An Introduction to Issue Class Certification under Rule 23(c)(4)

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The Federal Rules of Civil Procedure allow plaintiffs to certify certain issues common to a group of plaintiffs, even where the putative class itself has not been certified. Federal Rule of Civil Procedure 23(c)(4) states that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Simply put, this rule allows the division of large or complex litigation into smaller, more manageable pieces.

Consumer fraud class actions can be well suited for issue class certification because the defendant's allegedly deceptive practice is generally common to the class and can be easily separated from the remaining individual issues. Moreover, the use of issue class certification can help practitioners avoid unnecessary conflict with the heightened predominance requirements for certification under Rule 23(b)(3) imposed by *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541 (2011).[1]

Using Rule 23(c)(4), litigants may seek class certification with respect to certain issues, while allowing other issues to proceed on an individual basis.[2] Although the text of the Rule itself does not explain when an issue class is appropriate, over time a substantial amount of case law has helped define the issue class.[3] Most often in class actions, the rule is used to bifurcate the issue of a defendant's liability from the issue of individual class members' damages, but that is not the only way.[4] Courts have even used Rule 23(c)(4) issue certification in cases where there is only a single issue common to the entire class.[5] In applying Rule 23(c)(4), courts recognize that oftentimes the greatest efficiency and fairness can be achieved by "carving at the joints" of the dispute and resolving any common issues on a class-wide basis.[6]

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[1] *See In re Motor Fuel Temperature Sales Practice Litig.*, MDL No. 1840, 2013 WL 1397125, at *18-19 (D. Kan. Apr. 5, 2013).

[2] This can be done via bifurcation (where common and individual issues for all class members are resolved in separate stages of the same lawsuit) or via "partial class actions" (where the court certifies only the common issues for collective resolution, after which class members may file their own individual actions, relying on the preclusive effect of the collectively resolved common issue). *See* Jenna C. Smith, "'Carving at the Joints': Using Issue Classes to Reframe Consumer Class Actions," 88 Wash. L. Rev. 1187, 1204 (2013).

[3] Joseph A. Steiner, "The Issue Class", 56 B.C. L. Rev. ____ (2015) (forthcoming).

[4] *See, e.g., Hydrite Chem. Co. v. Calumet Lubricants Co.*, 47 F. 3d 887, 891 (7th Cir. 1995) (noting "there is no rule that if a trial is bifurcated, it must be bifurcated between liability and damages.").

[5] *See* 7AA Wright & Miller, Federal Practice and Procedure, § 1790.

[6] *Mejdrech v. Met-Coil Systems Corp.*, 319 F.3d 910, 911 (7th Cir. 2003).

Rule 23(c)(4) was adopted in 1966, along with other major amendments to Rule 23. However, until the late 1980s, courts and practitioners largely ignored Rule 23(c)(4), instead choosing to decide certification based on the litigation as a whole. Later case law from the late 1980s to the mid-1990s showed that courts were making use of Rule 23(c)(4) as an alternative certification path where certification under other rule sections proved unwieldy or inefficient.[7]

Then, in 1995, the tide seemingly shifted when the Seventh Circuit issued *Matter of Rhone-Poulenc Rorer, Inc.*, reversing a national class action of HIV-positive hemophiliacs who had brought suit against blood factor manufacturers for negligently screening donors.[8] Judge Richard Posner, writing for the majority, raised policy concerns of putting an entire industry on trial, and noted that bifurcating the case could lead to subsequent juries reexamining the first jury's findings, in violation of the Seventh Amendment.

The next year, the Fifth Circuit issued *Castano v. Am. Tobacco Co.*, decertifying a nationwide class of smokers that had been certified for the "core liability issues" of what the defendants knew about nicotine addiction, and defendants' conduct for fraud, consumer fraud, and breach of warranty.[9] The Fifth Circuit held that Rule 23(c)(4) could not be used to circumvent Rule 23(b)(3)'s predominance analysis – instead, it found it was just a mere "housekeeping rule" that permits the severance of common issues for a class trial *only after* Rule 23(b)(3)'s predominance requirement had been met by the class as a whole.[10]

However, as a true majority of Circuits recognize (including, now, the Seventh and Fifth Circuits themselves), Rule 23(c)(4) was originally intended to

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[7] *See, e.g., Cent. Wesleyan College v. W.R. Grace & Co.*, 6 F. 3d 177, 185 (4th Cir. 1993); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196-97 (6th Cir. 1988); *In re School Asbestos Litig.*, 789 F.2d 996 1008-09 (3d Cir. 1986).

[8] 51 F.3d 1293 (7th Cir. 1995).

[9] 84 F.3d 734 (5th Cir. 1996).

[10] The defense bar and defense-oriented commentators seized on the *Rhone-Poulenc* and *Castano* decisions immediately as a chance to reduce the availability of class actions. Even today, despite the clear rejection of these outlier opinions and the majority of Circuits (including now the Seventh and the Fifth) embracing the use of issue classes, the defense bar remains particularly attached to the *Castano* opinion, misleadingly presenting it as the majority – or at least the originally intended – approach to Rule 23(c)(4). Issue classes remain very much in the sights of the defense bar, and amending the Federal Rules to explicitly deem it a "housekeeping rule" is high on the U.S. Chamber of Commerce's agenda. *See, e.g.,* John Beisner, Jessica Miller & Jordan Schwartz, "A Roadmap for Reform: Lessons from Eight years of the Class Action Fairness Act," 2013 U.S. Chamber of Commerce, Institute for Legal Reform (available at http://www.instituteforlegalreform.com/uploads/sites/1/A_Roadmap_For_Reform_pages_web.pdf); John Beisner, Jessica Miller & Jordan Schwartz, "The New Lawsuit Ecosystem," available at http://www.instituteforlegalreform.com/uploads/sites/1/web-The_New-Lawsuit-Ecosystem-Report-Oct2013_2.pdf).

be interpreted broadly, and the Rule can be invoked to carve out common issues for class treatment even if the claim as a whole would not satisfy Rule 23(b)(3)'s predominance requirement.[11] Many of these courts have specifically considered and rejected the Fifth Circuit's approach in *Castano*, finding it illogical and counter-textual.[12]

It is clear from the plain language of the Rule and the accompanying notes that the Advisory Committee intended the Rule to provide an alternative path to certification when certification of the entire action under 23(b)(3) would not be possible. The original 1966 version of Rule 23(c)(4) read, "[w]hen appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall *then* be construed and applied accordingly" (emphasis added). Thus the original text of the Rule made it clear that it was *after* the division of an action into particular issue-classes or subclasses that the provisions of Rule 23(a) and (b) should be applied to those issue- or sub-classes. The change to renumber the sub-parts of the original Rule

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[11] *See, e.g., Smilow v. Sw. Bell Mobile Sys.*, 323 F.3d 32, 41 (1st Cir. 2003) (refusing to decertify TCPA class action, finding that even if individualized determinations were necessary to calculate damages, Rule (23)(c)(4)(A) would still allow the court to maintain the class action with respect to other issues); *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 223 (2d Cir. 2006) (holding that "a court may employ [Rule 23(c)(4)] to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement"); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 441 (4th Cir. 2003) (affirming conditional certification of some claims and decertifying on other claims where reliance and the need for individual inquiry precluded a finding of predominance); *Sterling*, 855 F.2d at 1197 (affirming certification on issue of liability where cause of groundwater pollution was a single course of conduct that was identical to all plaintiffs, but cautioning that not all claims of property damage or exposure are alike); *Mejdrech*, 319 F.3d at 912 (affirming certification of issue class on issue of liability and extent of contamination, but leaving damages to be tried individually); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues."); *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, No. 12-3776, 2013 WL 3389469, at *5 (10th Cir. July 9, 2013) (discussing the availability of 23(c)(4) to isolate common issues, but vacating and remanding the certification order because plaintiffs failed to show that damages were measurable on a class-wide basis); *Williams v. Mohawk Indus. Inc.*, 568 F.3d 1350, 1359–60 (11th Cir. 2009) (remanding case for determination of whether common issues predominated over individual issues and whether hybrid class for injunctive relief was appropriate).

[12] *See, e.g., Gunnells*, 348 F.3d at 409 (finding the Fifth Circuit's approach illogical because it would render Rule 23(c)(4) superfluous if a manageability determination has already been made in considering predominance under R. 26(b)(3)(D)); *see also Nassau Cty. Strip Search Cases*, 461 F.3d at 223; *Klay v. Humana, Inc.*, 382 F.3d 1241, 1274 (11th Cir. 2004).

as the current 23(c)(4) and 23(c)(5) was characterized by the Committee as "stylistic only."[13]

Moreover, the intent of the Committee that Rule 23(c)(4) allow certification of particular issues in cases where certification of the entire action would not be appropriate is illustrated in the example provided in the notes, which stated that Rule 23(c)(4) could be used in "a fraud or similar case [where] 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."[14]

As noted above, a substantial majority of Circuits recognize that Rule 23(c)(4) may be used even – indeed, especially! – when the action as a whole cannot satisfy the predominance requirement of Rule 23(b)(3). In recent years, the Seventh Circuit has embraced issue classes in several opinions that lay out a clear practical framework for their use.[15] Even the Fifth Circuit has relaxed its approach to issue classes in recent years, moving away from the position it took in *Castano.*[16] Considering the Fifth Circuit's more recent decisions, some commentators have opined that the "circuit split … has all but vanished."[17] The Seventh Circuit's concerns in *Rhone-Poulenc* have similarly been dispatched by later opinions, including several by Judge Posner himself.[18] At this point, it is

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[13] Adv. Committee Notes to Fed. R. Civ. P. 23 (2007); see also Jenna C. Smith, "'Carving at the Joints': Using Issue Classes to Reframe Consumer Class Actions," 88 Wash. L. Rev. 1187, 1213 (2013).

[14] Adv. Committee Notes to Fed. R. Civ. P. 23 (1966).

[15] *See, e.g., Mejdrech*, 319 F.3d 910; *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012) (approving an issues class for determining whether defendant's employment practices had a disparate impact on African-American financial advisers, even though individual trials would be necessary to determine damages), *cert. denied* 133 S. Ct. 338 (2012); *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010) (upholding class certification with respect to one "common issue" – "whether the windows suffer from a single, inherent design defect leading to wood rot" – even though causation would require individualized inquiries).

[16] *See, e.g., In re Rodriguez*, 695 F. 3d 360 (5th Cir. 2012); *Mullen v. Treasure Chest Casino, LLC*, 186 F. 3d 620 (5th Cir. 1999). Indeed, in a very recent opinion, the Fifth Circuit essentially ignored *Castano*'s imperative that a class must meet certification under FRCP 23(b)(3) before consideration of issue certification. *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (noting that "the district court anticipated that 'issues relating to damages' could and would be 'severed and tried separately' from other issues relating to liability, in accordance with this court's previous case law and Rule 23(c)(4) . . . This court has previously 'approved mass tort or mass accident class actions when the district court was able to rely on a manageable trial plan—including bifurcation' of 'class-wide liability issues' and issues of individual damages.") (citing *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006).

[17] See, e.g., Patricia Bronte et al., "'Carving at the Joint': The Precise Function of Rule 23(c)(4)," 62 DePaul L. Rev. 745, 745-46 (2013).

[18] *See, e.g., Mejdrech*, 319 F.3d at 911; *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) (Posner, J.) ("[A] class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed."); *see also Simon v. Philip Morris Inc.,* 200 F.R.D. 21, 33

more appropriate to say that decisions disallowing the use of issue classes reflect case-specific concerns rather than a trend or general opposition to the issue class mechanism.

In sum, contrary to what the defense bar would have us believe, issue class certification continues to be a vital and invaluable tool for class action case management, and is particularly well suited to consumer fraud class actions.

(E.D.N.Y. Feb 8, 2001); *Robinson v. Metro-North Commuter R.R. Co.,* 267 F.3d 147, 167 (2d Cir. 2001) (holding that bifurcation does not violate the Seventh Amendment as long as the particular factual issues are not re-tried). Some commentators have convincingly argued that the Seventh Circuit's Seventh Amendment analysis in *Rhone-Poulenc* was flat wrong all along, because of issues of standing and ripeness. *See* Douglas McNamara, Blake Boghosian, and Leila Aminpour, *Reexamining the Seventh Amendment Argument Against Issue Certification*, 34 Pace L. Rev. 1041 (2014) (finding ripeness and standing undermine Seventh Amendment arguments re reexamination because the reexamination argument relies on multiple speculations, and even if the matter were to become ripe, the defendant would still lack standing, because only the class plaintiffs – not the defendant, who would necessarily have lost before the first jury – could possibly suffer from a reexamination).