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CERTIFICATION

SUPREME COURT

The next area of class action jurisprudence to draw the attention of the U.S. Supreme Court may be the proper role of issue certification as established by Rule 23(c)(4), say attorneys Timothy E. Congrove, Gregory K. Wu, and Christopher W. Warren in this BNA Insight. The authors say the approach suggested by the American Law Institute's Principles of the Law: Aggregate Litigation may provide a start, but suffers from several flaws that could lead to undesirable policy consequences.

Uncertain Principles? Evaluating the Tension Between Rule 23(b)(3) And (c)(4) Post-*Dukes*, and the ALI's Effort to Integrate the Provisions

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I. Introduction

In recent years, class action law has been at the forefront of United States Supreme Court jurisprudence. In the 2010-2011 term alone, the Court handed down three impactful decisions relating to class action law – *Wal-Mart Stores, Inc. v. Dukes*,[1] *AT&T Mobility LLC v. Concepcion*,[2] and *Smith v. Bayer Corporation*.[3] Add those cases to an already extensive list of recent decisions in the class action area,[4] and there is reason to conclude that the Court's interest in class action law will persist for some time. Given that the few circuit courts that have addressed the issue are in disagreement,[5] the next area of class action jurisprudence to draw the Court's attention may well be the proper role of issue certification as established by Rule 23(c)(4).

Rule 23(c)(4)[6] provides that ''[w]hen appropriate, an action may be brought or maintained as a class action

[1] 131 S. Ct. 2541 (2011).
[2] 131 S. Ct. 1740 (2011).
[3] 131 S. Ct. 2368 (2011).
[4] *E.g.*, Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., 130 S. Ct. 1341 (2010).
[5] *Compare* Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996), *with*, In re Nassau County Strip Search Cases, 461 F.3d 219, 226 (2d Cir. 2006); Valentino v. Carter-Wallace Inc., 97 F.3d 1227, 1234 (9th Cir. 1996).
[6] The federal rules formerly ordered the provision contained in Rule 23(c)(4) as Rule 23(c)(4)(A) but this was altered for stylistic purposes by the 2007 amendments. *See* 2007 amendments to Rule 23 (''The language of Rule 23 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.'').

with respect to particular issues.'' How this inscrutable phrase interacts with other provisions of Rule 23 is puzzling. Some authority provides that in order to utilize Rule 23(c)(4), one must first properly satisfy all the requirements for class certification as to the entire cause of action – including, namely, predominance under Rule 23(b)(3).[7] Others believe that (c)(4) authorizes courts to isolate the issues common to a class, proceed with class treatment of those particular issues, and then permit class members to file individual lawsuits to litigate the individual issues left unresolved by the issue class action – essentially side-stepping the predominance inquiry required by Rule 23(b)(3).[8] Recently, the American Law Institute has entered the debate, introducing a standard approving the use of issue certification where the ''resolution of the common issue would . . . materially advance the resolution of multiple civil claims by addressing the core of the dispute in a manner superior to other realistic procedural alternatives . . . .''[9]

This article first analyzes the divided case law regarding the relationship between 23(c)(4) and the (b)(3) predominance standard, positing that the use of issue certification to bypass a showing of predominance as to an entire class is questionable and unlikely to be endorsed by the Supreme Court. Next, this article takes up the approach suggested by the American Law Institute in Principles of the Law: Aggregate Litigation and contends that, while the Principles laudably attempt to strike a balance between the two opposing views of 23(c)(4), the standard set forth in the Principles skews too far in favor of the expansive view of issue certification to be consistent with the restrained textual reading of Rule 23 favored by the Supreme Court. The article concludes that, to the extent there is an effort to amend Rule 23 to authorize more robust use of issue certification, the Principles' approach may be a start but drafters would do well to ensure that the predominance requirement presently codified in 23(b)(3) be retained in a more rigorous form than that contemplated by the Principles.

II. Circuits Are Split as to the Interplay Between Rule 23(B)(3) and (C)(4)

To be certified, a putative class must fit into one of three categories set forth in Rule 23(b).[10] Where a putative class seeks damages, the typical route is to certify the case under Rule 23(b)(3), which requires a showing of predominance and superiority. Specifically, this means that ''[c]ommon questions must 'predominate over any questions affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.' ''[11]

Rule 23(c)(4) states simply, ''[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.'' Courts have struggled with how the availability of the Rule 23(c)(4) issue class affects the certification process, especially with respect to the requirement that common questions predominate over questions affecting only individual members.

One early district court case endorsed the use of the issue class device to circumvent the Rule 23(b)(3) predominance requirement. In *In re Tetracycline Cases*, the plaintiffs sought to maintain a class action on behalf of a class consisting of persons in Missouri injured by the drug Tetracycline.[12] Specifically, the plaintiffs sought partial class treatment under then-Rule 23(c)(4)(A) for ''issues common to the class as a whole'' but upon prevailing in the common issues trial, ''the class members would . . . proceed to trial separately . . . upon the remaining 'individualized' liability and compensatory damages issues.''[13] The court analyzed ''the nature of the interplay between'' Rules 23(b)(3) and (c)(4) and specifically considered the defendants' argument that the ''interpretation of Rule 23(c)(4)(A) proffered by [the] plaintiffs . . . would render the predominance requirement of Rule 23(b) a nullity.''[14]

The defendants' nullity argument did not persuade the court. Instead, *Tetracycline* eschewed the predominance requirement altogether in favor of a standard of whether class certification would materially advance disposition of the litigation as a whole: ''I believe, accordingly, that the appropriate meaning of Rule 23(b)'s predominance requirement, as applied in the context of a partial class certification request under Rule 23(c)(4)(A), is simply that the issues covered by the request be such that their resolution (as a class matter) will materially advance a disposition of the litigation as a whole.''[15] In a praiseworthy instance of judicial candor, *Tetracycline* acknowledged that its ''material advance[ment]'' approach – fashioned from whole cloth as it was – had the effect of undermining the predominance requirement.[16] *Tetracycline* rationalized such emasculation of 23(b)(3) predominance as acceptable, however, given that this ''may be viewed . . . as offset by a corresponding increase in the importance accorded Rule 23(b)'s requirement of superiority, a requirement which is unaffected by Rule 23(c)(4)(A).''[17]

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[7] *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996); Laura J. Hines, *Challenging The Issue Class Action End-Run*, 52 Emory L.J. 709 (2003).

[8] *See* Valentino v. Carter-Wallace Inc., 97 F.3d 1227, 1234 (9th Cir. 1996); In re Nassau County Strip Search Cases, 461 F.3d 219, 226 (2d Cir. 2006); 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.

[9] *See* Am. Law Inst., Principles of the Law: Aggregate Litigation, § 2.02(a)(1) (2010).

[10] Of course, before reaching Rule 23(b), Rule 23(a) requires that to achieve class certification four initial conditions must be met – numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a); *see also* Amchem Prods v. Windsor, 521 U.S. 591, 614 (1997).

[11] *Amchem*, 521 U.S. at 615 (quoting Rule 23(b)(3)). Rule 23(b)(3) elaborates that the following considerations are pertinent to this inquiry: ''the class members' interests in individually controlling the prosecution or defense of separate actions;'' ''the extent and nature of any litigation concerning the controversy already begun by or against class members;'' ''the desirability or undesirability of concentrating the litigation of the claims in the particular forum;'' and ''the likely difficulties in managing a class action.''

[12] 107 F.R.D. 719, 721 (W.D. Mo. 1985).

[13] *Id.* at 725.

[14] *Id.* at 726-27.

[15] *Id.* at 727.

[16] *Id.* (''The admitted effect of this determination is to lessen . . . the importance of the predominance requirement, as such.'').

[17] *Id.*

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The approach pioneered in *Tetracycline* has met with mixed reactions in the circuit courts. In *Castano v. American Tobacco Co.*, the Fifth Circuit reversed the certification of a nationwide class of persons seeking damages for addiction to nicotine in cigarettes.[18] Despite the presence of numerous issues that would vary from class member to class member, including injury-in-fact, proximate cause, reliance, affirmative defenses, compensatory damages, and medical monitoring, the district court granted class certification as to ''core liability issues,'' i.e., ''common factual issues [of] whether defendants knew cigarette smoking was addictive, failed to inform cigarette smokers of such, and took actions to addict cigarette smokers.' ''[19] *Castano* held that certifying the class was error in that the district court had conducted an inadequate predominance inquiry and because the class action device was not a superior form of adjudication in that the class was too sprawling to be manageable, among other reasons. In the course of discussing the district court's incomplete predominance analysis, *Castano* pointedly remarked:

> A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial. . . . Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.[20]

Contrasting with this approach is *Valentino v. Carter-Wallace, Inc.*, a Ninth Circuit decision decided the same year as *Castano*.[21] *Valentino* involved the certification of a nationwide class alleging injury from the epilepsy drug, Felbatol.[22] The Ninth Circuit ultimately decertified the class holding that the certification order, which was ''brief and conclusory'' and ''entered with express hope on the part of the district judge of encouraging settlement,'' did not satisfy the predominance and superiority requirements of Rule 23(b)(3).[23] In the course of its analysis, however, and in apparent conflict with *Castano*, *Valentino* remarked ''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.''[24]

More recently, the apparent disagreement on this subject has ripened into an unequivocal circuit split. In *In re Nassau County Strip Search Cases*, the Second Circuit expressly rejected what it referred to as *Castano*'s '' 'strict application' of Rule 23(b)(3)'s predominance requirement.''[25] In *Nassau County*, the plaintiffs, aggrieved by Nassau County's policy of subjecting misdemeanor arrestees to compulsory strip searches, sought to have their action certified on the issue of liability only.[26] Although the plaintiffs adjusted their proposed class definition several times, the district court denied certification, noting a '' 'concern that partial certification might not be appropriate in the first instance where the cause of action, as a whole, does not satisfy the predominance requirement of Rule 23(b)(3).' ''[27]

On appeal, *Nassau County* acknowledged *Castano*'s position but aligned itself instead with *Valentino*: ''contrary to the District Court's reservations, a court may employ rule 23(c)(4)(A) to certify a class on a particular issue even if the action as a whole does not satisfy Rule 23(b)(3)'s predominance requirement.''[28] *Nassau County* offered several reasons for its holding. First, it posited that the structure of Rule 23(c)(4) in effect at that time implied that the (b)(3) predominance analysis is to come after certification of the particular issue under (c)(4).[29]

Next, the court found support for its holding in the 1966 advisory committee notes. Specifically, *Nassau County* concluded that according to the advisory committee notes, ''a court may employ Rule 23(c)(4) when it is the 'only' way that a litigation retains its class character,''[30] based on the advisory committee statement that, ''in a fraud or similar case the action may retain its 'class' character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.''[31]

Finally, *Nassau County* reasoned that Rule 23(c)(4) would be meaningless unless the provision could be employed to certify a class as to a particular issue even where the claim as a whole does not satisfy the pre-

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[18] 84 F.3d 734, 737 (5th Cir. 1996).

[19] *Id.* at 739 (quoting Castano v. Am. Tobacco Co., 160 F.R.D. 544, 553 (E.D. La. 1995)).

[20] *Id.* at 745 n.21. Several courts have expressed agreement with *Castano*. *See, e.g.*, In re St. Jude Med., Inc., 522 F.3d 836, 841 (8th Cir. 2008) (acknowledging the circuit split and holding that in the case before it ''the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation'' even if issue certification were available); In re Gen. Motors Corp. Dex-Cool Prods. Liability Litig., 241 F.R.D. 305, 314 (S.D. Ill. 2007) (''The Court, which has its own crowded docket to contend with, is sympathetic to these concerns, but concludes that an expansive approach to class certification under Rule 23(c)(4)(A) is supported neither by the test of Rule 23 nor the binding precedent of this Circuit''); Rink v. Cheminova, Inc., 203 F.R.D. 648, 651-52 (M.D. Fla. 2001) (deeming the *Castano* standard ''persuasive''); In re Jackson Nat'l Life Ins. Co., 183 F.R.D. 217, 225 (W.D. Mich. 1998) (praising *Castano* for its ''insightful caution'' against an expansive view of Rule 23(c)(4)); Arch v. Am. Tobacco Co., 175 F.R.D. 469, 496 (E.D. Pa. 1997) (''Before a district court may certify common issues pursuant to (c)(4), the court must first find that a cause of action, as [a] whole, satisfies the predominance requirement of (b)(3).''); Citizens Ins. Co. of Am. v. Daccah, 217 S.W.3d 430, 455 (Tex. 2007) (citing *Castano* and cautioning that the Texas counterpart to Rule 23(c)(4) ''cannot be used to manufacture compliance with the certification prerequisites'').

[21] 97 F.3d 1227 (9th Cir. 1996).

[22] *Id.* at 1228.

[23] *Id.* at 1234.

[24] *Id.*

[25] 461 F.3d 219, 226 (2d Cir. 2006).

[26] *Id.* at 222.

[27] *Id.* at 223.

[28] *Id.* at 225.

[29] *Id.* at 226.

[30] *Id.*

[31] Fed. R. Civ. P. 23(c)(4) adv. comm. n. to 1966 amend. The court also cited to supportive treatises. Nassau County, 461 F.3d at 227 (citing 6 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 18:7 (4th ed. 2002) (''Even cases which might not satisfy the predominance test when the case is viewed as a whole may sometimes be certified as a class limited to selected issues that are common, under the authority of Rule 23(c)(4).'')).

dominance requirement.[32] The court remarked that ''the Fifth Circuit's view renders subsection (c)(4) virtually null'' because '' 'a court considering the manageability of a class action – a requirement for predominance under Rule 23(b)(3)(D) – [would have] to pretend that subsection (c)(4) – a provision specifically included to make a class action more manageable – does not exist until after the manageability determination [has been] made.' ''[33]

III. *Nassau County's* View Of Relationship Between Rule 23(b)(3), (c)(4) Is Questionable

As between *Castano* and *Nassau County*, the latter presents a questionable vision of the relationship between Rule 23(b)(3) and (c)(4).[34] Many of the premises *Nassau County* relied upon to support its holding do not withstand careful scrutiny. First, *Nassau County*'s prime argument in support of its holding approving of a (c)(4) bypass of the predominance requirement has been called into question by a subsequent re-styling of Rule 23. *Nassau County* had reasoned that it was fairly implied that a predominance analysis was to be applied after the issue class was certified because Rule 23(c)(4) at the time read, ''[w]hen appropriate (A) an action may be brought or maintained as a class action *with respect to particular issues*, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall *then* be construed and applied accordingly.''[35]

The 2007 amendments, however – which were ''intended to be stylistic only''[36] – split the former singular section governing ''particular issues'' and ''subclasses'' into two distinct subdivisions. Rule 23(c)(4) now reads simply:

> (4) ***Particular Issues***: when appropriate, an action may be brought or maintained as a class action with respect to particular issues.[37]

Thus, any implication that assessing predominance comes after certification of an issue class is wholly absent from the current formulation of Rule 23(c)(4). Indeed, the fact that *Nassau County*'s structural argument is completely undone by a revision ''intended to be stylistic only'' suggests that Rule 23(c)(4)'s former structure was similarly nothing more than a matter of style – and probably not meant to form a basis for inferring that the (b)(3) predominance analysis is to be applied to an issue class only after it has been certified.

If anything, upon consideration of its full breadth, the structure of Rule 23 favors the approach adopted by the Fifth Circuit in *Castano*.[38] Rule 23(c)(4)'s ''placement in subdivision (c) . . . reflects a managerial rather than a primary role'' for the provision.[39] While subdivision (b) by its terms defines the ''Types of Class Actions,'' the provisions in subdivision (c) – including the court's responsibilities to issue a certification order at an early practicable time and notice to the class – ''reflect the laundry list of steps a court may take after properly certifying a subdivision (b) class action.''[40] Indeed, ''[n]one of the other subdivision (c) provisions alter the terms under which a (b) class action may be certified, or provide independent authority to certify another type of class action.''[41] The suggestion is powerful, therefore, that all available types of class actions are established by subdivision (b) while subdivision (c) – the home of issue certification – is intended only to deal with various features of judicial management, or, in the words of *Castano* constitute mere ''housekeeping rule[s].''[42]

Further, while *Nassau County* derives support for its approach by reasoning that any alternative would render subsection 23(c)(4) meaningless, paradoxically, the converse is also true, for, to accept *Nassau County*'s position is to render superfluous subsection (b)(3) predominance. In other words, if a court evaluating whether to certify an issue class may apply Rule 23(b)(3) only as to the particular issues that the proponent of the issue class wish to have certified, rather than with respect to both the common issues and the individual issues, then ''all the 'particular issues' will be common to the class, [and] under this theory (c)(4)[] class actions [will] satisfy the (b)(3) predominance requirement by definition.''[43] As *Castano* observed, this ''would eviscerate the predominance requirement of rule 23(b)(3)'' and result in ''automatic certification in every case where there is a common issue, a result that could not have been intended.''[44]

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[32] *Nassau County*, 461 F.3d at 226-27.

[33] *Id.* (quoting Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 439 (4th Cir. 2003)).

[34] While *Castano* and *Nassau County* starkly demonstrate the differing views on the relationship between Rule 23(b)(3) and (c)(4), other decisions have nibbled at the edges of the controversy. None of these cases squarely address the propriety of creating (c)(4) issue classes by applying the (b)(3) predominance standard to less than an entire cause of action, however, and so are distinguishable. *See, e.g.*, Gates v. Rohm & Hass Co., 655 F.3d 255, 272-73 (3d Cir. 2011) (declines to ''join[] either camp in the circuit disagreement''); Hohider v. United Parcel Serv., Inc., 574 F.3d 169, 202 n.25 (3d Cir. 2009) (''[w]e have not yet engaged this specific question, nor need we do so here''); Gunnells v. Healthplan Servs., Inc., 348 F.3d 417, 444-45 (4th Cir. 2003) (stating ''we have no need to enter that fray''); In re St. Jude Med., Inc., 522 F.3d 836, 841 (8th Cir. 2008) (acknowledging the circuit split and holding that in the case before it ''the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation'' even if issue certification were available). Similarly, recent Seventh Circuit decisions, often in the context of Rule 23(b)(2) class actions, have been supportive of the use of (c)(4) issue classes. *See, e.g.*, Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910, 911 (7th Cir. 2003); Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004); In re Allstate Ins. Co., 400 F.3d 505, 508 (7th Cir. 2005); McReynolds v. Merrill Lynch, 672 F.3d 482, 491 (7th Cir. 2012). But these cases are all silent on the core question that animates the dispute: whether the creation of an issue class requires a predominance showing as to the entire cause of action, or, merely with respect to the specific issue.

[35] *Id.* at 226. (quoting pre-2007 version of Rule 23(c)(4)) (emphasis added).

[36] 2007 amendments to Fed. R. Civ. P. 23.

[37] Fed. R. Civ. P. 23(c)(4).

[38] *See* Hines, *supra* note 7, at 718-19.

[39] *Id.*

[40] *Id.* at 719.

[41] *Id.*

[42] 84 F.3d at 745 n.21.

[43] Hines, *supra* note 7, at 718.

[44] 84 F.3d at 745 n.21. Additionally, the transcript from the Advisory Committee proceedings suggest a modest role was contemplated for Rule 23(c)(4). Prof. Benjamin Kaplan characterized the provision that was to become Rule 23(c)(4) as ''a sort of detail.'' Tr. of Civil Rules Committee Meeting, Oct. 31,

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IV. Supreme Court Unlikely to Favor Expansive View of Rule 23(c)(4)

The courts that have addressed the relationship between Rule 23(b)(3) and (c)(4) are at an impasse, setting the stage for ultimate resolution by Supreme Court decision or a clarifying revision of Rule 23.

Recent Supreme Court case law suggests that should the Court enter the fray, it would interpret Rule 23 in a restrained manner unfavorable to the approach espoused by the Second Circuit in *Nassau County*. As an initial matter, note that although the order of circuit court decisions – *Castano*, then *Valentino* and *Nassau County* – may leave one with the impression that the dominant trend is to read (b)(3) as subordinate to (c)(4), the latter cases may not strike as steady a blow in favor of the issue certification bypass as appears at first blush. For example, with respect to *Nassau County*, the Second Circuit has subsequently indicated in *McLaughlin v. American Tobacco Co.*,[45] that the predominance requirement can still act to prevent certification, even when the issue certification bypass is in play. In *McLaughlin*, the court reversed the certification of a class of plaintiffs seeking redress under the federal RICO statute for the defendants' alleged fraud of representing ''light'' cigarettes to be healthier than ''full-flavored'' cigarettes. *McLaughlin* concluded that although ''a court may employ Rule 23(c)(4) to certify a class as to common issues that do exist, 'regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement,' ''[46] certification was inappropriate because ''given the number of questions that would remain for individual adjudication, issue certification would not 'reduce the range of issues in dispute and promote judicial economy.' ''[47]

Moreover, the Court's interpretive approach to Rule 23, as demonstrated in such cases as *Amchem Products v. Windsor*,[48] *Ortiz v. Fibreboard Corp.*,[49] and *Wal-Mart Stores, Inc. v. Dukes*[50] has been marked by circumspection and restraint – worlds apart from the free-wheeling judicial attitude necessary to read into Rule 23 a bypass of subdivision (b)(3) predominance by way of issue certification. In these cases, the Court has held fast to the text of Rule 23 and the prescriptions of the Rules Enabling Act.[51]

In *Amchem*, the Court held that a ''settlement-only'' class – that is, a class action instituted for the sole purpose of settlement – must satisfy the requirements under Rule 23, including (b)(3) predominance, to achieve certification and, further, that the class in that case, composed of millions of asbestos-related claimants, failed to do so.[52] Fidelity to the text of Rule 23 and deference to the prescriptions of the Rules Enabling Act formed the logical underpinnings of the decision.[53] The Court noted that the Rules Enabling Act sets forth ''an extensive deliberative process'' for adopting federal rules which ''limits judicial inventiveness'' and instructs ''that rules of procedure 'shall not abridge . . . any substantive right.' ''[54] It is ''of overriding importance,'' furthermore, that courts ''be mindful that the rule as now composed sets the requirements they are bound to enforce.''[55] Courts must enforce Rule 23's safeguards not only because doing so protects against ''class certifications dependent upon [a] court's gestalt judgment,''[56] but, under the Rules Enabling Act, ''[c]ourts are not free to amend a rule outside of the process Congress ordered. . . .''[57]

In connection with its holding that the *Amchem* class failed Rule 23(b)(3) predominance, the court rejected the notion that the settlement's fairness – which required district court approval under Rule 23(e) – itself constituted a predominating common question. Resorting to Rule 23(e) to circumvent (b)(3) predominance is improper because Rule 23(e) ''was designed to function as an additional requirement, not a superseding direction, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b).''[58] Proving up (b)(3) predominance by satisfying subdivision (e) puts the cart before the horse: unlike subdivision (b)(3), ''it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place.''[59] Were it otherwise, the Court noted, the ''vital prescription [of predominance] would be stripped of any meaning . . . .''[60]

Ortiz centered around an asbestos claimant class certified under a Rule 23(b)(1)(B) limited fund theory. The Court held it was doubtful that a (b)(1)(B) limited fund rationale was applicable to a settlement class of tort claimants, and, even if it were applicable, certification was improper because the fund was not limited independently of the agreement of the parties.[61]

The themes of restraint and deference to the Rules Enabling Act which undergird *Amchem* were recapitulated in *Ortiz*.[62] The Court warned ''against adventurous application of Rule 23(b)(1)(B)'' in part because ''[t]he Rules Enabling Act underscores the need for caution.''[63] The Court deemed it unwise to treat Rule 23(b)(1)(B) as a license to engage in experimentation: ''Even if we assume that some such tension is acceptable under the Rules Enabling Act, it is best kept within tolerable limits by keeping limited fund practice under Rule 23(b)(1)(B) close to the practice preceding its adoption.''[64] The Court also pointedly reiterated that it would not allow the proponents of the settlement class to ''rewrite Rule 23'' by using Rule 23(e) as a means to bypass the requirements of subdivisions (a) and (b): ''A fairness hearing under subdivision (e) can no more swallow the preceding protective requirements of rule

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Nov. 1-2, 1963, at 3. In later correspondence, Prof. Charles Alan Wright referred to the same provision as a ''picky detail which does not require statement in the rule.'' Letter from Charles A. Wright to Benjamin Kaplan dated March 30, 1963.

[45] 522 F.3d 215 (2d Cir. 2008).

[46] *Id.* (quoting Nassau County, 461 F.3d at 227).

[47] *Id.* (quoting Robinson v. Metro-N. Commuter R.R., 267 F.3d 147, 168 (2d Cir. 2001)).

[48] 521 U.S. 591, 614 (1997).

[49] 527 U.S. 815 (1999).

[50] 131 S. Ct. 2541 (2011).

[51] 28 U.S.C. §§ 2071-2077.

[52] 521 U.S. at 622-28.

[53] *See* Hines, *supra* note 7, at 749-51.

[54] *Id* at 620.

[55] *Id*.

[56] *Id.* at 621.

[57] *Id.* at 620.

[58] *Id.* at 621.

[59] *Id.* at 623.

[60] *Id*.

[61] *Ortiz*, 527 U.S. at 864.

[62] *See also* Hines, supra note 7, at 751-52.

[63] *Id.* at 845.

[64] *Id*.

23 in a subdivision (b)(1)(B) action than in one under subdivision (b)(3).''[65]

Finally, in *Dukes*, the Court held it was error to certify a subdivision (b)(2) class comprised of over a million female Wal-Mart employees alleging discrimination on the basis of sex.[66] The Court's analysis in *Dukes* again focused on the structure of Rule 23. For example, in considering the question of whether claims for individualized relief (such as backpay) are certifiable under subdivision (b)(2), the Court concluded that ''the combination of individualized and classwide relief in a (b)(2) class is . . . inconsistent with the structure of Rule 23(b).''[67] The Court identified key differences between Rule 23(b)(2) and (b)(3), namely, that subdivision (b)(3) ''is an adventuresome innovation'' with ''greater procedural protections.''[68] ''Given that structure,'' the Court found it ''clear that individualized monetary claims belong in Rule 23(b)(3).''[69] The Court in *Dukes* also cautioned against novel approaches, admonishing again that the Rules Enabling Act forbids interpreting Rule 23 to ''abridge, enlarge or modify any substantive right.''[70]

These cases signal that the Court would look with disfavor on an expansive approach to Rule 23(c)(4). In case after case, the Court has eschewed ''judicial inventiveness,''[71] heaped reverence upon the Rules Enabling Act, and hewed closely to the text and structure of Rule 23. Given this state of affairs, the Supreme Court seems unlikely to endorse a Rule 23(c)(4) bypass of the subdivision (b)(3) predominance requirement.

V. The American Law Institute's Proposed Approach Laudably Seeks to Integrate Rule (b)(3) and (c)(4), but Is Flawed

Rather than resort to decision by the Supreme Court to unite the circuits, one alternative is to resolve the disagreement by revising Rule 23. In this regard, the American Law Institute has recently weighed in on the issue certification question with the release in 2010 of its Principles of the Law: Aggregate Litigation (''Principles''). The Principles do not take a declared position on either side of the *Castano*/*Nassau County* debate but instead offer a new integrated standard that purportedly merely adds precision to already existing law. Specifically, section 2.02 of the Principles, titled ''Principles for the Aggregate Treatment of Common Issues,'' provides, in pertinent part:

> (a) The court should exercise discretion to authorize aggregate treatment of a common issue by way of a class action if the court determines that resolution of the common issue would (1) materially advance the resolution of multiple civil claims by addressing the core of the dispute in a manner superior to other realistic procedural alternatives, so as to generate significant judicial efficiencies; . . .[72]

The meaning of the above passage is explicated in the commentary to section 2.02. Comment a offers an explanation for the phrase ''materially advance the resolution of multiple civil claims'' found in subsection (a)(1):

> This usage is in keeping with existing invocations of the phrase, or similar locutions, by courts. . . . This process of application is presently undertaken in terms of predominance of common questions and the existing authorization for class actions confined to particular issues. The present section draws upon experience with on-the-ground application of the existing law of class actions so as to frame both the predominance concept and the authorization for issue classes in a more coherent fashion. In particular, this Section as a whole – not just the phrase 'materially advance' in subsection (a)(1) – delineates the multifaceted inquiries presently encapsulated under the predominance concept.[73]

The commentary to section 2.02 thus evinces a laudable desire to integrate the Rule 23(b)(3) predominance requirement and the (c)(4) issue certification device. In terms of its use as a model for guiding a revision of Rule 23, however, the Principles' approach is flawed. While it bears repeating that the ALI views section 2.02 as an effort to reframe existing law rather than to revise it,[74] whether intended as a revision or not, the Principles' approach invites the risk that section 2.02(a)(1) will be utilized in a manner that short-shrifts the predominance requirement, a result that departs substantially from existing law and is dubious policy.

At first glance, the Principles' approach appears to dispense with predominance altogether – the word ''predominance'' does not actually appear anywhere in section 2.02. Upon closer inspection, section 2.02(a)(1) offers as a replacement the formulation that to be certified, an issue class must address the ''core of the dispute.''[75] It is unlikely that the ''core of the dispute'' language is an adequate substitute for subdivision (b)(3) predominance. Structurally, this language is wedged in the middle of a lengthy sentence and it is easy to picture a scenario in which courts overlook the ''core of the dispute'' inquiry and proceed directly to the more conspicuous question of whether issue certification will ''materially advance the resolution of multiple civil claims'' in a manner that is ''superior to other procedural alternatives.''

But section 2.02's shortcomings go beyond mere word choice. By authorizing issue class certification upon a showing that the ''resolution of multiple civil claims'' are ''materially advance[d]'' and ''significant judicial efficiencies'' are ''generate[d],''[76] section 2.02 contemplates a certification scheme that drastically shifts the emphasis away from predominance. This is precisely the result foreshadowed decades ago in *In re Tetracycline*, the original source of the material advancement standard.[77] If the judicial candor shared by

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[65] *Id.* at 858-59.
[66] *Dukes*, 131 S.Ct. at 2556-57.
[67] *Id.* at 2558.
[68] *Id*.
[69] *Id.*
[70] *Id.* at 2561 (quoting 28 U.S.C. § 2072(b))
[71] *Amchem*, 521 U.S. at 620
[72] Am. Law. Inst., Principles of the Law: Aggregate Litigation, § 2.02(a) (2010).
[73] *Id.* § 2.02 cmt. a.
[74] *See id.* § 2.02, Reporters' Notes at 104 (''The approach offered here is designed to lend precision to the inquiry presently undertaken by courts within the vocabulary of existing procedural law, particularly the predominance requirement and the authorization for issue classes found in Rule 23. For the most part, no change in existing procedural rules would be required in order for courts to implement the approach of this Section.'').
[75] *Id.* § 2.02(a)(1).
[76] *Id.* § 2.02(a)(1).
[77] The Reporters' Notes to section 2.02 indicate that the ALI borrowed the material advancement language from the Manual for Complex Litigation and the *McLaughlin* case. Prin-

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Tetracycline is any guide, use of an issue certification test primarily concerned with ''material[] advance[ement]'' is likely to ''lessen . . . the importance of the predominance requirement''[78] while inflating the significance of superiority.

Thus, instead of predominance and superiority acting as co-equal threshold requirements, section 2.02 risks the development of a practice whereby issue certification in practical effect is decided on the basis of superiority only. This is problematic because the ''predominance inquiry serves a vital role in permitting an inference of consent to representational litigation in a (b)(3) class action.''[79] In other words, ''[w]hen 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.''[80] This promotes class cohesion, which, as *Amchem* noted, ''legitimizes representative action in the first place.''[81] Where courts employ a class certification test with a weak or non-existent predominance requirement – as seems to be the danger inherent in section 2.02 – the inference of consent to representational litigation fails, class cohesion is undermined, and the class action device loses legitimacy.

VI. Conclusion

The existing circuit split regarding the relationship between 23(b)(3) and (c)(4) portends Supreme Court resolution either by decision or rule change. Recent decisional trends indicate that the Court is unlikely to interpret (c)(4) expansively. To the extent there is an effort to amend Rule 23 to resolve the extant circuit split, the Principles' approach is worthy of careful consideration. Certain aspects of the Principles' approach may undermine the predominance requirement, however, leading to undesirable policy consequences. Accordingly, should a resolution of the issue certification disagreement be made by rule revision, revisers would do well to ensure that the predominance requirement presently codified in 23(b)(3) is retained to a substantial degree.

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ciples of the Law: Aggregate Litigation, § 2.02 (2010), Reporters' Notes at 94-95, *citing*, Manual for Complex Litigation (Fourth) § 21.24, at 273 n. 838, and, McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 234 (2d Cir. 2008). These two authorities, in turn, cite to footnote 12 of *Robinson v. Metro-N. Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001), which quotes exclusively *Tetracycline* for the material advancement language.

[78] 107 F.R.D. at 727.

[79] Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 Ind. L.J. 567, 594 (2004).

[80] *Id.*

[81] 521 U.S. at 623-24.