification of an issue(s) class will have on the effectiveness and fairness of resolution of remaining issues; the impact individual proceedings may have upon one another, including whether remedies are indivisible such that granting or not granting relief to any claimant as a practical matter determines the claims of others; and the kind of evidence presented on the remaining issues, including the risk subsequent triers of fact will need to reexamine evidence and findings from resolution of the common issue(s).[189]

These considerations are not exhaustive, and should be used to guide courts as they apply Rule 23(c)(4) to "treat common things in common and to distinguish the distinguishable."[190]

As the next section of this Comment discusses, although the ALI factors are rarely mentioned in decisions, they provide helpful guidance as to when issue class certification is appropriate.[191] Many of these factors have been considered by courts in other jurisdictions, and can help courts balance the interests of efficiency and judicial economy with the black letter requirements of Rule 23.[192] The Third Circuit's approach is consistent with that adopted in the majority of federal circuits and provides a clearer methodology for determining when common issues are severable from individual issues.

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189. *Id.*

190. Chiang v. Veneman, 385 F.3d 256, 267 (3d Cir. 2004) (quoting Jenkins v. United Gas Corp., 400 F.2d 28, 35 (5th Cir. 1968)).

191. *Id.*; Clark v. Prudential Ins. Co. of Am., Civ. No. 08-6197 (DRD), 2013 WL 1694451, at *4 (D.N.J. Apr. 18, 2013) (court considered ALI factors and determined that issue of liability was not separable from individual damages).

192. *See, e.g.*, Wallace v. Powell, No. 3:09–cv–286, 2013 WL 2042369, at *10 (M.D. Pa. May 14, 2013) (court applied ALI factors to determine that certification of liability was wholly separable from individual issues).

V. RULE 23(C)(4) IS AN IMPORTANT TOOL THAT SHOULD BE USED MORE OFTEN TO OVERCOME CHALLENGES TO CERTIFICATION IN CONSUMER CASES

The Supreme Court denied certiorari in *McReynolds*,[193] thereby leaving the boundaries of Rule 23(c)(4) unsettled.[194] While the use of Rule 23(c)(4) to bifurcate a class action on the issue of liability and damages is widely accepted,[195] its use to certify issue classes in "partial class actions" or "hybrid class actions" is the subject of much debate.[196] In the wake of *Dukes*, issue class certification is an increasingly attractive option for litigants in complex consumer cases. Under the right circumstances, Rule 23(c)(4) can be used to certify an issue class so that common issues and remaining individual issues are resolved in a manner that is both fair to the parties and efficient for the judicial system.[197]

A. The Plain Language of Rule 23(c)(4) and Structure of Rule 23 Support an Expansive Interpretation of Issue Classes

The plain language of Rule 23 and accompanying advisory committee notes support a more expansive interpretation of issue class certification. Rule 23(c)(4) currently provides as follows: "When appropriate, an action may be brought or maintained as a class action *with respect to*

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193. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012), *cert. denied*, __U.S.__, 133 S. Ct. 338 (2012). In the petition for certiorari, Merrill Lynch framed the issues for review as follows:

> (1) Whether the Seventh Circuit's certification of a disparate impact injunction [in *McReynolds*] conflicts with the Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, which rejected certification of a nationwide class that, like [the class in *McReynolds*], asserted disparate impact claims based on employment policies requiring the exercise of managerial discretion[; and] (2) [w]hether the Seventh Circuit erred in holding, in conflict with other circuits, that Rule 23(c)(4) permits class certification of a discrete sub-issue when the claim as a whole does not satisfy Rule 23(b) and hundreds of individual trials would be needed to determine liability.

Petition for a Writ of Certiorari at i, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McReynolds, __U.S.__, 133 S. Ct. 338 (2012) (No. 12-113), 2012 WL 3041173, at *i.

194. The Supreme Court's only decision specifically addressing Rule 23(c)(4) held that a court has no obligation to utilize Rule 23(c)(4) sua sponte. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 408 (1980).

195. *See* Romberg, *supra* note 1, at 263.

196. *Id*. at 267. *See also* Timothy Congrove et al., Uncertain Principles? *Evaluating the Tension Between Rule 23(b)(3) And (c)(4) Post*-Dukes, *and the ALI's Effort to Integrate the Provisions*, 13 CLASS ACTION LITIG. REP. 741, 742 (2012). ("Courts have struggled with how the availability of the Rule 23(c)(4) issue class effects the certification process, especially with respect to the requirement that common questions predominate over questions affecting only individual members.").

197. *See* Romberg, *supra* note 1, at 265.

particular issues."[198] Originally, issue class certification was authorized by Rule 23(c)(4)(A), and subclasses were authorized by Rule 23(c)(4)(B).[199] However, in 2007 Rule 23 was amended and the issue class provision was relabeled Rule 23(c)(4) and subclass provision became Rule 23(c)(5).[200] The Advisory Committee described the 2007 amendments as "part of a general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."[201]

Prior to the 2007 amendments to Rule 23, however, a stronger argument existed that Rule 23(c)(4) could be invoked without first satisfying predominance.[202] The earlier version of Rule 23(c)(4) read, "[w]hen appropriate (A) an action may be brought or maintained as a class action *with respect to particular issues*, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall *then* be construed and applied accordingly."[203] Both the Second Circuit and Fourth Circuit drew heavily on this textual analysis in determining that Rule 23(c)(4) could be invoked without first satisfying predominance.[204]

As the court in *Gunnells v. Healthplan Services, Inc.*[205] articulated, the Fifth Circuit's approach is illogical because it renders Rule 23(c)(4) superfluous.[206] Under the Fifth Circuit's view, "a court considering the manageability of a class action—a requirement for predominance under Rule 23(b)(3)(D)—to pretend that subsection (c)(4)—a provision specifically included to make a class action more manageable—does not exist until after the manageability determination [has been] made."[207] Under this view, a court would only consider Rule 23(c)(4) as a tool "to

198. FED. R. CIV. P. 23(c)(4) (emphasis added).

199. *Id.*

200. *Id.* 23 advisory committee's note (2007).

201. *Id.*

202. *See* Congrove et al., *supra* note 196, at 744.

203. FED R. CIV. P. 23(c)(4) (pre-2007 amendments).

204. *See In re* Nassau Cnty. Strip Search Cases, 461 F.3d 219, 223 (2d Cir. 2006); *see also* Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 439 (4th Cir. 2003) (reasoning that the rule's language is an "express command" that "courts have no discretion to ignore").

205. *Gunnells*, 348 F.3d 417.

206. *See id.* at 439 (discussing the dissent's view that the claim as a whole must satisfy Rule 23(b)(3)'s requirement); *see also Nassau Cnty. Strip Search Cases*, 461 F.3d at 226–27 (discussing and adopting the Fourth Circuit's Reasoning in *Gunnells*).

207. *Gunnells*, 348 F.3d at 439 (discussing dissent's view that claim as a whole must satisfy Rule 23(b)(3) requirements).

manage cases that the court had already determined would be manageable *without* using Rule 23(c)(4)."[208]

One commentator argues that the 2007 amendments nullify the textual analysis relied on by the Second and Fourth Circuits and suggests that consistent with the reason for the 2007 amendments, "Rule 23(c)(4)'s former structure was similarly nothing more than a matter of style."[209] However, the 1966 amendments to Rule 23 included many substantive changes to the rule, including the creation of 23(b)(3) classes,[210] thus any inference that the prior structure of Rule 23(c)(4) was merely stylistic is unsupported.

In fact, a closer look at the 1966 advisory committee notes supports the interpretation that Rule 23(c)(4) can be invoked prior to showing predominance. The notes provide, "[i]n a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims."[211] Thus, the Advisory Committee specifically intended for Rule 23(c)(4) to be used to carve out the common issues for class treatment even if the claim as a whole would not satisfy Rule 23(b)(3)'s predominance requirement.

Finally, commentators note that records of the Advisory Committee's proceedings reflect that the committee intended for Rule 23(c)(4) to be interpreted broadly, evinced by the rejection of language that would have narrowed the scope of the rule.[212] As originally drafted, the rule read: "[W]hen appropriate . . . an action may be brought or maintained as a class action only with respect to particular issues *such as the issue of liability*."[213] The final Rule, however, rejected the narrowing language.[214] A plausible interpretation of the reason for this change is

208. *Id.* (emphasis in original).

209. *See* Congrove et al., *supra* note 196, at 744 ("[A]ny implication that assessing predominance comes after the certification of an issue class is wholly absent from the current formulation of Rule 23(c)(4).").

210. *See* FED R. CIV. P. 23 advisory committee's note (1966).

211. *Id.* 23(c)(4) advisory committee's note (1966).

212. Hannah Stott-Bumsted, *Severance Packages: Judicial Use of Federal Rule of Civil Procedure 23(c)(4)(A)*, 91 GEO. L.J. 219, 222 (2002). *But see* Laura J. Hines, *The Unruly Class Action*, __GEO. W. L. REV.__ (forthcoming (2013) (arguing that the private correspondence of Professor Charles Allen Wright, in which Wright described Rule 23(c)(4) as a "picky detail" suggests that the Advisory Committee did not intend for Rule 23(c)(4) to play a prominent role).

213. AMENDMENTS: PRELIMINARY DRAFT (Feb.–Mar. 1964), RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON THE RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-7104-53 (Cong. Info. Serv.).

214. Stott-Bumsted, *supra* note 212, at 224.

that the committee envisioned Rule 23(c)(4) to be used beyond situations of severing liability and damages, in support of a more liberal use of issue class certification.[215]

B. The Use of Issue Classes Promotes the Goals Rule 23's Drafters Intended to Advance

The more expansive interpretation of Rule 23(c)(4) is consistent with the overall purpose of Rule 23. The class-action mechanism was designed to conserve "the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion."[216] As the Supreme Court stated in *United States Parole Commission v. Geraghty*:[217]

> [t]he justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims.[218]

In *Amchem*, Justice Ginsburg described Rule 23(b)(3) as "the most adventuresome innovation"[219] in Rule 23: "framed for situations in which 'class-action treatment is not as clearly called for' as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit 'may nevertheless be convenient and desirable.'"[220] Because it was drafted the same year as the current Rule 23(b)(3), it is plausible that Rule 23(c)(4) was drafted to advance the same public policy goals as Rule 23(b)(3).

C. The Fact That Individual Determinations of Damages Are Required Does Not Defeat Commonality

Issue class certification under Rule 23(c)(4) is easily reconciled with the heightened commonality requirement established in *Dukes*. *Dukes* emphasized that the commonality inquiry should focus on the ability of a

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215. See *id.* at 222–25 for a more in-depth discussion behind the Advisory Committee proceedings and possible explanations for rejecting the narrower language.

216. Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 155 (1982) (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979)).

217. 445 U.S. 388 (1980).

218. *Id.* at 402–03.

219. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 592 (1997).

220. *Id.* at 615 (quoting FED. R. CIV. P. 23 advisory committee's note).

class-wide proceeding to produce common answers to fairly resolve the litigation.[221] Rule 23 contains no suggestion that the fact that individual damage determinations are required destroys commonality. Rather, using Rule 23(c)(4) to identify a particular issue for class treatment at the outset restructures the case so that common issues are treated together, and individual issues are treated separately.[222]

Rather than viewing issue class certification as an "end-run" around Rule 23's requirements, some courts view issue class certification as a way to "avoid any actual or perceived conflict with *Dukes*."[223] By reframing the certification inquiry to focus only on the issues common to the class, *Dukes*' heightened commonality requirement is more easily satisfied. For example, in *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*,[224] the Tenth Circuit acknowledged the importance of using Rule 23(c)(4) and (c)(5) to "preserve the class action model in the face of individualized damages."[225] Citing Justice Ginsburg's dissent in *Comcast Corp.*, the court explained that district courts are "in the best position to evaluate the practical difficulties which inhere in the class action format" and are "especially suited to tailor the proceedings accordingly."[226] In other words, while the need for individualized money damages weighs against a finding that common issues predominate, district courts have wide latitude to sever common issues from individual issues to preserve the class action model.

The Sixth Circuit recently issued one of the first appellate decisions to analyze *Comcast Corp.*'s impact on partial class certification, and concluded that the liberal application of Rule 23(c)(4) is still viable.[227] In *In re Whirlpool Corporation Front-Loading Washer Products Liability Litigation* (*Whirlpool II*),[228] the Sixth Circuit affirmed the certification of

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221. Wal-Mart Stores, Inc. v. Dukes, __U.S.__, 131 S. Ct. 2541, 2551 (2011).

222. WRIGHT ET AL., *supra* note 10, at 585–89. It has been noted that:

> Subdivision (c)(4) is particularly helpful in enabling courts to restructure complex cases to meet the other requirements for maintaining a class action . . . . The theory of Rule 23(c)(4)(A) is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis should be secured even though other issues in the case may have to be litigated separately by each class member.

Id.

223. *In re* Motor Fuel Temperature Sales Practice Litig., MDL No. 1840, 2013 WL 1397125, at *18–19 (D. Kan. Apr. 5, 2013).

224. No. 12-3176, 2013 WL 3389469 (10th Cir. July 9, 2013).

225. *Id.* at *6.

226. *Id.*

227. Glazer v. Whirlpool Corp., No. 10-4188, 2013 WL 3746205, at *27 (6th Cir. July 18, 2013).

228. *In re* Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig. (*Whirlpool I*), 678 F.3d 409 (6th Cir. 2012), *vacated sub nom.* Whirlpool Corp. v. Glazer, __U.S.__, 133 S. Ct. 1722 (2013),

a liability class for consumers who purchased specified Whirlpool washing machines that contained an alleged defect allowing mold and mildew to grow in the machines.[229] Proof of damages was reserved for individual determination following the liability proceeding.[230] The Supreme Court granted Whirlpool's petition for certiorari, vacated the certification order, and remanded the case for consideration in light of *Comcast Corp*.[231] On remand, the Sixth Circuit interpreted *Amgen* and *Comcast Corp.* to stand for the principle that "to satisfy Rule 23(b)(3), named plaintiffs must show, and district courts must find that questions of law or fact common to members of the class predominate over any questions that affect only individual members."[232] The court concluded that *Comcast Corp.* broke no new ground for the certification of a liability only class, and held that class certification was "the superior method to adjudicate [the] case fairly and efficiently."[233]

Whirlpool II highlights the need for a fact-specific inquiry to determine whether certification is appropriate, based on the particular substantive law involved. The court found that it was not improper to include in the class consumers whose washing machines had yet to display the defect, because "all Duet owners were injured at the point of sale upon paying a premium price for the Duets as designed."[234] Additionally, the plaintiffs did not have to prove that mold manifested in every machine, because "the injury to all Duet owners occurred when Whirlpool failed to disclose the Duets' propensity to develop biofilm and mold growth."[235] The court found that these contentions were common to the entire class and sufficient to warrant class treatment on the issue of liability.[236] This approach supports the contention that using Rule 23(c)(4) to carve common issues for class treatment avoids a more exacting inquiry into the merits of the claim at the certification stage.

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remanded sub nom. In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig. (*Whirlpool II*), No. 10-4188, 2013 WL 3746205 (6th Cir. July 18, 2013).

229. *Id.* at *27.

230. *Id.*

231. *Whirlpool Corp.*, 133 S. Ct. 1722.

232. *Whirlpool II*, 2013 WL 3746205, at *27.

233. *Id.* at *28.

234. *Id.* at *21.

235. *Id.* at *21–22.

236. *Id.* at *22.

*D. Issue Class Certification Allows Litigants to Avoid Uncertainty Regarding Merits Inquiries, Heightened Commonality, and Incidental Monetary Relief Post-*Dukes

Another compelling argument for endorsing the expansive interpretation of Rule 23(c)(4) is that by carving out common issues for class treatment, litigants can avoid difficult and uncertain areas of certification analysis that have emerged post-*Dukes*. *McReynolds* offers a prime example of how using Rule 23(c)(4) to single out common issues for class certification allows a large class to overcome *Dukes*' heightened commonality analysis.[237] By seeking certification only on the issue of injunctive relief pursuant to a Rule 23(b)(2) class, as the plaintiffs did in *McReynolds*, litigants can avoid answering tougher questions at the certification stage, such as how individual damages would be calculated.[238] While Rule 23(c)(4) "should not be invoked merely to postpone difficult certification questions,"[239] using this provision to reframe the certification analysis by focusing only on the common issues is a practical and permissible way to reframe complex consumer cases.

An example of a case that may have come out differently had the litigants followed the *McReynolds* approach is *Kottaras v. Whole Foods Market, Inc*.[240] In *Kottaras*, the court denied certification of a class of plaintiffs who alleged that a merger between Whole Foods Market and Wild Oats Market violated section 1 of the Sherman Act.[241] Although the court found that Rule 23(a)(2) was easily satisfied, it ultimately denied certification because plaintiffs' evidence was insufficient to prove that damages could be measured on a class-wide basis, which was necessary to satisfy Rule 23(b)(3)'s predominance inquiry.[242]

The outcome reached in *Kottaras* was essentially the same as that reached in *Comcast Corp.*, where the Court determined that certification was improper for a 23(b)(3) class on the ground that plaintiffs failed to show that damages could be measured on a class-wide basis.[243] Under the *McReynolds* approach, however, the plaintiffs in *Comcast Corp.*

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237. *See supra* Section III.B.I and accompanying notes (discussing *McReynolds*).

238. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 491 (7th Cir. 2012), *cert. denied,* __U.S.__, 133 S. Ct. 338 (2012).

239. WRIGHT ET AL., *supra* note 10, at 588–89.

240. 281 F.R.D. 16 (D.D.C. 2012).

241. *Id.* at 18.

242. *Id.*

243. Comcast Corp. v. Behrend, __U.S.__, 133 S. Ct. 1426, 1434 (2013).

could have used Rule 23(c)(4) to seek certification as a 23(b)(2) injunctive class, leaving individual damage determinations for a later inquiry. As one district court expressly noted, "*Comcast* does not foreclose a district court from certifying a liability only class under Rule 23(c)(4)."[244] This is not to say that a court will grant certification where it is clear that litigants are unable to prove that damages are measurable on a class-wide basis. However, as *McReynolds* illustrates, seeking injunctive relief or partial certification on the issue of liability allows litigants to avoid addressing individual issues at the certification stage.[245]

Even after *Comcast Corp.*, a district court allowed partial certification on the issue of liability, after acknowledging that individual damage determinations would be required.[246] The court found that Rule 23(a)'s commonality requirement was satisfied because the case involved a uniform method of allegedly deceptive practices to sell motor fuel that affected all class members in the same way, which satisfied *Dukes*' common contention requirement.[247] The court found that common issues predominated, even though individual determinations of damages would eventually be required.[248] The court balanced the efficiencies to be gained by deciding the issue of liability in a class proceeding with the burdens of individual trials, ultimately concluding that partial certification would advance the public goal of achieving a uniform resolution while also promoting judicial economy.[249]

E. Practitioners Should Proactively Use Rule 23(c)(4) to Frame Common Issues for Class Treatment

Another unique aspect of Rule 23(c)(4) is the flexibility it provides to litigants and to the courts. While Rule 23(c)(1) requires courts to determine whether to certify a class "[a]s soon as practicable after the commencement of an action,"[250] certification orders "may be conditional, and may be altered or amended before the decision on the merits."[251] Early in the case, the advantages of issue class certification

244. Wallace v. Powell, No. 3:09–cv–286, 2013 WL 2042369, at *19 (M.D. Pa. May 14, 2013).

245. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 490 (7th Cir. 2012), *cert. denied*, __U.S__, 133 S. Ct. 338 (2012).

246. *In re* Motor Fuel Temperature Sales Practice Litig., MDL No. 1840, 2013 WL 1397125, at *18–19 (D. Kan. Apr. 5, 2013).

247. *Id.* at *18–19.

248. *Id.* at *19.

249. *Id.*

250. FED R. CIV. P. 23(c)(1).

251. *Id.*

might not be apparent.[252] Fortunately, "[t]he process of isolating the issues appropriate for representative treatment and dividing the class into suitable units may be undertaken at any time and the desirability of doing so should be re-evaluated throughout the litigation."[253]

Despite this flexibility, framing common issues for certification from the outset is a more advantageous strategy.[254] By carving out only the common issues for class certification from the outset, litigants prevent the court from focusing on the weaknesses of the certification request. This approach was successful in *McReynolds*, where the plaintiffs made clear that they requested certification only on the issue of liability under a Rule 23(b)(2) class.[255] As a result, the court was able to focus solely on whether the issue class satisfied Rule 23's requirements. The class also provided sufficient information as to how the individual issues would be decided so that the court was satisfied that issue class certification would advance the efficiency of the litigation.[256]

Courts have also invoked Rule 23(c)(4) sua sponte to ensure that earlier certification orders are in compliance with *Dukes*.[257] In *Easterling v. Connecticut Department of Correction*,[258] plaintiffs alleged that the Connecticut Department of Corrections' physical fitness test had a disparate impact on female applicants.[259] The court granted class certification pursuant to Rule 23(b)(2) in January 2010.[260] After *Dukes*, the defendant moved for decertification on the grounds that *Dukes* prohibits claims for individualized relief under Rule 23(b)(2).[261] Rather than grant defendant's motion, the court instead modified the earlier certification pursuant to Rule 23(c)(4). Thus, the Rule 23(b)(2) class was allowed to proceed on the issue of liability and injunctive relief, and a separate class was certified with regard to individualized monetary relief.[262] While the court found that there were still several important

252. *See* Romberg, *supra* note 1, at 268.

253. WRIGHT ET AL., *supra* note 10, at 588.

254. *See* Romberg, *supra* note 1, at 268.

255. McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482 (7th Cir. 2012).

256. *Id.* at 492.

257. *See* Chen-Oster v. Goldman, Sachs & Co., No. 10 Civ. 6950(LBS)(JCF), 2012 WL 205875, at *8 (S.D.N.Y. Jan. 19, 2012), *adopted in part by & rev'd in part by*, 877 F. Supp. 2d 133 (S.D.N.Y. 2012); Easterling v. Conn. Dep't of Correction, 278 F.R.D. 41, 45 (D. Conn. 2011).

258. *Easterling*, 278 F.R.D. 41.

259. *Id.* at 44.

260. *Id.* at 43.

261. *Id.*

262. *Id.* at 51.

individual questions to be addressed in the 23(b)(3) damages class, the court ultimately concluded that these questions were "less substantial" than the questions that would be "subject to generalized proof" in the class proceeding.[263]

As the next part of this Comment discusses, this approach is not without drawbacks and is not appropriate in every situation. Certain types of issues are better suited for issue certification than others, and determining the limits of issue certification is a largely unsettled and important area of discussion.

VI. RULE 23(C)(4) IS NOT APPROPRIATE IN EVERY CIRCUMSTANCE AND REQUIRES A FACT-SPECIFIC INQUIRY

Rule 23(c)(4) is a discretionary tool, and like other certification determinations made under Rule 23, a court's decision to bifurcate should "be supported by rigorous analysis."[264] Determining the propriety of bifurcation under subsection (c)(4) requires a fact-specific inquiry into the prevalence and type of individual issues present in a given case.[265] Even courts that have generally approved the use of issue certification have declined to certify issue classes in certain circumstances.[266] For example, issue certification is not appropriate where the predominance of individual issues prevents limited class certification from increasing the efficiency of the litigation.[267] This is particularly problematic in cases where issues of individual reliance, injury, and damages are intertwined with the issue of liability.[268] Additionally, the Seventh Amendment, choice-of-law concerns, and the specific elements of a cause of action are important factors that must be considered when deciding whether to certify an issue class.

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263. *Id.* at 50.

264. Gates v. Rohm & Haas Co., 655 F.3d 255, 272 (3d Cir. 2011) (citing Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 200–01 (3d Cir. 2009)).

265. *See* Farleigh, *supra* note 52, at 1601 (noting that although recent case law indicates that issue classes are falling out of favor with the courts, recent appellate decisions declining to certify issue classes reflect case-specific concerns rather than opposition to the availability of issue class certification).

266. *See, e.g.*, *In re* St. Jude Med., Inc., 522 F.3d 836, 841 (8th Cir. 2008) (denying certification on issue of liability because individual damage trials would still be required to determine causation, damages, and applicable defenses).

267. *See* McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 234 (2d Cir. 2008) (denying issue certification where larger issues such as reliance, injury and damages would remain for each individual plaintiff, thus certification would not materially advance the litigation).

268. *Id.*

A. Seventh Amendment Re-examination Clause May Preclude the Availability of Issue Class Certification

One of the biggest challenges imposed by the use of issue classes is that in some instances, bifurcation of issues may produce constitutional problems stemming from the Seventh Amendment's Reexamination Clause.[269] In cases where the issues receiving class treatment overlap conceptually with issues to be tried in later proceedings, the Seventh Amendment prevents issues decided by a jury in the first proceeding from being reexamined in subsequent proceedings.[270] While this is certainly an important concern and does preclude issue class certification in some circumstances, the Reexamination Clause is not implicated in every type of bifurcated proceeding. For example, where the issue of liability is wholly distinct from the determination of damages, the jury in the latter proceeding would not be required to reexamine the findings of the earlier jury. In many types of product liability and mass tort cases, however, issues of proximate cause, negligence, and damages are so closely intertwined that the Reexamination Clause poses an insurmountable barrier.[271]

B. Choice-of-Law Concerns Arise Where Class Includes Plaintiffs from Different States

Choice-of-law concerns are another important impediment faced by class actions in diversity actions involving class representatives from multiple states.[272] In some cases, multiple state laws could apply to a single class. If the state laws at issue are uniform, choice-of-law concerns are inconsequential. However, where the discrepancies in state laws are material and the class has not agreed on which state's law

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269. 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 the Seventh Amendment requires a jury trial, this category is far reaching and includes most class actions. It 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), as well as "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).

270. *See* Farleigh, *supra* note 52, at 1602; *see also In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (declining certification where issues of negligence and proximate cause were so closely intertwined that they would violate the Seventh amendment's reexamination clause).

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

272. *See* Farleigh, *supra* note 52, at 1603.

should be applied, certification is not appropriate.[273] Recently, a district court denied certification in a breach of warranty claim where the plaintiffs failed to set forth which state's law would govern the class, and did not establish the elements of a claim for breach of express warranty in that jurisdiction.[274] Without this information, it was impossible for the court to determine "if the answers to the proposed questions would resolve an issue central to the validity of the express warranty claim."[275] This decision highlights that Rule 23(c)(4) cannot salvage claims that do not allege common issues that are capable of class-wide resolution.

The use of state subclasses under Rule 23(c)(5) is one possible way to address choice-of-law concerns.[276] As one commentator noted, "[s]tate 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."[277] Particularly where the nuances in state law are minor, and the use of subclasses and issue classes promotes judicial economy, choice-of-law issues do not pose an insurmountable barrier to issue class certification.

C. The Type of Substantive Law Involved Factors Heavily into Whether Issue Class Certification Is Appropriate

Another consideration when determining whether issue class certification is appropriate is the substantive law involved. While commentators frequently opine that liability is an issue that is well suited to issue class certification,[278] the resolution of the issue of liability often involves multiple stages and elements of law. Although the elements of a claim differ depending on the relevant cause of action, some elements of liability are inextricably intertwined with individual issues and may not be appropriate for class treatment. Elements that involve the defendant's conduct specifically are more likely to achieve certification, because

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273. *See* Cochran v. Volvo Grp. N. Am., LLC, No. 1:11-CV-927, 2013 WL 1729103, at *2 (M.D.N.C. Apr. 22, 2013).

274. *Id.*

275. *Id.*

276. *See* Farleigh, *supra* note 52, at 1603.

277. *Id.*

278. *Id.*

these elements are generally common to the entire class.[279] In the products liability context, courts are hesitant to grant partial certification on liability because elements of liability may overlap with individual issues, such as reliance, injury, and damages.[280] While courts have not explicitly ruled out the possibility of granting issue class certification in products liability cases, most often, the overlap of individual issues prevents courts from finding that common issues "predominate."[281]

Consumer and securities fraud are two areas that are generally well suited for issue class certification.[282] In these cases, the defendant's allegedly deceptive practice is generally common to the class and relatively easy to separate from the remaining individual issues. *Pella Corp. v. Saltzman*[283] is a prime example of how Rule 23(c)(4) and Rule 23(c)(5) can be used together to separate common issues for certification in the consumer fraud context.[284] In *Pella*, all of the consumers in the putative class purchased the same defective windows; however, some consumers had yet to experience any economic harm from the defect at the time the class sought certification.[285] The Seventh Circuit allowed for certification of a 23(b)(2) class on the issue of liability, which was an issue common to all consumers.[286] The plaintiffs also invoked Rule 23(c)(5) to create subclasses to distinguish those plaintiffs who had already incurred economic harm from those who had yet to incur any damages[287] and to avoid difficult choice-of law issues that arise for plaintiffs from different states.[288] Consistent with the approach the Seventh Circuit has taken when applying Rule 23(c)(4) in previous cases, the court found that the benefits of judicial economy and achieving a uniform disposition on the issue of liability outweighed any

279. *Id.* at 1605.

280. *Id.* at 1609–10.

281. *See* McLaughlin v. Am. Tobacco Co, 522 F.3d 215, 222, 234 (2d Cir. 2008) (denying certification after recognizing that issue class might be appropriate to address whether the defendants had a scheme to defraud, because issues of reliance, injury, and damages predominated for each individual plaintiff and partial class treatment would not materially advance the litigation).

282. *See* WRIGHT ET AL., *supra* note 10, at 235–37 ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class.").

283. 606 F.3d 391 (7th Cir. 2010).

284. *See id.* at 392.

285. *Id.* at 393.

286. *Id.* at 396.

287. *Id.* at 392.

288. *Id.* at 396.

potential concerns surrounding individual issues.[289]

CONCLUSION

Categorical rules for issue class certification are difficult to formulate and would undoubtedly lead to either the overuse, or underuse, of Rule 23(c)(4). The lack of clear judicial guidance on when to use Rule 23(c)(4), however, has led to divergent interpretations of the rule and significant uncertainty for litigants. This Comment highlights the importance of achieving a more uniform interpretation of Rule 23(c)(4), and argues that courts should follow the approach used in the majority of federal circuits. Furthermore, courts should use the ALI factors to help guide their analysis to ensure that Rule 23(c)(4) is used appropriately, to achieve its intended purpose of promoting judicial economy and improving the manageability of complex litigation.

As this Comment illustrates, the law surrounding consumer class actions is greatly unsettled. The use of issue classes to "carve at the joints,"[290] "treat common things in common,"[291] and break up complex litigation into more manageable pieces is consistent with recent Supreme Court jurisprudence and faithful to the purposes Rule 23 was designed to promote.

289. *Id.*

290. Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 911 (7th Cir. 2003).

291. Jenkins v. United Gas Corp., 400 F.2d 28, 35 (5th Cir. 1968).