# The Dangerous Allure of the Issue Class Action

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## INTRODUCTION

In the complex and chaotic world of mass torts, a class action that aggregates the claims of aggrieved individuals against a common defendant would seem not only a prudent solution, but possibly even a necessary one. The class device holds out the promise of resolving issues "common" to all plaintiffs in a single trial, preventing wasteful and repetitive litigation of similar issues, and the possibility of inconsistent results. And collective adjudication allows plaintiffs to pool resources against better-financed defendants. Despite these potential benefits and the admiration of a host of commentators, however, the class action has thus far failed to gain significant judicial acceptance as a fair and efficient mechanism for resolving mass tort claims.[1] Indeed, the Supreme Court in recent years struck down two wide-reaching mass tort class actions[2] in such sweeping terms that many

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* Associate Professor, University of Kansas School of Law. I am grateful to the faculty of the University of Missouri-Columbia School of Law who provided helpful comments on an earlier version of this Article at a faculty workshop. My sincerest thanks, also, to Ed Cooper, Chris Drahozal, Steve Gensler, Mary Kay Kane, Richard Marcus, Linda Mullenix, Richard Nagareda, Ed Sherman, and Kent Syverud for their encouragement and insights. Finally, I owe thanks to the University of Kansas for its generous research support. It should be noted that while in private practice at Arnold & Porter, I represented Philip Morris in its opposition to class certification in *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

1. *See infra* text accompanying notes 59-61.

2. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

observers predicted the death of the mass tort class action.[3]

While on some level of generality the claims of mass tort plaintiffs present the same issues regarding a defendant's misconduct,[4] recent class action jurisprudence has emphasized that in most mass tort cases such commonalities are overshadowed by the highly disparate character of plaintiffs' claims.[5] In the language of the federal class action rule, the common factual and legal questions raised by mass tort claims do not "predominate" over those questions unique to each individual.[6]

In response to these concerns, a number of courts and scholars have championed the notion of an "issue class action" alternative.[7] This alluring solution to mass tort predominance problems contemplates a class action that only encompasses issues common to the class, leaving individual class members to adjudicate the pervasive individual aspects of their claims in separate fora. The issue class action thus neatly evades the obstacle of predominance—common issues obviously predominate over individual issues in a class that contains no individual issues at all.[8]

In an earlier article, I argued that the current text of Rule 23 does not support such an expansive interpretation, and does not permit certification of a class action limited to common issues.[9] This Article analyzes the issue class action as a policy matter, questioning its legitimacy as a form of representational litigation. Class actions entail a significant displacement of fundamental individual autonomy rights warranted only by necessity or inferred consent.[10] The consent justification for Rule 23(b)(3) class actions is reflected in its predominance and superiority requirements, which provide the criteria by which courts may infer consent to class representation, as well as in its provision allowing class members to opt out of the class action once certified.[11] The issue class action undercuts each of these protections against unwarranted representation: It seeks to delegate authority in cases predominantly individual in nature, which undermines the inference of consent derived from class cohesiveness. It exacerbates individual autonomy concerns reflected in the superiority analysis, making it more difficult to infer class consent to the delegation of litigant autonomy. And its limited, abstract nature

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3. *See, e.g.*, Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 158 (1998) (noting the prevailing view that recent appellate cases have "pronounced the death knell for the mass tort class action"); S. Elizabeth Gibson, *A Response to Professor Resnick: Will This Vehicle Pass Inspection?*, 148 U. PA. L. REV. 2095, 2097-98 (2000) (asserting that while recent Supreme Court cases "may not sound the death knell for mass tort class action settlements, the decisions certainly increase the difficulty of getting either type of class action certified by a district court and ultimately approved on appeal").

4. *See, e.g.*, *In re* Rhone-Poulenc Rover, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

5. *See, e.g.*, Lienhart v. Dryvit Sys., Inc., 255 F.3d 138 (4th Cir. 2001); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *In re* Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995); *Rhone-Poulenc*, 51 F.3d at 1293.

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

7. *See infra* text accompanying notes 111-16.

8. *See infra* text accompanying notes 105-08.

9. *See* Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709 (2003).

10. *See infra* Part III.A.

11. *See infra* text accompanying notes 166-67.

complicates the meaningful exercise of opt-out rights by class members who might wish to rebut the inference of consent.

Part I of this Article examines the failure of existing procedural mechanisms to resolve the mass tort dilemma, which set the stage for the emergence of the issue class action. Part II describes the issue class action, and explains why its proponents see it as a tempting end run around many of the obstacles that thwart mass tort class actions. This Part also summarizes the argument that a proper interpretation of the current class action rule does not permit courts to certify expansive issue class actions.[12] Part III considers various theories of representational litigation, concluding that the justification for discretionary (b)(3) class actions lies in the inference of class members' consent. This Part next evaluates the issue class action under each of the (b)(3) provisions that combine to assure courts that consent may reasonably be inferred: predominance, superiority, and the right to opt out of the class action. Close analysis reveals that the issue class action undermines each of (b)(3)'s protections against unwarranted class litigation, and therefore may unacceptably infringe upon individual autonomy interests. Part III concludes with an assessment of the practical benefits and problems raised by the issue class action. While the exclusion of individual issues would undoubtedly make an issue class action more manageable, even the common issues in such cases may prove unmanageable on a class basis, as they have in mass tort class actions generally. And the limited scope of the issue class action, specifically its exclusion of class claims for damages, raises a host of problems unique to the issue class action and may inhibit its potential to accomplish significant settlement goals.

## I. THE MASS TORT DILEMMA

To understand the enormous pressure on courts to embrace the issue class action as perhaps the only adjudicatory solution to complex mass torts today, one first must consider the mass tort "dilemma" facing courts today. Mass torts, as the name implies, involve allegations that a defendant's tortious conduct has harmed a large number of people. Examples range from mass accidents such as plane crashes,[13] hotel skywalk collapses,[14] and restaurant fires,[15] to more dispersed mass torts such as exposure to a defective product[16] or drug.[17] Such cases became increasingly common in the latter quarter of the last century,[18] and new mass tort

12. *See infra* Part III.B.

13. *See, e.g., In re* Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 391 (E.D. Mich. 1989).

14. *See In re* Fed. Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982).

15. *See In re* Beverly Hills Fire Litig., 695 F.2d 207 (6th Cir. 1982).

16. *See, e.g., In re* Am. Med. Sys. Inc., 75 F.3d 1069 (6th Cir. 1996) (nationwide class action asserting product defect claims against manufacturer of penile prostheses).

17. *See, e.g., In re* Copley Pharm., Inc., 161 F.R.D. 456 (D. Wyo. 1995) (nationwide class action asserting product defect claims against manufacturer of Albuterol, a bronchodilator prescription drug).

18. *See, e.g.*, DEBORAH R. HENSLER ET AL., RAND, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 67 (2000); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1356 (1995).

claims emerge every year.[19] This phenomenon can be explained by reference to the mass nature of our society today, with mass transit, nationwide product distribution, and the development of new drugs and medical devices.[20] Or perhaps it can be best understood sociologically as a reflection of late-twentieth-century emphasis on individual entitlement and the rise of the entrepreneurial plaintiffs' bar.[21]

Whatever the cause, however, the fact remains that whenever a new mass tort arises, our judicial system confronts what often appears to be the daunting specter of hundreds or thousands of individuals alleging similar harm from a defendant's (or defendants') conduct.[22] The mass tort dilemma in part results from that specter alone, the sheer number of potential mass tort claimants who might file lawsuits. Often courts are importuned to certify a class action, for example, in order to forestall an otherwise inevitable and unmanageable inundation of cases asserting injury as a result of an alleged mass tort. This rhetoric of crisis can be traced to the courts' disastrous experience with asbestos cases,[23] the best-studied and longest-running mass tort with which our judicial system have been forced to contend.[24]

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19. *See, e.g.*, *In re* Paxil Litig., 212 F.R.D. 539 (C.D. Cal. 2003) (alleging that the manufacturer of the antidepressant drug Paxil failed adequately to warn of the severity of the drug's side effects for patients attempting to discontinue use of the drug); *In re* Rezulin Prods. Liab. Litig., 210 F.R.D. 61 (S.D.N.Y. 2002) (alleging that drug designed to treat diabetes caused liver failure).

20. *See* Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1948 (1998) ("Given modern commerce and distribution of products, there will continue to be mass misfortunes that beget litigation, and hence, 'mass torts.'").

21. *See* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1019-30 (1993).

22. Securities fraud and antitrust cases similarly present courts with allegations of large numbers of individuals injured by a defendant's misconduct. Courts have struggled with these cases as well, but the economic nature of the harm, the uniform federal law to be applied, and the often mechanical task of determining damages in such cases have typically been regarded as less troublesome than personal injury mass tort cases. *But see* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001) (challenging the presumptions in favor of securities class actions and against mass tort class actions).

23. The judicial experience with asbestos claims was summed up in an influential report on the subject:

> [D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 3 (1991).

24. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 597 (1997); DEBORAH R. HENSLER ET AL., RAND, ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS (1985); DEBORAH R. HENSLER ET AL., RAND, ASBESTOS LITIGATION IN THE U.S.: A NEW LOOK AT AN OLD ISSUE (2001); JAMES S. KAKALIK ET AL., RAND, COSTS OF ASBESTOS LITIGATION (1983); JAMES S. KAKALIK ET AL., RAND, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES (1984); Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1830-68 (1992).

Asbestos cases did indeed flood the courts in certain districts,[25] and several of those courts utilized novel procedural solutions for their overwhelming asbestos caseloads.[26] But few incipient mass torts will ever rival the scope of the asbestos cases.

First, not all mass tort claims prove meritorious. No deluge of cases will ever occur if the allegedly tortious conduct cannot be established, due to a lack of evidentiary support or failure to convince juries that defendant's conduct constituted a tort. Second, not every mass tort results in an unmanageable caseload. Asbestos aside, few mass torts will likely overwhelm courts to the point that aggregate or representational litigation represents the only feasible alternative.[27] This is not to say mass torts do not pose a serious challenge to our judicial system, only that the rhetoric of crisis may be overstated as a justification for the resort to novel, aggregate solutions.[28]

Part of the mass tort dilemma, therefore, might be addressed by litigating the first wave of individual cases alleging a mass tort, postponing resort to more complex aggregation devices until the true extent of the mass tort can be evaluated.[29] Several commentators have urged courts to adopt just such a strategy, waiting to embark on more adventuresome representational litigation until an incipient mass tort "matures," in order to gain experience with varying litigation strategies and better develop the factual record or scientific support for the claims.[30]

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25. *See* HENSLER ET AL., *supra* note 18, at 23 ("[T]ens of thousands of asbestos lawsuits were filed during the 1970s and 1980s, many of them in a few jurisdictions, where the workers who had been exposed to asbestos had worked.").

26. *See, e.g., In re* Sch. Asbestos Litig., 789 F.2d 996, 1011 (3d Cir. 1986); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 470 (5th Cir. 1986).

27. *See In re* Paxil Litig., 212 F.R.D. 539, 551 (C.D. Cal. 2003). (The court rejected plaintiffs' assertion that only a mass tort issue class action could prevent a judicial crisis: "The Court is not persuaded that denial of class certification will result in thousands of individual lawsuits bogging down the court system with thousands of cases being litigated across the states. What is more likely to happen is that the most compelling cases will be litigated first. The results of these cases undoubtedly will encourage the parties to dispose of the remaining cases."). *Id. But see* Davis, supra note 3, at 205 (noting that Rule 23(b)(3) does not require "that a judicial crisis the likes of asbestos litigation must be the paradigm crisis by which all class actions are judged").

28. *Cf.* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 985-97 (2003) (questioning rampant assumption regarding the "supposed litigation crisis" procedural reformists rely upon in justifying a resort to quicker, streamlined procedures and alternative dispute resolution).

29. *See, e.g.*, Davis, *supra* note 3, at 206 ("[W]here the claims are scientifically immature in that the evidence, for example, of general causation is lacking or in its infancy, the certification of a class may indeed be immature."); HENSLER ET AL., *supra* note 18, at 485.

30. *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 688-94 (1989); *see also* MANUAL FOR COMPLEX LITIGATION THIRD § 33.26 (1995). While statutes of limitations may pose some problem with the wait and see methodology, experience with a few mass torts suggests that allowing the medical science time to mature could result in savings to litigants and courts. This would have been true in the Bendectin cases, which alleged increased risk of birth defects from prenatal exposure to the drug Bendectin. Epidemiological studies ultimately failed to establish a sufficient causal link despite widespread belief in such a connection. *See* MICHAEL D. GREEN, BENDECTIN AND

Of course, this wait and see tactic risks adding undue delay in the resolution of claims.[31] More importantly, such an approach reduces (at least initially) the pooling of resources and bargaining power of collective litigation for plaintiffs.[32] Such disadvantages, however, only rise to the level of a true dilemma in cases involving negative value claims, where no individual litigation alternative exists because the cost of litigation exceeds the amount of damages at stake for each individual. In cases involving high value claims that merit individual adjudication, plaintiffs face only ordinary litigation costs and the ordinary bargaining power of most tort plaintiffs.

But courts and academics rightly point to another aspect of the mass tort dilemma—duplicative litigation. Even when courts can effectively manage the litigation of mass tort cases on an individual basis, there is bound to be some degree of relitigation of issues. Because a defendant's conduct allegedly harmed a large number of people, factual and legal questions surrounding the nature of that conduct will likely be similar across cases. In addition, many dispersed mass tort cases involve questions of general causation, the capacity of the allegedly defective product to cause the injuries alleged. The risk of duplicative litigation abounds in such circumstances—the same or similar discovery regarding defendant's conduct will be conducted in each case, the same experts will likely testify, and the same or similar issues will be adjudicated in each case.

Small wonder, then, that a number of courts have invoked innovative procedural solutions to handle the influx of mass tort cases, including application of non-mutual issue preclusion and certification of class actions. Most of these efforts, however, have been struck down as improper by appellate courts. The following sections briefly examine these procedural devices and consider the reasons why both have encountered judicial resistance, if not hostility, in the arena of mass tort cases. Tracing the failed history of issue preclusion and the increasingly dour outlook for mass tort class actions helps explain why many have advocated the issue class action as a possible answer to the mass tort dilemma. More significantly, in order to fairly analyze the issue class action as a viable alternative, one must clearly understand the policy and efficiency concerns that have bedeviled judicial attempts to invoke preclusion and broader class action certifications.

### *A. The Failure of the Collateral Estoppel Doctrine*

Collateral estoppel, or issue preclusion, represents one of the earliest responses to concerns about duplicative litigation in mass tort cases. As set forth in the

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BIRTH DEFECTS: THE CHALLENGE OF MASS TOXIC SUBSTANCES LITIGATION 19-22 (1995). More recently, the breast implant litigation debacle—which left thousands of women dissatisfied and Dow Corning in bankruptcy—might have been averted if the medical science had time to develop: "Science has arrived at a substantial consensus, if not an assurance of absolute safety." Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 339 (1996).

31. *See* David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons From a Special Master*, 69 B.U. L. REV. 695, 710 (1989) (arguing that "the maturity prerequisite generates years of redundant litigation, diverting enormously valuable party, lawyer, expert, and judicial resources from other productive undertakings").

32. *See, e.g., id.* at 709-10; Rubenstein, *supra* note 22, at 433 (explaining that class actions serve to "reduce disparities in bargaining power between plaintiffs and defendants").

Restatement (Second) of Judgments, "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the same parties."[33] The last requirement, referred to as the mutuality doctrine, has been modified significantly by the advent of non-mutual preclusion. While some states continue to adhere to the mutuality requirement, most states and the federal courts have now adopted a discretionary, multi-factoral non-mutual preclusion analysis that prevents relitigation of an issue if a party has had a full and fair opportunity to litigate in a previous case.[34]

The Supreme Court articulated the federal test for such non-mutual collateral estoppel in *Parklane Hosiery Co. v. Shore*.[35] First, a plaintiff who easily could have joined the prior action may not invoke preclusion.[36] This factor reflects the Court's concern about the unfairness of allowing a new plaintiff to "wait and see" how the first case turned out, taking advantage of an adverse defendant judgment but not being bound herself by a judgment favorable to the defendant. Due process, the Court made clear, does not allow a new party to the litigation to be bound by any earlier resolution of a disputed issue.[37]

Second, the Court listed a number of factors to consider in determining the "fairness" of allowing preclusion. The presence of inconsistent prior judgments, for example, would render preclusion on an adverse judgment unfair.[38] Similarly, if the prior action involved smaller stakes relative to the subsequent action, creating less incentive for the defendant to litigate fully, the Court suggested preclusion would be unfair.[39] Courts must also take into account procedural opportunities not available in the first action.[40]

Shortly after *Parklane*'s abandonment of the mutuality requirement, the Eastern District of Texas attempted to utilize non-mutual collateral estoppel in several cases involving asbestos claimants.[41] The Fifth Circuit, however, in *Hardy v. Johns-Manville Sales Corp.*, struck down those attempts on several grounds that continue to dog application of the doctrine in mass tort cases.[42] First, the lower court had invoked issue preclusion against defendants who had not been parties to the earlier action on which preclusion had been based.[43] In mass torts involving

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33. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

34. *Id.* § 29.

35. 439 U.S. 322 (1979) (allowing shareholder to assert non-mutual preclusion on issue of corporation's misleading proxy statements in violation of securities based on prior SEC litigation).

36. *Id.* at 331.

37. *Id.* at 327 & n.7 (citing Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971)).

38. *Id.* at 330.

39. *Id.*

40. *Id.* at 331.

41. *See, e.g.*, Flatt v. Johns Manville Sales Corp., 488 F. Supp. 836 (E.D. Tex. 1980); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981).

42. 681 F.2d 334, 344-46 (5th Cir. 1982); *see also* Thomas E. Willging, *Mass Tort Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 427 (1999) ("Issue preclusion has been attempted in asbestos litigation with little or no success.").

43. *Hardy*, 681 F.2d at 338-39. Courts also have rejected attempts by defendants to utilize collateral estoppel against plaintiffs who have not yet had an opportunity to litigate their claims. *See, e.g.*, Lynch v. Merrell-National Labs., 830 F.2d 1190 (1987) (rejecting

large numbers of defendants, such as asbestos cases, the court emphasized that similarity of interests does not suffice to permit preclusion.[44]

Three other problems addressed by the Fifth Circuit in *Hardy* continue to frustrate the utility of the collateral estoppel doctrine to preclude litigation of issues in mass torts cases. First, the court found ambiguity as to the issue actually decided in the earlier action on which the plaintiff sought to preclude litigation.[45] The earlier case established that the defendants had not adequately warned the plaintiff of the dangers of asbestos, but beyond that the court found the earlier verdict ambiguous: "it is impossible to determine what the [earlier] jury decided about *when* a duty to warn attached."[46] Moreover, the earlier case involved circumstances specific to the previous plaintiff that were not the same in the later cases, including different employment, exposure, products, and knowledge of the risks of asbestos.[47] While special interrogatory verdicts might be used that make more clear the exact grounds on which a jury bases its verdict, the problem of isolating the same issue in complex factual and legal circumstances remains a serious impediment to the use of collateral estoppel in mass tort cases.[48]

Second, the court in *Hardy* found preclusion improper because of the existence of prior inconsistent verdicts on the issue of the defendants' duty to warn.[49] Again, this factor does not bode well for preclusion in any economically viable mass tort case. Inconsistent verdicts are often the norm in such cases, and early defendant verdicts are far more common than plaintiff verdicts.[50]

Finally, the Fifth Circuit rejected the application of collateral estoppel on the ground that the earlier case had involved relatively smaller stakes and therefore inadequate incentives for the defendants to litigate as vigorously as they would have had they understood the case's preclusive impact on future cases involving millions of dollars of liability.[51]

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defendant's argument that plaintiff should be precluded from litigating issue of causal link between in utero exposure to Bendectin and birth defects based on verdict in Multi-District Litigation consolidated trial).

44. *Hardy*, 681 F.2d at 339-40. *But see* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992).

45. *Hardy*, 681 F.2d at 344-46.

46. *Id.* at 344 (emphasis in original).

47. *Cf.* Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 813 (1985) ("In a mass product defect case, the plaintiff seeking estoppel must show an identity in both cases of the product used, the defect claimed, and the circumstances surrounding its purchase and use by the plaintiff.").

48. *See, e.g.*, Dodge v. Cotter Corp., 203 F.3d 1190, 1198-99 (10th Cir. 2000) (reversing district court's application of non-mutual collateral estoppel in negligence action against the uranium mill defendant because of failure to establish that the issue to be precluded was the same as that found by the jury in the previous case); Trangsrud, *supra* note 47, at 813-14 (opining that the need to establish identity of issue in mass tort cases may be an impossible burden for plaintiffs to satisfy, particularly in light of varying state laws).

49. *Hardy*, 681 F.2d at 345-46.

50. *See* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1842 (1995) ("The cyclical theory of mass tort litigation contemplates an initial stage in the litigation during which there are inherent advantages for the defendant. . . . During this initial stage of the cycle, the defendant tends to win the cases it chooses to try and is often able to settle lawsuits quietly with little impact on other cases.").

51. *Hardy*, 681 F.2d at 346-47.

Some scholars, frustrated by the kind of judicial resistance to collateral estoppel illustrated by *Hardy*, have urged that preclusive force should be given to the first adjudication of an issue in all subsequent cases, whatever the outcome.[52] To permit preclusion on the basis of a single, initial verdict in all subsequent cases, however, would place enormous pressure on resolution of that first case. Such pressure has several disadvantages that can outweigh the efficiency and finality advantages. First, defendants would likely devote excessive resources to the first of any potentially mass tort claim. This could lead to wasteful expenditures on the part of the defendant, possibly prohibitively expensive litigation for the plaintiff, and undue judicial and managerial costs. More importantly, it would be unfair to permit preclusion based on a single verdict in mass tort cases where the evidence would have supported a judgment for either party. As one critic has explained, "In such circumstances there is no certainty that the initial verdict was correct and imposing the facts found in the first action on all later cases is unfair."[53]

The proposals for expansion of non-mutual collateral estoppel have not gained much momentum with courts, and the doctrine has thus far proven to be of little utility in mass tort cases.[54] Instead, beginning in the 1980s, courts stepped up efforts to utilize the class action device to achieve mass preclusion of issues that individual application of the collateral estoppel doctrine could not accomplish. The next section explores the obstacles and appellate resistance these mass tort class actions have faced.

### *B. The Failure of the Mass Tort Class Action*

The drafters of the 1966 amendment to Rule 23, the current federal class action rule, clearly never contemplated that the rule would play a significant role in the nascent world of mass torts. Indeed, Rule 23's Advisory Committee Note spells out the framers' skepticism towards, if not their outright disapproval of, the utilization

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52. *See, e.g.*, Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 815-22 (1989). *But see* Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63, 79 (1988); 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE JURISDICTION § 4449 (2d ed. 2002) (arguing against such an "erosion. Our deep-rooted historic tradition that everyone should have his own day in court draws from clear experience with the general fallibility of litigation and with the specific distortions of judgment that arise from the very identity of the parties."); Elinor P. Schroeder, *Relitigation of Common Issues: The Failure of Nonparty Preclusion and an Alternative Proposal*, 67 IOWA L. REV. 917, 980 (1982) (rejecting proposals to preclude nonparties after the first litigation of a common issue).

53. Transgrud, *supra* note 47, at 813.

54. *See, e.g.*, Linda S. Mullenix, *Problems in Complex Litigation*, 10 REV. LITIG. 213, 222 (1991) ("[T]he federal appellate courts have effectively eliminated issue preclusion as a means of preventing the relitigation of duplicative claims, except in the narrowest of circumstances. These doctrines have frustrated the ability of federal courts to deal with mass tort cases in an aggregative fashion, thus requiring the repetitive adjudication of thousands of similar claims."); Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 224 (1984) ("[C]ollateral estoppel has little potential to make a significant contribution in resolving the judicial administration difficulties engendered by asbestos litigation."); *see generally* LINDA S. MULLENIX, MASS TORT LITIGATION 404-38 (1996) (collecting mass tort cases considering the application of issue preclusion).

of the class action to resolve such cases: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways."[55]

Despite this warning, however, courts soon after the Rule 23 amendment began resorting to the class action rule to help manage the growing number of mass tort cases. The initial inroads took place in cases involving mass disasters, single event torts like fires or accidents.[56] Courts through the early 1980s continued to resist, however, broadening this development by certifying class actions to handle more dispersed mass torts.[57] But in the mid-1980s, particularly in asbestos cases, courts began to certify such actions more readily, with certifications peaking in the early 1990s.[58]

The pendulum swung back, however, as a series of appellate courts in the late 1990s struck down several far-reaching class actions involving nationwide exposure to defective products produced over time.[59] Indeed, the Supreme Court twice entered the mass tort class action fray during this era, and twice struck down sweeping asbestos class action settlements.[60] These decisions raise a great deal of doubt as to the viability of any mass tort class action.[61] To determine whether the

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55. FED. R. CIV. P. 23 advisory committee's note.

56. *See, e.g.*, Am. Trading & Prod. Corp. v. Fischbach & Moore, Inc., 47 F.R.D. 155 (N.D. Ill. 1969) (exhibition hall fire); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558 (S.D. Fla. 1973) (cruise ship food poisoning outbreak); *see generally* MULLENIX, MASS TORT LITIGATION, *supra* note 54, at 140-91 (describing initial mass tort class action "inroads and successes").

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

58. *See, e.g.*, HENSLER ET AL., *supra* note 18, at 22-27.

59. *See, e.g.*, *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002) (tires); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138 (4th Cir. 2001) (stucco siding); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (cigarettes); *In re* Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996) (penile prostheses); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) (trucks); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) (blood products); *see also* HENSLER ET AL., *supra* note 18, at 31-37; Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing for Class Actions in Gulf Waters?*, 74 TUL. L. REV. 1709, 1709 (2000) ("Since 1995, federal courts have articulated an increasingly conservative class action jurisprudence that has directed federal courts to stringently scrutinize proposed litigation and settlement classes.").

60. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

61. *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 372-74 (2000) (describing *Amchem* and *Ortiz* as having "essentially frozen the development of the class action," and warning against "an expansive reading" of those cases that "threatens the viability of thc class action across a broad range of litigation contexts"); Davis, *supra* note 3, at 157. *But see* Mullenix, *supra* note 59, at 1732-34 (noting that post-*Amchem*, "federal courts have cqually granted and denied class certifications (both in the litigation and settlement contexts) based on application of *Amchem* principles") (footnotes omitted).

issue class action can escape the fate of these class actions or instead suffers from many of the same infirmities, this Part concludes with a brief analysis of Rule 23 and why many appellate courts remain leery of its application in mass tort cases.

### 1. Federal Rule of Civil Procedure 23

Rule 23 requires that every class action satisfy the prerequisites of subdivision (a)—numerosity, commonality, typicality, and adequacy—and fit into one of the subdivision (b) categories of class actions. The two types of class actions authorized by subdivision (b)(1) reflect the class action equivalents of necessary party joinder.[62] The first requires that inconsistent adjudications would create "incompatible standards of conduct for the party opposing the class."[63] The second requires certification where individual adjudications that would be practically dispositive of the interests of other members of the class or would "impair or impede their ability to protect their interests."[64] Rule 23(b)(2) permits mandatory class actions for classes seeking injunctive or declaratory relief.[65]

Thus far, neither (b)(1) nor (b)(2) has proven much help in addressing mass torts. The Supreme Court struck down an asbestos claimant (b)(1)(B) limited fund class certification in *Ortiz v. Fibreboard Corp.*, in sweeping language that bodes ill for future (b)(1)(B) mass tort class actions.[66] And attempts to utilize (b)(1)(A) and (b)(2) have met consistent resistance.[67]

To the extent that courts have certified mass tort class actions at all, Rule 23(b)(3) has been the subdivision of choice. Rule 23(b)(3) authorizes certification of a class action for damages where litigation of claims on a class basis can achieve efficiencies without sacrificing fairness or other important values.[68] Class actions under (b)(3) are discretionary on the part of courts, and class members must be served notice of the action informing them of the nature of the action and their right to opt out of the action.[69] In addition to the (a) prerequisites, the (b)(3) rule requires a court to find that issues common to the class "predominate" over individual issues and that the class device presents the "superior" method of adjudicating the dispute. Both of these requirements have proven problematic for the certification of mass tort class actions. A brief discussion of the predominance and superiority factors helps to illuminate why mass torts have presented such challenges for class certification under (b)(3).

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62. *Cf.* FED. R. CIV. P. 19.

63. FED. R. CIV. P. 23(b)(1)(A).

64. FED. R. CIV. P. 23(b)(1)(B).

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

66. *See Ortiz*, 527 U.S. 815 (1999). *But see In re* Simon II Litig., 211 F.R.D. 86 (E.D.N.Y. 2002) (certifying (b)(1)(B) limited fund class action to resolve class punitive damages claims).

67. *See, e.g.*, *In re* Sch. Asbestos Litig., 789 F.2d 996 (3d Cir. 1986) (certifying class action under (b)(3) but rejecting plaintiff attempts to certify asbestos property damage claims under (b)(1) or (b)(2)).

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

69. FED. R. CIV. P. 23(c)(2).

### 2. Rule 23(b)(3): Predominance

While the predominance test cannot be reduced to any quantitative formula, the rule requires that the common questions of law or fact predominate over questions that must be decided on an individual-by-individual basis. The very nature of most mass torts, particularly those involving personal injuries, inevitably involves a host of complex individual issues: the degree and nature of exposure to an allegedly harmful product, specific causation of the plaintiff's injury by that exposure, the existence and extent of injury, possible affirmative defenses such as contributory negligence or assumption of risk, and quantum of damages.[70] Rejecting certification of an asbestos settlement class action in *Amchem Products, Inc. v. Windsor, Inc.*, the Supreme Court emphasized the complicated morass of individual issues that thwarted any finding of predominance:

> "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma . . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry."[71]

Given these disparities among class members, the Court concluded, no common issues such as "the health consequences of asbestos" could possibly satisfy (b)(3) predominance.[72]

In the last decade, appellate courts have rejected most mass tort class actions on predominance grounds, citing the highly disparate nature of the factual issues raised by class members' claims.[73] As one court explained, "the economies of scale achieved by class treatment are more than offset by the individualization of numerous issues relevant only to a particular plaintiff."[74]

In addition to the large number of factual variations among class plaintiffs' claims, courts have found state law variations to pose a seemingly insurmountable obstacle to finding predominance in mass tort class actions. In *Amchem*, for example, the Supreme Court concluded that the need to apply fifty state laws hugely compounded the factual disparities among class members' claims.[75] Indeed,

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70. *See, e.g.*, Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 895 (1995) (noting that predominance "present[s] peculiarly vexing problems in the mass tort context").

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

72. *Id.*

73. *See supra* note 59.

74. *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996); *see also In re* Rezulin Prod. Liab. Litig., 210 F.R.D. 61, 67 (S.D.N.Y. 2002) ("[W]hile there no doubt are common questions concerning the characteristics of Rezulin and the manner in which the FDA approval was obtained, individual questions, particularly but not limited to causation and reliance, overwhelm these common issues.").

75. *Amchem*, 521 U.S. at 624.

most appellate courts have cited varying state law standards in concluding that proposed mass tort class actions fail the (b)(3) predominance requirement.[76]

### 3. Rule 23(b)(3): Superiority

Rule 23(b)(3) requires courts to determine that the class action device represents the superior method of adjudicating class members' claims, inviting examination of other adjudicatory means. The subdivision sets forth several grounds on which to consider superiority that focus on individual adjudication as the primary alternative to the class action. The rule directs courts to consider the interest of class members in controlling the litigation on an individual basis, the extent of litigation already underway, the desirability of concentrating the action in a particular forum, and whether the proposed class action will be manageable.[77]

The first listed factor reminds courts that a (b)(3) class action is a discretionary, not a necessary aggregation device as in (b)(1) and (b)(2), and that an individual's autonomy in controlling her own litigation choices must be respected. Similarly, the extent of litigation inquiry suggests that if individuals have already engaged in litigation, such lawsuits are feasible and may be regarded as preferable to the (b)(3) class action. In other words, (b)(3)'s first two superiority factors reflect concern about interfering with individual litigation autonomy, and suggest that the framers intended the rule to apply in cases where the stakes are sufficiently low that individual litigation is not feasible and class members have small stakes in the outcome.[78]

Indeed, courts have expressly considered whether the class claims amount to a "negative value claim" where the costs of litigation exceed the expected benefit to individual members. Such a factor weighs in favor of class adjudication, while the converse, high stakes claims that warrant individual litigation, weighs against a finding that a class action is the superior option. The Supreme Court in *Amchem* recognized this concern, cautioning against class actions where "individual stakes are high and disparities among class members great."[79]

Courts also have considered the relative maturity of class claims in determining superiority, a factor relevant both to the extent of litigation already commenced and the desirability of concentrating class claims. The Seventh Circuit's opinion in *In re Rhone-Poulenc Rorer* represents an early and influential example of the significance of an "immature" tort in the superiority analysis.[80] In *Rhone-Poulenc*, the court emphasized that the theories of liability had only been

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76. *See, e.g.*, Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1190 (9th Cir. 2001); Castano v. Am. Tobacco Co., 84 F.3d 734, 742 n.15 (5th Cir. 1996) ("We find it difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered."); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).

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

78. *Amchem*, 521 U.S. at 617 ("While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'") (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INT'L & COMP. L. REV. 497, 497 (1969)).

79. *Id.* at 625; *see also* Castano v. Am. Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

80. 51 F.3d 1293 (7th Cir. 1995).

litigated a handful of times, and that the novel negligence theories would require the federal court, faithful to its *Erie R.R. v. Tompkins*[81] obligation, to make guesses as to how each of fifty states would approach the new tort theory.[82] While courts must sometimes accept such an obligation, the Seventh Circuit's superiority analysis led it to conclude that such a class action would not be the superior method of adjudication where individual lawsuits could be brought.[83]

Building on this superiority analysis, the Fifth Circuit in *Castano v. American Tobacco Co.* similarly cited immaturity concerns in decertifying a class action of cigarette smokers seeking compensation for their addiction to cigarettes.[84] The Fifth Circuit asserted:

> [A] mass tort cannot be properly certified without a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority analysis required by rule 23. This is because certification of an immature tort results in a higher than normal risk that the class action may not be superior to individual adjudication.[85]

The final superiority factor explicitly set forth in Rule 23(b)(3), manageability, has come to encompass a host of concerns. Obviously, the court must consider the factual and legal variations among class members' claims to determine (in addition to whether such variations undermine predominance) whether those disparities will prove unmanageable in a litigation context.[86] Even courts certifying mass tort class actions have questioned whether such complex issues can meaningfully be managed by a court, but have placed their hopes in various judicial management tools such as special masters, magistrates, and subclassing.[87] Other courts have pointed to manageability concerns to buttress their rejection of a proposed class riddled with complex issues not easily amenable to classwide proof.[88] Part of the

81. 304 U.S. 64 (1938).

82. *Rhone-Poulenc*, 51 F.3d at 1300.

83. *Id.* at 1304; *see also Castano*, 84 F.3d at 734.

84. 84 F.3d at 747.

85. *Id.*; *see also* MANUAL FOR COMPLEX LITIGATION, *supra* note 30, §33.26 ("Fairness may demand that mass torts with few prior verdicts or judgments be litigated first in smaller units . . . until general causation, typical injuries, and levels of damages are established. Thus, 'mature' torts like asbestos or Dalkon Shield may call for procedures that are not appropriate for incipient mass tort cases."); Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 U. PA. L. REV. 2225 (2000); McGovern, *supra* note 30.

86. *See, e.g.*, Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v, Shutts, 96 YALE L.J. 1, 64 (1986) (noting that nationwide class actions "present an even greater problem because of the sheer burden of organizimg and following fifty or more different bodies of complex substantive principles").

87. *See, e.g.*, Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 190 (4th Cir. 1993).

88. *See, e.g.*, *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002) (holding that the class claims at issue were not manageable due to factual variations compounded by need to apply differing state laws); Zinser v. Accufix Research Inst., 253 F.3d 1180, 1192 (9th Cir. 2001) (citing manageability "complexities" that "weigh heavily

manageability prong requires acknowledgment of the high transaction costs associated with (b)(3) class actions, particularly the cost of providing notice to the class members.[89]

Finally, courts have looked to whether the inevitable severance of issues tried in a class action truly promotes efficiency while preserving fairness. Some courts have suggested that those bifurcation concerns might amount to a violation of Seventh Amendment jury trial rights.[90] For example, where class claims permit the assertion of individualized defenses such as comparative or contributory negligence, it would be very difficult for a new jury in the individual phase of litigation to weigh and allocate fault among parties when the class jury has already determined the issue of the defendant's negligence.[91] At the very least, the second jury would have to rehear some of the evidence to assess the relative weight of the defendant's negligence as against that of the individual plaintiff's. That need to reconsider evidence of the defendant's conduct may violate the Seventh Amendment's Reexamination Clause, and at best undermines the efficiencies gained by determining the issue on a class basis.[92]

### *C. Conclusion*

Neither nonmutual offensive collateral estoppel nor the (b)(3) class action has proved reliably successful in resolving the mass tort dilemma. The shortcomings of these procedural devices, as demonstrated above, are not wholly unrelated. Both suffer from the highly complex and individualized nature of mass tort claims themselves, as well as the high stakes involved in such claims. These characteristics of mass tort claims make it quite difficult to find the requisite identity of issue (or predominance of common issues) and fairness (or superiority) of trying an issue once and precluding further litigation. The issue class action, however, has been promoted as a procedural alternative that can achieve mass issue preclusion where collateral estoppel and the (b)(3) class action have failed. The next Part will examine the issue class action and the debate surrounding its meaning, while the remainder of the Article will consider whether the issue class action truly represents an opportunity to avoid the problems that have thwarted collateral estoppel and the (b)(3) class action from resolving the mass tort dilemma.

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against class certification," including varying facts and the need to apply differing state laws).

89. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 747 (5th Cir. 1996) (citing the cost of providing "notice to millions of class members" as part of the "extensive manageability problems" with the lower court's class certification).

90. *See, e.g.*, *Castano*, 84 F.3d at 751-52; *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302-04 (7th Cir. 1975).

91. *See, e.g.*, *Castano*, 84 F.3d at 751-52; *Rhone-Poulenc*, 51 F.3d at 1302-04.

92. *Rhone-Poulenc*, 51 F.3d at 1303. *But see* Simon v. Philip Morris, Inc., 200 F.R.D. 21, 28-49 (E.D.N.Y. 2001); *In re* Copley Pharm., Inc., 161 F.R.D. 456, 463 (D. Wyo. 1995); Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 542 (1998) (arguing that "the separate trial of overlapping issues does not necessarily violate the Seventh Amendment Reexamination Clause," and should not obscure the benefits of an issue class action).

## II. THE ISSUE CLASS ACTION "ALTERNATIVE"

Frustration with the steady stream of mass tort cases in the late 1980s and 1990s, particularly asbestos, led many courts into "a period of desperate improvisation."[93] This era represented the heyday of mass tort class actions and, not coincidentally, witnessed the emergence of the issue class action. As courts struggled to find solutions to the mass tort dilemma, the Advisory Committee's cautionary advice against mass tort class actions became increasingly muted and ineffectual. While acknowledging the highly complex individual issues raised by mass tort claims, some courts determined that representative litigation of the common issues in such cases would still constitute an improvement over individual adjudication.[94] Casting about in search of support for these innovative mass tort class actions, such courts seized upon the language of Rule 23(c)(4), which states that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues, . . . and the provisions of this rule shall then be construed and applied accordingly."[95]

Today, class action plaintiffs increasingly pursue the strategy of seeking class certification under *either* Rule 23(b)(3) or (c)(4)(A), assuming that the latter provision authorizes an alternative form of class action: the issue class action.[96] This Part considers the development of the issue class action "alternative" and analyzes the proper interpretation of Rule 23(c)(4)(A).

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93. Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 948 (1995). In addition to the rise of the issue class action, courts during this time experimented with other novel approaches to achieving aggregate solutions in mass tort cases. The "settlement class action" experiment received the greatest amount of attention. *See e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (rejecting argument that Rule 23 empowered courts to certify "settlement class actions" that could not otherwise satisfy the rule's (a) and (b) requirements); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995) (same). As a result of the spotlight provided by the Supreme Court and a host of commentators, Rule 23 itself has been amended to specifically address settlement class actions. *See* FED. R. CIV. P. 23(e), (g)-(h) (amended 2003). The most revolutionary (but ultimately failed) experiment from this era was a district court's effort to litigate individual issues such as causation, injury, and damages on an aggregate basis using statistical sampling and extrapolation. *See* Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998) (reversing lower court's sampling and extrapolation plan for asbestos class action); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 344-45.

94. As one court explained: "Even if the action thereafter 'degenerates' into a series of individual damage suits, the result [of class findings on liability issues] nevertheless works an improvement over the situation in which the same separate suits require adjudication on liability using the same evidence over and over again." *In re* Sch. Asbestos Litig., 789 F.2d 996, 1008 (3d Cir. 1986); *see also* Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 185 (4th Cir. 1993); Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir. 1986).

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

96. *See, e.g.*, Benner v. Becton Dickinson & Co., 214 F.R.D. 157, 168 (S.D.N.Y. 2003) (rejecting plaintiffs' "attempt to avoid the shortfalls of previous product liability class actions by moving only for [(c)(4)(A) issue class] certification on two issues they argue are common to the class").

### *A. The Rise of the Issue Class Action*

While Rule (c)(4)(A)[97] dates back to the 1966 amendments to Rule 23, this provision of the class action rule languished in relative obscurity until it began to prove useful to courts certifying mass tort class actions.[98] At first, such courts simply relied on (c)(4)(A) to take the sting out of the Advisory Committee's warning against mass tort class certification.[99] The provision was not initially regarded as providing stand-alone authority to certify a class action that would not otherwise comply with Rule 23(b)(3).[100] Rather, its role in the class action rule served to underscore judicial discretion to approve (b)(3) class actions despite the need to separately adjudicate individual issues raised by class claims.[101] The Third Circuit aptly articulated this vision of (c)(4)(A) as augmenting courts' expansive interpretation of (b)(3): "Reassessment of the utility of the class action in the mass tort area has come about, no doubt, because courts have realized that such action need not resolve all issues in the litigation."[102]

But once (c)(4)(A) emerged from the class action shadows in the 1980s and early 1990s, its broad language became somewhat of a siren's song to courts and commentators eager to find solutions to the mass tort dilemma. In particular, the provision came to be seen as authorizing a new breed of class action, the "issue class action." Its chief allure: the exclusion of individual issues from the class action.

In the quest for issue preclusion in mass tort cases, where collateral estoppel had failed and (b)(3) class actions too often ran afoul of the predominance requirement, issue class actions appeared to offer the best of both procedures. Unlike collateral estoppel, the existence of prior inconsistent judgments could not prevent a court from certifying an issue class action. And more importantly, an issue class action could bind both plaintiffs and defendants to the outcome of a

97. FED. R. CIV. P. 23(c)(4)(A).

98. *See, e.g.*, Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 274-75 (explaining that courts in the 1980s "brought Rule 23(c)(4)(A) into the mainstream" in asbestos cases, although before that time "mass tort cases—the most prominent of class actions—were rarely certified").

99. *See, e.g.*, *In re* Sch. Asbestos Litig., 789 F.2d at 1008 (noting that despite Advisory Committee warning to the contrary, "there is growing acceptance of the notion that some mass accident situations may be good candidates for class action treatment").

100. *See e.g.*, Arthur Young & Co. v. United States District Court, 549 F.2d 686, 692 (9th Cir. 1977) (citing (c)(4)(A) along with Rule 42(b) to approve the lower court's class action bifurcation plan); Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 113 (E.D. Va. 1980) (explaining that Rule 23(c)(4)(A) may be employed to "bifurcat[e] the class actions here certified between liability issues and damage issues"); Hines, *supra* note 9, at 729-36 (detailing history of the judicial interpretation of Rule 23(c)(4)(A)).

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

102. *Sch. Asbestos Litig.*, 789 F.2d at 1008.

single adjudication of a particular issue, rather than the one-way preclusion against defendants offered by collateral estoppel.[103]

Compared to a (b)(3) class action, the issue class action appeared even more tempting, holding out the promise of binding issue preclusion on all issues common to class members without being bogged down by any of the complex, individualized issues raised by class claims (such as causation, injury, affirmative defenses, and damages). Following the resolution of the issue class action, class members would be expected to file separate lawsuits in other fora in order to litigate all the individual issues left unresolved by the class action.[104]

This exclusion of noncommon issues from the issue class action, moreover, convinced issue class action proponents that (c)(4)(A) fundamentally alters the (b)(3) predominance inquiry, essentially eliminating that requirement altogether.[105] If an issue class action consists only of common issues, then by definition those common issues must predominate over individual issues because the action contains no individual issues at all.[106] The implication of this interpretation for mass tort class actions is significant, especially in light of the recent series of appellate decisions rejecting classes for failure to satisfy the predominance test.[107] If the predominance test does not apply to issue class actions, or applies in a less stringent manner, a seemingly insurmountable objection to mass tort class actions melts away.[108]

One early judicial proponent of this view of (c)(4)(A) dismissed as "illogical" the argument that, even in an issue class action, (b)(3) requires that all issues raised by class claims be considered in conducting the predominance inquiry, and that common issues outweigh the individual issues in the case as a whole.[109] Instead, the court explained, analysis of the predominance requirement in issue class actions

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103. *See* Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 338-39 (5th Cir. 1982); *supra* note 43 and accompanying text; *see generally* Ratliff, *supra* note 52.

104. *See* Romberg, *supra* note 98, at 266.

105. *See, e.g.*, Romberg, *supra* note 98, at 263 (claiming that issue class actions can "fundamentally revamp the nature of class actions").

106. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION THIRD, *supra* note 30, § 30.17 (urging courts to consider only "the certified issues" when conducting the (b)(3) predominance analysis for issue class actions); 2 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4.23 (4th ed. 2002) (asserting that (c)(4)(A) issue class actions "automatically satisfy[] the predominance test under Rule 23(b)(3)"); Romberg, *supra* note 98, at 295-96 (arguing that in issue class actions, "common issues predominate by definition" because "the scope of the entire controversy that will be resolved in the suit *is* the common issues") (emphasis in original).

107. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002); Lienhart v. Dryvit Sys., Inc., 255 F.3d 138 (4th Cir. 2001); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); *In re* Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996); *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768 (3d Cir. 1995); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).

108. *See, e.g.*, Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving* Amchem Products, Inc. v. Windsor, 59 OHIO ST. L.J. 1155, 1184 (1998) (criticizing the Court in *Amchem* for failing to recognize that issue class actions "confer[] advantages of economy, while preserving fairness interests, in nearly any case in which a large number of plaintiffs sue a common defendant for exposure to the same product").

109. *In re* Tetracycline Cases, 107 F.R.D. 719, 727 (W.D. Mo. 1985).

"is quite different than in the usual application of Rule 23(b)."[110] Several other courts similarly adopted an expansive view of the issue class action, emphasizing that (c)(4)(A) could play an important role in mass tort cases involving complex individual issues.[111]

In *Valentino v. Carter-Wallace, Inc.*, the Ninth Circuit became one of the few appellate courts to address Rule 23(c)(4)(A) and its interplay with the (b)(3) predominance requirement.[112] Siding with issue class action advocates, the *Valentino* court made clear that lower courts should consider the issue class action alternative authorized by (c)(4)(A): "Even if the common issues do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."[113] As in the rule itself, however, the court provided little guidance as to when such an issue class action would be "appropriate."

The majority of commentators have also looked favorably on the issue class action alternative, often embracing it as one of the best solutions to the mass tort dilemma.[114] As explained by a leading treatise on class actions: Thus, "when common questions do not predominate when compared to all questions that must be adjudicated to dispose of a suit, Rule 23(c)(4) asks whether a suit limited to the unitary adjudication of a particular common issue" can be certified. Similarly, the Federal Judicial Center's Manual for Complex Litigation urges consideration of the issue class action in cases that otherwise "may either not qualify under the rule or be unmanageable as a class action."[115] One recent article devoted to the subject of issue class actions trumpeted (c)(4)(A) as playing a heroic role in offering courts

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110. *Id.*; *see also In re* A.H. Robins Co., 880 F.2d 709, 740 (4th Cir. 1989) ("[C]ourts should take full advantage of the provision in subsection (c)(4) permitting class treatment of separate issues in the case and, if such separate issues predominate sufficiently (i.e., is [sic] the central issue), to certify the entire controversy . . . .").

111. *See, e.g.*, Castano v. Am. Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996); *In re* Copley Pharm., Inc., 161 F.R.D. 456 (D. Wyo. 1995); Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410 (N.D. Ill. 1994), *rev'd on writ of mandamus sub nom.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995). *But see* Caruso v. Celsius Insulation Resources, Inc., 101 F.R.D. 530, 538 (M.D. Pa. 1984) (rejecting a request for a "reevaluation" of plaintiffs' formaldehyde exposure claims under (c)(4)(A) "should we decline to certify the entire matter"). The *Caruso* court emphasized that "any 'common issue class' certified under Rule 23(c)(4)(A) must still comply with the other applicable subdivisions of Rule 23." *Id.*

112. 97 F.3d 1227 (9th Cir. 1996).

113. *Id.* at 1234.

114. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION THIRD, *supra* note 30, § 30.17; CONTE & NEWBERG, *supra* note 106, § 4.23; 7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE JURISDICTION § 1780 (2d ed. 1986); Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79, 95-96 (1994); Davis, *supra* note 3, at 209-10; Romberg, *supra* note 98, at 298; Woolley, *supra* note 92, at 500-01.

115. MANUAL FOR COMPLEX LITIGATION THIRD, *supra* note 30, § 30.17 (noting that the issue class action has "so far [been] little used"); *see also* WRIGHT & MILLER, *supra* note 114, § 1770 (opining that "(c)(4) is particularly helpful in enabling courts to restructure complex cases to meet the other requirements of maintaining a class action"); Romberg, *supra* note 98, at 263 ("[C]ases that do not otherwise meet the predominance and superiority requirements of Rule 23(b)(3) can be certified as issue classes.").

the means to accomplish severance of "the bathwater [complex individual issues] from the baby [common liability issues]" in mass tort cases.[116]

While few appellate courts have yet considered the question, it is only a matter of time before they will be forced to weigh in to the controversy.[117] District courts everywhere are inundated with requests for certification of issue class actions as an alternative option to (b)(3) class actions, and many have expressed frustration with the lack of appellate guidance on the viability of an issue class action "alternative."[118] Faced with conflicting interpretations of Rule 23(c)(4)(A), district courts have split along the fault lines of the issue class action. A number of courts have followed the narrow view of (c)(4)(A), insisting on a whole case predominance approach,[119] but an equal number of district courts have championed the issue class action as a vital aggregation procedure that can operate even where class claims raise predominantly individual issues.[120]

### *B. The Proper Interpretation of Rule 23(c)(4)(A)*

As I concluded in an earlier article analyzing the subject at greater length and summarized below, this debate should be definitively resolved against the interpretation of (c)(4)(A) as authorizing expansive issue class actions.[121] Rule 23 demands satisfaction in all class actions of the four prerequisites set forth in subdivision (a)—numerosity, typicality, commonality, and adequacy—and then delineates four categories of class actions authorized by the rule: the necessary party class actions mandated by (b)(I)(A) and (B), the injunctive or declaratory relief class action authorized by (b)(2), and the discretionary class action permitted by (b)(3). Subdivision (b), in other words, exhausts all available types of class actions.

Subdivision (c), on the other hand, addresses various aspects of judicial management in the conduct of class actions, such as the provision for notice in (b)(3) class actions,[122] the timing of a class certification decision,[123] the division of

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116. *See* Romberg, *supra* note 98, at 256.

117. *See, e.g.*, Robinson v. Metro-North Commuter R.R., 267 F.3d 147, 167 n.12 (2d Cir. 2001). While the Second Circuit in *Robinson* addressed the issue class action question only in dicta, its criticism of the district court for failing to consider issue certification under (c)(4)(A) suggests its predisposition in favor of an issue class action alternative to (b)(3) class actions. *Id.*

118. *See, e.g.*, Rink v. Cheminova, Inc., 203 F.R.D. 648, 670 (M.D. Fla. 2001) (noting that (c)(4)(A) itself is "less than clear," and that "courts are not in agreement on the relationship between these [(b)(3) and (c)(4)(A)] subsections"); *In re* Am. Honda Motor Co., Inc. Dealer Relations Litig., 979 F. Supp. 365, 367 n.3 (D. Md. 1997).

119. *See, e.g.*, Augustin v. Jablonsky, 2001 WL 770839, at *14 (E.D.N.Y. Mar. 08, 2001) (No. 99CV3126); Cohn v. Massachusetts Mut. Life Ins. Co., 189 F.R.D. 209, 217-18 (D. Conn. 1999); *In re* Jackson Nat'l Life Ins. Co., Premium Litig., 183 F.R.D. 217, 224 (W.D. Mich. 1998); Arch v. Am. Tobacco Co., 175 F.R.D. 469, 496 (E.D. Pa. 1997), *aff'd*, 161 F.3d 127 (3d Cir. 1998).

120. *See, e.g.*, Simon v. Philip Morris, Inc., 200 F.R.D. 21, 28-31 (E.D.N.Y. 2001); Campion v. Credit Bureau Servs., Inc., 206 F.R.D. 663, 676 (E.D. Wash. 2001) (conducting predominance analysis on an issue-by-issue basis rather than on the case as a whole); Slaven v. BP Am., Inc., 190 F.R.D. 649, 657 (C.D. Cal. 2000) (same).

121. *See* Hines, *supra* note 9, at 763-64.

122. FED. R. CIV. P. 23(c)(2).

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

a certified class action into subclasses,[124] and the binding nature of class action judgments.[125] The ambiguous language of (c)(4), permitting actions to be brought "with respect to particular issues," may indeed tempt one to believe the provision permits a fifth species of class action, one limited to "particular issues" and therefore immune to the constraints of the (b)(3) predominance requirement. If this were true, however, why would this class action alternative reside in subdivision (c) of Rule 23 rather than among the other class action types set forth in subdivision (b)? Indeed, it appears virtually buried in the middle of subdivision (c), whose other provisions address matters of judicial management in the conduct of a class action certified pursuant to subdivision (b). Basic principles of rule construction preclude the expansive reading of (c)(4)(A) issue class action proponents have championed. Its placement in the context of Rule 23 as a whole, coupled with the evidence of its framers' intentions regarding its minor clarifying role, negates any interpretation of (c)(4)(A) as offering a fifth class action option, an alternative for courts to consider when (b)(3) cannot be satisfied.

As the Fifth Circuit concluded in *Castano v. American Tobacco Co.*, district courts should not be permitted to "manufacture predominance through the nimble use of subdivision (c)(4)."[126] The court reiterated the bifurcation function of (c)(4)(A), flatly rejecting the notion that the provision authorized an end run around (b)(3) predominance: "Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended."[127]

The most persuasive interpretation of this provision is that it represents the class action version of bifurcation. Similar to Rule 42(b), which provides judicial authority to bifurcate claims and issues for separate trial,[128] Rule 23(c)(4)(A) simply permits the severance of common from individual issues, allowing the former to be adjudicated on a representational basis even if the latter require individualized assessment.[129]

This bifurcation theory of (c)(4)(A) not only makes sense of the provision in the context of Rule 23 as a whole, it also appears to have been precisely what the framers of Rule 23 intended.[130] The Advisory Committee note regarding (c)(4)(A), for example, reflects its understanding of the provision as permitting issues

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

125. FED. R. CIV. P. 23(c)(3).

126. 84 F.3d 734, 745 n.21 (5th Cir. 1996).

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

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

129. *Cf.* Romberg, *supra* note 98, at 265-66 (explaining that "[t]he most familiar use of Rule 23(c)(4)(A)" is to conduct a bifurcated class action).

130. *See* Hines, *supra* note 9, at 752-61.

common to the class to be conducted on a class basis, with the understanding that "the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims."[131] Moreover, the Advisory Committee's note explicating (b)(3) predominance refers to the same class action example the Committee cited to explain the proper use of (c)(4)(A). This overlap underscores the complementary nature of (c)(4)(A) and (b)(3) and the Committee's desire to emphasize that class actions may still be permitted even when individual issues must be determined separately.[132]

The Advisory Committee's deliberations and drafting sessions also reflect its modest intentions regarding the role of (c)(4)(A). As evidenced in the transcripts of the Committee's meetings and its correspondence, (c)(4)(A)'s authors viewed the provision as an "obvious point,"[133] a "picky"[134] but "perhaps a useable detail."[135] The Committee intended for the provision to clarify what was already implicit in (b)(3) itself: a class action should not be rejected simply because some issues raised by class claims could not be resolved on a class basis, so long as the class action contained predominantly common issues. In light of its language, structural context, and framers' intent, the present Rule 23(c)(4)(A) thus cannot bear the weight of the expansive issue class action. The following Part considers the policy and constitutional implications of amending Rule 23 in order expressly to authorize such a class action type.

## III. THE LEGITIMACY AND WISDOM OF THE ISSUE CLASS ACTION

This Article has thus far considered the origins of the issue class action concept, examining the mass tort landscape that set the stage for its emergence and explaining its understandable allure. Given that the current class action rule cannot be interpreted to authorize the issue class action as conceived by its most ardent proponents, however, the remainder of the Article addresses the much more challenging policy question: should class action law be expanded to encompass the issue class action? To meaningfully answer that question requires analysis of fundamental principles of due process law in the context of representational litigation, as well as a more pragmatic evaluation of the relative efficiencies at stake. In short, this Part concludes that the issue class action does not live up to its promise—it suffers in many respects from the same concerns that have led courts to strike down mass tort class actions generally, and its narrow common issue scope threatens to undermine both its legitimacy and its efficacy.

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131. FED. R. CIV. P. 23(c)(4)(A) advisory committee's note.

132. FED. R. CIV. P. 23(b)(3) advisory committee's note; *see also* Hines, *supra* note 9, at 755-57 (discussing the overlap between the (c)(4)(A) and (b)(3) Advisory Committee notes and the case relied upon by the Committee in support of both provisions).

133. *Civil Rules Advisory Committee Meeting*, Oct. 31-Nov. 2, 1963. Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, No. C1-7104-53 [hereinafter Civil Rules Advisory Comm.]; *see also* Hines, *supra* note 9, at 756.

134. Letter from Charles Allen Wright to Benjamin Kaplan (March 30, 1963), *in* Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, No. C1-7001-41; *see also* Hines, *supra* note 9, at 758.

135. Civil Rules Advisory Comm., *supra* note 133; *see also* Hines, *supra* note 9, at 758.

### *A. Individual Autonomy and Representational Legitimacy*

Over sixty years ago, the Supreme Court recognized a central tenet in the centuries-old traditions of Anglo-American jurisprudence: "one is not bound by a judgment in personam in a litigation in which he is not designated as a party."[136] More colloquially, individual litigants are said to have a right to their "day in court,"[137] to participate and be heard, to retain counsel of their choice, to pursue a litigation strategy of their own choosing.[138] In short, litigants ordinarily possess the due process right to exercise individual autonomy in the adjudication of their legal rights.[139] To displace that autonomy, as in a class action authorizing representational litigation,[140] the state must offer a compelling justification.

Recent judicial and scholarly attention has focused on the proper boundaries of class action law, considering a number of proposed justifications for giving binding effect to a judgment entered on a representative basis.[141] The state-authorized preclusion of an individual's day in court in favor of a class action-based delegation of litigation authority obviously carries with it significant due process implications, and recent interpretations of the class action rule have emphasized the due process protections reflected therein.[142] The proper due process analysis for class actions requires at least two levels of inquiry. First, under what conditions can the state delegate to a private party the power to represent the rights of others in a class action? Second, assuming sufficient justification exists for permitting representational litigation, how ought the class to be governed and what assurances of adequate representation must be provided to absent class members?[143] While

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136. Hansberry v. Lee, 311 U.S. 32, 40 (1940).

137. *See* Martin v. Wilks, 490 U.S. 755, 762 (1989) (quoting WRIGHT ET AL., *supra* note 52, § 4449); *see also id.* ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.").

138. *See* John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 608-10 (1984).

139. *See* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 63 TEX. L. REV. 571, 572 (1997) (acknowledging that "core precept of the American constitutional tradition: Individuals have a right 'to be heard and participate in [any] litigation' which purports to extinguish their rights") (quoting Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985)).

140. *See, e.g.*, Bone, *supra* note 114, at 214-15 (noting that "the presence of representation in adjudication" appears at odds with traditional notions of "the individual litigant's freedom to make her own choices about how best to conduct a lawsuit").

141. *See, e.g.*, Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 181 (2003) (explicating a "preexistence principle" that begins with the recognition that "the class action has no roving authority to alter unilaterally class members' preexisting bundle of rights").

142. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (acknowledging the "inherent tension between representative suits and the day-in-court ideal"); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) (concluding that due process forbids exercises of jurisdiction over out-of-state plaintiffs absent notice, opportunity to be heard, and opportunity to opt out).

143. *See* Issacharoff, *supra* note 93, at 390 (emphasizing the need to disentangle the "structured inquiry to insure that the preconditions for subsuming individual claims within a collective action are met, and the separate issue of the legitimacy of representational governance that protects the interests of the absent class members that will be bound to a final decree"); Nagareda, *supra* note 141, at 185 (emphasizing, in the context of settlement

both of these questions deserve close study, the former lies at the heart of this Article's consideration of the legitimacy and wisdom of the issue class action.

The analysis begins with the legitimizing principles that support the class actions currently authorized by Rule 23. The first two class actions can be regarded as class action equivalents to the necessary party rule.[144] In other words, the interests of either the plaintiff class or the defendant cannot be fairly served by separate, individual litigation, necessitating adjudication on a class basis. Rule 23(b)(1)(A) class actions protect against the risk of "incompatible standards of conduct for the party opposing the class," just as Rule 19(a)(ii) requires joinder of persons not named as parties if their absence leaves one of the parties in the lawsuit "subject to a substantial risk of incurring . . . inconsistent obligations."[145] Similarly, the class action rule justifies (b)(1)(B) classes in order to protect the interests of class members that would be "substantially impair[ed] or impede[d]" absent collective adjudication, using the same language found in Rule 19(a)(i) to require joinder of such persons in a traditional lawsuit. The classic (b)(1)(B) example, as examined recently by the Supreme Court, is the limited fund. In these situations, the defendant has a fmite, limited fund with which to satisfy all claimants against it, and individual litigation will deplete that fund before the claims of all persons could be heard.[146]

Finally, Rule 23(b)(2) is also treated as a mandatory, necessary class action because the class representative seeks injunctive relief on behalf of the class. Even absent a class action, injunctive relief affects the interests of people other than the named representative, as they benefit or suffer as a group from the conduct that forms the basis for the request for injunctive relief.[147] These class actions, then, also reflect representation by necessity. Just as in the necessary party rule, (b)(1) and (b)(2) class actions seek to ensure fair treatment of plaintiffs and defendants by requiring the delegation of authority to litigate collectively.[148]

Whatever the propriety of the necessity justification, however, it cannot explain the delegation of representational authority in the (b)(3) class action. In a

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class actions, that class certification questions depend on "whether an implied delegation of power to class counsel exists in the first place, apart from whether that power has been exercised in a permissible fashion in the class settlement at hand"); *cf.* John E. Kennedy, *Digging for the Missing Link*, 41 VAND. L. REV. 1089, 1091 (1988) ("The court's first decision, to recognize a class, grants the group a form of power. Immediately thereafter the court decides whether the persons seeking to represent the class are worthy representatives.").

144. *Cf.* FED. R. CIV. P. 19.

145. FED. R. CIV. P. 19(a)(ii).

146. *See Ortiz*, 527 U.S. at 834-41 (interpreting limited fund rationale).

147. *See* Issacharoff, *supra* note 93, at 360 (discussing compulsory nature of (b)(2) classes because "should the plaintiffs prevail, the defendant will already have been legally coerced into a defined course of conduct that must be applied to all similarly situated individuals. These cases are not representative actions in any meaningful sense since individual claimants have no choice but to have their rights fully adjudicated in this proceeding.").

148. *But see* Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687, 691 (1997) (criticizing mandatory nature of (b)(2) class actions based on necessity justification: "[I]n such situations there are often several plausible courses of action that would improve the situation of the class members, yet the representatives are seeking, in the name of the class, only one avenue of relief.").

(b)(3) class action, the defendant is not at risk of inconsistent obligations—the payment of damages to some plaintiffs but not others has been consistently rejected as grounds for requiring collective resolution of claims.[149] Likewise, absent a limited fund, plaintiffs seeking damages from a defendant cannot argue that another plaintiff's lawsuit risks the impairment of their interests. Due process forbids issue preclusion against plaintiffs based on a defense judgment in a prior case.[150] Therefore, a legitimizing principle other than necessity must be found.

The most obvious one may be efficiency. Class action resolution of a common issue relating to the defendant's conduct potentially serves the efficiency goal of preventing duplicative litigation of that issue across a large number of individual lawsuits, saving judicial and litigant resources.[151] But efficiency alone cannot justify the delegation of representational authority.[152] Such a rationale obviously proves too much. Compared to the resolution of common issues in a class action, "individualized justice is inherently inefficient."[153] Due process, however, has never countenanced sublimation of individual rights solely on the basis of efficiency.[154] Rather, participation of litigants—the opportunity to be heard—represents perhaps the most essential mandate of the Due Process Clause.[155]

Nor can the legitimacy of a (b)(3) class action rest on some notion of exigency in a particular case. If the requirements set forth in the rule cannot be met, it is no answer to argue that a backlogged docket of cases nevertheless warrants class

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149. *See, e.g.*, *In re* Bendectin Prods. Liab. Litig., 749 F.2d 300 (6th Cir. 1984); ARTHUR MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT AND FUTURE 43 (1977) ("The risk of paying money to some and not others is not what the rule-makers intended by the words 'incompatible standards of conduct.'").

150. *See supra* text accompanying note 37.

151. *See* Rubenstein, *supra* note 22, at 434 (identifying efficiency as the "primary argument for aggregation in mass tort cases").

152. *See, e.g.*, *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020 (7th Cir. 2002) (rejecting class certification while railing at the "central planning" model of adjudication that fixates on efficiency at the expense of other important goals such as accuracy and fairness).

153. Yeazell, *supra* note 148, at 691; *see also* Edward Brunet, *The Triumph of Efficiency and Discretion over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 306 (1991) (bemoaning courts' increasing resort to more "efficient" solutions in complex litigation: "Underlying the triumph of efficiency over competing policies, there are difficult trade-offs, pitting efficiency against the historically and functionally significant policies of federalism and fairness.").

154. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (rejecting efficiency argument that plaintiffs need not provide individual notice to class members who could be easily identified); *cf.* Miller, *supra* note 28 (criticizing courts for appearing to place judicial efficiency interests above litigants' fundamental right to a day in court).

155. *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 476 (1986) (noting Supreme Court's emphasis on the value of "the individual's interest in having an opportunity to convince the decisionmaker that he deserves the right at issue"); *see also* Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80 (1988) (upholding due process right to notice of default judgment proceeding even where defendant had no meritorious defense); Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209 (1958) ("[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.").

action certification.[156] The Supreme Court's recent class action jurisprudence wisely has eschewed any such instrumental view of the class action in contemplating the authority for representational litigation. As it acknowledged in *Amchem*, "a nationwide administrative claims processing regime would provide the most secure, fair and efficient means of compensating victims of asbestos exposure."[157] But representational litigation cannot be justified on those grounds alone.[158]

One class action scholar, analyzing modern class action law through the lens of historic group litigation theories, has argued that representation of interests provides the most persuasive justification for class actions today.[159] While the demand for similarity of interests is indeed reflected throughout Rule 23, shared interests must be regarded as a necessary but not a sufficient justification for divesting individual litigation autonomy. As one critic of the interest theory cogently explained, this justification of representational litigation "questions the capacity of individuals to make intelligent choices regarding representation, participation, and the pursuit of their own interests. At its core, [it] rests upon a judicial paternalism that is paradoxically at odds with individual autonomy and other democratic values."[160]

In cases involving significant personal claims for damages, where individual autonomy interests run high and representation cannot be justified by necessity, a stronger justification for empowering representational litigation must be found than efficiency, exigency, or common interest. Representation by consent, or implied

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156. *Cf.* Ortiz v. Fibreboard Corp., 527 U.S. 825, 862 (1999) (rejecting argument that class action standards should be relaxed due to the unusual exigent circumstances of the case at hand); *In re* Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990) (concluding that class action failed (b)(3) requirements despite "compelling" argument that proposed procedure "is the only realistic way of trying these cases").

157. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997).

158. *See, e.g.*, WRIGHT ET AL., *supra* note 52, § 4455, at 486 (cautioning against temptation to "subordinate traditional insistence on individual control of individual claims to a new view that a generally fair procedure for aggregate disposition satisfies due process, never mind that occasional results will be untoward"); Nagareda, *supra* note 141, at 184 ("A good deal, in itself, cannot make for a permissible class, however, because the permissibility of the class is what legitimizes the dealmaking power of class counsel in the first place.").

159. *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 15 (1987). One of the earliest examples of group litigation was based on class members' shared association or community, such as representation by a union or residents of a community challenging an infringement of a right held by the community. *See, e.g.*, Mayor of York v. Pilkington, 25 Eng. Rep. 946 (Ch. 1737). Such cases, however, depend on an association among class members that preexists the litigation, which will not be found in cases where numerous, dispersed individuals suffer harm that gives rise to individual claims for money damages. *See* Coffee, *supra* note 61, at 383-84 ("Although the extent to which these historical examples [of prior association] provide relevant models for today can reasonably be debated, it seems doubtful that individuals who are simply seeking money damages in a class action because of a common injury . . . share any meaningful prior associations or community."); Issacharoff, *supra* note 93, at 366 (discussing a need to find legitimizing principle for (b)(3) class actions where "there is no preexisting political or organizational vehicle that can claim an independent source of authority to speak for the collective").

160. Kennedy, *supra* note 143, at 1119; *see also* Coffee, *supra* note 61, at 384 (identifying the shared interest theory as "[p]robably the weakest normative basis for deeming individuals to belong to a collective entity that can determine their rights").

consent, provides that justification.[161] The central tenet of representation in a political democracy, of course, is that "the actions of government must be based upon the consent of the governed."[162] Representation in litigation differs in important respects from political representation,[163] but the consent theory of representation best explains the delegation in (b)(3) class actions to private parties (class representatives) of binding, representational authority over individuals who would otherwise enjoy the right to litigant autonomy.[164] The legitimacy of a (b)(3) class action, therefore, rests on finding sufficient indicia of consent in "the uncharted territory between . . . actual consent . . . and the political consent thought to legitimate public legislation."[165]

While it does not require actual consent from each represented class member,[166] the structure of (b)(3) itself focuses on a consent-based analysis. The consent of class members may be inferred after a finding of adequate class cohesiveness (found through the predominance requirement), coupled with consideration of the viability of individual lawsuits, the personal nature of the claim, and the efficiencies to be gained by collective litigation (inquiries mandated by the superiority requirement). If predominance and superiority requirements have been met, a court may reasonably infer consent to the delegation of representational authority to the class representative and class counsel. And the rule further

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161. *Cf.* John C. Coffee, Jr., *Conflicts, Consent, and Allocation After* Amchem Products—*Or, Why Attorneys Still Need Consent to Give away Their Clients' Money*, 84 VA. L. REV. 1541, 1557 (1998) (asserting that "personal consent is [no] less important with regard to surrendering one's rights in a [(b)(3) class action] than with regard to other fundamental decisions").

162. James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 458 (1999); *see also* Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving* Amchem Products, Inc. v. Windsor, 59 OHIO ST. L.J. 1155, 1193 (1998) (quoting SIDNEY HOOK, POLITICAL POWER AND PERSONAL FREEDOM 67-68 (1965) ("This capacity to choose is an important aspect of humanity and has value in itself.")).

163. *See* Coffee, *supra* note 61, at 384 ("But legislative bodies are different from the class action in a variety of ways, the most notable of which is that the representative is held accountable through regular elections."); Nagareda, *supra* note 141, at 157 (emphasizing that unlike public legislation, such as the federal 9/11 Fund statutory scheme, class action law does not authorize alteration of preexisting substantive rights of class members).

164. *See* Kennedy, *supra* note 143, at 1115. Professor Kennedy argues that "[a] number of conceptual analogies are much closer to the concept of class representation than the concept of political representation," including law relating to corporations or agency principles in tort or contract law. Yet those concepts similarly require consideration of the consent (actual or implied) of the represented. Other analogies, such as the guardian relationship involving minors or incompetents, are based on necessity of representation.

165. Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 795 (2002); *see also* Coffee, *supra* note 61, at 381 (opining on difficulty of determining in a class action, short of actual consent, "when consent should be inferred").

166. *Cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812-13 (1985) (rejecting the argument that due process requires actual consent: "Requiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are [sic] required to make it economical to bring suit."); Issacharoff, *supra* note 93, at 370 ("[A]ny requirement that the [actual] consent of all the governed is the prerequisite to judicial approval of the maintenance or settlement of a class action threatens the viability of this aggregative tool.").

recognizes individual autonomy by notifying class members of the action on their behalf and enabling them to rebut the judicial inference of their consent by opting out of the class action.

If indeed consent theory best justifies representational litigation in (b)(3) class actions, the issue class action should be evaluated against that model. The following sections will consider in turn each of the (b)(3) factors that, in toto, permit a court to infer class consent to representational litigation. The beginning of that analysis is consideration of the normative value of predominance, the evasion of which is the primary goal and appeal of the issue class action.

### *B. The Issue Class Action and the Evasion of Predominance*

The predominance inquiry serves a vital role in permitting an inference of consent to representational litigation in a (b)(3) class action. Its presence in the rule makes clear that the bare existence of a common question, all that Rule 23(a) commonality requires, will not suffice to wrest litigative autonomy from class members who have the right to pursue individual litigation.[167] Rather, the predominance test demands a finding of supercommonality in the proposed class action. It requires careful assessment of the overall character of the class action, weighing the issues common to the class against the set of issues that separate the class. And that overall view of class claims must reveal that class members are more alike than different. When the claim of the class representative varies little from the individuals whom she seeks to represent, absent class members can trust that the litigation resource and strategy decisions of such a representative would equally serve their interests.[168] In other words, predominance serves an important role in satisfying courts that the interests of absent class members are so well protected that one can rationally infer consent to this extraordinary form of adjudication.[169]

In *Amchem Products, Inc. v. Windsor*, the Supreme Court emphasized the safeguarding function served by predominance: to prevent representational litigation in cases where class members' claims are too diverse.[170] In *Amchem*, the Court struck down the proposed class action for failure to satisfy the predominance requirement, pointing to the disparate nature of class members' claims and the paucity of common issues.[171] The "mission" of the (b)(3) predominance inquiry, as

167. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623-24 (1997) (explaining that "the predominance criterion is far more demanding" than the 23(a) commonality requirement).

168. *Cf.* Coffee, *supra* note 161, at 1557 (observing that "trust is the precondition to consent").

169. *See* Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 467 (1997) ("[B]ecause of the predominance of common questions, it was also reasonable to suppose that class members were willing to have the class attorneys represent them. No such supposition can be justified in the mass tort situation in which the claims are large and diverse.").

170. 521 U.S. 591, 620 (1997) (referring to the Rule 23 "standards set for the protection of absent class members" and the "safeguards provided by the Rule 23(a) and (b) class-qualifying criteria").

171. *Id.* at 624 ("Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of

the Court explained, is to "assure the class cohesion that legitimates representative action in the first place. The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[172] Representational litigation cannot be authorized, in other words, where class members' claims are riddled with varying factual and legal questions that belie class unity.[173]

Some commentators have questioned the cohesiveness-ensuring function of predominance, criticizing the Court for embracing an unduly technical, formalistic view of Rule 23.[174] First, cohesiveness does not stand out in the rulemaking history as the chief aim of the Advisory Committee in drafting the predominance requirement. As Professor John Coffee argues:

> Rule 23(b)(3)'s requirements seem much more closely linked to considerations of judicial efficiency than to concerns about absent class members . . . . [T]he more closely one examines the context in which the 'predominance' test was framed as part of the 1966 revisions of Rule 23, the more likely it seems that the draftsmen's primary intent was to confine Rule 23(b)(3) within judicially manageable limits.[175]

Indeed, the advisory committee notes on predominance contend that "[i]t is only where this predominance exists that economies can be achieved by means of the class-action device."[176] But the committee also recognized that (b)(3) class actions could only be justified where those efficiencies could be accomplished for "persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[177]

While the framers' intentions with respect to predominance may be ambiguous, conceptualizing predominance as serving the goal of efficiency certainly does not preclude service of another function, ensuring cohesiveness. The Eleventh Circuit has embraced this dual nature of the predominance test:

> The predominance and efficiency criteria are of course intertwined. When there are predominant issues of law or fact, resolution of those issues in one proceeding efficiently resolves those issues with regard to all claimants in the class. When there are no predominant issues of law or fact, however . . . class treatment would be either singularly inefficient, as one court attempts to resolve diverse claims from around the country in its courtroom, or unjust, as the various factual and legal nuances of particular claims are lost in the press to clear the lone court's docket.[178]

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those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.").

172. *Id.* at 623; *see also id.* ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.").

173. *See, e.g.*, Rubenstein, *supra* note 22, at 378 (acknowledging that (b)(3) predominance "ensures the cohesive nature of the group").

174. *See, e.g*, Issacharoff, *supra* note 93, at 351 (bemoaning the Court's "retreat to rules formalism").

175. Coffee, *supra* note 61, at 400 (criticizing *Amchem*'s "cohesion thesis [because] its historical foundations are shaky").

176. FED. R. CIV. P. 23 advisory committee's note, 1966 amendment.

177. *Id.*

178. Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1006 n.12 (11th Cir. 1997).

Moreover, our task is not to determine what goals its framers may have intended predominance to serve. Indeed, in the context of considering the policy implications of authorizing a new form of class action never conceived by those framers, it would seem quite anachronistic to impose limits on the role it should play in such a class action solely based on its intended meaning in broader class actions. Therefore, whatever its framers intended, the important inquiry here is to consider the functions predominance *does* serve in the class actions it facilitates. As it serves both efficiency and cohesiveness goals, its satisfaction assists in the process of determining the propriety of inferring consent.

Professor Coffee also argues that predominance should not be interpreted as a guarantor of cohesiveness because satisfaction of the prerequisites in Rule 23(a) adequately serves that goal. Typicality in particular, Coffee asserts, assures that "'typical' representatives will have interests sufficiently aligned with those of other class members" to authorize class litigation.[179] Because of this "overlap[]," Coffee explains that it would be "redundant to read the predominance test of Rule 23(b)(3) as having the same goal in mind."[180] Others, however, have explained (b)(1) and (b)(2) class action requirements as similarly, albeit through different means, seeking to ensure class cohesion.[181] And, of course, many of the Rule 23 requirements overlap.[182]

At the very least, predominance already overlaps with commonality—by requiring not only common questions but predominantly common questions.[183] Why, then, should we deem it redundant to assume that predominance also requires a degree of class cohesiveness higher than Rule 23(a) typicality and adequacy? As acknowledged by the Court in *Ortiz v. Fibreboard Corp.*, "the same concerns that drive the threshold findings under Rule 23(a) may also influence the propriety of the certification decision under the subdivisions of Rule 23(b)."[184] One may indeed rightly criticize Rule 23 for permitting (b)(1) and (b)(2) classes on a showing of less cohesiveness than required of a (b)(3) class,[185] but that argument only suggests

179. Coffee, *supra* note 61, at 402.

180. *Id.*

181. *See, e.g.*, Arthur R. Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 299, 315 (describing how mandatory (b)(1) and (b)(2) class actions "tend to be cohesive groups because the rule requires that the members have similar interests in the subject matter of the litigation or be seeking relief applicable to all of them"); Rubenstein, *supra* note 22, at 378 (explaining that the limited fund in (b)(1)(B) class actions provides the "necessary conceptual glue" to ensure class cohesion).

182. *See, e.g.*, CONTE & NEWBERG, *supra* note 106, § 4.22 ("There is considerable overlap between Rule 23(a)(2) and (b)(3)."); WRIGHT ET AL., *supra* note 52, § 1764 ("Some of the tests that have been suggested for applying [typicality] also could be employed to determine whether one of the other prerequisites in Rule 23(a) has been met.").

183. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 609 (1997) (recognizing that "Rule 23(a)(2)'s 'commonality' requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other questions").

184. 527 U.S. 815, 856 n.31 (1999).

185. *See, e.g.*, Coffee, *supra* note 61, at 435 (requiring heightened scrutiny of class cohesiveness in mandatory class actions "makes good normative sense, [and] supplies the necessary deterrent to prevent the misuse of Rule 23(b)(1) and (b)(2) class actions as a means of evading the greater procedural protections built into Rule 23(b)(3)"); *cf.* YEAZELL, *supra* note 159, at 253 (critiquing the mandatory nature of the (b)(2) class action because it

heightening the overly lax scrutiny mandated by Rule 23(a). It does not support an interpretation of (b)(3) predominance that focuses exclusively on efficiency, nor does it suggest that consent to representational litigation should not require high standards of class cohesiveness to protect absent class members' autonomy.

For some advocates of the issue class action, the predominance requirement has been interpreted either as irrelevant or automatically satisfied.[186] Indeed, this reflects the issue class action's primary appeal: that it excludes pesky individual issues and therefore evades the predominance obstacle to class certification.[187] But if predominance serves to confirm class cohesiveness, thereby permitting an inference of consent to representational litigation, an issue class action lacking predominance also lacks legitimacy. Courts cannot indulge the assumption that class members would consent to adjudication on their behalf by a class representative whose claim varies widely from their own.

Even scholars who accept the cohesiveness function of predominance assert that issue class actions help courts better accomplish that goal.[188] By severing issues common to the class from the predominantly individual issues, it is argued, class cohesion is strengthened by the issue class action: "As the scope of the proposed collective resolution changes, the degree of cohesiveness changes accordingly: a class that might not be sufficiently cohesive to be resolved collectively in its entirety may well be sufficiently cohesive as to a subset of common issues to warrant certification of those issues."[189] Therefore, predominance is automatically satisfied by an issue class action, and perfect class cohesion is achieved.

This analysis fails to take into account, however, the fact that even under a whole case (b)(3) class action the class representative never litigates individual issues on behalf of absent class members.[190] So the delegation of litigative authority to the representative only ever applies to common issues. If predominance serves to assure consent to that delegation on the basis that class members are more homogenous than diverse, one cannot pretend that those disparities disappear just because individual issues will be litigated elsewhere. Whether class members are forced to litigate their individual issues pursuant to the class action centralizing device or free to adjudicate those issues in a forum of their own choosing, the class is no more or less cohesive with respect to the significance of the common issues.

Issue class actions, therefore, contemplate representational litigation without regard to one of the fundamental bases for inferring consent to that extraordinary

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is "more likely than in the (b)(3) cases that the interests of the group's members will conflict and will be least amenable to abstract assessment").

186. *See supra* notes 105-06 and accompanying text.

187. *See, e.g.*, David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 958 (1998) (bemoaning as "unnecessary" the current class action law that bars (c)(4)(A) issue class actions "unless there is a prior determination under 23(b)(3) that class claims predominate over the individual aspects of the case").

188. *See, e.g.*, Davis, *supra* note 3, at 222-23; Weber, *supra* note 108, at 1184 (criticizing *Amchem*'s predominance analysis for failing to recognize the (c)(4)(A) issue class action alternative: "Despite the disparities among the members of a class like *Amchem*'s, there is no reason to eschew the efficiencies of classwide determinations on such issues as whether a reasonable finder of fact could determine general causation in plaintiff's favor . . . .").

189. Romberg, *supra* note 98, at 295.

190. *See, e.g.*, Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998).

imposition on individual autonomy rights, the predominance of common issues. Indeed, it has been argued that the evasion of that "obstacle" to mass tort class actions should be hailed as a step in the right direction to resolving the mass tort dilemma.[191] But if predominance, as this Article contends, serves a vital role in justifying binding adjudication of certain issues common to the class, then issue class actions seek to authorize representation unwarranted by consent theory.

### *C. Superiority and Consent*

Even its most ardent advocates acknowledge that issue class actions should satisfy the superiority requirement of (b)(3) as a check on unwarranted issue class certification.[192] But at least two of the superiority factors focus on individual autonomy concerns that may call into question the almost tautological superiority argument in favor of the issue class action: that half a loaf must be better than none.[193] Consideration of the first two superiority factors helps assure courts of the propriety of inferring class consent to the class action, thereby shifting the burden onto class members to rebut that inference by opting out of the class action. The remaining superiority factors, while important in assessing the practical benefits to be gained by an issue class action, are less relevant to questions of consent.[194]

The first superiority factor, consideration of an individual's interest in controlling her own litigation, fares no differently for issue class actions than for whole case class actions. Related to the predominance inquiry discussed above, this factor tests whether the claims raised by the proposed class can viably be maintained in individual lawsuits.[195] The stakes at issue, of course, enormously impact this assessment. In negative value cases, where the cost of litigation exceeds the likely recovery,[196] "separatc suits would be impracticable," and class members' interest in controlling the litigation must be considered more a "theoretic" than a

191. *See supra* notes 105-08 and accompanying text.

192. *See, e.g.*, *In re* Tetracycline Cases, 107 F.R.D. 719, 726-27 (W.D. Mo. 1985); Romberg, *supra* note 98, at 298 (explaining that the (b)(3) superiority inquiry applies to issue class actions: "[T]he superiority analysis becomes central to determining whether a case should be certified as to common issues, or whether other available means of resolving the controversy would result in greater efficiency and fairness.").

193. *See* Romberg, *supra* note 98, at 298-326 (conducting superiority analysis of the issue class action).

194. *See infra* notes 227-68 and accompanying text (discussing manageability concerns, the fourth superiority factor, and other practical implications of the issue class action). The third superiority factor, "the desirability or undesirability of concentrating the litigation of the claims in the particular forum," appears chiefly concerned with the convenience of the forum chosen by the class representative. FED. R. CIV. P. 23(b)(3)(C). But it would not seem to be a factor that weighs particularly for or against the creation of an issue class action, although it may mildly influence the court in its task of divining the likelihood of class consent to litigation in that particular forum. *See* WRIGHT ET AL., *supra* note 52, § 1780, at 573 (indicating that court should consider various convenience matters including "the location of the interested parties, the availability of witnesses and the evidence, and the condition of the court's calendar") (footnotes omitted).

195. FED. R. CIV. P. 23(b)(3)(A).

196. *See* Coffee, *supra* note 61, at 429-32 (discussing the negative value class action, "the classic small claimant class action where the option of individual litigation does not exist as a practical matter").

realistic one.[197] In such cases, it may be reasonable to infer consent to representational litigation because the alternative of litigating the claim individually is not economically feasible.[198] On the other hand, in cases involving high value claims, the superiority analysis suggests that courts should be loathe to compromise individual autonomy in favor of class representation.[199] As the Supreme Court suggested in *Amchem*, it may be less reasonable to assume class members would delegate litigation authority to another when "individual stakes are high."[200]

One scholar has suggested an additional theory for assessing an individual's interest in controlling the litigation, urging that the personal versus impersonal dichotomy of the rights at issue "suppose[] that litigant autonomy and individual participation make their strongest normative claims when state adjudicative power focuses directly on personal attributes of an individual rather than on aggregative characteristics of a group."[201] Thus, the personal nature of a personal injury claim, for example, suggests a strong individual autonomy interest that should not be trumped solely on the basis of a similar interest shared by other claimants.[202]

The issue class action does not appreciably alter the superiority analysis under either the personal/impersonal theory or the high/low stakes approach to determining the significance of class members' interest in individual autonomy.

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197. FED. R. CIV. P. 23 advisory committee's note, 1966 amendment; *see also* Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 512 (1987) ("The desire of individual class members to control their own suits carries little weight in class actions involving small amounts of money.").

198. *See* Rubenstein, *supra* note 22, at 394 (superiority of representational litigation in negative value cases may be justified "precisely because of the limited nature of the individual rights at issue"). *But see* Weber, *supra* note 108, at 1206 (questioning the argument that "consent may safely be assumed when the stakes are small and the interests of the class members are clearly identical," particularly because "the smaller the claim, the less incentive any class member has to monitor the attorney").

199. *Cf. In re* Stucco Litig., 175 F.R.D. 210, 218 (E.D.N.C. 1997) (questioning whether a class action can achieve economies of scale in cases where the "not insignificant damages sought by the plaintiffs and the number of independent actions already filed" reflect a likelihood that many high value class members will opt out of the class). *But see* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 464 (2000) (explaining that even in informal aggregation, it would be "wrong to pretend that the individual litigant in massive multi-suit litigation is truly autonomous. Not only does the individual litigant often lack significant control over his own lawyer, that lawyer often works as part of a large and complicated network of interdependent lawyers.") (footnote omitted); Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 250 (1991) (noting that the existence of related suits unavoidably affects litigant autonomy: "The reality that related cases impact on one another and that there are patterns in their disposition undercuts the pure theory of the virtue of individuation.").

200. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997); *see also id.* at 617 (noting that "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'") (citation omitted).

201. Bone, *supra* note 114, at 292-93 (footnote omitted).

202. *See, e.g., id.*; Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 889 (1995) (discussing (b)(3) requirement that courts consider "the uniquely personal nature of the claims compromised"); Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 74-76.

With respect to high stakes or highly personal claims, it seems unlikely that consent to representational litigation of particular issues would be any more justified in an issue class action than in an ordinary (b)(3) class action. One might argue that the issue class action permits class members to retain greater individual autonomy because they are delegating less to the issue class action representatives.[203] But it is not at all clear that we should assume class members would be more likely to delegate representational authority when the class action can accomplish less for them.[204]

Individual autonomy interests are also reflected in (b)(3)'s second superiority factor, the "extent and nature of any litigation concerning the controversy already commenced by or against members of the class."[205] Again, the underlying message of (b)(3) is that class representation may be less warranted (i.e., consent to representation less easily inferred), and less fair to absent class members, where individual litigation is so feasible an option that would-be class members are already exercising it: "Moreover, the existence of litigation indicates that some of the interested parties have decided that individual actions are an acceptable way to proceed, and even may consider them preferable to a class action."[206]

The issue class action offers no answer to the concerns courts have raised regarding the propriety of inferring consent to representational litigation in cases where individual lawsuits remain a viable alternative for class members.[207] Prior inconsistent judgments, one of the hobgoblins of collateral estoppel,[208] need not be taken into account in an issue class action, enabling broad issue preclusion even in the face of previous verdicts in defendant's favor. But those inconsistent judgments may undermine any confidence in the accuracy or fairness of a class-wide resolution of that issue.[209] As Judge Posner has argued, allowing individual trials of disputed common issues to proceed results in a more "robust" resolution of that issue: "[T]he pattern that results will reflect a consensus, or at least a pooling of judgment, of many different tribunals. For this consensus or maturing of judgment the district court proposes to substitute a single trial before a single jury instructed in accordance with no actual law of any jurisdiction . . . ."[210]

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203. *See* Davis, *supra* note 3, at 233 (advocating "use of the mass tort class action in its limited issue format [to] serve the goal of resolving costly and protracted litigation"); Romberg, *supra* note 98, at 302-03 (arguing that issue class actions "allow[] plaintiffs to aggregate their resources such that the results of litigation or settlement more accurately reflect the merits of the underlying controversy").

204. *See* Fisher v. Bristol-Meyers Squibb Co., 181 F.R.D. 365, 368 (N.D. Ill. 1998) (doubting whether "enough economies of time and effort would accrue to the judicial system from resolving the common issues on a class basis to justify the diminution of individual autonomy that inherently results from the certification of a class").

205. FED. R. CIV. P. 23(b)(3)(B).

206. *See* WRIGHT ET AL., *supra* note 52, § 1780, at 570.

207. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 616-17 (1997).

208. *See supra* note 38 and accompanying text.

209. *See In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020 (7th Cir. 2002) ("Getting things right the first time would be an accident.").

210. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299-300 (7th Cir. 1995); *see also In re Bridgestone/Firestone*, 288 F.3d at 1020 ("Markets [unlike the single adjudication, 'central planning' model of class adjudication] . . . use diversified decisionmaking to supply and evaluate information . . . . [Although] [t]his method looks 'inefficient' from the planner's perspective, . . . it produces more information [and] more accura[cy] . . . .").

If we regard with skepticism the one-time, one-jury, one-roll-of-the-dice adjudication of an issue that might reasonably be found for or against the class, lowering the threshold requirements in an issue class action to allow such representational litigation would seem at best highly imprudent,[211] especially in the context of immature torts.[212] Again, the issue class action does not lessen any of the autonomy and fairness concerns that have proved troubling in the context of mass tort class actions generally. Indeed, the issue class action would seem to supply even less justification for inferring class consent to representational litigation because the class action accomplishes less.[213]

### *D. Meaningful Opt-Out Rights and Consent*

The right to individually rebut the inference of consent, to exit the class action, has been a frequent subject of academic commentary.[214] Much of the scholarly debate has focused on governance principles and the vital role the right of exit plays in curbing potential abuses by class counsel in the context of settlement class actions.[215] But concerns have also been raised about the degree to which the right to opt out provides a vital opportunity for class members to reject representational litigation of their claims even by a legitimate representative.[216] Rule 23(c)(2) guarantees class members the right to exclude themselves from (b)(3) class

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211. *Cf. In re* Repetitive Stress Injury Litig., 11 F.3d 368, 373 (2d Cir. 1993) ("The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation.") (quoting *In re* Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 853 (2d Cir. 1992)). *But see* Shapiro, *supra* note 187, at 935 (arguing that "it makes little sense to defer class certification of what appears to be a mass tort, suitable in some respects at least for class treatment, until the requisite number of individual actions has been ground through the system").

212. *See, e.g., supra* notes 80-85 and accompanying text.

213. *See, e.g.,* Benner v. Becton Dickinson Co., 214 F.R.D. 157, 169 (S.D.N.Y. 2003) ("The sheer number of issues left for [individual litigation] is emblematic of the futility of issue certification on design defect and negligent design."); Begley v. Acad. Life Ins. Co., 200 F.R.D. 489, 498 (N.D. Ga. 2001) (rejecting issue class action because "resolution of issues of the duties owed by the defendants would save the plaintiffs little or no time or cost in their individual suits").

214. *Compare* Weber, *supra* note 108, at 1196 (applauding the "strategic behavior" of high value plaintiffs who opt out of a class action, "striving to obtain the highest recovery for his or her injuries"), *with* Shapiro, *supra* note 187, at 937-38 (questioning the propriety of opt-out rights in light of argument for "entity treatment of the class"), *and* Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85, 153 (1997) (suggesting that "courts should not be reticent to curtail opt-out rights or impose mandatory classes under appropriate circumstances").

215. *See, e.g.,* Coffee, *supra* note 61, at 434-38 (arguing that right of exit better serves goal of client autonomy and assurance of loyal representation than *Amchem*'s cohesiveness rationale); Nagareda, *supra* note 141, at 173 (identifying right of exit as an effective check on the monopoly power of class counsel).

216. *See* Perino, *supra* note 214, at 106 ("From a normative perspective, opt-out rights preserve traditional notions of individual justice by 'institutionaliz[ing] and enlarg[ing] the central value of claimant autonomy.'") (alteration in original) (quoting Schuck, *supra* note 93, at 964).

actions,[217] underscoring the importance of consent to representational authority in such class actions.[218] While the requirements of (a) and (b)(3) combine to permit courts to infer class members' consent to the delegation of litigative authority, (c)(2) makes clear that this inference may be repudiated by a class member who opts to retain litigant autonomy.[219] Failure to opt out, of course, cannot constitute consent to representational litigation that otherwise lacks legitimacy under (a) or (b)(3).[220] Indeed, some have questioned whether the failure to opt out should be interpreted as conferring consent even when the (b)(3) class action prerequisites have been satisfied.[221]

There may be good reason to be skeptical about the ability of class members to fully understand the class notice,[222] and to make informed decisions on whether to sit passively by or act to exclude themselves from the class:[223]

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217. FED. R. CIV. P. 23(c)(2) (requiring notice to advise each (b)(3) class member that "the court will exclude from the class any member who requests exclusion").

218. *See* Joan Steinman, *Managing Punitive Damages: A Role for Mandatory "Limited Generosity" Classes and Anti-Suit Injunctions?*, 36 WAKE FOREST L. REV. 1043, 1087 (2001) ("Failure to exercise the right to opt out can be the basis for an inference of consent to prosecution of a suit on a class member's behalf.").

219. Professor David Shapiro has urged a reexamination of individual rights to opt out of a (b)(3) class action: "If there is a clear need for an unconditional right to opt out, one wonders about the soundness of the underlying decision to allow class treatment." Shapiro, *supra* note 187, at 938.

220. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (holding that, in addition to the right to opt out of a (b)(3) class action, "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members"); Hansberry v. Lee, 311 U.S. 32, 42-43 (1940); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1169 (1998) (explaining that "the inference of consent from class members' failure to opt out" cannot be interpreted in collateral litigation to bar due process challenges regarding the legitimacy and binding effect of the class action judgment); Graham C. Lilly, *Modeling Class Actions: The Representative Suit as an Analytic Tool*, 81 NEB. L. REV. 1008, 1047 (2003) (explaining the same); *cf.* Coffee, *supra* note 61, at 432 (arguing that *Amchem* "probably forecloses" the argument that "implied consent [to attorney allocation decisions] should be found in any opt-out class action where class members fail to opt out after notice").

221. *See, e.g.*, Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 960 (1998) (advocating an opt-in class action proposal and questioning, at least in the mass tort context, the strongly held belief "that the failure to opt out represents genuine, informed consent to be included in the class"); Coffee, *supra* note 61, at 422 (noting that "rational apathy" rather than meaningful consent may explain low opt-out rates among class members in most settlement class actions involving "modest claims and no real alternative because their claims are typically too small to litigate on an individual basis").

222. *See* Miller & Crump, *supra* note 86, at 22 ("Much of what lawyers write, however, including many class action notices, is incomprehensible to average citizens. The lawyerly concern for completeness and accuracy may conflict with the objective of intelligibility."); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1215 (1982).

223. Concerns about the content and comprehensibility of class action notices have recently resulted in amendments to Rule 23 and "illustrative" notice forms published by the Federal Judicial Center. The revised Rule 23(c)(2)(B), effective December 1, 2003, requires (b)(3) class notices to "concisely and clearly state in plain, easily understood language" detailed information about the proposed class action and how it may affect class members' rights. FED. R. CIV. P. 23(c)(2)(B). This renewed attention to the sufficiency and clarity of

> It is beyond the experience or expectation of reasonable citizens that the failure to respond to what looks like a slightly unusual piece of junk mail constitutes assent to the solicitation of employment by self-selected counsel desiring to represent the recipient in an action involving serious personal injury or death. There is no reason to believe that a serious personal injury claimant desires to be represented by class counsel.[224]

The meaningful exercise of the right to opt out of an issue class action would be undermined by these same concerns regarding the adequacy of notice; indeed, arguably more so. Issue class action notices would have an abstract quality to them even more confusing than the legalese of an ordinary class action. A class member rationally examining the notice would observe that the class action does not seek to adjudicate any of the myriad of individual aspects to her claim, including proximate causation, injury, affirmative defenses, damages, and a potential host of other liability issues. In that context, where the class litigation may be in a distant forum and does not hold out the promise of any remedy, an issue class member may very well fail to appreciate the significance of her failure to take steps to opt out of the class action. If it is difficult for most class members to comprehend the class notice in ordinary class actions that at least warn them that the class action seeks to adjudicate their whole claim, an issue class action notice exacerbates the problem.

While this notice problem may simply amount to one of proper draftsmanship,[225] one must take seriously the great likelihood that issue class members will fail to comprehend the highly abstract nature of the proposed class action and to recognize that representational litigation of even a part of their claim may not serve their best interests. In this respect, the potential for issue class action members not to "appreciate the gravity" of the opt-out rights at issue may parallel concerns raised in class actions affecting individuals who have not yet manifested injury.[226] While obviously a much less compelling argument, the ability of laypersons to comprehend the abstract nature of the issue class action should seriously be questioned.

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class notices may help address some of the concerns regarding meaningful exercises of opt-out rights.

224. Carrington & Apanovitch, *supra* note 169, at 467-68 (footnotes omitted); *see also* Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 U. PA. L. REV. 1943, 1949 (2000) ("The level of informed consent represented by a failure to opt out is likely to be as high in body-injury mass torts as anywhere, but still leaves much to be desired."). *But see* Weber, *supra* note 106, at 1206 (arguing that while the failure of class action notice recipients to "take the time to understand the form or take it to someone who can" may be a concern in "small-claims cases, it is very dubious for larger-scale mass torts cases").

225. *See supra* notes 229-32; Weber, *supra* note 108, at 1206 (suggesting that many notice problems may be cured by "better, more sensitive drafting").

226. *Cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (acknowledging significant concerns about whether adequate notice "could ever be given to legions so unselfconscious and amorphous"); Issacharoff, *supra* note 93, at 367 (explaining that "the benefit [of opting out] standing alone offers little" to class members who have not yet manifested injury and do not have sufficient "knowledge of the reason to opt out"); Weber, *supra* note 108, at 1203 (noting that future claimants "were in no position to appreciate the gravity of the settlement decision when they had not yet manifested any kind of symptoms from the exposure [to asbestos]").

### E. Evaluating the Benefits of the Issue Class Action

Before embarking on an issue class action course that threatens to undermine fundamental principles of consent and individual autonomy, it will be vitally important to assess the benefits that might justify such a risk. The issue class action's chief advantage, of course, is that it offers to resolve some aspect of liability on a class basis, even though the predominantly individual elements of plaintiffs' claims remain to be adjudicated on an individual basis in separately filed lawsuits. This benefit may indeed be a significant one in some cases, preventing duplicative litigation and providing a vehicle for plaintiffs to pool resources. But the issue class action has been primarily heralded as providing a solution to the problems that have doomed recent mass tort class actions, permitting class action treatment of cases that otherwise could not be certified under (b)(3).[227] Close analysis of the issue class action in this context, however, suggests that it may promise more than it can deliver. Many of the obstacles that have frustrated mass tort actions continue to dog the issue class action, and its very limited scope may undermine its utility. Something, in other words, may not actually be better than nothing.

It is certainly true that by carving out the individual issues raised by class claims, the issue class action would be more manageable than a whole case (b)(3) class action.[228] Courts have struggled, often in vain, to find some means by which to adjudicate complex individual issues such as reliance, proximate cause, injury, affirmative defenses, and damages in a class action.[229] The issue class action offers to relieve the certifying court of the burden of individual issues, while still permitting efficiencies to be gained by trial of the common issues.[230] Because manageability is a major part of the (b)(3) superiority analysis, and has proven to

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227. *See infra* notes 107-08 and accompanying text.

228. *See, e.g.*, Simon v. Philip Morris, Inc., 200 F.R.D. 21, 50 (E.D.N.Y. 2001) ("Severing issues for trial [pursuant to (c)(4)(A)] enhances rather than detracts from the manageability of such cases."); Davis, *supra* note 3, at 231 (extolling the virtue of the issue class action in reducing manageability problems); Romberg, *supra* note 98, at 313 (describing Rule 23(c)(4)(A) issue certification as "an especially valuable tool for making a class action manageable").

229. For example, the Fifth Circuit has rejected innovative lower court plans to adjudicate individual issues on either an aggregate basis or on the basis of extrapolation from a sample of class plaintiffs. *See* Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998); *In re* Fibreboard Corp., 893 F.2d 706 (5th Cir. 1990). The Fifth Circuit has also rebuked the suggestion that individual issues can be adjudicated on an abbreviated basis in class actions, emphasizing that the district court offered "no credible support for the proposition that our rules of evidence and procedure may be altered or diminished in any manner, in actions of this kind, other than those recognized to be within the sound discretion of the district court." Watson v. Shell Oil Co., 979 F.2d 1014, 1020 (5th Cir. 1992), *reh'g en banc granted on other grounds*, 990 F.2d 805 (5th Cir. 1993), *appeal dismissed*, 53 F.3d 663 (5th Cir. 1994).

230. Of course, the judicial burden of managing those individual issues does not go away simply because they are excluded from the issue class action. Courts in other jurisdictions must still manage those issues in the context of any individual lawsuits that follow a favorable class verdict in an issue class action.

be an insurmountable hurdle for many mass tort class actions,[231] the manageability benefits of the issue class action cannot be overlooked.[232]

But due to the complex nature of many mass tort claims, significant manageability concerns may persist even in issue class actions.[233] Mass tort class actions often require resolution of a matrix of factual and legal issues even among the "common" issues.[234] At some level of generality, of course, mass torts present common issues regarding the defective nature of a product or the unreasonableness of a defendant's conduct.[235] But "as a practical matter, the resolution of . . . [such a] common issue breaks down into an unmanageable variety of individual legal and factual issues."[236] With respect to factual variations, many product defect class actions actually encompass a wide range of different products, undermining any attempt to conduct a manageable "common" issue trial.[237] In rejecting a nationwide needle stick class action, one district court recently explained:

> [T]his Court finds that the issues of design defect and negligent design are not common to the class due to the numerous products included in the class. Each product must be individually reviewed to balance its risks, utilities, benefits, and feasible safer alternatives. That is not a common class-wide issue.[238]

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231. *See, e.g.*, Woolley, *supra* note 92, at 501 (explaining that "efforts to certify classes to resolve mass tort claims in their entirety" have often failed because the individual issues in such cases make the class action unmanageable); *In re* Am. Med. Sys., 75 F.3d 1069 (6th Cir. 1996) (reversing on mandamus nationwide product liability class action in part because the lower court failed to consider manageability of factual and legal variations among class members' claims).

232. *See* Davis, *supra* note 3, at 231 (urging that issue class actions are more manageable than "class actions certified as a whole" because there is no need to create "damages or causation sub-classes . . . to accommodate the remainder of the issues to be resolved before liability ultimately attaches"); Woolley, *supra* note 92, at 501.

233. *See, e.g., In re* Paxil Litig., 212 F.R.D. 539, 546 (C.D. Cal. 2003) (rejecting proposed issue class action due to unmanageable nature of common issues that would be "too vast and too complicated for even the most diligent jury to grasp . . . [resulting] in trial management problems and jury confusion"); Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1332 (E.D.N.Y. 1996).

234. *See supra* notes 70-76 and accompanying text.

235. *See, e.g., In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) ("It is no doubt true that at some level of generality the law of negligence is one, not only nationwide but worldwide.").

236. Andrews v. Am. Tel. & Tel. Co., 95 F.3d 1014, 1023 (11th Cir. 1996).

237. *See, e.g., In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1019 (7th Cir. 2002) (explaining that some of the sixty-seven tires at issue "come in multiple diameters, widths, and tread designs; their safety features and failure modes differ accordingly. . . . [Therefore] it would not be possible to make a once-and-for-all decision about whether all 60 million tires were defective, even if the law were uniform."); *In re* Am. Med. Sys., 75 F.3d 1069, 1085 (6th Cir. 1996) ("A single litigation addressing every complication in every model of prosthesis, including changes in design, manufacturing, and representations over the course of twenty-two years . . . would present a nearly insurmountable burden on the district court."); *In re* Rezulin Prods. Liab. Litig., 210 F.R.D. 61, 67 (S.D.N.Y. 2002).

238. Benner v. Becton Dickinson & Co., 214 F.R.D. 157, 167 (S.D.N.Y. 2003); *see also In re* Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417, 424 (alteration added) (E.D. La. 1997) (noting that because "there is no single Masonite

Multi-state mass tort claims also require the application of multiple state laws,[239] which severely compounds the task of managing varying factual questions raised by the "common" issues of defendant culpability or product defect.[240] These disparate factual and legal questions undermine the efficiency and fairness of an issue class action just as seriously as they do in whole case (b)(3) class actions.[241] When the state law and factual variations inherent in many "common" issues are taken into account, therefore, even an issue class action limited to common issues may fail the (b)(3) manageability requirement.[242] In addition, the risk of improper severance of certain common issues from individual issues persists in mass tort issue class actions.[243] As one court recently explained, "[e]ven if it were possible for the court to fashion an issue class action with very narrowly drawn issues so as to avoid the Seventh Amendment [Reexamination Clause] concerns, in doing so, the court would likely negate any widespread benefit."[244]

Adequacy concerns may also persist in any issue class action proposed to improve the viability of mass tort class certification. Stock manageability devices, such as subclassing to ensure adequate representation to reflect significant factual or legal differences[245] or special jury verdict forms[246] to help clarify necessary jury

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manufacturing process or Masonite product, . . . even questions of product character and manufacturer conduct appear inappropriate for class-wide resolution").

239. *See, e.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1300 (asserting that even if state negligence laws vary "only in nuance," the significance of that nuance and need to faithfully apply each state's law "is suggested by a comparison of differing state pattern instructions on negligence and differing judicial formulations of the meaning of negligence and the subordinate concepts"); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. at 70 ("Critical liability questions therefore presumptively will be governed by the law of the states in which particular members of this million person putative class reside."). *But see* Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 583 (1996) ("[T]here will never be fifty different substantive rules, or even fifteen or ten. States tend to copy their laws from each other, and many use identical or virtually identical rules.").

240. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624 (1997); *see also* Castano v. Am. Tobacco Co., 84 F.3d 734, 742 n.15 (5th Cir. 1996) ("[B]ecause we must apply an individualized choice of law analysis to each plaintiff's claims, the proliferation of disparate factual and legal issues is compounded exponentially.").

241. *See, e.g.*, Haley v. Medtronic, Inc., 169 F.R.D. 643, 656 (C.D. Cal. 1996) (an issue class action approach, "whereby subclasses of plaintiffs are created and only certain elements of some causes of action are heard, seems inherently complicated and incredibly inefficient").

242. *See, e.g.*, *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., 209 F.R.D. 323, 351 (S.D.N.Y. 2002) (issue class action certification "'is not appropriate if, despite the presence of a common issue, certification would not make the case more manageable'") (quoting Hamilton v. Accu-Tek, 935 F. Supp. 1307, 1331-32 (E.D.N.Y. 1996)); Rink v. Cheminova, Inc., 203 F.R.D. 648, 670-71 (M.D. Fla. 2001); Emig v. Am. Tobacco Co., 184 F.R.D. 379, 395 (D. Kan. 1998).

243. *See infra* notes 90-92 and accompanying text.

244. *Rink*, 203 F.R.D. at 672; *see also "MTBE" Litig.*, 209 F.R.D. at 351 ("While a court may instruct a jury to try only certain issues, it is constitutionally limited by concerns over juror confusion and uncertainty."); *Emig*, 184 F.R.D. at 395 (rejecting issue class action on ground that "the common issues are inextricably entangled with the individual issues").

245. *See, e.g.*, DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 669 (2d ed. 1994) (suggesting nationwide mass tort class actions could be divided into fifty subclasses); Arthur R. Miller & Price Ainsworth, *Resolving the Asbestos Personal-Injury Litigation Crisis*, 10 REV. LITIG. 419, 433-34 (1991).

findings, have often proven unavailing in mass tort class actions.[247] A large number of subclasses at some point becomes inherently unworkable,[248] and jury forms designed to truly capture the complex matrix of factual and legal determinations required to resolve "common" issues can "overwhelm[] jurors with hundreds of interrogatories and a verdict form as large as an almanac."[249]

The set of incentives to fairly represent absent plaintiffs on each varying factual and legal issue is also implicated. Can a named plaintiff from Montana, who used a particular product over a thirty-year period, adequately represent an absent plaintiff from Vermont who used a different model of that product for five years? Moreover, asking the issue class jury to enter a verdict applying Vermont law to a particular set of facts, if no Vermont plaintiff is involved in the class trial, may verge perilously close to an advisory opinion. This point is underscored by the fact that the class jury may be making findings of fact and law that no absent plaintiff will ever utilize in individual follow-up litigation.[250] This concern is closely related to the collateral estoppel requirement of an identical issue essential to the judgment.[251] Just as courts have struggled to apply collateral estoppel in mass tort cases where the factual and legal issues vary from case to case, issue class action resolution of legal or factual issues not necessary to the claims of the named plaintiffs also may fail to assure careful and thoughtful adjudication of those issues.[252] In such an event, the jury is really being asked to be a finder of facts disassociated from any person's actual claim, and that undertaking would be

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246. *See, e.g.*, *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 815 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995) (criticizing lower court for failing to consider "whether the case in terms of claims and defenses might fall into three or four patterns so that, with the use of special verdict forms, the case might have been manageable").

247. *See, e.g.*, *In re* Stucco Litig., 175 F.R.D. 210, 216 (E.D.N.C. 1997) (holding that subclasses and jury interrogatories cannot overcome insuperable manageability problems raised by class claims). *But see* Simon v. Philip Morris, Inc., 124 F. Supp. 2d 46, 77 (E.D.N.Y. 2000).

248. *See, e.g.*, *In re* Telectronics Pacing Sys., Inc., 172 F.R.D. 271, 294 (S.D. Ohio 1997) (rejecting subclassing as a feasible solution to factual and legal variations); *In re* Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417, 426 (E.D. La. 1997) (holding the same); *cf.* Issacharoff, *supra* note 93, at 380 (arguing that "a spiral of subclasses and sets of counsel . . . would not only swamp the incentive to invest in bringing a class action, but would impose tremendous transactional costs on an already vulnerable procedure that turned heavily on its ability to realize economies of scale").

249. Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 350 (D.N.J. 1997) (rejecting nationwide class action because plaintiffs failed to explain "how their multiple causes of action could [manageably] be presented to the jury for resolution in a way that fairly represents the law of the fifty states").

250. *Cf. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1302 (7th Cir. 1995) (citing C.I.R. v. Sunnen, 333 U.S. 591, 599-600 (1948)) ("If there are relevant differences in state law, findings in one suit will not be given collateral estoppel effect in others—and that is as it should be.").

251. *See supra* note 33 and accompanying text.

252. *But see* Romberg, *supra* note 98, at 308 (describing the advantages of issue class actions over offensive use of collateral estoppel in individual cases because courts certifying such class actions do so "with the capacity and intent to craft an efficient and fair process for resolving all class members' claims" with the preclusive implications squarely in mind).

fraught with the same dangers associated with issues not essential to the judgment in collateral estoppel law.[253]

Moreover, to the extent individual litigation is not a feasible alternative, as in the case of negative value claims, the issue class action may prove to be a largely futile exercise. Because issue class actions exclude individual issues such as damages,[254] they assume members of the class will litigate those issues in an economically viable individual lawsuit following a favorable judgment in the class action.[255] If no such follow-up lawsuits are feasible, however, it is not clear what benefit the issue class action can offer either the plaintiffs or the judicial system. The cost and burden of the class action would, at best, establish certain liability issues on a class basis, but if the class action cannot encompass claims for damages and if follow-up lawsuits would cost more to litigate than the expected recovery, the issue class action in such cases may provide only illusory benefits.[256]

One advocate of the issue class action argues that the exclusion of claims for damages in issue class actions serves to protect class members from one of the most pernicious features of recent mass tort class actions: the risk that class counsel may collude with the defendant to settle the class action on self-serving terms unfavorable to class members.[257] Because issue class actions do not encompass class damages' claims, it is argued that "[t]he opportunity and incentive for a settlement in which the defendant and class counsel short-change absent class members will therefore be much weaker, because class counsel will not have the power to settle damages, and the defendant will not be able to assure global peace by settling."[258]

Excluding damages from any issue class settlement, however, while potentially advantageous in terms of reducing intra-class and class counsel conflicts of interest, may also weaken defendants' incentives to settle at all. Without assurances of global peace, defendants have far less incentive to enter into any settlement. Even the promise of removing the threat of punitive damages[259] or guaranteeing an arbitral adjudication of claims[260] may not be sufficient inducement in light of

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253. *See supra* notes 45-48 and accompanying text.

254. *See* Coffee, *supra* note 18, at 1440 ("Neither damages nor damage ranges would be established by the original verdict or by any settlement" in an issue class action.).

255. *See supra* note 104 and accompanying text.

256. *But see* Romberg, *supra* note 98, at 302 (advocating issue class actions in negative value cases).

257. *Id.* at 326-32. Professor Coffee has aptly described this phenomenon: "[W]here the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest." Coffee, *supra* note 61, at 371; *see also* Nagareda, *supra* note 30, at 308-10; Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Prods., Inc., 80 CORNELL L. REV. 1045 (1995).

258. Romberg, *supra* note 98, at 328; *see also* Coffee, *supra* note 18, at 1440 (pointing out that in issue class actions, "although there could be a 'settlement class' action, it could only establish liability, not the range within which recoveries would be allowed," thereby protecting absent class members from the risk of unfair settlement recoveries).

259. *See, e.g.*, Coffee, *supra* note 18, at 1441 (suggesting as a viable issue class settlement option defendant's concession of liability in exchange for plaintiffs' agreement to abandon claims for punitive damages); Romberg, *supra* note 98, at 328 (suggesting the same).

260. *See, e.g.*, Romberg, *supra* note 98, at 329; Coffee, *supra* note 18, at 1441.

plaintiffs' right to opt out of the issue class. Plaintiffs with the strongest claims are the ones most likely to opt out of any class action and proceed individually,[261] so a defendant in an issue class action could still be confronted with claims for punitive damages by opt-out plaintiffs and possibly high compensatory damages awards even after settlement of an issue class action.[262]

Finally, the exclusion of class claims for damages presents yet another practical problem in the context of class counsel compensation. In a whole case class action, attorney fees are allocated on the basis of the damages recovered by the class at trial or in the course of a settlement.[263] But there will be no class monetary recovery in an issue class action because individual issues including damages have been expressly excluded from the class action.[264] One option would be to include in the class notice a provision that informs absent plaintiffs that if the class prevails, class counsel will be owed a percentage of every plaintiff's recovery that represents the fair value of the issue to the class.[265] Class plaintiffs in a recent needle stick liability issue class action offered just such a solution to the attorney compensation problem: "[P]laintiffs' counsel may make an application to this Court 'in recognition of the benefits created by obtaining the Class-wide judgment on the Defect Issue, to establish a lien in favor of plaintiffs' counsel with respect to a portion of any recovery ultimately obtained in such Individual Actions.'"[266] Absent some provision of payment for class counsel, of course, attorneys would have no incentive to invest litigation resources in an issue class action due to the high transaction costs inherent in the litigation of any class action.[267] But these fee arrangements may be problematic additions to the abstract nature of class action notice already necessitated by the issue class action, and require close scrutiny of the assumption of consent to representation by class counsel.[268]

## CONCLUSION

The issue class action presents a tempting solution to the seemingly intractable shortcomings of mass tort class actions. Its beauty lies in its stunning simplicity: when class claims fail (b)(3)'s predominance or superiority requirements because of pervasive and disparate individual issues, courts may nevertheless certify a class action that eliminates those individual issues, stripping class claims down to whatever common issues exist. This approach seems to promise all the efficiencies

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261. *See* Perino, *supra* note 214, at 154 ("In mass tort cases, core theoretic concepts of individual rationality suggest that opting out is only an option for claimants who expect to increase significantly their recoveries outside the class."); Weber, *supra* note 108, at 1196.

262. *See, e.g.*, Laura J. Hines, *Obstacles to Determining Punitive Damages in Class Actions*, 36 WAKE FOREST L. REV. 889 (2001).

263. *See* Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 391-92 (1970).

264. *See* Romberg, *supra* note 98, at 332 ("When a partial class action is resolved, however, *there is no common fund* from which class counsel can be reimbursed . . . [because] resolution of the common issues will not include any award of damages to the class." (emphasis in original)).

265. *Id.* at 333.

266. Benner v. Becton Dickson & Co., 214 F.R.D. 157, 170 (S.D.N.Y. 2003).

267. *See* Issacharoff, *supra* note 93, at 380.

268. *See* Romberg, *supra* note 98, at 333 (acknowledging the "innovative" nature of such an attorney compensation scheme); *see also supra* notes 222-26.

of a (b)(3) class action without the need to come to grips with any of the problematic individual aspects of class claims.

Such an issue class action, however, threatens to unacceptably infringe upon the important individual autonomy interests protected by the provisions of (b)(3). Predominance is not a technical impediment to class actions that may be disregarded if it proves inconvenient. Rather, it serves a vital role in ensuring the class cohesiveness necessary to any inference of consent in representational litigation. Likewise, the superiority inquiry of (b)(3) validates the assumption that class members would assent to class representation. Issue class actions also exacerbate the meaningful exercise of opt-out rights, further complicating the inference of class consent. Moreover, many of the manageability problems that have thwarted mass tort class actions remain serious concerns in the issue class action, and its uniquely limited scope raises other practical problems. If a proposed class action fails to satisfy the requirements of (b)(3), courts cannot wish away complex individual issues or critical differences among class members by certifying an issue class action. As appealing as it might sound, the issue class action cannot escape the legitimacy and manageability concerns inherent in mass tort class actions.